Journal of Planning & Environment Law

Power to the People?

Papers from the 42nd Joint Planning Law Conference held at New College, Oxford, in September 2014, organised by The Law Society, The Bar Council, The Royal Institute of Chartered Surveyors, and The Royal Town Planning Institute

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Kate joined Notting Hill Housing as Chief Executive in 2004. She was previously Chief Executive of Servite Houses and Director of Housing in Brighton and Hove. She has experience in local government and the private and voluntary sectors. OP78

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Ruth Stanier OBE

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John is the Operational Director for Development Planning at Westminster City Council overseeing the busiest planning authority in the UK. The pressure for development is intense with over 12,000 applications handled every year. OP117

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Richard Harwood OBE QC MA LLM (Cantab)

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Foreword

Mike Hayes CBE

It would appear that the 42nd Oxford Joint Planning Law Conference, dedicated to the memory of Professor Sir Peter Hall, has been a great success and lived up to the high standards set in previous years. Why? Well a full house, excellent organisation, catering and entertainment all accommodated in the spectacular environs of New College, Balliol College and the Oxford Union clearly helped. But the conference is about much more than just having a nice time. Year on year the committee strives to produce a programme that is relevant, challenging and thought-provoking and engage participants in a continuing discussion about key issues throughout and beyond the weekend itself. This year the range and quality of the papers and the presentations and discussion through the conference did not disappoint.

In 2014 two principal ideas came together.

First, a theme reflected in the overarching title *Power to the People?* that sought to explore the current tensions around planning policy and decision-making exemplified by debates about localism *v* centralism, the questioning of democratic norms and the challenges to development, whether it is exploiting new sources of energy or building new homes. We live in an age of major economic, environmental and social pressures where both professional and political decisions are frequently challenged and the boundaries of legitimate protest are sometimes stretched; where the lines between policy and procedure, engagement and acceptance, consultation and protest are sometimes blurred; and where some fundamental questions about the legitimacy of decision-making, public engagement, consultation and societal acceptance need to be asked.

Second, 2014 is the centenary of the Royal Town Planning Institute, an event the conference wished to mark by exploring planning's historical development, some of its successes and failures and the direction it might take in the future.

Put this heady mix into the context of a conference that began on the day the result of the Scottish independence referendum was announced and it was perhaps inevitable that the role of planning and those engaged in it, the need for both political and professional leadership, the legitimate limits of radicalism and the purpose of the law became hotly debated issues.

Dr Hugh Ellis, Head of Policy at the Town and Country Planning Association, set the theme on Friday evening with a clarion call for planning to engage seriously with today's issues, the need for courageous professional and political leadership and the imperative to engage ordinary people both locally and in the big strategic issues.

Heroes and Villains: Challenge and Protest in Planning the first session on Saturday allowed Simon Ricketts, Partner at King and Wood Mallesons SJ Berwin LLP, and Gita Parihar, Head of Legal at Friends of the Earth, to discuss their different perspectives on the history, mechanisms and methods by which planning decisions have been, and are, challenged both within and outwith the current law, where legitimacy lies and the boundary between policy, procedure and personal and shared moral imperatives. Simon's opening Pathé News film showing then Minister of Town and Country Planning Lewis Silkin announcing his intention to build Stevenage New Town in 1946 reminded us of a different, optimistic age and that strategic planning decisions are always controversial and face opposition!

An innovation this year was to follow the two talks on challenge and protest with a series of vox pop delegate interviews and a panel chaired by Michael Humphries QC and involving both Simon Ricketts and Gita Parihar with other experts which continued the discussion in an informed (and informal) way. The edited film of the interviews and panel discussion will be available at *www.jplc.org*.

Catherine Howard, Senior Associate at Herbert Smith Freehills LLP gave an expert overview of the practical and legal issues around the controversial search for shale gas through "fracking" and examined the effectiveness of the 1990 and 2008 planning regimes to provide the decision making mechanisms that the two stages of exploration and production require. Notting Hill Housing Chief Executive, Kate Davies shared her practitioner's view of the current housing crisis, particularly in London, and made a plea for the entrepreneurial capabilities of housing associations to be unlocked as an important component of delivering affordable housing in the capital and elsewhere.

The keynote address marking the RTPI centenary *Making the Past—Delivering the Future* was to have been given by the internationally acclaimed practitioner, academic and author Professor Sir Peter Hall. Tragically Peter passed away a few weeks earlier and in his honour the conference was dedicated to his memory. Kelvin MacDonald, Senior Visiting Fellow, Department of Land Economy, Cambridge University and a former conference chair willingly stepped up to the plate at short notice and delivered a *tour de force* on the origins of planning, its institutions and legal framework in England, and reflected on the direction planning needs to take going forward. He challenged the profession to rediscover planning's focus, ethics, values and the need for vision. He emphasised the importance of the moral imperative that energised the early leaders of planning thought and practice and the important link between vision and implementation.

The Saturday after-dinner speech at the Oxford conference is often an opportunity for some well-honed humour around planning and legal themes. In 2014 former President of the American Planning Association and Chief Planning and Development Officer for the city of Raleigh in North Carolina and now Commissioner of the New York City Department of Parks and Recreation, Mitchell Silver delivered a passionate address emphasising the challenges that societies across the world face and the difference that planners and those involved with planning make. His focus was on the importance of understanding changing trends and the demands they make, of having an ethically driven planning system that emphasises equity as well as the economy and environment and for society to "fall in love with planning again"! After heartfelt and prolonged applause following his address Cath Ranson, President of the RTPI presented Mitchell with honorary lifetime membership of the Institute.

One of the current coalition government's key innovations was discussed on Sunday morning as Ruth Stanier OBE, Director of Planning at the Department of Communities and Local Government and Operational Director Development Planning at Westminster Council, John Walker addressed *Local Heroes: Neighbourhood Planning in Practice*. Ruth provided an update of progress on producing neighbourhood plans in England, their achievements and some of the issues that have emerged through developing practice. John was unconvinced that neighbourhood plans were achieving anything that could not be delivered previously in urban areas where there were many difficulties in planning for, organising and achieving legitimacy in neighbourhood plans, notwithstanding the achievements of neighbourhood planning elsewhere in the country outside of London.

The conference closed in traditional fashion with Richard Harwood's comprehensive legal update. Noting how there has been a doubling in planning judgements in the last two years he discussed how the courts are interpreting policy, the role and competence of councillors in the decision-making process, reasons at the time and after the event, the Court's exercise of discretion and the effect of the Planning Court.

So, it was over for another year and delegates made their way home to reflect on an event characterised by thought-provoking, challenging and inspiring addresses; solid practical learning about current practice; passionate and informed discussion and (hopefully) re-energised and re-equipped to address the challenges and opportunities that lie ahead!

We were sorry that this year Steven Durno who has been a key background member of the conference organisation for over 20 years retired from the Law Society. We are grateful for all he did in his quiet and

ultra-efficient manner and wish him well and hope he will return as our guest in the future. Steven was replaced by Lori Frecker and Dean Thompson who gave the committee and speakers sterling support and to whom we offer our thanks. Once again the bulk of the work in organising the conference fell to Lucinda Howe of Quadrilect. Lucinda truly is the conference's backbone and we (and the Chairperson in particular) are in her debt for all she did in enabling the 2014 event to take place so successfully.

The committee are grateful to all the speakers who gave their time and effort unstintingly to prepare papers and presentations of the highest quality and to the delegates who once again came in numbers to contribute to an outstanding conference.

The English planning system: In glorious expectation of the life to come

Dr Hugh Ellis

It's a great honour to be asked to give this opening presentation, even more so since I am widely recognised as the least influential member of the planning community. I can confess to having had no influence over the last four years of planning "reform" and nothing I say in the next few minutes will have the least impact on the future of the planning system. I should also stress that what I have to say is a personal view and not that of the TCPA. Before I begin I would also like to remember two figures who died recently. Sir Peter Hall, in whose memory this conference is dedicated, was the greatest urbanist of his generation. He was also a man of great personal generosity and will be desperately missed as president of the TCPA. Phil Michaels led Friends of the Earth's legal work for many years. Phil had a forensic intelligence, great compassion, but above all he spoke truth unto power, challenging governments of all persuasions. His wisdom and energy will be very sadly missed.

The message I have this evening is a simple one. The English planning system is effectively dead and our task now is to reconstruct it so it meets the challenge of the 21st century. The core foundations of the 1947 settlement that have done so much to secure a civilized and democratic nation are being fatally undermined. It that sense the remaining parts of the system best resemble a headless chicken. Morally and structurally decapitated even if the toes are still wriggling. Nothing less than the root and branch reform of planning will do. We need a new Planning Act which re-establishes a progressive purpose for planning and upholds the democratic and participative rights of communities. We need to stop being defensive about the value of regulation and begin making the case for planning with ambition.

I was particularly struck by an extract of an article in the August edition of the TCPA journal:

> "Dr Osborne announced that the English planning system passed quietly away on Thursday the 12th of June 2014 after a long illness. A short service was conducted at the Mansion House followed by burial under the Treasury. The system was predeceased by its sister the New Towns Act which had died due to lack of use. The planning system had been sadly confined only to local issues since 2010 and became rather isolated from its friends and relatives in other Government departments. Despite this it continued to 'get out a bit' in local roles until a series of deregulations incapacitated its remaining spatial ambitions."

The planning was system was born in 1947 to both utopian and practical parents. A love match between Ebenezer Howard and Montague Barlow aimed not just at real practical improvements in people's living conditions but in "reconstructing anew the entire external fabric of society".[1] The system's inspiration was drawn from a long lineage of thinking that believed humanity had both the responsibility and capability to shape change for our wider collective welfare. The system we are now dismantling was conceived in the desperate years of the second war which should have taught us a lasting lesson that planning is the solution to our problems and not their cause. In the post-war period much had to be done out of necessity, but what's remarkable is the high social ambition which that generation had for the future. It wasn't just a debate about bricks and mortar; it was about building a new society of personal and collective opportunity. As the then planning minister, Lewis Silkin MP, introduced the 1946 New Towns legislation, he invoked not an engineering manual or an economics text book, but Thomas More's *Utopia*.

[1] Howard (1898) *To-morrrow: a peaceful path to real reform*, p.140.

Of course, this is not to say that all aspects of procedural reform were not necessary, but taken as a whole the reform package has gone way beyond tweaking the process to strike at the very heart of what planning is meant to achieve.

The level of dysfunction in the current system is a complex narrative. At a national level we are the only nation in Northwest Europe to have no effective national or regional planning framework. Our National Policy Statements do not relate well together and the 2008 regime has been developed in isolation from the rest of Town and Country Planning which is deeply illogical. The abolition of regional planning was that kind of intellectual vandalism of which the English are fond, but it has led to a much more complex and confusing "mosaic" of sub-regional planning with the slow emergence of combined authorities in some places and with LEPs doing more or less planning with no democratic legitimacy whatsoever. We can call this trend many things, but coherent isn't one of them. And of course we have the duty to cooperate, which must win an award amongst legislative provisions for generating the most paperwork and meetings for the least practical effect in the history of law making.

The NPPF is lauded as being short, but its contents are both unclear and unprincipled. There is no adequate articulation of sustainable development and no reference to the established definition in the 2005 UK Sustainable Development Strategy. Key concepts on equality and resource management have been effectively sidelined. The NPPF is, as courts have held, a "radical" change to planning. The reintroduction of the presumption in favour of development plays uneasily with the presumption in favour of the plan in law. The outcome is a new legal industry dedicated to trying to determine when a plan is not a plan. Legal judgments are also bringing into question the safety of any housing land allocation policy adopted before the NPPF's publication, reducing "safe" plan coverage to around 27 per cent of England. The language of the presumption is also much more extreme than its last formulation in the 1980s and means that proving "harm" is extremely difficult. And to all this we need to add the infamous plan-wide viability test which effectively brings to an end the ability of local authorities to set key public interest standards on accessibility, space or environmental performance.

The viability test is truly a Disney creation, for only Mickey Mouse could have formulated a measure quite so economically illiterate. In the first instance, the NPPF version of residual valuation fails to account for the basic costs and benefits of actions key to the purpose of planning such as climate resilience and health. These have quantifiable benefits which can be monetised but are excluded from the NPPF's simplistic accounting format.

Such a basic error means that the long-term costs of meeting these challenges fall on the public sector. If the economics are flawed, the simple outcomes for people are deeply worrying. Less social housing, lower quality homes shown by declining levels of Code for Sustainable Homes compliance and, of course, the smallest room sizes in northwest Europe. Appeal decisions reinforce the fact that local authorities cannot defend even the most basic room size standards. The case seems to be that low-cost homes must have unusably small rooms. Of course viability is key, but the apparent paradox of a viability crisis along with the record profits increases of parts of the development sector has to be resolved and ultimately we need a transformation of our development model so that land value capture can fund high quality outcomes.

There are many other examples of deregulation to the system, but the expansion of permitted development is the most potent. Knowing that the direct deregulation of the development plan was politically difficult, the current Government is using the rapid expansion of permitted development to make plans increasingly irrelevant. Change of use to residential is the starkest example whereby next year almost any structure short of an explosives store can be converted to a "home". The prior approval process means that LPAs can gain no contributions for education, ensure no adequate climate resilience to temperature, or even adequate child play space. Planners cannot even get through the doors of the office blocks concerned.

This is a dangerously centralising agenda where communities have lost control over key processes of change. It ends in the grotesque chaos of the fifth richest economy on earth throwing office workers out

of their jobs to create flats where the cat couldn't swing a mouse with no play or green space, no educational contributions and the lowest environmental build standards in North West Europe. These are truly the slums of the future. We as a nation should be capable of so much better.

Taken together it is interesting to reflect that the reform package has undermined three of the four foundations of the 1947 settlement. Planning is no longer comprehensive as result of permitted development; it is no longer discretionary, with less and less scope for professional judgment; and of course less powers makes it less democratic. The fourth principle, effective betterment taxation, has long since been abandoned and we now give away most of the value the community creates through the grant of planning permission.

The final victory of the Treasury and Cabinet Office in extinguishing progressive planning is, in fact, merely an aftershock of something more profound which began 30 years ago and was crowned in Kate Barker's review of land use planning in 2006.[2] The danger now is that a new generation of reform will be based on a similar and flawed prospectus.

It is important to stress that the Barker Report was not wrong in its own terms. It is simply that the terms, set by Treasury, were to assess the economic impacts of planning. There is some passing reference to the environment, but essentially planning was categorised as a land allocation mechanism that interfered with the operation of the free market. So while ironically the Barker report goes further in acknowledging the value of planning than anything the coalition Government has done, it never adequately defines the real and complex social and environmental objectives of the system. It establishes estimates of the cost of the system with no quantification of the benefits of planning.

This is not simply bad maths in terms of not measuring benefits, it is poor economics, because nowhere do they adequately deal with wider externalities of the free market in land. The current suggestions to replace planning with price mechanisms fail because they can't deal with the complexity of what society needs to achieve through the development and use of land, not least a democratic and participative decision-making process which will of course at times be at odds with market "rationality". This is very important because in relation to housing supply our failure as a nation has not been about technical planning but about local and national political will. Planning does not unduly restrict land supply; politicians who control the system can for more or less legitimate reasons. It was purpose and politics that were the problem, not the mechanics of planning, so why has reform focused on wrecking the machine?

So where does this leave the future? First, and above all, we need an honest and full assessment of planning and not simply a narrow economic assessment. Secondly, we must remind policy makers that all of Barker's major recommendations were implemented so what's the unfinished business? It would, for example, be very odd for the forthcoming Lyons report on housing and planning to base its proposals for reform on the Barker report analysis. What we really need is a comprehensive assessment of social, environmental and economic impacts of this radical deregulation of land use planning. That assessment will reveal what many of us foolishly regarded as self-evident. That a free market in land creates a kind of corrosive chaos which is both unfair and inefficient and stacks up costs on the public sector. Smart, democratic regulation has it problems, but it is the test of a responsible and civilised society

I have talked about some of the outcomes for people and communities resulting from the end of comprehensive planning, but it's worth noting the scale of the instability of the current system. This instability is founded on a lack of political consensus for the radical scale of change. Most simply it is reflected in growing local anger that, far from localism, the government has stripped powers from local communities where it really counts. You can have the best neighbourhood plan in the world but it can do nothing to shape a high street where planning regulations over change of use have been removed. Ultimately you can't build without public consent and on issues such as fracking that consent is absent. Removing planning controls from these difficult issues will just lead to direct action because, as the Scottish referendum proved, people's views are not shaped solely by crude economic self-interest.

[2] *Barker Review of Land Use Planning*, 2006 (HMSO).

So how do we create the case for progressive planning? Lawyers have a pivotal role in this debate. It was the legal profession in the shape of Montague Barlow's 1940 report and, perhaps even more significant, the 1942 Uthwatt report which framed the guiding principles and mechanisms of the planning system. These were not radicals and indeed Barlow had been a Conservative politician. They did, however, understand the value of planning in the wider public interest and the need for a system which was effective and democratic.

In reconstructing planning we need a clear understanding that the system is not solely a land allocation mechanism. Its outcome objectives are complex, requiring an understanding of economics, ecosystems and human behaviours across a range of spatial scales from an individual building to the nation as a whole. Planning's ambitions should go beyond dealing with the obvious externalities of free market behaviour to provide an arena for the mediation of solutions to the major challenges of our time, including inequality and climate change. Much of the value of this work in terms of resilience or human health is quantifiable but long term. So if the outcomes of planning play out in time and space, as well as art and economics, the process of planning is equally important. The control of land must remain democratic and, wherever practicable, local.

So a multi-layered ambitious endeavour to mediate the future through democratic means. Nothing in the current reform package in England recognises this ambition nor the importance of democracy in securing the legitimacy of decisions. Nothing but the complete root and branch reform of planning will give us the system that the nation so desperately needs. Neither can any programme for planning insulate itself from the debate about local government reform. It goes without saying that we need rapid and real devolution of power to local authorities over tax and spending.

To start with we will need new planning law. The 2015 Spatial Development Act would consolidate the rat's nest of existing legislation. It would create a new statutory purpose for planning based on securing the long-term sustainable development of the nation. The purpose would include requirements on equality and place making. The new Act would modify the format of local plans to create a single integrated development plan for each LPA which represented, spatially, all the priorities of all key service providers. It would create a new legal clarity for LPAs to act as local development agencies for major projects and deploy their existing powers of compulsory purchase and public investment in an integrated and positive manner. The New Towns Act would of course be updated with a new place-making purpose for development corporations.

The new Planning Act would create a requirement on Government for the preparation of a national spatial strategy underpinned by the same legal duty as to the purpose of planning but aimed in the short term at the integration of existing NPSs along with critical demographic and climate data. It would be framed by a one nation development strategy and by strong drive for cooperation with the nations of the UK and the EU. The plan would seek to identify national priorities for housing including sub-regional areas of search for new and expanded settlements. It would require a national technical laboratory to enable the systematic gathering of spatial data to assist in both national and local planning, ensuring common approaches to the assessment of, for example, demographic change and housing needs. All elements of national and local government would have to have regard to the spatial plan.

All local authorities would be required to be a member of a strategic planning group of combined authorities, using either City Regional or Shire County boundaries. National Government would reserve the right to set boundaries and membership. Such combined authorities would have statutory power to prepare structure plans covering strategic cross-border issues. The duty to cooperate would be abolished without delay.

We clearly need new planning policy. The NPPF must be revised to create a much stronger commitment to genuine sustainable development with a focus on social justice and tackling poverty and inequality. We need to remove the wealth of vague and unhelpful language that has led to the doubling of judicial

review cases in three years. We need to modify the extreme language of the presumption in favour of development so social and environmental harm can be properly recognised and bring clarity to the pre-eminence of legal duty in favour of the development plan. Policy change would enforce a new strategic policy for housing, ensuring an end to piecemeal development and a focus on meeting growth strategically in the most sustainable locations based on garden city principles. The viability test would be revised to ensure complete "open book accounting" under which no relevant data to viability could be regarded as commercially confidential and ensure that the monetarised benefits of actions on health and climate change are properly reflected in residual valuations.

And of course we need the full restoration of all the powers lost to communities through deregulation of permitted development. Local authorities must have full power to determine their own schemes of permitted development. We also need the full restoration of the Code for Sustainable Homes and new standards on Lifetime Homes including a genuine national space standard which would provide a basic national minimum beyond which local government could innovate. We need a new settlement for people based on clear articulation of individual and democratic rights based on the Aarhus Convention. We could do worse than commission a Skeffington 2, since there has not been a proper revision of "People and Planning" since 1969.

To conclude, it is clear that democratic planning has lost its way. In such circumstances it is perhaps fitting to end by retracing our steps to the pioneers of the planning system who did so much to lay the progressive foundations which are now being undermined. William Morris was one of these key figures and had a profound impact on Howard and in particular Raymond Unwin who designed Letchworth and was Britain's first Chief Planner. This is an edited extract of Morris speaking in 1887 and encompassing all the ambition for the future which is so completely absent from our current debate:

> "And, again, that word art leads me to my last claim, which is that the material surroundings of my life should be pleasant, generous, and beautiful; that I know is a large claim, but this I will say about it, that if it cannot be satisfied, if every civilized community cannot provide such surroundings for all its members, I do not want the world to go on. I do not think it possible under the present circumstances to speak too strongly on this point. I feel sure that the time will come when people will find it difficult to believe that a rich community such as ours, having such command over external nature, could have submitted to live such a mean, shabby, dirty life as we do. When they are no longer slaves the people will claim as a matter of course that every man and every family should be generously lodged; that every child should be able to play in a garden close to the place his parents live in; that the houses should by their obvious decency and order be ornaments to Nature, not disfigurements of it.
>
> And so take courage, and believe that we of this age, in spite of all its torment and disorder, have been born to a wonderful heritage fashioned of the work of those that have gone before us; and that the day of the organisation of man is dawning. It is not we who can build up the new social order; the past ages have done the most of that work for us; but we can clear our eyes to the signs of the times, and we shall then see that the attainment of a good condition of life is being made possible for us, and that it is now our business to stretch out our hands, to take it."[3]

And so farewell to the English planning system in the glorious expectation of its rebirth in 2015! Thank you.

[3] Delivered to the Hammersmith Branch of the S.D.F. at Kelmscott House, on November 30, 1884. It was first printed in *Commonweal*, 1887.

Heroes and Villains—Challenge and Protest in Planning: What's a Developer To Do?

Simon Ricketts*

Why is development so difficult?

The planning system does not operate in a vacuum. It is not a board game whereby the players will necessarily always abide by the outcome. As planning, and planning law, practitioners, we focus so much of our day-to-day attention on the minutiae of the process, and on the constantly-changing rule book (and we grew up as "playing by the rules" people). We too often neglect the question of whether the process is sufficiently resilient from attack by those who fear, and therefore seek deliberately to delay, its outcome by way of challenge in the courts or by more direct action in the form of civil disobedience.

The present Coalition Government, faced with a desperate need for additional housing, for economic growth and for improvements to our energy and transport infrastructure, has sought to assist developers in clearing the "planning permission" hurdle. For example, it has:

- increased the types of development that do not require planning permission;
- eased procedural requirements;
- eased policy requirements; and
- accelerated planning appeal procedures.

But changes to planning policy and to specific procedures will not necessarily unlock development if it can be thwarted by other means.

This paper takes a wider perspective in relation to controversial planning projects in particular and considers the following:

- why the prevalence and intensity of protest appears to have increased;
- the implications of changes to the judicial review process in relation to planning matters;
- how the courts are dealing with civil disobedience in planning matters;
- ideas for ensuring a more resilient planning system; and
- how to reduce the risks of delay to particular projects.

Why the prevalence and intensity of protest appears to have increased

In previous generations, large scale development has been achieved largely without recourse to the courts and without direct action on the part of objectors, for example:

- the post-war new towns programme;
- large-scale provision of council housing and associated clearance programmes; and
- airports, roads and railway lines.

That is not to say that development was always popular, that campaigns were not vigorously mounted in relation to particular issues (for example, Sir John Betjeman's campaign against the demolition of the Euston Arch, including a deputation to the then Prime Minister, Harold Macmillan, and a television appeal; or the local reaction to the then planning minister, Lewis Silkin's, support of Stevenage new town[1]). But

* With assistance from Chloe Man, King & Wood Mallesons SJ Berwin although all errors, omissions, views and prejudices are mine alone.

[1] Arriving by train at Stevenage for a meeting with protesters he found that the platform signs for the station had been changed to "Silkingrad". See also the subsequent unsuccessful judicial review: *Franklin v Minister of Town and Country Planning* [1948] A.C. 87.

the final decision was usually, indeed, final. This social compact between the state and its citizens appears to have weakened more recently.

Let's keep the UK planning system in context. Citizens' relationship with governments on all issues, in this country and internationally, is changing. We are not necessarily against development nor are we "NIMBY" (an unpleasant and disparaging word). Indeed a recent survey[2] suggests that opposition to new homes may have in fact reduced from 2010 to 2013.

People may be less likely to accept an unpalatable planning decision than in previous generations. But the same is true in relation to issues such as:

- badger culling, game hunting and other animal rights issues;
- climate change and other environmental issues;
- concerns over globalisation (another, less cuddly, localism movement); and
- tax and public spending issues (e.g. the Occupy movement).

We have reduced faith in democracy and officialdom. It is not just on the football pitch that the referee's whistle may not be the end of the matter.

Via social media, we can readily show our frustrations and organise ourselves, quickly establishing a strong presence, strength in numbers and political influence, sharing data and knowledge.[3] Whilst there will always be a role for the old-fashioned demonstration with placards[4], has the traditional planning system yet caught up with the consequence of thousands of objections able to be generated on-line by use of SurveyMonkey and equivalent free software? How much detail does the objector need to provide for his or her objection to be registered and dealt with individually, and to what extent is the sheer quantity of objections received to a particular proposal a material planning (as opposed to a political) consideration? How are decision-makers and developers alike to cope with the occasional personalisation of campaigns? Some will recall the effigy of Secretary of State, Nicholas Ridley, that was burned by objectors following his announcement, that he was minded to grant planning permission for Consortium Developments' proposed development of 4,800 homes at Foxley Wood in Hampshire in 1986 (subsequently overturned by his successor, Chris Patten). It is so much easier these days for objectors to turn up the heat on individuals via Twitter and Facebook from the comfort of their smartphone, often under a pseudonym.

We have a more campaigning traditional press, prepared to play our concerns and prejudices back at us.[5]

We live in a less hierarchical, more "rights-based" society, with a perception that there will be remedies available in relation to almost anything, and that European law and the European Convention on Human Rights[6] will always be there to ride to the rescue.

We have access to information legislation, enticing us to look under every stone for the "smoking gun", the incriminating email or unwise comment that may found an objection or challenge.

[2] Public attitudes to new house building: *Findings from the British Social Attitudes Survey 2013*, Department of Communities and Local Government, July 26, 2014.

[3] For example campaign groups and/or web resources such as Tescopoly, Frack Off, Plane Stupid, HS2 Action Alliance and Long Live Southbank.

[4] For a recent colourful example courtesy of the Save Smithfield campaign see *http://www.cathedralgroup.com/homepage-blog/youd-have-to-be-gaga-to-tear-down-smithfield/*. [Accessed October 13, 2014.]

[5] e.g. *Daily Telegraph*'s "Hands off Our Land" campaign.

[6] The favourite bête noire of the *Daily Mail*: "… a body meant to defend democratic rights against Nazism and Stalinism has become a menace to democracy, trampling on once-sovereign peoples. We saw this vividly when Strasbourg overruled the emphatic will of Parliament and the public to retain Britain's historic ban on votes for prisoners. We saw it again in judgments endangering the innocent by preventing the deportation of foreign criminals and terrorists. Other arbitrary rulings, ordering huge compensation for paedophiles, drug-abusers and even the traitor, George Blake, defy every instinct for justice. But then what can we expect from a court that draws ill-qualified judges from such countries as Liechtenstein, San Marino, Monaco and Andorra, whose combined population is smaller than the London borough of Islington? One of the Tories' most popular election pledges, hastily shelved under pressure from the Lib Dems, was to scrap Tony Blair's Human Rights Act, which imposes Strasbourg's caprices on our courts, and replace it with a British Bill of Rights. The 60th anniversary should be a moment to revive that promise. For until we clip Strasbourg's wings, we cannot begin to restore sovereignty and true justice to the nation that liberated Europe from the tyranny of arbitrary law." ("After 60 years, bring back Britain's rights" Daily Mail comment piece, September 3, 2013). A copy of the Convention can be found at *www.echr.coe.int/Documents/Convention_ENG.pdf*. [Accessed October 13, 2014.]

There is a natural equal and opposite reaction to the Government's support for particular forms of development, whether it be housing, shale gas or high speed rail.

The rule of law rightly requires that the public should be able to hold the state, and public bodies, to account for transgressing the law or judge-made criteria of acceptable conduct (e.g. rationality, lack of bias, lack of lawful consultation). However, the boundary lines between acceptable and unacceptable conduct are not easy to discern in the red mist of fury over an unwelcome development on one's doorstep. Judicial review has grown from an exceptional remedy of last resort to the predictable next step for a determined objector looking to frustrate or delay a development.[7]

Any Government needs to ensure that those concerned about the legality of public bodies' actions can seek judicial review, whilst ensuring that the process is not so elongated that there is a perverse incentive for objectors to bring challenges simply to seek to delay or frustrate development. But try to speed up the process and the risk is that people's concerns that they are being shut out are accentuated; difficult isn't it? The difficulty for government is to get the balance right.[8]

It is tempting for politicians to single the planning system out for special treatment and to look for the special lever that will deliver consensus and the right development in the right places. We see the emphasis move from time to time onto a particular lever, whatever it may be, for example, on pre-application engagement with communities, neighbourhood planning[9] or financial inducements.[10] The reality is more complex: these factors may help but the resistance to development, developers and change often runs more deeply.

The implications of changes to the judicial review process in relation to planning matters

The requirement that public bodies must abide by the rule of law has always been a fundamental part of our (unwritten) constitution, namely that no public body (including the Government itself) can act outside the powers which have been given to it, directly or indirectly, by Parliament, or in a way that is irrational or unfair (i.e. infringing basic judge-made principles such as avoiding pre-determination or bias). As a matter of legal principle, there is nothing new about the concept of judicial review.

Whilst prior to 1977 applications to the High Court to challenge the decisions of public bodies could be made, the enactment of Order 53 of the Rules of the Supreme Court that year[11] effectively created what we see as the modern form of judicial review, with cases involving administrative law directed to the Queen's Bench Division of the High Court.

Another change has undoubtedly been the increase in regulation; an explosion of rule-making. The more rules, the greater the opportunity for objectors to argue that there have been infringements, and the more so when rules are unclear, or constantly changing and where the consequence of even a minor infringement may be to send the developer down a long snake, back to an earlier stage of the decision-making process. The current Government has attempted to address this "red tape challenge" with limited success, but at least it has removed some of the legal "tripping hazards" introduced in recent years, such as the requirement for a planning permission to summarise the reasons for grant, prescriptive

[7] Which objector may be as likely to be a commercial competitor as a local resident, notwithstanding the comment by Auld L.J. in *R. (on the application of Noble Organisation) v Thanet DC* [2005] EWCA Civ 782: "I add a note of dissatisfaction at the way the availability of judicial review can be exploited—some might say abused—as a commercial weapon by potential rival developers to frustrate and delay their competitors' approved developments, rather than for any demonstrated concern about potential environmental or other planning harm" (SJ Berwin acted for the claimant).

[8] Depeche Mode, 1983.

[9] "[I]f we can enable communities to find their own way of overcoming the tensions between development and conservation, local people can become proponents rather than opponents of appropriate economic growth." (*Open Source Planning*, Conservative Party, February 2010).

[10] See references to a proposed "framework of incentives for development" in the Conservative Party's "Open Source Planning" paper (2010), encouraging developers to "speed up the planning process by reaching voluntary agreements to compensate nearby householders for the impact of the development on their amenity, in return for their support" and more recent reported comments by Deputy Prime Minister Nick Clegg. ("Nick Clegg: pay residents to accept new Garden Cities", Daily Telegraph, August 3, 2014.)

[11] Following recommendations by the Law Commission in its report *Remedies in Administrative Law* (1976) Law Com No.73.

requirements about the detail to be provided with outline applications and (in some cases) the requirement for design and access statements. Section 1 of the Localism Act 2011, authorities' so-called general power of competence, has had rather less effect.

A further change has been the layering on top of our domestic common law system of sometimes poorly fitting sets of international requirements, notably EU Directives, the European Convention on Human Rights[12] and the Aarhus Convention.[13]

The uncertainty that has been caused, and potential tensions in relation to Parliamentary sovereignty, came to the fore in the recent HS2 Supreme Court ruling.[14] Two of the Supreme Court justices in that case have since gone further in their comments in papers delivered this summer. Lady Hale concluded her paper[15] to the Constitutional and Administrative Law Association Conference 2014 as follows:

> "The judgments in HS2 raise the issue that it does not follow from *Factortame* that the 1972 Act necessarily requires our courts to give primacy to EU law over all domestic law, regardless of its constitutional importance. And litigants (or more importantly litigators) have been reminded that they should look first to the common law to protect their fundamental rights: radical suggestions have been made about the power of judicial review to protect them. Whether this trend is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public, whether it is putting down a marker for what might happen if the 1998 Act were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten, I leave it to you and to the academics to decide."

Lord Neuberger followed an equivalent theme in a paper delivered at the Supreme Court of Victoria, Melbourne:[16]

> "… the development of pan-European law after centuries, indeed millennia, of separate development and frequent wars, and with different political and legal traditions, and different historical experiences and different traditions, was never going to be easy."

A further change has been the "mission creep" that we have experienced regarding the wider societal issues with which our planning system must grapple, from climate change[17] to race equality[18] to crime prevention,[19] and the physical and social infrastructure which it is encouraged to secure by way of s.106

[12] To which all 47 members of the Council of Europe are parties. See above.

[13] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on June 25, 1998 in the Danish city of Aarhus (see *http://ec.europa.eu/environment/aarhus/* [Accessed October 13, 2014]) to which 46 Member States of the United Nations Economic Commission for Europe and the EU itself are parties, embodying within Europe principle 10 of the Rio Declaration: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[14] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 (King & Wood Mallesons acted for HS2 Action Alliance).

[15] "UK constitutionalism on the march?" July 14, 2014 at *http://www.supremecourt.uk/docs/speech-140712.pdf* [Accessed October 13, 2014].

[16] "The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience" August 8, 2014 at *http://www.supremecourt.uk/docs/speech-140808.pdf*. [Accessed October 13, 2014.]

[17] *National Planning Policy Framework* (DCLG, March 2012), para.93.

[18] For an example of a planning permission quashed on the basis of non-compliance by the local planning authority with the requirements of race equality legislation see *R. (on the application of Harris) v Haringey LBC* [2010] EWCA Civ 703.

[19] For an example of a police authority challenging by way of judicial review a planning permission, on the basis that it considered that s.106 contributions towards additional police equipment and facilities were inadequate, see *R. (on the application of Police and Crime Commissioner for Leicestershire) v Blaby DC* [2014] EWHC 1719 (Admin) (King & Wood Mallesons SJ Berwin acted for the interested parties, whose permission was under challenge).

agreement,[20] much of which was previously the responsibility of the public sector, paid for us directly by taxes, from affordable housing to schools.

All of these changes have contributed to where we are now: in a planning system where there can be no certainty at all that a planning permission can be relied upon until the deadline for judicial review has safely passed or, if a claim is made, until that claim is finally disposed of.

Until the Coalition Government's procedural changes we have continued to operate under the basic judicial review regime that was introduced in 1977, rather than under a system that reflects modern social reality.

There have long been calls for judicial review reform.[21] Unlike any previous administration, this Government has finally grasped the nettle, recognising that an efficient judicial review system is an inherent part of a functioning planning system. It has both made various changes and proposed further reform, seeking to reduce delays in what the Lord Chancellor has described as a saturated judicial review system, full of unmeritorious and frivolous claims.[22] The Government's figures have described an increase in judicial review applications from 4,500 in 1998 to 12,400 in 2012, of which only one in six were granted consent to proceed beyond the permission stage[23] and of these around five per cent reached a final hearing.[24] But caution is needed. Planning-related cases only account for approximately two per cent of judicial review applications as a whole and around a third of planning-related claims were given permission to proceed.

Nevertheless, planning judicial review claims have historically been relatively slow to resolve, with the amount of time taken averaging 370 days in 2011.[25] The Government's reforms aim to filter out "weak, frivolous and unmeritorious claims at an early stage, while ensuring that arguable claims proceed to a conclusion without delay".

The Lord Chancellor's Written Ministerial Statement on November 19, 2012[26] was overshadowed in the media by a rather incendiary speech on the same day by the Prime Minister to the CBI[27] which talked of judicial review being "a massive growth industry in Britain today" and of the country being "in the economic equivalent of war today—and we need the same spirit. We need to forget about crossing every 't' and dotting every 'i' and we need to throw everything we've got at winning this global race".

The Lord Chancellor this year himself spoke plainly in an article in the *Daily Telegraph*:[28]

> "[We are in a] society that is too legalistic, and where the system can be, and is exploited inappropriately by pressure groups with a political point to make, and a minority of lawyers who make money out of creating opportunities to attack government, Parliament and the decisions they make.
>
> Taking legal action via judicial review has become a must-use tool for pressure group lobbyists. Rushing to court can serve as a delaying tactic. It can serve as a public relations tool to get more media coverage. It can even bring crucial projects to a juddering halt on a technicality.
>
> I've seen lawyers launching legal action on a technicality to try to delay a change to legal fees that will bring down insurance costs for motorists, purely to try to stave off the day when their businesses

[20] Being careful of course not to open up the risk of challenge by taking into account a planning obligation failing the tests in reg.122 of the Community Infrastructure Regulations 2010—a recent addition to potential claimants' armoury of "tripping up" points.

[21] e.g. Committee of the JUSTICE, All Souls Review of Administrative Law, "Administrative Justice: some necessary reforms" (1988); Lord Woolf's "Protection of the Public—A New Challenge"; and the Law Commission's "Administrative Law: Judicial Review and Statutory Appeals" (1994).

[22] See *https://consult.justice.gov.uk/digital-communications/judicial-review-reform/results/govt-response-judicial-review-proposals-for-reform-april-2013.pdf*. [Accessed October 13, 2014.]

[23] See *https://www.gov.uk/government/news/specialist-planning-court-proposed-to-boost-uk-business*. [Accessed October 13, 2014.]

[24] See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192246/jr-ad-hoc.pdf*. [Accessed October 13, 2014.]

[25] See *https://www.gov.uk/government/news/specialist-planning-court-proposed-to-boost-uk-business*. [Accessed October 13, 2014.]

[26] See *https://www.gov.uk/government/news/grayling-unclogging-the-courts-to-bring-swifter-justice*. [Accessed October 13, 2014.]

[27] See *http://www.telegraph.co.uk/finance/economics/9687688/David-Cameron-CBI-speech-in-full.html*. [Accessed October 13, 2014.]

[28] See *http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html*. [Accessed October 13, 2014.]

> would have to adapt. We've had court cases brought to delay important infrastructure projects that will create jobs and wealth for Britain—even companies seeking to undermine each other's businesses by taking legal action over planning decisions."

Politicians' language is perhaps inevitably overstated and betrays from time to time a soreness about being on the receiving end of challenges (such as HS2 Action Alliance's first proceedings[29] in relation to HS2) which are recognised by the parties and courts as raising arguable grounds of challenge. However, my direct experience is indeed of an increase in the use of judicial review in planning matters in recent years (indeed with some niche law firms specialising in such claims and dispelling for potential claimant clients any mystique around the process[30]) and (until recent reforms) of a system that was getting slower and disengaged from wider reforms of the planning system.

Changes to planning-related judicial review procedures

The first set of the two major changes came into effect on July 1, 2013. The Civil Procedure (Amendment No.4) Rules 2013[31] amended r.54 of the Civil Procedure Rules ("CPR"), making a number of procedural changes to the way judicial review claims are handled:

- The time limit for applying for judicial review of a planning decision has been reduced from three months to six weeks from when the grounds for making the claim first arose (i.e. most commonly after the grant of planning permission).
- Where the court refuses permission to proceed with a full judicial review at the initial permission stage as a result of the judge concluding that an application is "totally without merit", the claimant's right to make oral submissions for the reconsideration of his application is removed and the claimant may now only appeal to the Court of Appeal against the refusal on paper, and not by oral submission (therefore reducing the maximum number of stages for a claim at "permission" stage from four to two).
- The introduction of the "Planning Fast-track" system which identified planning-related applications at an early stage and appointed specialist planning judges to review cases. The Planning Fast-track aimed to get substantive hearings heard within three months of all evidence being submitted (or around four months from obtaining permission). This system has now been superseded by the introduction of a separate Planning Court.

The second of the two procedural-related reforms came into effect on April 6, 2014 under the Civil Procedure (Amendment No.3) Rules 2014.[32] Following on from the introduction of the Planning Fast-track, these amendments established a new Planning Court within the High Court. Judicial reviews relating to a wide range of planning matters (specified in CPR 54.21(2)(a)) are now automatically allocated to the court, which is a separate list under the supervision of a specialist Planning Liaison Judge (Lindblom J.). Although not all environmental cases are automatically listed at the Planning Court, the scope of environmental matters that fall under the remit of the court is extensive.[33] And under CPR 54.21(2)(a)(ix), the Planning Liaison Judge also has the discretion to grant permission for cases he deems appropriate to be heard by it. The procedural rules for the new Planning Court are set out in CPR 54.21–24 (Appendix A to this paper) and PD 54E (Appendix B to this paper).

[29] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

[30] The renowned claimant firm Richard Buxton and Co has an admirably informative website at *http://www.richardbuxton.co.uk/v3.0/*. [Accessed October 13, 2014.]

[31] Civil Procedure (Amendment No.4) Rules 2013 (SI 2013/1412).

[32] Civil Procedure (Amendment No.3) Rules 2014 (SI 2014/610).

[33] CPR 54.21(2)(a)(vii)—EU environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control.

The Planning Liaison Judge is able to categorise certain claims as "significant"[34] and fast-track the timetable for the case. The following maximum timescales apply for "significant" cases:

- applications for permission should be dealt with on the papers within three weeks of the deadline for filing the acknowledgement of service;
- oral renewals should be heard within one month of the application; and
- substantive hearings are to take place within ten weeks of the deadline for the defendant to submit its detailed grounds for contesting the claim (the deadline normally being five weeks after service of the order granting permission).

Implications of these reforms

The reduction in the time limit to six weeks for bringing judicial review claims is in my view extremely positive. It removes longstanding uncertainty, the subject of concerns expressed by the Court of Justice of the European Union[35] ("CJEU") about the application of the "promptness" requirement that overlaid the previous three months' time limit.

Given that most agreements relating to development between land owners, purchasers, developers and/or funders are expressed to be conditional on expiry of the judicial review period, it has also, at a stroke of the pen, accelerated many transactions and projects by six weeks. It has also brought non-statutory judicial review claims into line with the deadline for statutory challenges and the deadline for judicial review of development consent orders for nationally significant infrastructure projects under the Planning Act 2008.

It is said that less time is available for potential claimants to consider their legal position, instruct lawyers, secure funding and prepare a pre-action letter. But my experience is that, whatever the deadline, there is a rush just before that deadline. Pre-action letters rarely avoid the need for proceedings and in any event the potential grounds for a challenge usually arise from the committee resolution in relation to the particular application, often well before the planning permission is issued.

The removal of the right to an oral hearing to seek to persuade a judge to grant permission where the claim is certified on the papers as "totally without merit" is also a potentially significant change, although this will depend on how the Planning Court applies the statutory test. In *Harrier Developments Ltd v Fenland DC*,[36] the Planning Court rejected an application for judicial review made by Tesco's development partner, Harrier Developments, seeking to challenge the council's decision in January 2013 which granted planning permission to Sainsbury's for a proposed store in Whittlesey. Mitting J. ruled that the application was "totally without merit". Harrier Developments has now appealed on the papers to the Court of Appeal against the ruling.[37] The Court of Appeal in of *R. (on the application of Grace) v Secretary of State for the Home Department*[38] equated the meaning of "totally without merit" as simply meaning "bound to fail". The claimant argued that the phrase should be interpreted more narrowly: that a case should only be certified as "totally without merit" if it were so hopeless or misconceived that a civil restraint order[39] would

[34] PD 54E (3.2)—"significant" claims are those which relate to developments with significant economic impact, raise important points of law, generate significant public interest or those which, by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

[35] *Uniplex (UK) Ltd v NHS Business Services Authority Ltd* (C-406/08) [2010] P.T.S.R. 1377; [2010] 2 C.M.L.R. 47.

[36] *Harrier Developments Ltd v Fenland DC* CO/1489/2014. Mitting J. wryly commented in the reasons for his order that "despite the length and erudition of the Grounds, there is nothing in them".

[37] See *http://www.wisbechstandard.co.uk/news/could_fresh_legal_challenge_be_the_straw_that_breaks_sainsbury_s_back_is_whittlesey_supermarket_now_in_doubt_1_3637026*. [Accessed October 13, 2014.]

[38] *R. (on the application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091 CA (Civ Div) (Lord Dyson M.R., Maurice Kay L.J., Sullivan L.J.).

[39] A civil restraint order is an order issued to those who have had more than one court claim dismissed or struck out for being totally without merit. The order prevents that person from issuing further claims or making applications in some or all of the county courts in England and Wales and also in the High Court, without first getting permission of the judge named in the order. For an example of where even that protection was sought to be circumvented, by an individual issued with a civil restraint order bringing a claim by way of a corporate body established for that purpose see *R. (on*

be justified if a similar claim was repeated. The court rejected that submission, holding that the formulation "bound to fail" was both sufficiently clear for judges to follow it confidently and not so restrictive that claimants would still have access to the Court of Appeal following a refusal.

The Planning Fast-track and the equivalent approach now adopted by the Planning Court are also to be welcomed. The Government has claimed that the new Planning Court will see 400 cases a year settled more quickly.[40]

Anecdotally, a pattern has emerged in relation to case management directions since the Planning Court was established. The work has undoubtedly become more front-loaded for the parties, with the documents to be lodged including an agreed chronology, agreed narrative of relevant facts and an agreed list of issues. "Rolled-up" hearings, at which the consideration about whether to grant permission and the substantive hearing takes place at the same time, in order to avoid the risk of delay, also appear to be more common. The parties are also likely to find that short shrift is given to requests for further time, particularly on the basis of non-availability of particular counsel.[41]

The Court of Appeal and Supreme Court have not set themselves similar targets.

Changes to environmental judicial review costs regime

Since April 1, 2013, due to the enactment of the Civil Procedure (Amendment) Rules 2013, potential environmentally-related judicial review claimants have the option of additional protection against the risk of an unaffordable claim for costs against them if they bring a claim and lose, introduced by the Government to seek to satisfy the requirements of the Aarhus Convention.[42] The third pillar of the Convention requires that the process for access to environmental justice must "provide adequate and effective remedies … and be fair, equitable, timely and not prohibitively expensive". Until April 1, 2013, the standard costs position applied to environmental claims was that the unsuccessful party pays the costs of the successful party, subject to the court's discretion and assessment. A report by Sullivan L.J. on ensuring access to environmental justice[43] in 2008 concluded that the rules on costs in England and Wales inhibited implementation of the Convention. A wider review of the civil litigation costs regime, conducted by Jackson L.J.,[44] confirmed that costs were "prohibitively expensive" and that they were preventing ordinary members of the public from challenging decision in relation to environmental matters. In *Commission of the European Communities v Ireland*,[45] the CJEU held that procedural rules must be sufficiently certain in their operation to avoid prohibitive expense. The Irish courts' discretion, equivalent to that of the courts of England and Wales, not to order the unsuccessful party to pay the costs of the other party was not sufficient to comply with the Aarhus Convention. On February 13, 2014, the CJEU in *European Commission v United Kingdom*[46] ruled that the costs regime in the United Kingdom did not properly implement the requirement that access to justice in relation to environmental matters should not be prohibitively expensive.

Protective costs orders ("PCOs"), which cap a party's maximum exposure to an award of costs should they lose, have been available according to the "Corner House" principles,[47] although often arguments over whether a PCO should be granted have in themselves frequently prolonged proceedings significantly.[48]

the application of English and Heritage Organisation) v Kensington and Chelsea RLBC [2008] EWCA Civ 91 (SJ Berwin acted for the interested party whose permission was under threat).

[40] See *https://www.gov.uk/government/news/new-planning-court-gets-go-ahead-to-support-uk-growth*. [Accessed October 13, 2014.]

[41] *London and Henley (Middle Brook Street) Ltd v Secretary of State for Communities, Local Government and the Regions* [2013] EWHC 4207 (Admin).

[42] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. See above.

[43] *Ensuring Access to Environmental Justice in England and Wales* (May 2008).

[44] *Review of Civil Litigation Costs: Final Report* December 2009.

[45] *Commission of the European Communities v Ireland* (C-427/07) [2009] E.C.R. I-6277.

[46] *European Commission v United Kingdom* (C-530/11) [2014] 3 W.L.R. 853.

[47] *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

[48] *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006.

In relation to judicial review proceedings at first instance, the following mutual cost-capping is now available for "Aarhus Convention claims" (i.e. cases relating to environmental matters), as set out in the new CPR 45.41 to 45.55 and PD 45 paras 5.1 and 5.2:

- If the claimant ultimately loses the proceedings and is an individual (and not bringing the claim as or on behalf of a "business or other legal person") his or her maximum cost liability is £5,000. In all other cases (e.g. commercial entities, non-profit organisations, public bodies), the claimant's maximum liability is £10,000. These caps apply regardless of the claimant's actual financial position.
- If the claimant ultimately wins the proceedings, the defendant's maximum liability is £35,000.

CPR 45.41(2) defines an Aarhus Convention claim as meaning:

> "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

The Implementation Guide[49] indicates that the definition of "environmentally-related" should be "as broad in scope as possible", directing us to art.2(3) of the Convention which simply refers, without further definition, to "environmental matters".

Venn v Secretary of State for Communities and Local Government[50] was a Town and Country Planning 1990 s.288 statutory challenge in November 2013, where the claimant submitted that the loss of green space in the garden of a Victorian terrace in London raised environmental matters falling under the Aarhus Convention. Lang J. recognised that there was no application of CPR 45.41 to s.288 challenges but held that the challenge did fall within the remit of the Aarhus Convention, and that the approach in *R. (on the application of Garner) v Elmbridge BC*[51] should be applied to interpret UK law in line with the Convention. As the case raised "environmental matters", the judge made an order limiting the claimant's costs exposure to £3,500. An appeal is due to be heard in October 2014.

CPR 45.41 does not apply to appeals to the Court of Appeal and beyond to the Supreme Court. At each appellate stage a PCO needs to be sought.

I venture to suggest that aspects of the automatic cost capping regime may warrant review. Can it be right that the financial means of a claimant is always irrelevant? A wealthy claimant (whether an individual or corporate) may well be better funded than the body being challenged. Furthermore, the rules by implication include local authorities within their ambit when they bring proceedings as claimant. Again, is this "gold plating" of the requirements of the Convention? Lastly, the lack of clarity about the definition of "environmental matters" is unhelpful.

Changes to legal aid

The Lord Chancellor introduced the Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014[52] to combat the spread of "legal-aid abusers".[53] The Regulations have been in force since April 22, 2014 and have been put in place to restrict legal aid to only those applicants who have been granted permission by the court to proceed with the application. Where the case concludes prior to a court decision, legal aid is at the discretion of the Lord Chancellor.

[49] *Implementation Guide of Aarhus Convention* (2013).
[50] *Venn v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin).
[51] *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006.
[52] Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014 (SI 2014/607).
[53] See *http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html* [Accessed October 13, 2014].

Previously, work on a judicial review case could qualify for legal aid whether or not the court gave permission for the claimant to proceed to a substantive hearing. The amendments have undoubtedly shifted the burden of risk for pre-permission work to solicitors and advocates. Reports by the Joint Committee on Human Rights ("JCHR") and the House of Lords Secondary Legislation Committee[54] have recommended that the Government annul the Regulations and reintroduce the measures as amendments to the Criminal Justice and Courts Bill, in order to allow full Parliamentary scrutiny. On May 7, 2014, the House of Lords held a debate on the motion of Lord Pannick QC to "regret" the Regulations.[55]

However, legally-aided judicial reviews of planning decisions have historically been a real problem for those who are seeking to rely on the decision being challenged. There is a perception on the part of developers, and no doubt local authorities, that decisions on whether to grant legal aid have been made behind closed doors. Whilst representations about why a proposed claim is unarguable can be made, the reasoning for decisions on whether to award legal aid is not made available. Once a potential claimant has legal aid, he or she is able to proceed largely with impunity from any adverse costs rulings and the usual checks and balances in the system have been lost.

There have also been increases in court fees, and the fee payable on a full hearing is now payable when an application for permission is turned down on the papers and renewed in front of a judge.

Proposals for further judicial review reform

The Criminal Justice and Courts Bill ("the Bill") had its second reading in the House of Lords on June 30, 2014. Part 4 of the Bill contains a number of further proposed changes in relation to judicial review:

> Clause 70: a proposal to lower the threshold where a court can refuse judicial review relief on the basis that correcting the error would be "highly unlikely" to make any difference to the substantive decision of the body being reviewed. The current threshold where the court may exercise its discretion to refuse a remedy or permission to appeal is where it considers it "inevitable" that the result would be the same if reconsidered on the correct basis by the decision-making body. The proposal lowers the threshold and also removes discretion, requiring the court to refuse relief where the lower threshold is met. The proposals also encourage this issue to be considered at the permission rather than substantive hearing stage.
>
> Clauses 71 and 72: a proposal to require all judicial review claimants to disclose their financial circumstances (including, in the case of any body corporate that is unable to demonstrate that it is likely to have financial resources available to meet liabilities in relation to the claim, information about its members and their ability to provide financial support), and the likelihood that a third party may be able to fund the claim, to allow the court to assess costs. The court would not grant permission to proceed unless all resources are disclosed.
>
> Clause 73: a proposed presumption that interveners in judicial review cases will pay their own costs and any costs incurred by any other party because of their intervention. The court already has the power under Supreme Courts Act 1981 s.51 to make an award of costs against a person who is not a party to the claim but this amendment would establish a presumption.
>
> Clauses 74–76: the proposed introduction of a more restrictive framework for cost capping orders. Save in cases raising environmental issues within the meaning of the Aarhus Convention, the Government proposes to codify the Corner House regime to restrict any PCOs to applicants (not interveners) and only after permission is granted.
>
> Clause 77: a proposed "permission" stage for statutory challenges.

[54] Thirty-seventh Report of Session 2013–2014, *Civil Legal Aid (Remuneration)(Amendment) (No.3) Regulations 2014*, HL Paper 157; Thirteenth Report of Session 2013–2014, *The implications for access to justice of the Government's proposals to reform judicial review*, HL Paper 174/HC 868 ("the JCHR Report").

[55] See *http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140507-0002.htm#140507102001180*. [Accessed October 13, 2014.]

Clause 78: proposed standardisation of how the six-week deadline is to be calculated for the purposes of different types of proceedings (again, finally the nettle has been grasped so that the deadline starts the day after the relevant decision, meaning that proceedings to quash a decision taken on a Wednesday must be commenced on or before the Wednesday six weeks later—fewer sleepless nights for claimants' lawyers).

The Bill follows a consultation paper, *Judicial Review: proposals for further reform*[56] and related consultation which ran from September 6 to November 1, 2013. A Government fact sheet[57] accompanying the Bill sets out a number of examples of the types of delays to development projects that the proposals aim to prevent:

"• The expansion of Bristol airport which was delayed by around 36 weeks at considerable cost to the developer and the local economy;
- a £38m retail development in East London, due to create 500 jobs, which was delayed by 15 months;
- a development of 360 dwellings in Carmarthenshire which was delayed by around 18 months by an unsuccessful judicial review; and
- a supermarket development in Skelton which was challenged by a rival store, delaying the development by around six months. The challenge was found to be totally without merit."

The document also refers to the example of the judicial review[58] against the Secretary of State's decision to grant a licence to exhume the remains of Richard III, to illustrate the need for a more restrictive cost capping system. The limited company claimant, the Plantagenet Alliance, formed for the purpose of bringing the litigation, was granted a PCO. Despite winning the case on all grounds, the Ministry of Justice estimated its own unrecoverable costs at over £90,000 (not including the costs of other defendants).

The Government has abandoned a proposal to change the rules on "standing" which would have made it more difficult for those with less than a "direct interest" to apply for judicial review, the current test being that a person must have "sufficient interest" to bring a claim, which has been interpreted relatively broadly by the courts. It has also abandoned a proposal to prevent local authorities from challenging decisions under the Planning Act 2008 in relation to nationally significant infrastructure projects.

A number of the provisions that are still being taken forward in the Bill will have a material effect on the practical use of judicial review in relation to planning matters:

The proposed lowering, by way of cl.70, of the threshold for exercising discretion not to quash a decision, to where the error was "highly unlikely" to have made a difference to the outcome, echoes the Prime Minister's exhortation that we should forget about crossing every "t" and dotting every "i". Plainly, the application of the test will be routinely the subject of legal argument, as the reality is that many judicial review claims are brought in relation to argued technical errors and omissions on the part of the authority that probably were not (although it is usually difficult to be sure) central to its decision-making.

The proposed requirements in cll.71 and 72 for disclosure of claimants' financial circumstances and of any likely providers of financial support, together with the "lifting of the corporate veil" in relation to corporate claimants that cannot demonstrate that they have sufficient financial resources to meet potential costs liabilities, sits uncomfortably with the requirements of the Aarhus Convention. This proposal may well discourage claims that are not likely to attract automatic Aarhus Convention costs capping protection, in that it would bring to an end the common practice of potential individual claimants establishing a vehicle, usually a company limited by guarantee, for the purposes of pursuing the litigation in order to provide protection against individual cost liability and in some cases an element of anonymity. Fund

[56] See *https://consult.justice.gov.uk/digital-communications/judicial-review*. [Accessed October 13, 2014.]
[57] *Criminal Justice and Courts Bill Fact Sheet: Reform of Judicial Review* (updated June 27, 2014 on Gov.UK).
[58] *R. (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662.

raising and campaign membership in connection with potential claims may also become more difficult if potential funders risk exposure to an award of costs. I do have a concern that this will lead to an increase in litigants in person and/or disparate individual poorly funded claimants, neither of which leads to efficient consideration of the material legal issues.

How courts are dealing with civil disobedience in planning matters

Thankfully, civil disobedience (by which I mean unlawful behaviour as a means of protest against a project or policy, rather than lawful protest) is still relatively rare in relation to planning matters. However, we have seen examples, particularly of trespass and obstruction in relation to environmental issues, with such sagas as:

- The 1990s road protests, in relation to, for example, the A30 in Devon (where a Daniel Hooper briefly gained celebrity status as "Swampy" for spending a week in a complex series of tunnels under its route) and the Newbury bypass (over 800 arrests and £55m spent on police and security services).
- Recent protests in relation to shale gas exploration proposals at Barton Moss, Salford and at Balcombe in Sussex.[59]
- The occupation by Greenpeace activists of the chimney stack at Kingsnorth in 2007 as part of protests against E.ON's proposals for a coal-fired power station.[60]
- Various protests about airport expansion, including the Camp for Climate Action[61] and Grow Heathrow[62] occupations at Heathrow, and breaches of security fences at Stansted[63] and other airports.

More widely we have seen the growth of the Occupy movement and other anti-capitalist groupings, giving rise to a number of politically-charged cases, including orders for possession secured against protesters and/or injunctions to prevent unlawful acts.[64] When is civil disobedience justified in response to the threat of development? Indeed, is it ever justified? I suspect that we all have differing personal moral standpoints. My own is that there is no room for civil disobedience in a properly functioning democracy, but that it is vital that the system can be said, in as objective a way as possible, to be fair in order to remove any justification not to follow the rule of law. The sense that civil disobedience can only be justified where there is a democratic deficit in the processes which have led to the subject matter of the protest is supported in an interesting paper by Daniel Markovits in the *Yale Law Journal*.[65]

There is a danger in extending, to every proposal that may be unpopular to some faction or other, the principles set out by Henry David Thoreau,[66] which assert that individuals have a duty not to allow governments to overrule their conscience—voting is not enough—and that they are themselves the agents of injustice if they do nothing. Thoreau's attention was on the evils of slavery and on the US war with

[59] In Balcombe, the protesters were charged under the Public Order Act 1986, mainly under s.14, which allows police to impose conditions on protestors. The police in this case designated protest areas on the road outside the entrance to Cuadrilla's site, to which the protestors did not abide. However, the protesters were acquitted owing to the fact that it was not made clear to them that there were designated areas so they could not have knowingly failed to comply with the conditions to stay within them. Caroline Lucas MP, and four others charged with breaching the police order was cleared of all charges with the District Judge questioning the legality of the conditions issued under the 1986 Act. Several protesters at Barton Moss were charged under ss.4 and 5 of the 1986 Act for "causing distress to council workers".

[60] Six Greenpeace protesters were arrested for breaking in, climbing the station's chimney stack, painting the word "Gordon" on the chimney and causing an estimated £30,000 of damage. They were acquitted in a 2008 Crown Court hearing. See *http://www.theguardian.com/environment/2008/sep/10/activists.carbonemissions*. [Accessed October 13, 2014.]

[61] See *http://news.bbc.co.uk/1/hi/uk/6943084.stm*. [Accessed October 13, 2014.]

[62] See *http://www.bbc.co.uk/news/uk-england-london-28759853*. [Accessed October 13, 2014.]

[63] See *http://www.planestupid.com/blogs/2008/12/9/why-we-shut-stansted-airport* .[Accessed October 13, 2014.]

[64] e.g. *City of London Corporation v Samede* [2012] EWCA Civ 160 (St Paul's churchyard) and *Sun Street Properties v Persons Unknown* [2011] EWCA 1672 (UBS premises).

[65] Daniel Markovits,"Democratic Disobedience" (2005) 114 Yale L.J. 1897.

[66] Henry David Thoreau, *Resistance to Civil Government* (1849).

Mexico. His thinking was followed by Mahatma Ghandi and by Martin Luther King. It seems to me to be quite a leap for the "Frack Off" group to equate their objections to shale gas exploration and production as an equivalent cause to "universal suffrage, Indian independence, US Civil Rights …".[67]

After all, many people have strongly held views about shale gas.[68] But they also have strongly held views about:

- the green belt;
- large housing schemes;
- historic buildings;
- airports;
- supermarket chains;[69]
- coffee chains;
- traveller sites;
- large road and rail projects;
- waste water projects;
- tidal power; and
- power stations, whether nuclear, gas or coal or indeed generating energy from waste.

In each of these instances, people have held increasingly cynical views about the validity of the administrative process that arrives at the relevant policy or project authorisation and the behaviour of the relevant promoters. They are also increasingly cynical about the scientific, economic or technical justification relied upon as the basis for such decisions: there is equivalent mistrust of "technocracy" as there is of democracy.

How on earth do we ensure that life doesn't simply grind to a halt?!

The practical solution may often be to ensure that protest can take place in a way which does not cause undue disruption or damage whilst maintaining appropriate security, in consultation with the police, to prevent real harm being caused to people, property and/or business activity.

In exceptional cases, legal remedies are available and are there to be used, whether an injunction where there is the substantial risk that damage will be caused by unlawful activity or an order for possession where unlawful trespass has already occurred.

Care is needed. Resorting to law will often play into objectors' hands, giving an opportunity for the underlying issues to be given further publicity, for protestors to be portrayed as being picked upon and for the detailed terms of any order to be resisted (for example, in the way that it seeks to define the categories of individuals and/or groups affected, the extent of land to be the subject of the order and/or the range of activities to be restrained), all of which no doubt BAA experienced in relation to the injunction it obtained in 2008 seeking to prevent unlawful protest to the proposed expansion of Heathrow Airport.[70]

However, there is now a growing and increasingly clear body of case law, excellently summarised in papers by David Forsdick QC,[71] Katherine Holland QC and Melissa Thompson[72] on the circumstances in which the courts will afford protection and the procedural steps to be taken. The papers together consider in detail, with practical guidance:

[67] See *http://frack-off.org.uk/civil-disobedience-will-be-outcome-of-dash-for-gas/*. [Accessed October 13, 2014.]

[68] The majority in fact in favour according to a recent survey undertaken by Populus for industry group UK Onshore Oil and Gas at *http://www.bbc.co.uk/news/business-28735128*. [Accessed October 13, 2014.]

[69] The 2011 Stokes Croft disturbances in Bristol, apparently triggered by objections to a proposed Tesco store, being a particularly unpleasant and extreme example at *http://www.bbc.co.uk/news/uk-england-bristol-13234890*. [Accessed October 13, 2014.]

[70] See *http://www.independent.co.uk/news/uk/crime/baa-wins-right-to-block-heathrow-protest-460493.html*. [Accessed October 13, 2014.]

[71] David Forsdick, "Protest, Trespassers and Human Rights—the Aftermath of St Paul's and the Occupy protests: looking at the approach to possession actions involving protest groups on public and private land" (2012) at *http://www.landmarkchambers.co.uk/userfiles/documents/resources/DF-Protest.pdf* .[Accessed October 13, 2014.]

[72] "Restraining Persons Unknown" *Estates Gazette*, June 22, 2013 at *http://www.landmarkchambers.co.uk/userfiles/documents/resources/KH_Restraining_Persons_Unknown_EG0613.pdf*. [Accessed October 13, 2014.]

- the *Samede*[73] and *Sun Street "Occupy"* cases referred to earlier;
- the proceedings in 2012 to clear Parliament Square of encamped protesters;[74]
- the injunction obtained by the Olympic Delivery Authority against protesters to enable the construction of the construction of a basketball facility for use during the 2012 Olympics;[75]
- the application of the European Convention on Human Rights, particularly art.6 (the right to a fair hearing), art. 10 (the right to freedom of expression) and art.11 (the right to peaceful assembly).

Ensuring a more resilient planning system

It is important that the planning system is swift and efficient in its operation. But also it is also important to minimise the number of instances where decisions are challenged in the courts because they are not accepted as a "fair" outcome (often because the process and the operation of policy is not at all understood), or where frustrations with the process lead to civil disobedience.

It is important that the system is seen as fair, judged by as objective standards as possible. So what are the useful standards to judge it against?

European environmental legislation

The Strategic Environmental Assessment Directive provides a useful framework for judging the processes by which "plans and programmes" are arrived at. Reasonable alternatives to policies will have been considered before options are ruled out. Provided that authorities comply with the Directive's requirements, it is a useful guarantee for procedural rigour, however high-level the debate at the examination of plans may be. It may still be early days, but unfortunately our experience is that sustainability appraisals too often amount to weighty-looking reports, heavily tabulated, that fail to engage with the real issues in a way which is clear and meaningful - leading to a series of challenges.[76]

In relation to large projects, the Environmental Impact Assessment Directive[77] similarly provides an appropriate procedural framework for the assessment of likely significant effects on the environment.

Again, what sometimes brings the Environmental Impact Assessment Directive into disrepute is:

- the intimidating extent of written material prepared by risk-averse professionals to seek to safeguard against the risk of challenge; and
- the frequency with which alleged non-compliance with the Directive is used as a basis for challenge by objectors of unwelcome development proposals.

Neither of these issues will be resolved by the latest amendments to the Directive[78] which are due to be incorporated into national legislation by May 16, 2017. DCLG, however, recognises the concerns which have been expressed and is consulting[79] on a proposed raising of the EIA screening threshold for "urban estate projects" and "industrial estate development" on non-sensitive sites from 0.5ha to 5ha:

[73] See above. Factors taken into account by the Court of Appeal: "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land and the extent of the actual interference the protest causes the rights of others including the property rights of the owners of the land and the rights of any member of the public."

[74] *Mayor of London v Hall* [2010] EWCA Civ 817.

[75] *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch).

[76] e.g. *Save Historic Newmarket Ltd v Forest Heath DC* [2010] EWHC 3268 (Admin); *Heard v Broadland DC* [2012] EWHC 344 (Admin).

[77] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

[78] Directive 2014/52 amending Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

[79] *Technical Consultation on Planning* (DCLG, July 31, 2014), s.5.

> "While it is important that local planning authorities meet their legal obligations, we believe that concern about the risk of legal challenge has led some local planning authorities to require environmental impact assessment for projects which are not likely to give rise to significant effects. Additionally, some developers undertake assessments voluntarily to avoid the risk of a legal challenge or seek confirmation from the Secretary of State that an assessment is not required. It also appears to be the case that developers are carrying out increasingly large and overly complex environmental assessments."

European Convention on Human Rights ("ECHR")[80]

Article 6(1) of the ECHR provides that in:

> "the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publically but the Press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice."

Article 8 of the ECHR states as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection or the rights and freedoms of others."

The ECHR has been directly enforceable in the United Kingdom since October 2002 as a result of the Human Rights Act 1998.

The extent to which the UK planning system is compatible with art.6(1) was considered by the House of Lords in *Alconbury*.[81] The House of Lords held that art.6(1) applies in principle to planning decisions. Their Lordships' speeches referred to the existence of procedural safeguards in the administrative procedure, including that of a quasi judicial hearing before an inspector, but did not express views on what safeguards were necessary. So it is difficult to know the extent to which safeguards in the current system (which has itself changed materially since *Alconbury*) can be removed without giving rise to art.6(1) concerns.

The House of Commons' Library note on Human Rights and Planning[82] comments:

> "had the Lords ruling gone the other way, the whole Town and Country planning system would have required reform, possibly by introducing a system of environmental courts, as in New Zealand, and allowing third party rights of appeal."

[80] See above.

[81] *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holding & Barnes Plc, Alconbury Developments Ltd and Legal & General Assurance Society Ltd* [2001] UK HL 23. See also *Lough v Secretary of State and Bankside Development Ltd* [2004] EWCA Civ 905.

[82] Standard note SN/SC/1295, June 21, 2010.

Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention, came into force on October 30, 2001.[83] It has three "pillars", or sets of principles, about the procedures that signatory states should adopt in relation to environmental matters. It will be seen that each of the pillars relates to a fundamental aspect of our planning system:

> Pillar One: The right of everyone to receive environmental information that is held by public authorities ("access to environmental information"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged to actively disseminate environmental information in their possession. This is given domestic effect by way of the Environmental Information Regulations 2004.[84]
>
> Pillar Two: The right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public and environmental non-governmental organisations affected to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment. These comments are to be taken into due account in decision-making and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making").
>
> Pillar Three: The right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

The UK Government is required to produce a National Implementation Report every three years, setting out the procedures and mechanisms in place to enable use of the Convention in the United Kingdom, providing examples of the practical steps being taken to implement its requirements. The latest draft[85] represents a useful and relatively detailed assessment by the UK Government on how its administrative and legislative arrangements comply with the requirements of the Convention.

Complaints about Government breaches of the Convention can be made to the Aarhus Convention Compliance Committee, which makes non-binding recommendations to full "Meetings of the Parties" i.e. meetings of representatives of the signatory states.

We need to be wary of attempts to remove these important safety nets, although no doubt European environmental law directives will attract few "yes" votes in any referendum in relation to our continued membership of the European Union, and reference has earlier been made to widespread misconceptions about the role of the ECHR.[86] We also seem to have growing "European law skepticism" at the highest level of our judiciary demonstrated by the forthright comments in the "further observations" at paras 158–211 of the HS2 Action Alliance Supreme Court ruling[87] recently alluded to and elaborated upon by Lady Hale and Lord Neuberger.[88]

There has been recent political debate over whether there should be a British Bill of Rights,[89] but care will be needed to ensure that it is seen as having the rigour that comes with ultimate recourse to justice in Europe, whether in Luxembourg in relation to the Court of Justice of the European Community, in

[83] See above.
[84] Environmental Information Regulations 2004 (SI 2004/3391).
[85] See *http://www.unece.org/fileadmin/DAM/env/pp/NIR_2014/NIR_2014_UK_eng_trc.docx*. [Accessed October 13, 2014.]
[86] Coalition programme for Government, May 2010: "We will establish a commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties."
[87] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
[88] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
[89] House of Commons Select Committee on Political and Constitutional Reform: "A new Magna Carta?", July 10, 2014.

Strasbourg in relation to the European Court of Human Rights, or in Geneva in relation to the Aarhus Convention Compliance Committee.

Does the system still comply with the ECHR? In my view none of the changes to the planning system since *Alconbury* would lead to a different ruling, certainly not with the presently constituted Supreme Court. But we should not be complacent. For example:

- It is vital that the Planning Inspectorate retains its independent and impartial role. We should be vigilant against any suggested watering down of the appeal process—for example, any suggestion that local planning authorities should provide an independent review process in relation to domestic planning matters, or any limitations on the right to appeal along the lines of those that were trailed in Open Source Planning.[90]
- Government should resist the temptation to further streamline the planning process when the root cause of delay is often politics, or lack of proper resources or guidance. (However, perhaps conversely, we as a profession should be more prepared to consider proposals that may genuinely lead to improvements with an open mind.)
- Government should also be particularly careful in arriving at bespoke administrative processes for its "grands projets". Where the state is the enthusiastic promoter and supporter it can be difficult to ensure independence of decision-making and a sufficiently robust testing of policy. We have seen the political fall-out from perceived shortcomings in the mechanisms adopted for bringing forward, for example, the ill- fated "super-casinos" competitive shortlisting process pursuant to the Gambling Act 2005; the eco-towns competitive shortlisting process, and, some would say, the consultation carried out in relation to elements of the HS2 rail project. At least the Government accepted that the eco-towns process would be subject to the rigours of the Strategic Environmental Assessment Directive, even if serious questions had to be asked about the flawed methodology for arriving at the preferred sites and the lack of clarity about the "planning" advantage that would be gained.

How to reduce the risk of delay to particular projects

No matter how potentially controversial a project, there are basic practical measures that can be taken to reduce the risk of successful legal challenge. The most fundamental is straightforward engagement with the public and interest groups whilst the scheme is at a formative stage when views can be taken into account.

If concerns arise from particular interest groups, they need to be understood and tackled head on. It may be that concessions or further discussions are required or it may be that the concerns need to be acknowledged as understandable but put in the wider planning context.

Ignore social media at your peril. It is a vital tool, both for understanding, in real time, how issues are playing out and for communicating in a direct and unmediated way.

I do not think it is special pleading to suggest that a legal audit of the planning application package should be carried out given the risks of delay through non-validation at application or appeal stage, or of legal challenge, if the legal and procedural requirements are not adhered to in relation to the application package, including environmental and design and access statements. I say it is not special pleading because this should not be an opportunity for legal advisers to spend hours proof-reading long sets of Environmental Statement technical appendices; the focus must be on correcting inaccuracies, omissions (such as the potential need for an EIA screening opinion) or internal inconsistency in the application package that may lead to legal attack.

[90] Conservative Party, February 2010.

Without impinging in any way on planning officers' role in reaching professional conclusions, there should be greater encouragement for a draft of the committee report to be shared with the applicant for a sense check in relation to applications of any complexity. For example, if the development is likely to affect the setting of a listed building or the character and appearance of a conservation area, have the relevant statutory tests been applied?[91]

There needs to be a clear understanding between the applicant, the authority and third parties about what correspondence and documentation should be regarded as exempt from disclosure under the Freedom of Information Act 2000 and Environmental Information Regulations 2004, particularly in relation to viability appraisal. The Information Tribunal's decision[92] in relation to the Heygate Estate development in Southwark retains some doubt regarding which aspects of an assessment should be regarded as properly commercially confidential and which elements should be disclosed. It may be that more detailed Government guidance is needed, given the frequency with which arguments are arising in the context of planning applications and inquiries over what information should be disclosed and what is properly confidential, and the frequency with which related issues are relied upon by claimants as a further ground for judicial review.

We all should remember that the risks of challenge can be greater when you have a keenly supportive decision-maker; that is where corners get cut.

Care is needed in relation to the s.106 agreement and planning conditions to ensure that they fall within the parameters of the resolution to approve and that they generally are lawful. Authorities frequently have to be reminded that art.36 of the Town and Country Planning (Development Management Procedure) (England) Order 2010[93] requires that any "proposed" planning obligation or s.278 agreement be placed on the planning register; another "tripping hazard".[94]

More generally, developers are not served well by the failures of Government and local planning authorities to provide a supportive, consistent and positive policy backdrop, without mixed messages and agendas that can be seen as contradictory. Public expectations were certainly not well managed in relation to the Government's localism agenda.

As we approach another general election, wouldn't it be refreshing if politicians' intentions to promote or support development were more clearly flagged in manifestos so there is real democratic mandate for development and a discussion about "where" and "how" rather than "whether"?

In relation to housing development, the arguments over need and affordability are there but so often trumped by more local concerns. It is important that groups such as Shelter and Priced Out continue to make the case for housing. But, alongside that, is there more for the house building industry to do? Wouldn't it be great if people aspired to live in, or near, house builders' brands, echoing the halo effect of a Waitrose or M&S or the brand values of a Volvo or Mini Cooper?

Perhaps developers of major schemes might be tempted to take heed of Nick Clegg's recent comments in the context of new garden cities, and look for mechanisms for compensating, on an ex gratia basis, those who consider that the value of their properties will be affected by development—looking to examples in relation to recent airport and rail proposals. This could include a range of discretionary compensation options to be considered, including:

- express purchase: a proposal for a streamlined system of purchasing owner-occupied properties that are within a defined area of influence;

[91] The pitfalls of getting it wrong are amply illustrated by *Barnwell Manor Wind Energy Ltd v East Northamptonshire DC* [2014] EWCA Civ 137 and *R. (on the application of Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin).

[92] See *http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20%2809.05.14%29.pdf*. [Accessed October 13, 2014.]

[93] Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184).

[94] Raised as a further ground of challenge and rejected by Foskett J. in *R. (on the application of Police and Crime Commissioner for Leicestershire) v Blaby DC* [2014] EWHC 1719 (Admin).

- a voluntary purchase scheme;
- a property bond scheme guaranteeing that any losses in value of properties over a defined period due to the scheme will be made good; and
- a long-term hardship scheme for those blighted by the prospect of the scheme.

Or will this simply give rise to fresh complaints that permissions are being bought, and reduce the money available for more formal contributions and mitigation by way of s.106?

Finally, we could do more to make the system, and the language that we use, understandable. The acronyms of the 2004 Act recede into the past but we too often talk and write in lifeless technocrat code. Is part of the fear of development, in fact, simply fear of the unknown?

Appendix A

II Planning Court

General

CPR 54.21

(1) This Section applies to Planning Court claims.

(2) (2) In this Section, "Planning Court claim" means a judicial review or statutory challenge which—

(a) involves any of the following matters—

(i) planning permission, other development consents, the enforcement of planning control and the enforcement of other statutory schemes;

(ii) applications under the Transport and Works Act 1992;

(iii) wayleaves;

(iv) highways and other rights of way;

(v) compulsory purchase orders;

(vi) village greens;

(vii) European Union environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control;

(viii) national, regional or other planning policy documents, statutory or otherwise; or

(ix) any other matter the judge appointed under rule 54.22(2) considers appropriate; and

(b) has been issued or transferred to the Planning Court.

(Part 30 (Transfer) applies to transfers to and from the Planning Court.)

Specialist list

54.22 (1) The Planning Court claims form a specialist list.

(2) A judge nominated by the President of the Queen's Bench Division will be in charge of the Planning Court specialist list and will be known as the Planning Liaison Judge.

(3) The President of the Queen's Bench Division will be responsible for the nomination of specialist planning judges to deal with Planning Court claims which are significant

within the meaning of Practice Direction 54E, and of other judges to deal with other Planning Court claims.

Application of the Civil Procedure Rules

54.23 These Rules and their practice directions will apply to Planning Court claims unless this section or a practice direction provides otherwise.

Further provision about Planning Court claims

54.24 Practice Direction 54E makes further provision about Planning Court claims, in particular about the timescales for determining such claims.

Appendix B

Practice Direction 54E—Planning Court Claims

General

1.1 This Practice Direction applies to Planning Court claims.

How to start a Planning Court claim

2.1 Planning Court claims must be issued or lodged in the Administrative Court Office of the High Court in accordance with Practice Direction 54D.

2.2 The form must be marked the "Planning Court".

Categorisation of Planning Court claims

3.1 Planning Court claims may be categorised as "significant" by the Planning Liaison Judge.

3.2 Significant Planning Court claims include claims which—

(a) relate to commercial, residential, or other developments which have significant economic impact either at a local level or beyond their immediate locality;

(b) raise important points of law;

(c) generate significant public interest; or

(d) by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

3.3 A party wishing to make representations in respect of the categorisation of a Planning Court claim must do so in writing, on issuing the claim or lodging an acknowledgment of service as appropriate.

3.4 The target timescales for the hearing of significant (as defined by paragraph 3.2) Planning Court claims, which the parties should prepare to meet, are as follows, subject to the overriding objective of the interests of justice—

(a) applications for permission to apply for judicial review are to be determined within three weeks of the expiry of the time limit for filing of the acknowledgment of service;

(b) oral renewals of applications for permission to apply for judicial review are to be heard within one month of receipt of request for renewal;

(c) applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue;

(d) substantive statutory applications, including applications under section 288 of the Town and Country Planning Act 1990, are to be heard within six months of issue; and

(e) judicial reviews are to be heard within ten weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party as provided in Rule 54.14.

3.5 The Planning Court may make case management directions, including a direction to any party intending to contest the claim to file and serve a summary of his grounds for doing so.

3.6 Notwithstanding the categorisation under paragraph 3.1 of a Planning Court claim as significant or otherwise, the Planning Liaison Judge may direct the expedition of any Planning Court claim if he considers it to necessary to deal with the case justly.

Appendix C

VII Costs Limits in Aarhus Convention Claims

Scope and interpretation

45.41 (1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, "Aarhus Convention claim" means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

(Rule 52.9A makes provision in relation to costs of an appeal.)

Opting out

45.42 Rules 45.43 to 45.44 do not apply where the claimant—

(a) has not stated in the claim form that the claim is an Aarhus Convention claim; or

(b) has stated in the claim form that—

(i) the claim is not an Aarhus Convention claim, or

(ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43 (1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

Challenging whether the claim is an Aarhus Convention claim

45.44 (1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless—

(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8—

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim—

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

Appendix D

Orders to limit the recoverable costs of an appeal

52.9A (1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

(2) In making such an order the court will have regard to—

(a) the means of both parties;

(b) all the circumstances of the case; and

(c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

An Environment for Change: Using Law to Protect the Planet

Gita Parihar

Background to Friends of the Earth and aims of this paper

Formed in 1971, Friends of the Earth is one of the United Kingdom's largest and most influential campaigning organisations. Internationally, it is part of the world's largest grassroots environmental network with around 2 million supporters across five continents and more than 75 national organisations worldwide. In England, Wales and Northern Ireland, it has a unique network of local campaigning groups, working in more than 220 communities. Its campaigns are rooted in the conviction that justice and fairness are integral to solving the environmental problems we all face; that there is an interdependent relationship between people and the planet, and that deep, lasting change is necessary, desirable and possible.

After a brief explanation of the nature of the current climate change crisis, I will spend the bulk of this paper considering whether our current legal framework is fit to meet the challenges that climate change poses. For the purposes of (relative) brevity I have chosen to focus on climate change, although it is worth emphasising that this is far from the only serious environmental threat that we face, or the only issue on which Friends of the Earth campaigns.[1]

As a grassroots organisation, Friends of the Earth sees the role of communities and individuals in taking action as vital, and public participation as key to shaping a sustainable future. It aims to work in a way that redresses environmental injustice, i.e. the fact that the greatest environmental harm and degradation is often faced by those with the least capacity to respond. For these reasons, the second theme interwoven through this paper concerns the value of public participation in environmental decision-making and whether it is sufficiently recognised within our legal system.

The science of climate change

In 2013/2014, the Intergovernmental Panel on Climate Change ("IPCC") produced three major reports on climate change and its impacts. Its key conclusions were as follows[2]:

- The planet is warming.
- Human activity has been the dominant cause of warming since the mid 20th century.
- Warming is already leading to more extreme weather events—floods and droughts.
- Sea levels are rising.
- Food production will be hit. Climate change is expected to reduce crop productivity by 2 per cent per decade.
- 20–30 per cent of plant and animal species assessed are at increasing risk of extinction as global mean temperatures exceed warming of 2–3 degrees above pre-industrial levels.
- The poorest people will be hit hardest. Women, children and the elderly are particularly at risk. Africa is particularly vulnerable, even with high levels of adaptation.
- Globally, marginalised people are highly vulnerable to climate change.

[1] See further *http://www.foe.co.uk/what_we_do_index*. [Accessed October 8, 2014.]

[2] See *http://www.foe.co.uk/resource/subject/Climate%20Change* [Accessed October 8, 2014], and *http://www.foe.co.uk/sites/default/files/downloads/climate-change-ten-key-findings-climate-scientists-46417.pdf* [Accessed October 8, 2014] and *http://www.foe.co.uk/sites/default/files/downloads/climate-change-ten-key-findings-climate-scientists-46417.pdf*. [Accessed October 8, 2014.]

- Business-as-usual will lead to between 3.2 and 5.4 degrees warming; the impacts of 4 degrees risks tipping points into catastrophic irreversible climate impacts.
- Warming will continue, but it is still possible to avoid 2 degrees of warming.
- This will require peaking global emissions before 2020 and cutting global fossil fuel use by around two-thirds by 2050.

In addition, for a two-thirds chance of staying under 2 degrees warming we need to emit less than 800 billion tonnes of CO_2 from fossil fuel burning from now to 2050; this is around 20 years-worth at current rates (we emit about 35 billion tonnes a year globally now). We need to peak our global emissions before 2020 and cut emissions rapidly thereafter. Given that developed countries are overwhelmingly historically responsible for the situation we're in right now, they need to take the toughest action fastest and provide financial assistance to developing countries to enable the latter to move to low carbon development while still being able to address pressing issues such as poverty eradication.

The IPCC say that renewables and energy efficiency are essential to meet the 2 degrees target; they estimate that investment in low emissions generation technologies needs to double to around $300 billion a year, investments in energy efficiency need to grow by over $300 billion per year and $21–35 billion per year needs to be invested in deforestation.

Crucially, we also need to keep most of the world's fossil fuels in the ground. Carbon Tracker's work on unburnable carbon[3] highlights that existing proven reserves of oil, coal and gas globally would emit 2,800 billion tonnes of CO_2 when burned. However, we can only safely emit 800 billion tonnes of CO_2, so three quarters of existing proven reserves need to stay in the ground. This is before we even come to exploration for unconventional fossil fuel sources such as shale gas, or drilling in the Arctic.

Friends of the Earth's campaigning is rooted in this environmental reality. The organisation invests its time and energy grappling with these facts and what they mean for us as a society, nationally and globally. As a result, it doesn't oppose or support projects or policies to annoy or support developers or public authorities, but based on whether they lead us towards, or away from, breach of the key environmental limits that threaten our survival as a species.

The context for Friends of the Earth's work in the United Kingdom

One might reasonably expect serious attention to be paid to the matters above in the political debate concerning the kind of development that should be promoted in the United Kingdom. However, as I discuss below, the focus of development policy and practice remains the promotion of economic growth and the restriction of perceived hurdles to it, such as environmental regulation[4] or judicial review of development decisions in court. This situation brings to the fore questions concerning environmental protection, democracy and the role of the economy. At the intersection of all three sits planning law.

In her article, "Revisiting the Ideologies of Planning Law",[5] Julie Adshead examines three "ideologies"[6] of planning law proposed by Patrick McAuslan in 1980 and their relevance today. These are:

- The traditional common law view that the role of law is to protect private property. This stems from the history of our legal system, which charts a close relationship between law and property ownership.

[3] Carbon Tracker, 2013. Unburnable Carbon 2013 at *http://www.carbontracker.org/site/wastedcapital*. [Accessed October 8, 2014.]

[4] Examples include the "Red Tape Challenge" at *http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/pm-speech-2/* [Accessed October 8, 2014] and the *Review of the Balance of Competences between the UK and the EU: Environment and Climate Change* (HM Government, February 2014)—see *https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review*. [Accessed October 8, 2014.]

[5] Julie Adshead, "Revisiting the ideologies of planning law (private property, public interest and public participation in the legal framework of England & Wales)"[2014] , *International Journal of Law in the Built Environment* Vol.6 No.1/2. I am indebted to Stephen Tromans for drawing my attention to this through his paper *EIA, SEA and Ene Projects, better decision-making or a game of snakes and ladders?* at this year's UKELA conference.

[6] "Ideology" was defined by McAuslan as embracing "values, attitudes, assumptions, hidden inarticulate promises".

- A "Benthamite" view centred in the idea that the law exists to serve the public interest. This provides legitimacy for actions by public officials and administrators.
- A more recent perspective through which law serves the cause of public participation. On this view, there should be mechanisms for the public to be consulted and involved in the decision-making process, not because of any property rights but in the interests of democracy and justice.

These different "ideologies" raise interesting questions: is planning law paternalistic or public interest-oriented? Is it a process to approve projects, for public authorities to make decisions in what they perceive to be the public interest, or for local communities to have a say about what happens to their area and their environment (considered at the micro and macro levels)? There are obvious tensions between the three which play out in policy, practice and the experience of most involved in the planning system.

Adshead cites McAuslan's conclusion from 1980—that law that might appear to be designed to increase public participation is in fact grounded in the ideology of public interest and that such provisions as do exist cater to the interests of private property rather than the public at large. Her own conclusion on the review of the current position is that little has changed today. The above framework and the conclusions drawn by both Adshead and McAuslan form a useful background for the discussion below.

The case for public participation

Of the three "ideologies" outlined above, the public participation model may be the least familiar to this audience so it merits a pause for consideration. Principle 10 of the Rio Declaration at the Earth Summit in 1992[7] sets out what is probably its most famous formulation:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by pubic authorities … States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including access to remedy, shall be provided."

The first sentence of Principle 10 is particularly noteworthy. The role of public participation is emphasised, not as a way for people to have their voices heard and therefore as a general democratic good, but instead as the best manner of ensuring that good decisions are made concerning environmental matters.

The Aarhus Convention[8] ("the Convention") gives legal force to the Principle 10 rights of access to environmental information, participation and access to justice in environmental matters within the broad European region. A number of the Convention's provisions (such as that requiring that the costs in environmental cases should not be prohibitive) have been incorporated into the Environmental Impact Assessment ("EIA") and IPCC directives, and the European Union and United Kingdom are both parties to the Convention in their own right.

Reference to the wider aim behind giving legal effect to the Aarhus rights can be found in the Preamble to the Convention:

> "Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,
>
> Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental

[7] See *http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm*. [Accessed October 8, 2014.]

[8] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on June 25, 1998 in the Danish city of Aarhus: see *http://ec.europa.eu/environment/aarhus/*. [Accessed October 8, 2014.]

> matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights."

This highlights two complementary but distinct aspects of environmental concern: a public right to a healthy environment and a public duty to protect and improve the environment. The rights enshrined in the Convention are presented as the procedural means to achieve these substantive goals. This is confirmed in art.1 of the Convention, which sets out that the rights guaranteed are:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being."

It is notable that at the time of ratifying the Aarhus Convention, the UK Government filed a reservation stating that the references to the right to a healthy environment in the Convention were aspirational and not legally binding.[9]

Views on the value of public participation can often be corroded by the idea of "nimbyism"—the perception that people get involved in planning decisions on a selfish level to oppose development local to them without considering its benefits to society at large.

It is notable that even in the case of *Berkeley*,[10] often regarded as a "high water mark" case regarding public participation, EIA is referred to as a process "in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues".

This attitude to the value of public engagement is markedly different to that set out in the Convention above. However, even from this rather negative perspective, public participation still has benefits. As pointed out by Geraint Ellis in an article on Third Party Appeals:

> "In a time of declining engagement in any form of citizenship behaviour, it is particularly inappropriate to denigrate as frivolous or NIMBY the actions of individuals who do feel they are acting with sound purpose."[11]

Aarhus rights and planning challenges

The Government's recent consultations on changes to judicial review[12] illustrate current pressures on the exercise of Aarhus rights. If any doubt existed about the political motivations behind the proposed reforms, it was banished when Chris Grayling penned an article in the Daily Mail entitled: "The judicial review system is not a promotional tool for countless Left-wing campaigners."[13] The constitutional importance of judicial review as a check and balance against the actions of public authorities and the necessity for the latter to act within the law (and be open to legal challenge when they do not) was completely side-lined.[14] In addition, the statistics presented in the consultation paper did not support Grayling's portrayal of judicial review as the NGO "go to" tool of choice.[15]

[9] "The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under Article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."

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

[11] "Third Party Appeals: Pragmatism and Principle" *Journal of Planning Law and Practice* Vol.7 No.3 pp.11–12. See *http://www.rtpi.org.uk/media/10012/ge-third-party-appeals-planning-theory-and-practice.pdf*. [Accessed October 8, 2014.]

[12] *Judicial Review: Proposals for Reform* (Ministry of Justice, December 2012)—see *https://consult.justice.gov.uk/digital-communications/judicial-review-reform*. [Accessed October 8, 2014]; *Judicial Review: Proposals for Further Reform* (Ministry of Justice, September 2013)—see *https://consult.justice.gov.uk/digital-communications/judicial-review*. [Accessed October 8, 2014.]

[13] A link to Grayling's article and FoE's riposte can be found at *http://www.foe.co.uk/news/jr_41159*. [Accessed October 8, 2014.]

[14] "There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review." Lord Dyson, *R. (on the application of Cart) v Upper Tribunal* [2011] UKSC 28 at [122].

[15] According to the consultation, approximately 50 JRs per year are lodged by NGOs, representing 0.4% of all applications. The statistics also indicated that JRs brought by NGOs were more successful than average.

In the context of the environment, Aarhus has operated as a partial shield against attacks on judicial review and other procedural rights, because it (and the EU/UK legislation that derives from it) provides legal recognition that there is a public interest inherent in environmental litigation. As eloquently acknowledged by Lord Hope:

> "Environmental law proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The Osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf."[16]

The natural environment, our commons and forests, oceans and atmosphere are in much the same position.

Prior to the judicial review consultations, both the Aarhus Convention Compliance Committee and EUCJ had found that the United Kingdom did not have a legal framework that fully implemented the provisions of the Convention and that bringing public interest environmental cases in the United Kingdom was prohibitively expensive.[17] As a result, the Government set limits for maximum claimant costs recovery in cases falling within the ambit of the Convention and these were not changed following the consultation.[18] Its proposed changes to standing (which were not ultimately implemented) were also framed in a way such as to limit their impact on cases falling within the Aarhus Convention.

Nevertheless, although it is regarded as being in continuing breach of its Aarhus obligations on the issue of costs,[19] the Government is still planning on increasing court fees and increasing costs risk for NGOs who intervene in proceedings- to judicial disquiet:

> "… it seems to me that the courts, and through them the law and the constitution, get a great deal of help from the people and organisations who bring proceedings or intervene in the public interest … As a general rule, organisations which intervene in the public interest should neither have to pay the other parties' costs or be paid their own … Dare I say it, if there is a problem, could it be that it is not the NGOs and public bodies who bring or intervene in public law proceedings who are to blame, so much as private bodies or individuals who do either in vigorous pursuit, not of the public interest, but of their own private profit?"[20]

"Obstructive" planning judicial reviews were put forward as a justification for why reform was necessary. However, there was no evidence for this in case numbers. A study of judicial review cases dealt with by the court via substantive hearings shows that in a sample of 500 final hearings over a 20-month period there were 44 planning judicial reviews and that in areas other than immigration and asylum the number of judicial review claims has remained fairly stable.[21] Nevertheless, following the initial consultation, a planning court was established with the prescribed policy objective of speeding up planning cases.[22] Further, a six-week time limit has been introduced for planning judicial reviews.[23] These are measures

[16] *Walton v Scottish Ministers* [2012] UKSC 44 per Lord Hope at [152].

[17] There have been a number of findings against the UK. For the most recent decision see *European Commission v United Kingdom* (C-530/11) [2014] 3 W.L.R. 853 at *http://www.bailii.org/eu/cases/EUECJ/2014/C53011.html*. [Accessed October 8, 2014.]

[18] See CPR 45.41 to 45.44 and Practice Direction 45; CPR 52.9A re the Court of Appeal and (Costs Practice Direction, as amended in November 2013) re the Supreme Court. Although they do not go far enough, such limits are a welcome step in the right direction. They see an end to situations such as that in which a claimant I acted for was served with a schedule of costs of £25,000 by the interested party in respect of time spent producing an Acknowledgment of Service.

[19] Decision V/9o concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the convention, adopted at the recent meeting of the Aarhus parties in Maastricht, final version not yet available on Aarhus website.

[20] Baroness Hale, "Who guards the Guardians?" [March 2014] *Judicial Review* Vol.19, Issue 1, 8.

[21] Briefing on response to consultation, judicial review: proposals for reform V. Bondy and M. Sunkin at*http://www.publiclawproject.org.uk/data /resources/21/Judicial_Review_Consultation_Briefing_Paper.pdf*. [Accessed October 8, 2014.]

[22] See CPR 54.21 for the types of cases to be heard by the court, including any claim arising from EU environmental legislation, judicial reviews and statutory appeals.

[23] Rule 54.5(5) of the Civil Procedure Rules—see *http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.5*. [Accessed October 8, 2014.]

which prioritise an efficient system of providing certainty for developers over the ability for the public to participate in development decisions (the implications of the six-week time limit below are discussed further below).

A similar lack of enthusiasm for public participation is evident when one considers Nationally Significant Infrastructure Projects ("NSIPs").[24] National Policy Statements[25] are the subject of relatively limited discussion, but once they are adopted they take discussion of very important issues concerning the merits of a particular project out of the hands of an inquiry. There are no rights of cross-examination at inquiry, the emphasis is on exchange of written evidence and the process of testing and examination is very short in view of the size and implications of particular projects (such as nuclear power stations, for example). Again, communities wishing to engage meaningfully in such a process face an uphill struggle.

The weighting of the respective interests in planning in favour of development is underlined by the fact that applicants are able to appeal against failures to grant planning permission, but members of the public are not able to appeal a decision to grant planning permission. In an article considering the functioning of Third Party appeals in Ireland, Geraint Ellis[26] acknowledges that such appeals do carry implications for delaying decisions. However, he goes on to point out that the substantial number of initial planning decisions amended or reversed following appeal indicates high value derived in the form of planning decisions that much better match established policy or reduce external costs on other interests. In contrast our planning system as currently constituted places little importance on these factors.

The law and environmental protection: Case studies

Equipped with this understanding of the relevant scientific and legal frameworks, let us examine specific cases that Friends of the Earth has played a role in and consider these against wider case law trends. Friends of the Earth campaigns against fossil-fuel related development that threatens our ability to stay within our carbon budget, termed "dirty development" in this paper. Equally, it campaigns in favour of "clean energy", renewable technologies that move us in a sustainable, low-carbon direction. In both areas I will consider questions of public participation that arise and how they have been addressed.

"Dirty Development"

London City Airport, communities and climate

In 2009–2010, Friends of the Earth's Rights and Justice Centre brought a case on behalf of a community group called Fight the Flights ("FtF"), challenging an application to increase the number of flights at London City Airport.[27]

Before getting into the substance of the case, a word on judicial review time limits. Planning permission for the airport expansion was granted on July 9, 2009 and the case was lodged on September 28, 2009, near the end of (what was then) the three-month time limit. This was despite the fact that FtF already had legal representatives, became aware of the grant as soon as it was made, and lodged a case as promptly as possible. In that time the merits of the legal case needed to be assessed, and the group had to consider options for fundraising to ensure it could pay a Protective Costs Order (" PCO") if it lost the case. The timing of the grant, close to the beginning of the summer holiday period, inevitably slowed down progress on all fronts. It is not at all unusual, in my experience, for controversial planning decisions to be made during, or close to, the summer or Christmas holiday periods.

[24] Established under Pt 3 of the Planning Act 2008.
[25] Established under Pt 2 of the Planning Act 2008.
[26] See above.
[27] *R. (on the application of Griffin) v Newham LBC* [2011] EWHC 53 (Admin).

There would be a much clearer basis for FtF to obtain costs protection now, but it would face a higher level of court fees and real difficulties with lodging a claim in time. In my view, the changes to the time limit pose clear risks for access to justice and it would not be surprising to see a legal challenge to it at some stage. The court's power to vary the time limit in exceptional cases appears to me to be an insufficient protection in this regard. It remains to be seen how it is used in practice.

FtF's grounds of challenge to the expansion were:

- failure to consider the Government's reduction in aviation emissions target; and
- failure to consult two adjoining London Boroughs and their residents.

A decision had already been deferred a number of times as a result of representations made on behalf of FtF relating to points which it was incumbent on the authority in question to consider (including air quality, race equality and climate change) but which would not have come before it without FtF's engagement.[28]

The Air Transport White Paper ("ATWP") existing at the time stated that Britain's economy was "increasingly dependent on air travel", and accepted in principle further development of airports such as London City, subject to environmental considerations. It referred to climate change but said this was best dealt with at the international level through a well-designed emissions trading regime, although the Government recognised that this was not the whole answer. In the course of the decision-making process, FtF made representations concerning the Climate Change Act, pointing out that the level of auctioning under the EU Emissions Trading System ("EU ETS") was much lower than had been assumed. In addition, the Climate Change Committee ("CCC"), whose views the Government was legally bound to take into account, had stated that including aviation in the EU ETS would not cover non-price policy levers such as decisions over air traffic control and infrastructure. The local authority, Newham LBC, stated that upon considering these issues and a new increased carbon reduction target from the Government, it was of the view that there had been no material change in Government's climate change policy.

On January 15, 2009, the Government announced a new target to reduce aviation emissions in 2050 to 2005 levels. FtF argued that this was a fundamental change in approach which the local authority had unlawfully failed to consider. In December 2009, after the grant of planning permission but before the court hearing, the CCC published a report in response to the Government's request confirming that there would need to be a restriction in planned capacity increases at airports to meet the target.

The High Court held that the ATWP remained a relevant policy statement and that there had been no change in planning policy relevant to the Council's decision. In one particularly strong paragraph the judgment stated:

> "When making his statement in July 2009, the Secretary of State expressly requested CCC's advice as to policy. It was not for the Council to work out a new policy in the meantime. The Council would in my judgment have been wrong to do so. The important questions which arise call for national guidance and not speculation by a planning authority as to the effect of a target announced for 2050."

For a number of reasons, not least the potential ramifications of this broad statement on airport expansion well beyond London City Airport, FtF applied to appeal the decision. The appeal was refused by Lord Sullivan in a manner far more sympathetic to the policy point at stake:

> "The December 2009 CCC report supports the Appellant's view that there was an inconsistency between the two policies, and that there may well need to be some reduction in the increases in capacity assumed in the ATWP if the 2050 target is to be met, but that is to consider the matter with the benefit of hindsight, which was not available to the Respondent in July 2009."

[28] Various Planning Officer Reports relating to the application stated that the proposed decision to grant planning permission was a "finely balanced" recommendation but none of the points made by FtF tilted the balance away from grant.

However, despite this softening of the potential impacts of the decision of the lower court, a challenge to airport expansion at Bristol airport was refused having regard to the London City Airport judgment. There were clear "inconsistencies" as Lord Sullivan put it, between the Government's stated objective of reducing emissions and what was happening on the ground in local authority decision-making, yet this was not a situation in which the courts felt able to recognise a shift for planning purposes.

On the question of EIA, Newham's failure to consult the adjoining boroughs of Waltham Forest and Redbridge was held not to be irrational.

Shale and participation rights

As yet, there is no case law concerning shale development, but the Government is taking steps to weaken the regulation of this emerging and potentially risky area of activity and limit the role of public participation in the decision-making process. For example, it has removed the duty on business to notify landowners individually of their intention to drill or frack in connection with the planning application. It has announced reforms to the law of trespass, so as to give drilling and fracking companies an automatic right of access to the rock below people's property, thereby overriding their existing right to contest such activity application (thinking back to our three ideologies, these are interesting examples of the Government determining that one set of property rights in land should trump another). It has failed entirely to consult on planning practice guidance concerning onshore hydrocarbons. The Environment Agency has also consulted on plans to introduce "standard permits" for certain aspects of fracking which are expected to prevent any participation by the local community in this decision-making process.

Once more, this brings to the fore the question of how public participation in environmental decision-making is valued against the perceived economic benefits to a particular activity. In Friends of the Earth's experience, community engagement generally contributes significantly to the quality of the decision-making, in the manner recognised in the Aarhus Convention. A pertinent example in the shale context is where a community we worked with pointed out to the determining authority that an application for shale development was being made in the region of a former explosives site, something that the determining authority appeared to have been unaware of.

In addition, in communities where there is opposition to shale development, such as Balcombe, this is being accompanied by a rise in interest in community renewables. True to the words of Principle 10, the communities in question understand there is an energy crisis, but wish to address it in a sustainable manner.

Public participation and case law

It is worth pausing here to consider whether current case law on environmental public participation is supportive of procedural rights or is also following a negative trajectory. In line with the wider trends identified, current case law appears to indicate that EIA arguments are failing unless there are major procedural flaws.[29] Such flaws are not unknown; a community we work with was given three weeks to read through approximately 4,000 pages of documentation in an Environmental Statement concerning shale drilling. In that instance, EIA arguments were successful in extending the time period, albeit that a pre-action protocol letter needed to be sent on behalf of the community before the arguments were given serious consideration. In the vast majority of cases, however, EIAs are carried out to a standard that meets procedural requirements, and any substantive consideration of the aims of environmental protection behind the legislation is generally blocked by the thick wall of *Wednesbury* unreasonableness.

Similar difficulties arise in the context of Strategic Environmental Assessment ("SEA"): Friends of the Earth was set to intervene in the hearing by the Supreme Court of the *Central Craigavon*[30] case but it was

[29] See, e.g. the case of *R. (on the application of Gibson) v Harrow DC* [2013] EWHC 3449 (Admin).
[30] The appeal of *Re Central Craigavon Ltd Application for Judicial Review* [2011] NICA 17.

withdrawn at a late stage.[31] Our intervention would have argued for a consistent and coherent approach to when a document or statement of planning intent constitutes a "plan or a programme" stressing the need for a broad and purposive approach to the SEA directive.[32]

The question of SEA eventually came before the Supreme Court in the HS2 proceedings,[33] in which it rejected the approach taken by the CJEU[34] of giving a broad, purposive interpretation to the meaning of "required". Not only was this counter to the approach adopted by the CJEU, it was also at odds with the clear statement in art.1 of the SEA Directive that its objective "is to provide a high level of protection of the environment". It is worth noting that the Aarhus Compliance Committee is currently considering whether the Supreme Court decision in the HS2 case breached the requirements of the Aarhus Convention.

From the above it will be clear that legal procedural rights can be useful in very "botched" assessments, but are of limited further effect in a system where:

- the value of such rights is not always fully understood (or accepted) by decision-makers and the judiciary; and
- their implementation is divorced from the substantive aims of environmental protection to which they were intended to contribute, such as those set out in the Aarhus Convention or the SEA directive.

On this analysis there is sadly very little to refute the conclusions of Adshead above (and McAuslan before her) about the efficacy of participation rights in the law and practice of our planning system.

"Clean Energy"

Feed-in Tariff litigation

At this juncture one might be forgiven for thinking that Friends of the Earth's only engagement in the legal system is to oppose development projects. However, it is as ready to act in favour of appropriate low carbon development as it is to act against its opposite.

In its Feed-in Tariff litigation,[35] Friends of the Earth brought judicial review proceedings alongside companies from the solar industry to challenge a proposal by the Government to change the Feed-in Tariff rates. The Courts found this proposal to be retrospective and unlawful.

Friends of the Earth's particular interest in the Feed-in Tariff stemmed from its history as an active supporter of renewable energy and solar power. Friends of the Earth led the campaign for Feed-in Tariffs for small-scale renewable electricity (as well as a parallel incentive for heat, the Renewable Heat Incentive) in the Energy Act 2008, and subsequently for a more ambitious Feed-in Tariff scheme than proposed, alongside the Renewable Energy Association and a coalition of more than 50 organisations.

The deployment of solar, and other renewables, on the necessary scale requires an adequate and stable support framework to allow the sector to develop, and to continue to drive cost reductions and deployment in the coming years. In May 2012, as a result of the Government's proposal, the installation rate of photovoltaics was reported to have dropped by 25 per cent and around 6,000 people to have lost their jobs.[36]

[31] Shortly before the hearing and on the day that written cases were due, it was indicated that the appeal would be withdrawn by the appellant on the basis of certain undertakings made by the Department of the Environment in Northern Ireland.

[32] Gregory Jones QC, Ned Westaway, Roger Watts, "Case comment: Why Central Craigavon was wrongly decided (and other problems with the incorporation of the Strategic Environmental Assessment Directive into domestic law)" [2013] J.P.L. 1074–1088.

[33] *R. (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324.

[34] See *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* [2012] 2 C.M.L.R. 909 and *Terre Wallone* [2010] E.C.R. I-5611.

[35] In *R. (on the application of Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2011] EWHC 3575 (Admin) and *Friends of the Earth v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28.

[36] See *http://www.prospectlaw.co.uk/solar-judgement-press/*. [Accessed October 8, 2014.]

As a claimant, Friends of the Earth was able to highlight the importance of a strong solar sector from an environmental perspective and the highly damaging consequences of retrospective decision-making for its long term viability, making clear that the consequences were not simply commercial ones. It was also able to provide evidence concerning the impacts on schools and other community organisations wishing to deploy solar.

Like the London City Airport case, the Feed-in Tariff litigation provides an example of the potential impacts of the new judicial review rule changes on access to justice. Upon lodging the case, Friends of the Earth obtained an order for expedition and a rolled-up hearing. This was challenged by the defendant and the matter was considered on the papers by Ouseley J. who set aside the Order, finding, amongst other things: "The claim has no arguable merit anyway for the reasons in the AoS …"

It seems perfectly possible that if it had been possible at that time to make a "totally without merit"("TWM") finding, this is what would have happened, particularly when one considers that the phrase "totally without merit" means simply "bound to fail" and not completely hopeless or misconceived.[37] In the event, the Order was overturned at an oral renewal hearing and the case was listed for expedition as originally requested. Friends of the Earth and the other claimants were successful in the substantive hearings in the High Court and the Court of Appeal, and the Government was refused permission to appeal further to the Supreme Court. It is chilling to think how different things might have been in circumstances where the "TWM" option existed.

Clean Energy and the planning system

As far as case law in this area is concerned, a quick survey identified six cases concerning energy-related developments in the past year, five relating to renewables and one relating to fossil fuel energy (drilling for oil in the greenbelt).[38] Four out of the five clean energy cases went against the developer, whereas the drilling for oil case was decided in the developer's favour. The National Planning Policy Framework ("NPPF") has clearly been a significant factor in these cases. The fact that it explicitly states that mineral extraction "is not inappropriate" in greenbelt[39] was relied on by the court in the oil drilling case to overturn the inspector's decision.[40] The fact that it is silent on clean energy projects was relied on by the court in one case to take as its starting point that such a development was inappropriate in greenbelt unless justified.[41] However, other provisions in NPPF which are supportive of renewables[42] were relied on in the ruling in favour of a solar energy farm.[43]

Change for the better

At the beginning of this paper, we looked at the science on climate change for a two thirds chance of staying below two degrees of warming. We saw that we have roughly 20 years of greenhouse gas emissions left globally[44] and that we need to peak our global emissions before 2020 and cut emissions rapidly thereafter. We learnt of the need to leave the vast majority of existing proven fossil fuel reserves in the ground, forbear from extraction of unconventional sources of fossil fuels and double investment in renewables. And yet we find ourselves in a situation where traditional economic growth remains the

[37] *R. (on the application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091.

[38] Friends of the Earth's backing for clean energy recognises that the siting of renewables also requires consideration of its environmental impacts and the views of the interested public. For this reason we do not support site specific cases unless we (or one of our local groups) has read the documents and has decided to support a project.

[39] See NPPF para.90.

[40] *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825.

[41] *R. (On the application of Holder) v Gedling BC* [2014] EWCA Civ 599.

[42] See NPPF paras 97 and 98, e.g. duty to have positive strategy to promote renewable energy.

[43] *Lark Energy Ltd v Secretary of State for Communities And Local Government* [2014] EWHC 2006 (Admin).

[44] It is also worth bearing in mind that developed countries, responsible for the lion's share of emissions to date and without the poverty reduction burdens of developing countries, are not in a good position to consume large amounts of the remaining budget.

overriding imperative, where renewable technologies face rough terrain and our Government is actively encouraging unconventional fossil fuel extraction.

We also discussed the importance of public participation, with particular reference to procedural rights and their link with ensuring democratic values and substantive environmental protection. We saw that, while there is much rhetoric concerning such rights, their full implementation in practice remains elusive and is likely to remain so until there is a recognition of their real value and the fact that the environment requires legal protection.

Governments are driven by short-termism, heavily motivated by securing the next election victory when the environment requires a more long term focus. The private sector's primary motivation is profit. Limited representation, limited resources and narrow avenues of engagement for the public and NGOs mean that the voices that hold sway will continue to be from the private sector and Government, with all the attendant consequences for the environment and human wellbeing.

I would argue that this is not a tenable situation for anyone who cares about our survival as a species on a flourishing planet. In this final section of the paper, I set out some key reforms that would go a significant way towards gearing our legal and planning system in a more sustainable direction. These are:

- Full implementation of the Aarhus Convention's rights of information, participation and access to justice in order to ensure that the public and environmental NGOs are genuine participants in the public debate. This includes removal of the barriers on access to justice identified above.
- Changing the standard of review of decision-making to a merits-type review test (perhaps akin to the human rights "proportionality" standard) rather than *Wednesbury* unreasonableness. Judges should have access to scientific and technical expertise so that they have independent information on the environmental impacts of a proposal or project.
- Legal reform: As discussed above, in the United Kingdom there is no legal recognition of the fact that human well-being is intrinsically bound up with living within environmental limits.[45] Constitutional recognition of a right to a healthy environment would be one way of redressing this. Another would be to have a legal definition of sustainable development that recognises the need to live within environmental limits, ensure social justice and create an economy that is geared towards these aims, rather than positing growth as a good in and of itself.[46] A third party right of appeal could also redress the current imbalance where the only method of challenging weak planning decisions (if one is not the applicant for planning permission) is through judicial review.
- The continuing criminalisation of environmental protest should be halted and reversed. Given what we know of the science, one must seriously question how it can be acceptable to continue to introduce projects and policies which push current and future generations towards environmental collapse. We are now in an era where such projects are and will be vehemently opposed. And is it rational to expect anything else?

  It is not necessary to look far back in history to find great leaders, trained as lawyers, who were not afraid to challenge and disobey unjust laws and systems, whether in order to end colonial rule in the case of Mahatma Ghandi, or Apartheid in that of Nelson Mandela. As human beings, we have an enormous battle ahead of us if we wish to avoid runaway climate change. In such circumstances, it cannot be a surprise that for some engaged on the frontlines of meeting this challenge, the dictates of conscience trump the inadequate, or indeed hostile, letter of the law. Protest is a headline-grabbing issue, but rather than berating justified

[45] Internationally, over 90 countries have given constitutional recognition to a right to a healthy environment.

[46] See, e.g. the work done by Friends of the Earth's Cymru office and others relating to the Sustainable Development Bill in Wales at *http://www.foe.co.uk/cymru/english/news/37379.html*. [Accessed October 8, 2014.]

concern, it is my view that our interest as lawyers lies in reforming our legal system. It is worth noting that threats to environmental defenders (as they are known) are not only a problem in the United Kingdom; in other parts of the world they face risks to their very lives.[47]

- Profit is the ultimate bottom line for corporations. There is no particular legal duty on such entities to consider the environmental and social consequences of their actions. This state of affairs is also ripe for legal reform.

The proposals outlined above may well seem Utopian in circumstances where we are fighting to retain the legal protections we already have, with mixed success. However, Friends of the Earth and allies will continue to take forward such opportunities as exist to push for reform.

Conclusion

Developers (and public authorities) may see NGOs, community groups and individuals who turn to the law in defence of the environment as a thorn in their side, causing obstruction and delay. I hope this paper has explained the real (and increasing) obstacles that in reality prevent them from being more than marginal players in the debate.

Facilitating the engagement of these groups may be inconvenient and time-consuming. It will also undoubtedly shift the debate away from the considerations dearest to developers and sometimes public authorities. However, it is in the interests of anyone who cares about democracy, justice, the environment or future generations that such groups are able to play their rightful part in environmental decision-making and fully enabled to help shift our society towards a more sustainable future. Of course, we are all members of the public and communities in our own right and we all have a contribution to make. As a result, it is my hope that this paper will win over some champions for reform along some of the lines I've outlined, on a personal, if not professional level!

[47] See *http://www.globalwitness.org/deadlyenvironment/* [Accessed October 8, 2014] and *http://www.foei.org/resources/publications/publications-by-subject/human-rights-defenders-publications/we-defend-the-environment-we-defend-human-rights/*. [Accessed October 8, 2014.]

Fit to Frack?

Catherine Howard

Summary

> "The UK will certainly feel the impact of the shale gas revolution. It has its own shale gas resource. The question is whether the UK is to be a producer or simply an importer. The Government are committed to development of British shale gas. The Prime Minister and the Chancellor of the Exchequer have announced measures to encourage it. Public concern about possible environmental and health risk, most of it unfounded, together with regulatory uncertainty, have so far delayed the exploration and appraisal needed to assess the UK's economically recoverable onshore shale gas reserves … There is no reason why effective regulation should not be transparent and speedy as well as rigorous. Delay is not only costly and wasteful, it can also drive investors elsewhere."

These were some of the conclusions reached by the House of Lords' Economic Affairs Committee report on "The Economic Impact on UK Energy Policy of Shale Gas and Oil" published in May this year.[1]

This paper examines:

- the recent history of planning decisions for onshore oil and gas applications;
- the causes of delay and uncertainty in achieving planning permissions for shale gas exploration and other onshore oil and gas applications;
- what can be done to speed up the process for obtaining planning permission for shale gas exploration;
- the complexity of the related regulatory processes and the scope to clarify or streamline these processes;
- how the planning process might be made more efficient for applications for shale gas production;
- the importance of a change in law to address access to underground land; and
- legal issues to be tackled in future.

This paper concludes that notwithstanding the growing number of authoritative reports confirming that shale gas can be extracted safely under the United Kingdom's existing legislative regime, public concerns about hydraulic fracturing and its local impacts have made it increasingly difficult to obtain planning permission for onshore oil and gas operations of any kind. The only recourse for an applicant whose application is refused, or not determined within the target of 16 weeks, is the time-consuming and costly process of appealing. Two factors make such delays a particular problem for the shale gas industry, as compared with "ordinary" developers:

- shale gas operators are not currently seeking consent for commercial projects—they are merely seeking consent to explore in order to ascertain whether commercial production is viable. Appeal costs and delays therefore add disproportionately to the financial gamble that operators are being asked to take in investing in the United Kingdom; and
- the United Kingdom needs to attract significant investment in the infrastructure needed for exploration—unless would-be supply chain companies see a consistent stream of consents being granted they will not invest in setting up the manufacturing businesses which should be one of the principal benefits for the United Kingdom.

[1] See Abstract of the House of Lords Report on p.6 of that report.

The following recommendations are made:

- Despite the delays we are seeing, applications for shale gas exploration should remain subject to local determination by minerals planning authorities, subject to the right of appeal against refusal. However, in the longer term it would not be surprising if the Government considered bringing shale gas applications for commercial production within the Planning Act 2008 ("DCO") regime.
- Even if shale gas production is brought within the DCO regime, it would make sense for operators to retain the ability to apply to the minerals planning authority if they choose to, recognising that flexibility is essential where some exploratory activity may still be needed during the production phase.
- The Government should continue to oppose bespoke European legislation on shale. Such legislation is unnecessary and could create uncertainty for regulators at the point at which they are coming to understand how to apply existing Directives to shale gas operations.
- The role of environmental risk assessment should not be allowed to increase over time such that it overlaps with environmental impact assessment ("EIA").
- A fact-based and proportionate approach should be taken to addressing long-term monitoring and liability for abandoned wells.
- The proposed change in law allowing access to underground land by licensed operators should be enacted as a matter of urgency.

Background

Onshore oil and gas exploration is not new to the United Kingdom but is not familiar

The first home-grown UK oil supply was produced from shale in the Midland Valley of Scotland in 1851 and discoveries of oil and gas onshore continued throughout the eighteenth and nineteenth centuries. Up to 1964 in the United Kingdom there were 25 discoveries, of which seven were gas fields and in 1974 the largest onshore oilfield in Western Europe was discovered at Wytch Farm in Dorset.[2] However, from the late 1960s the industry's focus in the United Kingdom largely shifted to production offshore, following the discovery of major reserves in the North Sea. Therefore, despite approximately 2,000 wells having been drilled onshore in the United Kingdom, and some increase in onshore activity again after the 1979 increases in oil prices, the UK public is not familiar with the idea of production of oil and gas onshore, in contrast to their familiarity with coal mining in particular.

The development of hydraulic fracturing technology

Historically, oil and gas were sourced from "conventional" oil and gas fields—reserves trapped within rock with the porosity to hold fluids, usually porous sandstone or fractured limestone. Originally, these reserves were reached via drilling of vertical wells, but as technology advanced in the 1990s it became possible to reach them by diagonal or "directional" drilling[3] enabling operators to reach reserves under adjoining land at some distance from the surface infrastructure on the "well pad". Hydraulic fracturing ("fracking") is not new. It has been used as a technique to enhance the flow of oil and gas from many conventional fields since 1947. Ten per cent of the 2000 conventional oil wells onshore in the United Kingdom have been hydraulically fractured. However, hydraulic fracturing has come to greater prominence due to advances in technology in the United States since the 1990s, which have allowed directional drilling

[2] UK Onshore Operators Group: "Factsheet: The History of Onshore Oil and Gas".
[3] Sometimes also known as "lateral" or "horizontal" drilling.

to be combined with hydraulic fracturing to release oil and gas trapped in shale rock (a much less permeable and porous rock than sandstone). This method is one of a number of so-called "unconventional" techniques for oil and gas exploration and production. It involves injecting large volumes of water, sand and small amounts of non-toxic chemicals into boreholes drilled laterally through shale rock at depths around 2km from the surface in order to create fractures in the shale. These fractures allow gas trapped within pore spaces in the shale to flow back up the borehole, where it can be fed into the gas grid.

The use of the terms "shale gas" or "unconventional gas" can be misleading to the general public. There is nothing unusual or unconventional about the gas itself. It is the same type of gas (methane) which is sourced from conventional fields on and offshore and piped to homes across the country. The terms "shale" and "unconventional" simply refer to the source rock and extraction techniques.

The economic benefits of the shale gas revolution in the United States have been much discussed and will not be repeated here.[4] There have also been concerns raised about the potential for contamination of water supplies, air pollution, and adverse impacts to human health. However, in the United States most of the data-gathering from exploration of the major shale plays had already occurred before the technique became controversial. In the United Kingdom we are at a much earlier stage.

Exploration is necessary in the United Kingdom

Unlike the United States, we are faced with a situation where controversy over hydraulic fracturing has influenced opinions before exploratory data-gathering has even occurred. In addition, much has been made of the argument that, because the United Kingdom is more densely populated than the United States, shale gas development at scale will be far harder to achieve in this country.[5] While it is estimated that the United Kingdom has significant amounts of "gas in place", the amount of that gas which can be recovered economically using hydraulic fracturing is unknown. Without a significant number of consents being granted for exploratory drilling and fracturing over a number of years, the industry will not be able to demonstrate whether commercial production is even possible in the United Kingdom. The Government is supportive of shale gas, operators have the technical capability to carry out exploration immediately, but as the House of Lords' report highlights, there is a risk that investors will lose confidence purely due to the delay in obtaining consents.

What do exploratory works consist of?

To carry out exploratory drilling and hydraulic fracturing of shale, there are essentially six stages of works which follow the initial non-intrusive 3D seismic surveying of the geology, and project design. The description of these stages of works set out below is based on Cuadrilla Resources' two recent planning applications for exploration of the Bowland Shale in Lancashire[6] (June and May 2014). However, it should be noted that the details of these stages in terms of number of seismic monitors and array points, parameters and timescales are likely to vary for future sites and applications. The Cuadrilla applications propose the following:

- **Preparing the site:**

  This involves constructing a rectangular stone surface of approximately 1.5ha[7] (known as a "well pad") from which wells can be drilled, constructing an access track, landscape bunds,

[4] For a summary of the economic effect of shale on the US, see Ch.3 of the House of Lords Economic Affairs Committee report "The Economic Impact on UK Energy Policy of Shale Gas and Oil" May 2014.

[5] In reality, the facts are not quite so simple. For a discussion of the population density issue see s.5.6 of the Institute of Directors Report, "Getting shale gas working" 2013.

[6] Applications for exploration at Roseacre Wood (LCC/2014/0101) and Preston New Road (LCC/2014/0096).

[7] Slightly larger than a football pitch (being approximately 1.08ha).

water collection ditches and fencing. This process will take about two months. In parallel, a monitoring array of 80 small seismic monitors are installed within fenced locations (of approximately 2m x 2m) over an area of approximately a 4km radius of the well pad. The purpose of the array is to collect fracture propagation data and monitor seismic activity.

- **Drilling:**

  A drilling rig of between 30 and 53m in height and related drilling equipment are mobilised to the site and drilling of wells is carried out. A well is drilled first vertically to a depth of between 1.5 and 3.5km and then can be extended laterally (horizontally) for 1km to 2km. Drilling is likely to take five months for the initial well (during which geological sampling is taken) with subsequent wells taking approximately three months each. The number of wells drilled from one site for exploration will vary. Cuadrilla has proposed to drill four wells in total from each of the two sites for which planning applications were recently made. For technical reasons drilling must be carried out on a 24hr/7day per week basis.

- **Hydraulic fracturing:**

  Hydraulic fracturing equipment is mobilised to the site and hydraulic fracturing is carried out (see description in above), lasting approximately two months per well for these initial exploration wells.

- **Initial flow-testing:**

  The flow-rate and quality of gas flowing from the fractured shale into the wellbore is tested for up to three months, with the gas being burnt off using an enclosed flare during that temporary flow-test period.

- **Extended flow-testing:**

  If initial flow-testing shows promising results there will be an 18–24 month period of extended flow-testing. During this time gas will be piped into the nearby gas mains network rather than being flared. Site activity over this period will be minimal, with no need for tall structures on the site and relatively low levels of traffic.

- **Wells suspension or restoration:**

  If the site is not to be taken into commercial production the wells will be plugged with cement and the site restored to its former use. Alternatively, if the operator wishes to take the site into commercial production, a planning application for production will need to be made and consent granted.

Overall, the above activity may take between five and six years to complete. The drilling and fracturing activity will take place for 22 months of this period. During the rest of the time, there will be a much lower level of activity until the site is restored.

Significant environmental effects and wider public concerns

Provided that sites are chosen sensitively, as you would expect for any type of development, the only significant adverse environmental effects likely to be unavoidable are: (i) the visual impact of the rig; and (ii) the contribution towards skyglow and reflected light where operations are to be carried out in rural areas (principally only for the drilling phase which requires 24 hour working). Even these effects will only be temporary in the case of an exploration site: lasting for the first two or so years of the project.

Similarly, as with any industrial development, particularly in a rural area, the noise and transport impacts are likely to be of concern to local residents. However, in principle these can be controlled where necessary by the imposition of appropriate conditions: for example, restricting hydraulic fracturing (the noisiest part of the operation) to daytime hours only, by implementing a system of monitoring and a proactive approach to traffic management. The main HGV movements are linked to short duration activities associated with importing/exporting stone to construct/remove the well pad (two-three weeks) and activities to mobilise and demobilise the drilling and fracturing equipment to/from site (one week each). During these periods, up to 50 movements per day will be generated (25 HGVs visiting site and 25 HGVs leaving site). In between these peaks however, HGV movements are less, and associated with deliveries of materials and removals of wastes. On average, HGV traffic visiting the site equates to 10 movements daily (five vehicles arriving and five vehicles leaving). Proposals by Cuadrilla to draw water from the mains network (with consent from United Utilities) and the re-use of fracturing fluid has helped to reduce the transport movements and minimise impacts.

Given the relatively limited impacts and their temporary nature, were this any other form of development, the applicant should feel fairly confident of approval. In planning terms, the impacts are not great. As described below, it was no doubt due to these relatively low level planning impacts that historically, onshore oil and gas applications (including the only shale gas application consented to-date in the United Kingdom) were approved in a relatively shorter timescale than we are witnessing currently.

However, wider fears about the potential impact of shale gas operations have coloured the perception of some sections of the public. The commonly raised concerns include:

- Concerns about pollution of groundwater by hydraulic fracturing fluids;
- The risk that methane migrates up natural faults and into aquifers;
- The risk that poorly constructed wells allow waste water or methane to enter aquifers;
- How waste water from the hydraulic fracturing process will be treated and disposed of;
- Fears over potential water shortages due to the amount of water to be used in the hydraulic fracturing process;
- The risk of induced seismic activity; and
- The potential risk to public health arising from air emissions from shale gas activities.

All of these concerns have been extensively investigated by scientists in the United Kingdom and across the world, and by Cuadrilla as part of their EIA. Of course, as Karl Popper noted, all science is provisional and research can never end. But the House of Lords' report summarises the evidence it heard on these issues and concludes in each case that there is either no evidence to support these risks or that they can be adequately controlled by existing regulation. For reference, their conclusions on these issues are set out in the appendix to this paper. There has also been much debate about the potential impacts on climate change of increased use of shale gas. Both the House of Lords Select Committee and the Intergovernmental Panel on Climate Change[8] have, however, concluded that shale gas is compatible with commitments to reduce greenhouse gas emissions—recognising that shale gas has a lower carbon footprint than the alternatives of liquefied natural gas and coal which would in reality be imported to the United Kingdom if an indigenous supply of shale gas is not forthcoming. In other words, the fight is not between shale gas and renewables, but between shale gas and LNG/coal. Indigenous shale gas has the potential to help reduce the United Kingdom's greenhouse gas production as part of a transition towards greater renewable energy, as the capacity and affordability of these renewable technologies improves.

With greater public interest now existing in these sorts of applications, decision-makers understandably feel under scrutiny. The combined concerns of local residents worried about changes to their area, and the wider concerns of environment groups and the anti-capitalist movement are a powerful combination.

[8] Intergovernmental Panel on Climate Change, 5th Assessment Report, *Working Group 3: Summary for Policy Makers*, 2014.

As discussed below, we are already seeing this having an effect on the decision-making by minerals planning authorities.

The recent history of planning decisions on oil and gas applications

To date hydraulic fracturing of shale has been carried out at only one location in the United Kingdom: Preese Hall near Blackpool. Lancashire County Council's decision to grant planning permission for "Temporary change of use from agriculture to the construction of a drilling platform … to allow drilling of exploratory borehole and testing for hydrocarbons" on October 30, 2009 was made by a planning officer under delegated powers. The application was for a single well and EIA was not required since the proposed development was Sch.2 development and under the threshold of 1 hectare. The usual statutory bodies were consulted and no representations were made by local residents. The Officer's report notes the potential for some visual impact of the rig, some highway noise and light impacts but concludes that given the short-term nature of the works these could be controlled adequately by conditions. At the time, this approach to consenting of onshore oil and gas applications was the norm. The fact that a particular technique would be used to carry out the exploration (hydraulic fracturing) would not have been considered contentious by the minerals planning authority, the applicant (Cuadrilla Resources) or local residents.

Throughout 2010, Cuadrilla was granted consent for exploration activities at a number of other sites in Lancashire. At some sites its intention was to carry out hydraulic fracturing, and at others drilling and other exploratory activities. In all cases the applications were decided by Lancashire CC taking into account the usual planning concerns of a local planning authority for any development, as they had done for Preese Hall. Across the country, applications for onshore oil and gas developments were receiving similar treatment.

This changed in April and May 2011 with the reporting of two minor earth tremors at Preese Hall, alleged to have been caused by Cuadrilla's hydraulic fracturing activities. The largest tremor measured 2.3ML, less than previous induced earth tremors such as those related to coal mining and very unlikely to cause structural damage.[9] But due perhaps in part to the protest movement which had sprung up following the release of the US documentary "Gasland",[10] it led to a voluntary moratorium on hydraulic fracturing for 18 months while the Government carried out investigations into the safety of hydraulic fracturing. The outcome of that Government review was published as a response to the public consultation on the report into the tremors, commissioned by Department of Energy and Climate Change ("DECC"'). The report concluded that if properly regulated, shale gas exploration using hydraulic fracturing was safe, and recommended the use of a real-time "traffic light" seismic monitoring system (now required of all operators). Nevertheless, post-Preese Hall, applications for any form of onshore oil and gas exploration have come under increased scrutiny by minerals authorities and the public.

The protests widely reported at Balcombe in Sussex in August 2013 were a response to Cuadrilla's implementation of a planning permission granted in 2010 to drill an exploratory oil well. No objections to the application had been received in 2010 and it had been determined under delegated powers. The operations did not involve hydraulic fracturing, or gas exploration. The fact that protests were sparked by the implementation of this consent in 2013 demonstrated the trend towards all hydrocarbon exploration onshore in the United Kingdom becoming subject to increased suspicion. This was confirmed when Cuadrilla recently sought consent to flow test oil for a seven-day period at the exploration well previously drilled at Balcombe, before restoring the site. Despite the fact that the flow-testing had previously been authorised by the now-expired 2010 permission, 889 objections were received by West Sussex CC, a

[9] According to the British Geological Society, there are generally between 200–300 earth tremors in Britain each year, many related to past coal mining activity.

[10] Energy in Depth ("EiD"), launched by the Independent Petroleum Association of America, has created a web page with a list of claimed factual inaccuracies in the documentary, and produced an associated film entitled "TruthLand".

37-page report was produced and the matter was taken to Committee. The Committee granted consent for the application, recognising the need for the development and citing the National Planning Policy Framework which gives "great weight" to the benefits of mineral extraction, including to the economy, and notes that minerals can only be worked where they are found. The report also refers to the Minerals section of the National Planning Practice Guidance which states that oil and gas will continue to form part of the national energy supply, and recognises the continuing need for indigenous oil and gas. In addition, the West Sussex Minerals Local Plan (2003) was referred to, which states that planning permission for oil and gas exploration will normally be granted, subject to environmental considerations and the development being the "best option" in the area of search. Nevertheless, in June 2014, the Frack Free Balcombe Residents Association made an application for judicial review, on grounds which include the materiality of the extent of public feeling. Permission was granted in August for the challenge to be heard in the High Court later this year.

Applications by Dart Energy for exploration have received an equally difficult time recently. In March 2013, Wrexham CBC refused planning permission for the temporary drilling of an exploratory borehole to remove a core of coal for sampling, after which it was proposed that the site would be restored. The proposed drilling operation, limited in its own right, was to be the first stage in the evaluation of the area for the extraction of coal bed methane—another "unconventional" source of gas, which like shale gas is just beginning to become commercial in the United States, Canada and Australia. Thirty-eight letters of objection were received, along with a petition of 1,649 signatures. Despite the council officer's recommendation that permission be granted due to "the suitability of this particular site, based upon normal planning considerations", the Committee refused consent on the grounds that the proposed development would be environmentally unsustainable, the site was inadequately served by the highway network, the increase of HGVs in a rural area, increased noise levels, adverse impact on landscape, insufficient provision of information in respect of the impact of the drilling on the movement of gas, and the supposed potential this has to result in geological instability, potential subsidence and pollution. Policies from the Wrexham Unitary Development Plan 2005 were used as the basis of these considerations. It appears from both the officer's report and media reports of the Committee meeting that there was concern that the proposals might involve hydraulic fracturing or be a precursor to hydraulic fracturing. Media reports suggest that this played a large part in the refusal, despite a clear statement in the officer's report that the application did not propose the use of this technique.

Also in March this year, Dart Energy brought an appeal on grounds of non-determination by Falkirk and Stirling Councils of its application for planning permission for coal bed methane production in Airth, Scotland. The outcome of this appeal is awaited. While the appeal relates to coal bed methane rather than shale gas operations, many of the issues raised are similar to those we can expect to see raised in relation to shale exploration. As the first appeal in relation to an unconventional gas planning application in the United Kingdom, its outcome will be significant.

A significant number of coal bed methane planning applications have been granted in the past across the United Kingdom. But what we are seeing now is that applications for any form of unconventional gas exploration or production (e.g. Wrexham and Airth) and indeed conventional oil exploration (Balcombe) are at risk of being refused in a way in which they were not previously, due to the raising of fears by opposition groups. Applications for limited exploratory boreholes are being viewed as the thin end of the wedge, to be resisted on that basis alone. Protestor action is also being seen where operators seek to implement permissions that were obtained lawfully and without objection several years ago: for example, iGas's drilling of an exploratory well in Barton Moss last year.

In May and June this year, Cuadrilla submitted two planning applications to Lancashire County Council for shale gas exploration at Roseacre Wood and Preston New Road. These are the first applications for shale gas exploration including hydraulic fracturing, to have been submitted by any operator since

Cuadrilla's Preese Hall application was granted in 2009. The outcome of these applications will be of great interest to the industry and Government. Not only the outcome, but the way in which the various consent bodies interpret their respective remits is likely to attract attention. This is discussed below.

More recently still, in July 2014, there was wide press coverage of the refusal of Celtique Energie's planning application to test drill (but not hydraulically fracture) at a site just outside the South Downs National Park, near Wisborough Green. The grounds for refusal included failure to demonstrate that the site represented the best option compared with other sites, unsafe highway access, and impact on the local area including noise and additional traffic on village roads.[11] It is reported that 2,471 objections were received. Celtique issued a statement following the Committee meeting that council members had "not followed the spirit or the letter of government policy or good practice." It remains to be seen whether Celtique will appeal.

The causes of uncertainty and delay in obtaining planning permissions

Uncertainty due to the wide discretion of local planning authorities in making decisions under Town and Country Planning Act 1990

The unpredictability we are seeing in decision-making on oil and gas applications is in part a necessary function of the way that planning decisions are made. A wide discretion has been recognised by the courts when interpreting the matters to which a local planning authority (or minerals planning authority) must have regard by virtue of s.70(2) of the Town and Country Planning Act 1990 and s.38(6) of the Planning and Compulsory Purchase Act 2004, set out below:

> "70(2) In dealing with such an application the authority shall have regard to—
> (a) the provisions of the development plan, so far as material to the application,
> (b) any local finance considerations, so far as material to the application, and
> (c) any other material considerations."

> "38(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Significantly, the Acts give no definition of "material considerations", which has been left instead to be interpreted by the courts.[12] In practice, the minerals planning authority has a fairly broad licence to:

- interpret their own development plan policies;[13]
- give weight to certain policies over others; and
- decide that particular material considerations outweigh the provisions of the development plan.

In practice, this gives scope for minerals planning authorities to refuse applications on the basis of a broad range of impacts and concerns, including temporary levels of HGV traffic or visual impacts which may be no greater than for other local developments which are granted consent without controversy.

Even an ill-founded public perception of danger and risk to human health has been held capable of being a "material consideration" which may, although "perhaps rarely", constitute a good reason for refusal of planning permission.[14] It is at the minerals planning authority's discretion to weigh this fear against the

[11] Committee Minutes not available at time of writing. Therefore, the grounds for refusal are based on those reported in the Press.
[12] *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65 at 77.
[13] Although, to a lesser degree following *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13; [2012] 2 P. & C.R. 9.
[14] *Newport BC v Secretary of State for Wales* [1998] Env. L.R. 174.

benefits that would flow from the development and professional evidence on the extent to which those fears are objectively justified.[15] In this sense, the public fears surrounding hydraulic fracturing are reminiscent of public concerns in the past relating to the location of mobile phone masts and overhead electric lines.[16]

The only recourse of an applicant who is refused permission is to appeal. On appeal, the application will be examined by the Planning Inspectorate and it is open to the Planning Inspector at that point to make his or her own judgement as to the relative weight to be attributed to the various considerations. Where the Secretary of State has provided clear policy on a particular matter, the outcome of an appeal is likely to be more predictable than the decision of a local planning authority, as an Inspector will generally give that policy more weight than the local considerations which may have influenced the decision at the local level. This can lead to "planning by appeal" for types of development supported by central Government policy but which are not popular locally. Where it is clear that the local planning authority has refused permission unreasonably, it is open to an applicant to apply for a costs award against the authority, for payment of the applicant's appeal costs. However, in practice, cost awards are rarely applied for or made.

In reality, an applicant has few cards to play against an authority minded to refuse an application. This emphasises the importance of applicants working hard to address local concerns if they wish to avoid the delay entailed by an appeal—although, of course, the pre-application work necessary to satisfy a minerals planning authority may in itself be a cause of delay to submission. Applicants may also find themselves in a situation where the authority puts off determination pending further consideration or provision of more information, or because they do not have the resources or political appetite to make the determination. While it is open to an applicant to appeal after 16 weeks,[17] this may involve a difficult judgement as to whether a swifter (and positive) decision is more likely to be achieved by an immediate appeal (which may not be determined for nine months) or by continuing the work with the minerals planning authority.

The Government has done what it can to guide minerals planning authorities on the matters which should and should not be material to their decisions on onshore oil and gas applications. The risk that planning authorities would take it upon themselves to consider risks of pollution and safety issues in determining shale gas applications was recognised early on. One of the key recommendations of the influential Institute of Directors' report "Getting shale gas working" (May 2013) was that:

> "the sub-surface operations should be approved by the national bodies—DECC, the Environment Agency and the Health and Safety Executive—with the Minerals Planning Authority concentrating on the surface operations once approval for the sub-surface operations has been received."[18]

In July 2013, the Government brought out "Planning guidance for onshore oil and gas" which sought to clarify the limitations of the minerals planning authority's remit:

> "The focus of the planning system should be on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approvals under other regimes. Minerals planning authorities should assume that these non-planning regimes will operate effectively … However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body."

Similarly worded guidance has now been subsumed into para.112 of the Minerals section of the online National Planning Policy Guidance first published in March 2014.

[15] *Trevett v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2696 (Admin).

[16] To address this directly, we may see local planning authorities requesting applicants to carry out some sort of health impact assessment as part of their application.

[17] For EIA development.

[18] Ch.6 (Recommendations) p.164.

It remains to be seen how far this guidance will be effective in limiting the matters which authorities focus on for upcoming shale gas applications. A string of cases[19] has confirmed that while planning authorities may assume that other regulatory authorities will regulate matters within their control effectively, it is still open to the planning decision-maker to take into account any residual effects "on the amenity and/or issues as to the appropriateness of locating the development on the site in question".[20] In the case of shale gas exploration, those residual amenity effects are likely to be fairly limited (see para.13) but may nevertheless in some cases be given significant weight locally.

Delay caused by the carrying out of Environmental Impact Assessment

To date, a significant cause of delay to the submission of applications for exploratory shale gas wells involving hydraulic fracturing has been the preparation of environmental statements.

As mentioned above, it was not standard practice in the past for applicants for exploratory onshore oil and gas operations to provide an EIA with their applications. As part of its recent review of the EIA Directive,[21] the European Union considered making EIA mandatory for applications involving hydraulic fracturing by adding such operations to the list of Annex 1 projects in the Directive. In the end, no such amendment is to be made. However, exploratory operations involving hydraulic fracturing will fall within Sch.2(2)(d) (deep drillings, where the area of works exceeds 1ha)[22] of the EIA Regulations 2011.[23] This means that EIA is required if the proposed exploration is "likely to have significant effects on the environment by virtue of factors such as its nature, size or location" or if it is located in a "sensitive area". Under the Regulations it is possible for a potential applicant to apply for a screening opinion from the planning authority, confirming that an EIA is not required because the proposal is not likely to have significant effects. However, in a press release in January 2014, the UK Onshore Operators' Group committed the industry to carrying out EIA for all exploration wells that involve hydraulic fracturing.[24] In these early days of exploration, this makes sense as:

- operators will want to demonstrate to the public that they have been rigorous in their assessment of the environmental impacts;
- local authorities and statutory consultees are likely to want to see an assessment on a precautionary basis;
- some of the information in the assessment will be required in any event to support related permit applications; and
- failure to provide an EIA where the courts consider that one is required has been a fertile ground for judicial reviews of planning decisions (the existence of a screening opinion stating that no such assessment is required not necessarily providing a defence).

It may be that as the environmental impacts of exploration become more familiar and better understood, the scope of EIA can be scaled back. However, as Cuadrilla's experience has shown, currently the preparation of an environmental statement for such applications may take up to a year, with the inevitable delay to exploration programmes. The carrying out of EIAs for exploration will also have knock-on effects in terms of the length of time taken by minerals planning authorities to determine applications. As with all EIA applications, authorities have 16 weeks to make their determination before an applicant may appeal

[19] *Gateshead MBC v Secretary of State for the Environment* [1994] J.P.L. 55; *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin); *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin).

[20] McKenna L.J. in *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin).

[21] Directive 85/337on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

[22] Also potentially Sch.2, 2(2)(e): "surface industrial installations for the extraction … petroleum, natural gas … (where the area of the development exceeds 0.5 hectares)."

[23] (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824).

[24] UKOOG Press Release January 13, 2014: *How to engage with shale gas/hydraulic fracturing planning and permitting*.

to the Secretary of State for non-determination, rather than the 13-week period for non-EIA major applications. The provision of thorough environmental statements may also in itself make it more likely that authorities take longer than 16 weeks to make their determinations, as they assess the material provided and await responses from statutory consultees.

The additional burden of Environmental Risk Assessment and extensive pre-application consultation

In addition to EIA, operators are required to prepare and consult on an Environmental Risk Assessment ("ERA"), in advance of submitting a planning application. This requirement arose from a recommendation in a report published by the Royal Society and the Royal Academy of Engineering in June 2012.[25]DECC published guidance for operators on the preparation of ERAs for shale gas operations in April this year.[26] There is no direct statutory requirement for provision of an ERA, but the guidance makes clear that DECC considers it to be part of the operator's duty under its petroleum licence to apply good practice in the conduct of operations. The guidance states that:

> "The fundamental objective of the ERA for shale gas is to provide at an early stage in the planning and consenting cycle an overview of environmental (including health) risks relevant to the proposed shale gas activities, comprehensive in scope though not in depth of detail, as a basis for early engagement with stakeholders including local communities."

In terms of timing, the guidance recommends that it is "prepared as early in the project planning cycle as practicable and before planning permission is sought". It must be submitted to DECC at least four weeks before submission of a planning application, giving DECC an opportunity to consult with other regulators and either confirm its adequacy or request that further work is carried out. In practice, the conclusion reached in the ERA will be subject to more detailed analysis by the Environment Agency at the permit application stage.

Given that operators will wish to carry out extensive pre-application consultation as part of the planning process in any event, there is some scope for operators to combine the planning consultation with the engagement required as part of the ERA process. Nevertheless, they are separate processes, and as such potentially add to the length of the pre-application period. It is to be hoped that DECC's expectations about the scope and level of detail in the ERAs do not increase over time. While ERAs may have a role in helping to engage with and reassure the public, it is important that they do not begin to duplicate EIAs.

Judicial review: a cause of delay in the future?

To date, the only shale gas exploration planning permission including hydraulic fracturing to be granted and executed was the Preese Hall consent in 2009. This was not subject to judicial review. However, the recent heightened interest in onshore oil and gas consents more recently will increase the risk that future permissions are subject to judicial review proceedings.

The changes to the cost rules brought in since April 1, 2013 by the Civil Procedure (Amendment) Rules 2013 mean that those bringing environmentally-related judicial reviews may now have additional protection against the risk of an unaffordable claim to pay the other side's costs if they lose. The changes were brought in to satisfy the requirements of the Aarhus Convention[27] following a ruling from the European Court of Justice[28] that the costs regime in the United Kingdom did not properly implement the requirement

[25] "Shale gas extraction in the UK: a review of hydraulic fracturing" Royal Society and Royal Academy of Engineering, June 2012.

[26] "Guidance on the preparation of an environmental risk assessment of shale gas operations in Great Britain involving the use of hydraulic fracturing".

[27] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (signed in Aarhus, Denmark in 1998, and ratified by the UK in 2005).

[28] *European Commission v United Kingdom* (C-530/11) [2014] 3 W.L.R. 853.

that access to justice in relation to environmental matters should not be prohibitively expensive. The position now is that individuals or non-profit organisations will have a maximum liability of £5,000 and £10,000 respectively in respect of payment of the other side's costs if the judicial review is lost. Provided parties wishing to bring a challenge can find lawyers willing to act on a no-win-no-fee basis, these figures therefore represent their maximum total outlay.

It seems likely, therefore, that we will see a greater volume of environmental judicial reviews brought in future, albeit that other recent changes to the Civil Procedure Rules mean that they may be dealt with more swiftly by the courts.[29]

A particular problem for shale gas exploration

With the exception of the requirement to carry out ERA, none of the factors discussed above is unique to shale gas applications. The need to carry out extensive pre-application consultation, prepare EIAs and deal with the unpredictability of local decision-making are issues routinely encountered by developers of major projects of all kinds. However, there are two factors which magnify the issue for shale gas operators:

- Shale gas operators are not currently seeking consent for commercially viable projects.
  Operators are seeking consent merely to carry out temporary exploratory operations to enable them to discern whether commercial operations will be possible in particular geological formations. Whereas the developer of a supermarket, an energy from waste power station or a housing estate may suffer the delay and expense of going through an appeal process, he knows that once he has that permission in place he has all he needs to construct and operate a revenue generating asset. This is not so for shale gas exploration companies in the United Kingdom today. Exploration costs are sunk costs, financed by investors who hope that in the longer-term the resource will be proven to be commercial. A significant number of exploratory sites will be needed over the coming years if the United Kingdom is to properly evaluate its shale resources. Appeal costs therefore add disproportionately to the financial gamble that operators are being asked to take on the viability of commercial production of shale gas in the United Kingdom.
- The United Kingdom needs to attract significant investment in the infrastructure needed for exploration.
  An onshore drilling rig costs around £20m to buy, and has a lead time of approximately a year from the date it is ordered. If instead of buying a drilling rig, an operator chooses to hire one, the hire contract must be entered into many months in advance of the agreed delivery date and a large daily fee will be payable from that agreed date. Such investment decisions are almost impossible for operators to make given the current uncertainties surrounding the timescale for obtaining the necessary consents. Just as importantly, investment will not be made in setting up drilling rig or related manufacturing companies in the United Kingdom unless there is seen to be a consistent stream of work to pay for the equipment and maintain a stable workforce. The recent EY report on the supply chain for the industry estimated that there is potential for a £1.2bn rig manufacturing business in the UK. But without a significant throughput of planning consents the risk is that the United Kingdom ends up importing drill rigs from abroad and missing out on the supply chain benefits of the development of the shale gas industry—in much the same way as the United Kingdom has failed to benefit from the development of a turbine manufacturing industry for offshore wind.

[29] The Civil Procedure (Amendment No.4) Rules 2013 (SI 2014/1412) which came into effect on July 1, 2013 and The Civil Procedure (Amendment No.3) Rules 2014 (SI 2014/610) which came into effect on April 6, 2014.

Reducing delay and uncertainty in the planning process for the exploration phase

Would Government intervention in shale gas planning decisions help?

In June 2013,[30] the Government announced its decision not to include onshore oil and gas schemes within the Planning Act 2008 ("DCO") regime, but to leave them to local determination under the Town and Country Planning Act 1990 regime. The Government statement noted that extraction has yet to take place on a commercial scale in the United Kingdom and that, as it develops, the Government will ensure that an effective planning system is in place. A commitment was made to keep this position under review.

Clearly then, the Government will not consider bringing shale gas exploration within the DCO regime at least until they have seen how early applications fare. The Government was elected on a strong localism agenda, and has called-in far fewer planning applications for its own determination than any other Government in recent years (typically fewer than ten per year). To be seen to route shale gas exploration applications through the DCO regime while such operations remain controversial and in sight of a general election would be politically unpalatable.

It is also likely that the DCO regime would, in any case, be slower than local decision-making if minerals planning authorities were to make positive decisions within the target 16-week period from application specified for EIA applications. The statutory timetable for determination of a DCO application is, by contrast, approximately 15 months from date of application. In addition, the more rigorous statutory requirements for pre-application consultation for DCO applications would be likely to take longer than consultation under the Town and Country Planning Act 1990. In particular, where a choice of sites is available, there might be an expectation under the DCO regime that two formal rounds of pre-application consultation are conducted[31] (together with presentation of preliminary environmental information for each round): the first round dealing with site selection and the second round providing more detailed environmental information on the particular site to be taken forward for the application. Furthermore, to class temporary exploratory operations as "nationally significant infrastructure projects" for the purpose of the 2008 Act could seem somewhat odd.

Even in a case where planning permission is refused by the minerals planning authority (or not determined within 16 weeks) and the operator appeals, the total time from application to decision is still likely to be marginally quicker than if the application had been dealt with under the DCO regime. Therefore, there seems to be no benefit in operators lobbying to bring shale gas exploration applications within the DCO regime.

An alternative way in which the Government could intervene in decision-making on shale gas applications would be for the Secretary of State to exercise his powers of "call-in". Call-in powers are used where planning proposals are of national significance, including cases which may have a significant long-term impact on economic growth or give rise to national controversy. Use of call-in for shale gas applications would require amending the Government's current policy criteria for call-in to include, for example, proposals of major significance for the delivery of the Government's energy policies. This could be achieved simply by a Ministerial statement made to Parliament to this effect. However, use of call-in for all (or even some) shale gas applications might again be seen as flying in the face of the Government's commitment to localism. It would also be unlikely to result in faster decision-making since the procedure and timetable for determination of a call-in application would be similar to that for a recovered appeal.[32]

[30] *Major infrastructure planning: extending the regime to business and commercial projects—summary of responses and Government response*—(DCLG, June 2013).

[31] This would only be the case where there are a number of alternative sites which are viable from a technical perspective, which may or may not be the case.

[32] i.e. an appeal for which the Secretary of State chooses to make the decision rather than delegating it to the Planning Inspectorate.

In conclusion then, Government intervention in decision-making for exploration via the DCO regime or call-in would not appear to be advantageous.

A national policy statement on shale gas would help significantly

While the Government has been vocal in its support for shale through various oral and written statement,[33] no formal national policy statement exists for shale gas or unconventional hydrocarbons more widely. The adoption of a formal national policy statement would assist local authorities in determining applications.

National planning policies provide a framework for decision-making by local authorities, and for decisions made on appeal by Planning Inspectors or the Secretary of State himself. While there is no legal requirement for such policies to be disseminated in any particular manner in order to be taken into account as "material considerations" in the planning process, the weight to be attached to a particular policy may vary in accordance with the formality of its expression.[34] In particular, policies which have been subject to public consultation generally have greater weight.

The duty of planning authorities to determine planning applications in accordance with the "[development] plan unless material considerations indicate otherwise"[35] currently causes some difficulty, as the "development plan" for shale gas exploration applications will be the Minerals Local Plan or Core Strategy for the relevant area. However, very few such plans currently deal with hydrocarbon exploration from "unconventional" sources, although they may deal with hydrocarbon extraction in general terms. There is therefore something of a local policy vacuum until minerals planning authorities update their Local Plans through the required formal consultation and examination procedures.[36]

In the absence of relevant development plan policies, the National Planning Policy Framework and the various supportive statements made by the Government in relation to shale gas should have weight as "material considerations" in the decision-making process. Paragraph 142 of the National Planning Policy Framework states that minerals "are essential to support sustainable economic growth and our quality of life", and emphasises the need for a "sufficient supply of material to provide the … energy … that the country needs".

Applicants will wish to quote these supportive policies in their applications. However, a national policy statement supporting shale gas, which had been subject to public consultation before being adopted, would be a more powerful tool in the decision-making process. The Government has put in place a suite of such sector-specific policy statements for the purpose of decisions under the DCO regime. Government has made clear that those statements should also be considered as material considerations where applications are made locally for infrastructure of the same type but falling below the thresholds which would bring them within the DCO regime. Therefore, even if such a policy is not put in place immediately, if Government were in future to bring the production phase of shale gas within the DCO regime (see the discussion below) the statement should be framed in terms wide enough to give policy support to applications made locally for shale gas exploration.

Elapse of time while the system beds down

To some extent, time alone should help the planning system to deliver positive decisions on shale gas exploration applications in a more timely manner. At the moment, both minerals planning authorities and operators are nervous. Given the spotlight under which the first shale gas planning applications will be decided, we can expect to see applicants preparing lengthy environmental statements, and local authorities

[33] Including the press release from the Prime Minister's Office, No.10 Downing Street, January 13, 2014 when he referred to "going all out for shale"; and the speech of Edward Davey MP delivered on September 9, 2013 "Myths and realities of Shale Gas Exploration".

[34] *Dinsdale Developments Ltd v Secretary of State for the Environment* (1986).

[35] Town and Country Planning Act 1990 s.70(2) and Planning and Compulsory Purchase Act 2004 s.38(6).

[36] In doing so they must ensure that those plans address the matters set out in National Planning Policy Framework para.143.

still feeling their way as to where their remit ends and that of other regulators begins. Yet as discussed earlier, in land use planning terms the impact of these exploration schemes is small, and temporary—probably less than many other developments that will be granted consent in the relevant areas, and no greater than the impact of numerous conventional oil and gas permissions which have been granted in the United Kingdom previously without arousing interest. However, it may not be until exploration involving hydraulic fracturing is actually carried out without adverse impact on communities or the environment that attitudes change, and we see this filter down into the planning system. By analogy, we may compare the significant local opposition to the building of new nuclear power stations several decades ago with the overwhelming local support for development of EDF Energy's Hinkley Point C DCO application in 2012. Fears over telecommunication masts and overhead electric lines are other examples of cases where public fears at one time made planning decisions controversial, but are now much less so.

In legal terms, as with any new or controversial type of development, we can expect to see a number of appeals and judicial reviews being brought. While operators will not welcome the delays they will cause to individual proposals, in planning terms they will be helpful in clarifying policy and the matters which are "material" to planning decisions on these types of application. Greater speed and certainty over subsequent decisions is therefore likely to be achieved once these legal precedents have been set.

Since the courts have held that appeal decisions made by planning inspectors cannot be taken as statements of the Secretary of State's policies (in a way that decisions made by the Secretary of State himself can) it seems likely that the Secretary of State may well choose to "recover" for his own determination any appeals that are made against local refusals. We have seen Eric Pickles intervene in this way when he issued a statement in October 2013 stating that he would be recovering all onshore wind appeals for his own determination for a six-month period (now extended by a further 12 months) so that he "could consider the extent to which the then new practice guidance was meeting our intentions".

In the case of wind farms, Eric Pickles' application of Government policy has been seen as generally anti-development. But given the Government's vocal support for shale gas, operators would hope that recovered appeals for shale gas exploration would be considered more favourably—at least where they are not located in sensitive areas. It is notable that in announcing updated National Planning Policy Guidance restricting permissions for unconventional oil and gas developments in National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage Sites on July 28, 2014, the Government also stated:

> "We want to ensure that the government's intentions in respect to development concerning unconventional hydrocarbons in these areas are given appropriate effect. So for the next 12 months from today, … my department will give particular attention to recovering appeals for such developments."[37]

As the environmental impacts of exploratory operations become more familiar and better understood by minerals planning authorities and communities, it is also likely that the scope of EIA can be scaled back. Once a number of applications have been accompanied by environmental statements identifying little or no significant environmental impacts other than the temporary visual impact of the rig, and these assessments have been corroborated by practical experience, operators and minerals planning authorities may be more confident to reduce the scope of assessments being required. In the long term we may even find that we return to a situation where EIA is not even deemed to be required for onshore oil and gas exploration applications. Instead more focused "environmental reports" on relevant issues might accompany applications, as is common for other non-EIA development.

[37] Written ministerial statement by Lord Ahmad of Wimbledon on planning for unconventional oil and gas (July 28, 2014).

In due course, we can also expect to see minerals planning authorities updating their development plans to deal specifically with applications for unconventional hydrocarbons.[38] The process of updating these development plans, with the necessary public consultation, should in due course provide a more robust basis for decision-making.

The complexity of the related regulatory processes and the scope to clarify or streamline these processes

In addition to planning permission, a number of other consents are required for shale gas exploration. It was recognised by Government and industry early on that it would be important to clarify which authorities are responsible for which aspects of the process. Three key documents were put in place in a bid to achieve this clarity:

- Department of Communities and Local Government's ("DCLG") "Planning practice guidance for onshore oil and gas" published in July 2013 and now subsumed into the Minerals section of the online National Planning Policy Guidance;
- DECC's "Regulatory Roadmap: onshore oil and gas exploration in the United Kingdom: regulation and best practice" published in December 2013; and
- The Environment Agency's draft Technical Guidance issued for consultation in August 2013: "Onshore oil and gas exploratory operations: draft technical guidance".

The roles of the key regulators in aspects of the consenting process are set out below.

DECC's role

It is DECC's role to issue petroleum licences to particular operators, giving them an exclusive right to extract oil and gas within specified geographical areas. Under the terms of the standard petroleum licence,[39]DECC will have an ongoing role in consenting aspects of the operator's works. Before granting consent for shale gas operations that include hydraulic fracturing, DECC will also require a hydraulic fracturing plan to be submitted, and the agreement of methods of monitoring induced seismicity, including the adoption of the real time "traffic light monitoring system" which will require operations to cease if seismic activity reaches a magnitude of $0.5M_L$ (far below a perceptible surface event but larger than the level expected to be generated by the fracturing of the rock). In addition, as discussed above, the submission to DECC of an Environmental Risk Assessment is also required to:

- drill a particular well;[40]
- plug and abandon a well;[41] and
- flare any gas.[42]

Health and Safety Executive's ("HSE") role

The HSE regulates the safety aspects of all phases of extraction. It is responsible for enforcement of legislation concerning:

[38] Paragraph 143 of the National Planning Policy Framework addresses the preparation of local plans for minerals, although does not mention hydrocarbons specifically (conventional or unconventional).

[39] References to licence conditions in the footnotes to this paragraph are references to licence conditions under the Petroleum Licensing (Exploration and Production) (Seaward and Landward Areas) Regulations 2004 (SI 2004/352). Licences granted under the 14th onshore licensing round announced in July 2014 will be granted subject to slightly different licence conditions as set out in the Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014 (SI 2014/1686).

[40] Licence condition 15(1).

[41] Licence condition 15(5).

[42] Licence condition 19(3).

- well design and construction;
- well integrity during operations; and
- operation of surface equipment on the well pad. Before design and construction, operators must assess and take account of geological strata and fluids within them, as well as any hazards that the strata may contain.

Under health and safety legislation,[43] the integrity of the well is subject to examination by independent qualified experts throughout its operation, from the design stage right through to final plugging at the end of operations. At least 21 days before drilling is planned, the HSE must be notified of the well design and operational plans to ensure that major accident hazard risks to people from well and well-related activities are properly controlled. The operator is required to establish a site safety document, and the HSE will review pre-drilling activity via the wells notification process. Well abandonment proposals will be expected to comply with the Oil and Gas UK guidelines and also with the UK Onshore Shale Gas Well Guidelines published by the industry trade body (UK Onshore Operators Group) in February 2013.

Environment Agency's role

The Environment Agency has responsibility for protecting water resources (including ground water aquifers) ensuring appropriate treatment and disposal of mining waste, emissions to air, and suitable treatment and management of naturally occurring radioactive material.

One of the challenges for the industry, not just in the United Kingdom but across Europe, is interpreting how the various EU Directives controlling these aspects of the environment apply to shale gas exploration. Last year, the European Commission examined the regulation of environmental and safety aspects of shale gas. The outcome of this examination was published in January 2014.[44] It had widely been expected to grapple with the issue of how the various Directives apply to shale, but did not do so. Instead it reaffirmed the swathe of EU environment and safety legislation that applies, and stated that the Commission would be monitoring their application, publishing a scoreboard of member state performance and reviewing their effectiveness in 18 months' time.

Clearly, at this early stage, we can expect to see the Environment Agency and operators taking a precautionary approach to the interpretation and application of European Directives to shale exploration. The key permits[45] likely to be required are set out below. In practice, the Environment Agency may suggest that these are applied for and granted as a single permit:

- A mining waste permit: This will be required for all wells drilled for the purpose of hydrocarbon exploration. Its purpose is to ensure that extractive wastes (predominantly drill cuttings, fracturing fluids, flowback water and gas waste) do not harm human health or the environment.
- A groundwater activity permit: Unless the Environment Agency is satisfied that there is no risk of contamination of groundwater because of the location of drilling.
- A radioactive substances activity permit: To address the storage of waste water flowed back from the well and contaminated by naturally occurring radioactive material caused by radiation from the rock strata.
- An industrial emissions activity permit: Required when the operator intends to flare more than ten tonnes of gas per day.

[43] Health and Safety at Work etc Act 1974; and Offshore Installations and Wells (Design and Construction) Regulations 1996 (SI 1996/913) (particularly regs 18 and 6). Despite the title of the latter, these Regulations apply to both onshore and offshore wells, both conventional and unconventional.

[44] Commission Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing (C(2014) 267/3).

[45] Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675).

Permit applications may be subject to two stages of public consultation: one on issues of principle and the other on the draft permit conditions (if a "minded to grant" letter is issued by the Environment Agency). The Environment Agency has stated that its aim is to issue permits within 13 weeks of application.[46]

In addition, a water abstraction licence will be required if the operator plans to abstract more than $20m^3$/day for their own use in the fracturing process rather than purchasing water from a public water supply utility company. A water discharge activity permit will be required if surface water run-off becomes polluted. Flood risk consent may also be required if the proposed site is near a watercourse or main river. The combined capacity of on-site combustion equipment such as drill rigs, fracture pumps and flares is likely to cross the threshold requiring participation in the EU Emissions Trading Scheme. The Operator will therefore need a greenhouse gas permit and to acquire and surrender EU emissions trading allowances.[47]

Should these processes be streamlined or simplified for exploration?

None of the above regulations is unique to shale gas exploration. The House of Lords' report concluded that the applicable UK regulations are rigorous and well respected internationally but unnecessarily complicated. The report agreed with the view expressed by the Royal Society and Royal Academy that a single body to regulate onshore development of shale gas and oil would be desirable in principle, but stated that the necessary reorganisation would cause delays. The report instead recommended that there be "a more coordinated and responsive approach within the existing framework, with a lead regulator identified by the Government." In practice, as Dr Grayling of the Environment Agency acknowledged in his evidence to the House of Lords Committee, the Agency "is going through a learning exercise …, while the industry was also going through a learning exercise on how to apply for the appropriate permits". Much of that learning has now been crystallised in the form of the permit applications made by Cuadrilla in May and June this year in respect of its two proposed Lancashire exploration sites.[48] For each site, a single installations permit was applied for, which encompasses the necessary environmental permits within it.

The Environment Agency has committed to delivering more standard rules permits for onshore oil and gas drilling and hydraulic fracturing. A consultation was launched in February 2014 on four such permits: for the use of water-based muds and oil-based muds (generated from exploration not involving hydraulic fracturing); for temporary gas flaring at exploration and appraisal sites; and for disposal of radioactive waste from naturally occurring radioactive materials arising from the production of oil and gas. While such standard rules are to be welcomed, it may prove more difficult for them to be put in place for hydraulic fracturing activities because of the relevance of the distinctive local features of the underground environment into which hydraulic fracturing fluids are to be injected, which is likely to require bespoke elements to any mining waste plan to be approved. In any event:

- even if we do not see the industry taking up standard rules permits, the existing permitting process seems unlikely to delay the start of operations, provided that applications are made in parallel to the planning application process; and
- the scope to change the permitting processes is limited by the need to comply with the relevant EU Directives, which are fairly prescriptive about the materials to be submitted with different types of permit applications.

[46] The Environment Agency has also committed to reduce determination periods to two-four weeks for lower risk activities with the adoption of standard rules permits.

[47] There may also be other permits required during the construction phase, e.g. if local drainage channels are culverted or diverted, as well as licences if there is a need to disturb protected species or wildlife. Local bylaws could also require further consents, and a trade effluent consent might be required for any discharges direct to the sewerage system.

[48] Permit applications have also been granted to other operators including Egdon, Alkane and iGas for various exploratory operations but not operations which include hydraulic fracturing.

Lack of confidence by regulators in the boundaries of their remit

The potential for delay is more likely to arise if there is a confusion between the various regulators about the extent to which they should be involving themselves in consent processes and issues beyond their direct remit. Until March this year, it was necessary for planning permission to be granted before the Environment Agency would issue mining waste permits for any facility involving a mining waste operation or facility. However, this is no longer the case, and we may see local authorities wishing to wait until permits are issued before taking shale gas applications to Committee—despite the fact that the two consent processes are, legally, entirely independent.

As mentioned earlier, the independence of other consent regimes from planning decision-making has been re-affirmed in National Planning Policy Guidance on Minerals para.112:

> "There exist a number of issues which are covered by other regulatory regimes and minerals planning authorities should assume that these regimes will operate effectively. Whilst these issues may be put before minerals planning authorities, they should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body."

It will be important that minerals planning authorities properly interpret this guidance as summarising the decision in the leading case on this issue: *Gateshead MBC v Secretary of State for the Environment*.[49] This case was recently resoundingly re-affirmed in a Court of Appeal case: *R. (on the application of an Taisce (The National Trust of Ireland)*).[50]

The *Gateshead* case related to the extent to which the Secretary of State in granting planning consent for an incinerator could legitimately rely on future consents under the Environmental Protection Act 1990 to control emissions to an acceptable level. The *An Taisce* case addressed the extent to which it was legitimate for the Secretary of State to grant a development consent order for a nuclear power station at Hinkley Point C in reliance on future approvals under the UK nuclear regulatory regime. Both cases concluded that reliance on the operation of other consent regimes is perfectly proper in planning decision-making. Sullivan L.J. in the latter case approved [193] of the High Court judgment (below):

> "In my judgment there is no reason to preclude the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the [EIA] Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon."

It will, of course, be important that minerals planning authorities take the advice of the regulators as to whether relevant impacts are capable of being controlled within acceptable limits. To this extent, the responses of the relevant regulators as statutory consultees in respect of the planning application will be crucial. However, it is clear that the minerals planning authority need not carry out its own evaluation of matters that are within the expertise of other regulators. Not only could such an approach slow down the

[49] *Gateshead MBC v Secretary of State for the Environment* [1995] Env. L.R. 37.

[50] *R. (on the application of an Taisce (The National Trust of Ireland)) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin).

planning process, it might also make planning decisions more challengeable if minerals planning authorities find themselves making judgements about matters outside their area of expertise.

How could the planning system be made more efficient for the production phase?

The Government will be looking ahead

We do not yet know whether further exploration will confirm that the United Kingdom's geology is favourable for commercially viable shale gas production. However, given the lead times associated with making any necessary changes to law and guidance, the Government will want to consider how the consenting process would work for any production phase. There has been some concern that investment in the industry may be adversely affected, even at the exploration stage, due to uncertainty over whether the planning and approvals process can scale up to deal with a significant increase in applications in the production phase.

In order to assess whether existing consent routes would work, it is necessary to consider what commercial shale gas production might look like for an individual operator and assuming widespread development across the United Kingdom.[51]

Maximising recovery with minimal footprint

By virtue of The Petroleum (Production) Act 1934, the Crown owns petroleum in the United Kingdom and grants exclusive licences to operators to explore and produce petroleum within defined geographical areas of the country. These areas are defined by DECC, and licences are awarded following periodic bidding processes.

The size of onshore licence areas varies significantly. Cuadrilla's licence area in the Bowland shale is 1,200km,^{2} but other licence blocks can be significantly smaller than this. Operators may bid for any number of 100km^2 blocks, which may be adjacent and therefore make up a larger overall licence area. In the 14th licensing round, DECC will therefore have a high degree of control over the size of the acreage awarded to different operators.

An operator's objective and the Government's objective will be to extract as much gas as possible from the whole of the licensed area, insofar as commercially viable taking account of environmental, local and technical constraints. The incentive for the operator to actively explore and then to maximise production is actually built into the terms of the licence granted by DECC. The financial benefit which DECC obtains for the Exchequer from petroleum licensing is derived not from charging a large upfront premium or annual fee, but largely from the tax revenues (levied at 62 per cent) payable for any oil or gas produced.[52] Under the licence, operators are obliged to commit to "work programmes" and "field development programmes". Failure to implement those programmes could lead to licence termination or partial relinquishment of acreage.

In simple terms, maximising the production of shale gas from an operator's licence area will depend on how much of the subsurface can be safely and sensibly accessed by horizontal wells. Part of the purpose of the exploration phase is to establish the length of fractures which can be created in the particular geology, using different techniques. This information will allow operators to optimise the spacing of well pads for production, subject of course to all other local and environmental considerations.

[51] The description which follows is based on the Institute of Directors' report "Getting Shale Gas Working" by Corin Taylor, and the author's discussions with the UK Onshore Operator's Group and a limited number of operators. The figures and assumptions made form only one scenario of a potential production phase, but illustrate the principles of shale gas production at scale.

[52] However, it should be noted that the shale gas tax allowance allows some set off of capital expenditure, likely to be claimed in the first year of operations.

It will not be in the operator's interest to establish more well pads than absolutely necessary to develop their licensed acreage. The cost of creating a well pad, moving equipment between well pads, and the local resistance to proliferation of well pads will incentivise operators to drill as many laterals off each well pad as reasonably possible, and to ensure that each lateral is as long as possible.

Fewer well pads can be expected than in the United States

In the United States, recovery has been carried out with a greater number of wells than we can expect in the United Kingdom, for a number of reasons. First, oil and gas is owned by individual land owners in the United States, and the terms on which they lease their land to operators usually means that royalty payments are only triggered if well pads are actually established and drilled from the leased land. If such drilling is not carried out within a fixed period from the start of the lease (usually five years) the lease terminates, allowing the land owner to lease the land to someone else. It was these sorts of leases which led to the proliferation of new well pads being constructed and drilled in the United States even in years when the gas price had fallen to uneconomic levels for the shale industry. Operators would rather drill it than lose it for the future.

Secondly, in the United States, land ownership issues have often meant that only short laterals can be drilled, up to the boundary of another land ownership which may be leased to another operator. This again increases the need for well pads in order to reach all of the operator's acreage, which may be in a patchwork of locations.

Thirdly, multilateral technology (the ability to drill laterals at different depths from the same vertical well) had not evolved when much of the US drilling was carried out. The development of multilateral technology may eventually enable more laterals to be drilled from a single well pad than in the early days in the United States.

Fourthly, the strata of shale rock in the United States is relatively thin compared with the United Kingdom. It is estimated that the Bowland shale in Lancashire is five or six times as thick as the main US shale plays,[53] giving scope for many more laterals to be drilled from each well. Lastly, the areas of the United States which are sometimes shown as the worst examples of moonscapes of multiple well pads are in areas which have been dedicated to the oil and gas industry for decades. In areas such as these, largely unpopulated, it is less surprising that there was no pressure from the authorities or local people to minimise the visual impact by drilling efficiently.

Spacing and grouping of well pads for the purpose of applications

So what should we assume operators will be seeking consent for at the production phase? The Institute of Directors' report has made the assumption that what we could see in the United Kingdom are well pads of 2ha (approximately the same size as the exploration pads we have seen applications for to date) from which 10 vertical well bores might be drilled, and 4 laterals drilled from each of those well bores. This would mean that 40 laterals could be drilled from each 2ha site.

How many well pads could we expect an individual operator to seek consent for at one time? Is it realistic for operators to make separate planning applications under the existing Town and Country Planning Act 1990 regime for each well pad? Or are operators likely to want to apply for a number of pads at the same time? If so, would the development consent order regime work better for the production phase?

To answer these questions, it is necessary to understand how the nature and economics of shale gas production drives activity on the ground. A key feature of shale gas production is that each lateral is most

[53] Institute of Director's report, "Getting shale gas working", May 2013, p.1174.

productive in the early years after hydraulic fracturing[54] and thereafter sees a steep decline in the amount of gas produced, but will continue producing at some reduced level for around 20 years before becoming uneconomic. This means that development drilling will continue at different sites over a multi-year development and production period. For the purpose of this paper only, it is assumed that an operator would want to drill and fracture 10 laterals per year, every year. This could be done with a single rig on a single well pad. In principle, it is likely to be most efficient for the operator to drill all laterals from a single well pad before moving on to another well pad if they have use of only one rig. However, the nature of shale exploration and production is such that it is possible that the operator may decide for technical reasons that it would be preferable to move to another well pad early to drill laterals at a particular depth (where a "sweet spot" is expected) and perhaps return later to drill further laterals from the first well pad. There is also the possibility that it would suit operators to drill a well but not fracture it until later, in order to maintain the desired production profile.

The number of well pads an operator is drilling and fracturing at any one time would be constrained by a number of factors, including the availability of rigs and fracturing equipment, staff, financial resources and, importantly, the acceptability of multiple sites in concurrent operation to the local community (socially and environmentally). The latter factor would, of course, be a key consideration for any planning decision and something to be controlled via planning conditions or obligations (see para.99(ii)).

The operator will not know for certain at the time of application how many laterals it may eventually drill from a particular pad. This will depend on technical findings. But it should be possible for an operator to make its planning application on the assumption that a maximum number of laterals are drilled from a particular pad. This would in effect provide the "worst case" scenario for the purpose of the EIA accompanying the application.

Will the Government bring commercial production of shale gas within the Development Consent Order regime?

The suggestion that minerals applications are in some shape or form brought within the Planning Act 2008 ("DCO") regime for nationally significant infrastructure projects has been mooted by Government for some time.

The suggestion was first raised in the House of Lords debate on the Growth and Infrastructure Bill (now the Growth and Infrastructure Act 2013). The March 2013 Budget announcement confirmed that the Government was keeping under review "whether the largest shale gas projects should have the option to apply to the major infrastructure regime". A specific suggestion had previously been made in a consultation launched by DCLG in November 2012 that onshore oil and gas extraction above a threshold of 500 tonnes per day for petroleum and 500,000m^3 per day for gas was brought within the new "business and commercial" category of projects being added to the regime. In its response to this consultation in June 2013, DCLG confirmed that it would not be bringing onshore oil and gas extraction within the regime at that time. However, DCLG stated that it "will keep this under review" and that "shale gas extraction has yet to take place at a commercial scale in this country and, as it develops, the Government will ensure that an effective planning system is in place". It seems likely that Government will therefore be re-evaluating this issue at some stage in future.

From the perspective of operators and the public, there would be some advantages, but also some challenges of bringing applications for commercial production within the DCO regime. The advantages would include:

[54] Institute of Director's report, ""Getting shale gas working" May 2013, p.120. It should also be noted that a particular lateral will not be re-fracked, other than in exceptional circumstances.

- **Multiple well pads in a single DCO application:**

  The DCO regime would lend itself to single applications being made for multiple well pads, consented under one DCO. In practice, the number of well pads for which an operator sought consent under a single DCO would be constrained by factors such as the cost of carrying out 3D seismic surveys, the time and cost of carrying out the necessary environmental impact studies, resourcing issues associated with carrying out public consultation across a wide area, and confidence about the robustness of any EIA which could be made over a number of sites, particularly in terms of cumulative impacts. For the purpose of this paper I assume that around four sites per application might be feasible. From an economic perspective, investors are likely to want to know that they have a number of well pads consented.
  In principle, it would be possible to submit a single planning application under the Town and Country Planning Act 1990 for multiple sites, but in practice the minerals planning authority is unlikely to be comfortable with this. Such an approach would also be likely to increase the risk of the whole application being refused in the event that there were concerns associated with one of the sites.
  Alternatively, an operator could submit multiple Town and Country Planning Act 1990 applications concurrently, provided each application was supported by an environmental statement which cumulatively assessed all of the other sites. This would allow refusal of any of the individual sites, without refusal of them all. However, this seems less than ideal in terms of achieving certainty, and in terms of the cost burden it would place on operators who would need to prepare separate application documents and possibly go through separate appeal processes and judicial reviews.
  For shale gas development to be viable, operators need to be able to plan a programme of activities across a number of well pads making up a single economic unit. It therefore makes sense to treat a number of sites collectively as a single project, or one phase of a project which (subject to future consents) may cover the whole licence area. An analogy would be the Round 3 offshore wind farms, which cover such large areas that we are seeing development consent orders for groups of turbines being applied for in phases.

- **Clarity over cumulative impacts:**

  By applying for a number of sites through a single development consent application, and carrying out pre-application consultation on those sites as a whole, operators would help the public to have clarity about the combined effects on their community, both beneficial and adverse. The operator would be able to paint a clear picture of how they planned to conduct activities across the four or so sites they applied for in, say, a 100km^2 area. This should alleviate some of the uncertainty the public might otherwise feel about the proliferation of drilling sites, and the criticism often levelled at promoters that they are "salami-slicing" projects to avoid consideration of the impacts as a whole. It would also enable sensible conditions to be imposed on operators' activities to control the cumulative impacts over the wider area. This could be achieved via DCO requirements and s.106 obligations controlling, for example, traffic routes and total number of rigs in operation at any one time in the wider area.

- **Public consultation:**

  The DCO regime emphasises thorough pre-application consultation, which is placed on a statutory footing by the Planning Act 2008. Even before consultation is carried out, the promoter must engage with local authorities to agree a statement about how consultation is

to be carried out. A single process for multiple sites would avoid the consultation fatigue which residents might otherwise feel if consulted on numerous separate applications. If other consents such as environmental permits were wrapped into the DCO application (see below) then the public would also avoid any potential confusion over to whom their consultation responses should be addressed. All responses would be made to the Planning Inspectorate.

- **Avoiding a strain on local planning authority resources:**

  If shale gas applications remain within the Town and Country Planning Act 1990 regime for the production phase, a significant strain will be placed on minerals planning authorities' resources in determining multiple applications and dealing with the potential appeals and judicial reviews. Under the DCO regime, local authorities play a key part in the process (advising on the appropriate form of local consultation and submitting a report on local impacts) but they are not the decision-maker. In many cases, this shift of role may be welcomed by minerals planning authorities.

- **Wrapping in other consents and streamlining procedures:**

  There is scope under the Planning Act 2008 for DCOs to wrap in other consents needed for a project. The Government's original intention was that DCOs would become a "one-stop shop" for all consents required for the infrastructure projects they authorise. In practice, applicants have generally not sought to use DCOs in this way, preferring to seek consents separately where they are required. This is partly because the mechanism provided under the Act for wrapping in consents is not appropriate in many cases. Under Planning Act 2008 s.150 the need for other consents may be "disapplied"[55] by a DCO if the body normally responsible for issuing such consents agrees to this (e.g. the Environment Agency in respect of an environmental permit). It is unlikely to suit regulators or applicants for consents to be disapplied in this way. Even if the sorts of conditions that regulators would normally impose on a particular consent were drafted into a DCO, the general statutory powers of enforcement and mechanisms to vary that consent (under the Act or Regulations which would normally control it) would not be available.

  A better approach would be for the "deemed" permits and licences to be capable of being granted by a DCO,[56] subject to appropriate conditions. Currently only deemed marine licences can be granted via a DCO. A deemed consent would by definition be subject to all of the same procedures for enforcement, variation etc that would apply to that consent if granted on a standalone basis. If achieving a one-stop shop is something that the Government wishes to encourage, it might consider adopting a model DCO for shale gas, including model provisions to apply where particular consents are wrapped in. In terms of providing meaningful public consultation and engagement there are clearly advantages to the one-stop shop approach. For promoters, the wrapping in of other consents would limit the number of potential judicial reviews which could be brought, simply by reducing the number of public law decisions being made. Equally, for those wishing to challenge a decision on shale gas, it would reduce the burden of launching multiple proceedings against different consents.

[55] The list of consents which may be disapplied is prescribed by The Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 (SI 2010/105) Sch.2. Those which may be relevant to shale gas production include: environmental permits under the Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675); greenhouse gas permits under the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/465); and abstraction licences under the Water Resources Act 1991.

[56] This would require an amendment to Planning Act 2008 Sch.5 Pt 1, and may be something the Government is currently considering as part of DCLG "Technical Consultation on Planning" (see s.6 on Streamlining Consents). This consultation suggests removing certain consents from the list of consents that can be disapplied under Planning Act 2008 s.150, but it is unclear whether it will instead be possible to apply for these as deemed consents under a DCO.

- **Predictability of decisions:**

  The upfront costs of shale exploration, appraisal and production are high and only recoverable once production is reached at scale. Rigs need to be booked up to a year in advance and, at a cost of approximately £30,000 per day, an operator cannot risk them lying idle while planning consent is awaited for the next well pad.[57] As we have seen from the decisions made by local planning authorities recently (see earlier) local decision-making is unpredictable. If brought within the DCO regime, decisions on shale gas applications would be taken by the Secretary of State following an examination by the Planning Inspectorate. As required by Planning Act 2008 s.104, that decision would be taken in accordance with a national policy statement "unless the adverse impact of the proposed development would outweigh its benefits". Environmental impacts and local concerns would have an important place in the decision, and the Secretary of State is directed by statute to have regard, among other things, to any "local impact report" submitted by the relevant local authorities (s.104(2)(b) of the Act). However, an operator who had consulted properly, listened to local concerns, and prepared a robust application addressing all impacts would have more certainty of obtaining consent than under the Town and Country Planning Act route. The Planning Act 2008 also expressly provides that all representations relating to the merits of the national policy as set out in the national policy statement are to be disregarded. This avoids the risk, inherent in planning inquiries held under the Town and County Planning Act regime, that evidence will need to be heard at length on the merit or otherwise of shale gas as part of the United Kingdom's energy mix. That is an important debate to be had, but the DCO regime recognises that it makes more sense for this to be debated once and for all via the consultation preceding the adoption of a national policy statement rather than repeating the debate in multiple planning appeals.

Challenges of dealing with shale gas under the DCO regime

If shale gas production were brought within the DCO regime, several issues and challenges would be faced by operators:

- **Length of pre-application consultation and examination process:**

  The statutory consultation duties under the Planning Act 2008 means that pre-application consultation is likely to take longer and be more formal than under the Town and Country Planning Act 1990. Post-application, most elements of the examination and determination process are subject to maximum statutory time-periods which mean that the period from application to decision need be no more than 15 months. However, experience to date has shown that it is unlikely to be any quicker than this. Therefore, if the DCO regime is to work for operators, it would make sense for them to apply for several sites under a single DCO consent to achieve efficiency.

- **What happens if the Secretary of State is minded to grant the application but without one of the well pads within the application:**

  It is unclear under the Planning Act 2008 what procedure the Secretary of State would follow if he were minded to grant a DCO application for only part of the development applied for.

[57] It should also be noted that there will be many other fixed and daily costs besides the cost of the rig (which will generally only account for 25 per cent of the cost of a well).

To date this has not been an issue, as most DCO applications have been single site applications, where the Secretary of State has a simple decision to make: to consent or refuse the entire application. But what would happen if he were minded to grant, say, only three out of the four production sites applied for by an operator under a single DCO application? Under EIA Regulations, the Secretary of State must have environmental information before him setting out the likely significant effects of the development for which he grants consent. If that is a production facility of three well pads rather than four, he must have an EIA before him which identifies the impacts of those three sites alone. Without this his decision could be vulnerable to judicial challenge. However, there is no specific procedure or extra time period allowed for under the DCO regime to deal with this circumstance. To address this issue, applicants might need to prepare their EIAs specifically with this potential severance in mind—making clear what difference it would make to the environmental impacts if any one or more of the sites were not authorised. If this approach were not taken by an applicant, the Secretary of State might have no option but to refuse the entire application, or issue a "minded to grant" letter which required the updating of the environmental statement and some form of re-consultation before determination. While there is potentially scope for this approach under Planning Act 2008 s.114, it is not clear how this would work procedurally.

- **Consenting shared infrastructure:**

  The extent to which a DCO can authorise "associated development"[58] not directly connected with the main infrastructure for which DCO consent is sought has caused some anxiety for Round 3 offshore wind farm developers. There has been a legal question mark over whether a DCO could authorise the laying of additional ducts onshore to create capacity for future offshore wind farms, and whether compulsory purchase powers could be granted for such works. On June 17, 2014, the Secretary of State granted a DCO for the East Anglia One Offshore Windfarm, including powers in relation to additional ducting for future phases which were not themselves authorised by the DCO. However, there may be uncertainty over the extent to which the definition of "associated development" could be stretched to allow the consenting of the shared regional infrastructure which may not be necessary solely to support shale gas production by the particular operator promoting a particular DCO. An expansion of the definition of "associated development" and changes to the Planning Inspectorate's guidance on associated development may be required. Nevertheless, establishing a "compelling case in the public interest" as required for compulsory purchase powers to be granted is likely to remain more difficult where there is no immediate need for infrastructure of a particular type or scale.

Future steps by Government

The adoption of a national policy statement on shale gas would constitute a "plan or programme" for the purpose of European law and therefore require preparation of a strategic environmental assessment, which would need to be made available as part of the formal consultation on any proposed national policy statement required by Planning Act 2008 s.7. The Secretary of State must "carry out such consultation, and arrange for such publicity, as he thinks appropriate"[59] in relation to a proposed national policy statement. Where it identifies particular locations as suitable (or potentially suitable) for a specified type of development, local publicity and consultation will be needed. However, to date only the nuclear national

[58] Defined by Planning Act 2008 s.115.
[59] Planning Act 2008 s.7(2).

policy statement has identified particular sites in this way, and it seems unlikely that a shale gas national policy statement would be site specific given the areas of the country which are subject to onshore licences. Since the Government has already published a strategic environmental assessment for the 14th licensing round it would have a good starting point, but clearly additional work would be required. The Secretary of State must have regard to the responses to the consultation and publicity in deciding whether to designate (adopt) the national policy statement. The process overall has not proven to be swift, and once designated the policy can be the subject of a statutory challenge under Planning Act 2008 s.13. However, in principle as soon as the Planning Act 2008 were varied to bring shale gas within its remit, it would be possible for operators to carry out pre-application consultation in parallel with the Government's consultation on the national policy statement, and in parallel with any legal proceedings to challenge it. This was in fact the situation for EDF Energy in relation to its Hinkley Point C application.

The Town and Country Planning Act 1990 regime must retain a role

Even if the DCO regime were adopted for shale gas production, it would be appropriate for the Town and Country Planning Act 1990 regime to continue to apply to certain types of operations. By nature, petroleum exploration and production are not always two distinct processes. There may be circumstances where a large area is in production from a number of sites consented via a DCO but it becomes necessary to drill a discrete vertical exploration well in order to gain additional information. If this need was not anticipated and consented as part of the DCO, then it should be open to the operator either to vary the DCO or apply to the minerals planning authority for planning permission under the Town and Country Planning Act 1990.

It might also make sense for operators to be able to choose whether to use the DCO route or to apply for planning permission locally under the Town and Country Planning Act 1990 for single production sites.

To the extent not prohibited by art.3(10), operators would also continue to enjoy the right to carry out certain operations under the Town and Country Planning (General Permitted Development) Order 1995.[60] In particular, they may wish to take advantage of the right under Pt 22 (Mineral Exploration) to drill boreholes, carry out seismic surveys or make "other excavations" for the purpose of mineral exploration, which may be useful in some cases despite the notable exclusion where the drilling of boreholes is "for petroleum exploration." There may also be circumstances where Pt 19 (Development Ancillary to Mining Operations) is useful to an operator.[61]

The importance of a change in law to address access to underground land

Background to the proposed change in law

One of the most controversial issues related to hydraulic fracturing this year has been the Government's proposal to change the law to allow operators an automatic right to access underground land to extract oil and gas—something referred to by the media as the right to "frack under people's homes without their permission".

It is an established principle of law that land owners own the subsoil of their land to the centre of the earth. This principle was reaffirmed in the *Bocardo* case.[62] Star Energy was held to have committed trespass when it drilled an oil well diagonally through certain land (without land owner consent) to reach the apex

[60] Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418).

[61] If shale gas development is brought within the development consent regime there will need to be a minor consequential amendment to the definition of an "approved site" in Pt 19 such that it refers also to sites consented under the Planning Act 2008.

[62] *Star Energy UK Onshore Ltd v Bocardo SA* [2010] UKSC 35.

of an oil field. The case concerned conventional petroleum operations rather than hydraulic fracturing operations. However, the potential for land owners to use this principle to prevent hydraulic fracturing from taking place under their land has been much trumpeted by Greenpeace and Friends of the Earth, who have run campaigns encouraging land owners to sign petitions declaring that they will never authorise hydraulic fracturing under their properties.

In the *Bocardo* case, the diagonal oil well had already been drilled by the time the land owner sought a remedy through the courts. The remedy sought in that case was financial, rather than an injunction. However, the courts have the right to grant an injunction where trespass is committed, and were an operator to start drilling under a person's land without authority there is a significant chance that an injunction would be granted if sought. In practice, therefore, operators today would be unwilling to risk commencing drilling operations without obtaining the necessary land rights. Clearly for public relations reasons alone, shale gas companies would not wish to flout the law in any event.

There is a procedure under the Mines (Working Facilities and Support) Act 1966 (the "1966 Act") which allows courts to vest the necessary land rights in exploration companies where these rights cannot be obtained voluntarily. However, it has been little used, and the only reported case took 20 months[63] to obtain rights from a single land owner.

Shale gas exploration and production has two particular characteristics which means that the industry cannot develop if the legal status quo persists:

- The scale of the areas of subsurface land through which drilling and fracturing must be carried out in order to extract gas; and
- The fact that a number of separate exploratory sites must be drilled and fractured in exploratory operations before it is possible for a company to decide whether it is commercial to go into production in a particular area.

Without a change in law, operators would be faced with the prospect of negotiating with potentially hundreds or even thousands of land owners. In financial terms, it is unlikely to be viable for shale gas exploration companies, at the early stages of exploration, to invest the huge amount of time and money in legal fees currently necessary to acquire land rights for these test operations.

The current law in relation to acquiring rights to carry out onshore petroleum exploration

The Petroleum (Production) Act 1934 provides that within the United Kingdom the Crown owns the exclusive rights to any petroleum which may exist under a person's land. This includes "natural gas existing in its natural condition in strata". The only person who may search or bore for natural gas is a person licensed by the Crown.

Section 7 of the Petroleum Act 1998 states that the 1966 Act applies:

> "for the purpose of enabling a person holding a licence under [the Petroleum 1998 Act] to acquire such ancillary rights as may be required for the exercise of the rights granted by the licence."

The term "ancillary rights"' is widely defined and is likely to encompass the right to carry out drilling and fracturing operations to extract gas.

The process requires submission of an application for the grant of a right to the Secretary of State, setting out the circumstances alleged to justify the grant of the right. The Secretary of State must refer the matter to the High Court "unless after communication with such other parties interested (if any) as he may think fit, he is of the opinion that a prima facie case is not made out". Before he refers the matter to the High Court, he will wish to carry out a consultation with the affected parties. There is no specified timescale

[63] *BP Petroleum Developments Ltd v Ryder* [1987] 2 E.G.L.R. 233; [1987] R.V.R. 211.

for such consultation and in theory it could encompass parties other than simply land owners. For the right to be granted, the court must be satisfied that it is "expedient in the national interest". The applicant must also show that it is "not reasonably practicable to obtain the right by private arrangement" due to one of a number of specified factors.

Evidence on all of these matters would need to be provided to the court. Upon the order being made, the rights vest automatically in the applicant (1966 Act s.5). The court may also determine the amount of compensation or consideration due to the land owner. Section 8(2) of the 1966 Act states that:

> "The compensation or consideration … shall be assessed by the court on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions, subject to which the right is or is to be granted."

In practice, following the *Bocardo* case, such compensation is likely to be nominal given the limited nature of the underground rights being vested in the applicant. In the *Bocardo* case, Lord Brown stated that:

> "the £1000 awarded by the Court of Appeal can be regarded as positively generous: compensation under section 8(2) would have been assessed at no more than £82.50 including the 10% uplift. There is frankly no coherent basis for an intermediate award."

The inadequacy of the current law

When the Petroleum (Production) Act 1934 was first enacted, oil and gas was extracted via vertical drilling. The 1934 Act applied a compulsory acquisition procedure to acquisition of land rights (via a predecessor to the 1966 Act—The Mines (Working Facilities and Support) Act 1923). Clearly in 1934, when only vertical drilling was used, it was easier to achieve agreement from a relevant land owner (likely to be a single individual). The need to apply to the courts for compulsory rights would therefore have been relatively rare. Today, when: (i) directional drilling is often used to extract conventional oil and gas; and (ii) unconventional gas extraction may require drilling and fracturing of many hectares of land, the compulsory rights regime is no longer fit for purpose.

It is fair to assume that a case involving multiple land owners would take longer to go through the 1966 Act process than a case involving only a single land owner (longer then than the 20 months in the *BP v Ryder* case). The more objectors who are made defendants because they own land under which drilling will take place, the more time may be given to enable them to put forward their case and for the licence holder to respond.

The nature of the 1966 Act process would also require a judge to decide what is "expedient in the national interest." In the case of an application for rights relating to shale gas exploration, one could imagine this being used as an opportunity for interest groups to bring to the court technical evidence about the safety and environmental impact of hydraulic fracturing. The judge would be placed in the uncomfortable position of being asked to weigh up whether the economic case for exploitation outweighs the environmental case against it. The court proceedings might effectively be turned into a quasi-public inquiry. It is surely, in any event, appropriate for Parliament or the Government to determine whether shale gas exploration is "expedient in the national interest" rather than a judge.

Even if the right were granted by the courts, an objector might appeal. It is possible that permission would be granted for an appeal to the Court of Appeal and then to the Supreme Court on the issue of whether the grant of rights would be "expedient in the national interest", at least in respect of the first application for rights by a shale gas operator. It does not seem unreasonable to suppose that the whole process, including appeals, could take four or five years.

This would be a fairly untenable timescale for any commercial infrastructure project, but even more so when in the case of shale exploration, operators do not even have the assurance that there will be a commercially viable project at the end of the process.

From the point of view of a land owner seeking compensation, the existing process also has little appeal. Given that the drilling and fracturing for shale gas is to take place over a mile below the surface, it is difficult to see a judge doing anything other than following the judgement of Lord Brown in the *Bocardo* case, that the land owners are not affected "one iota" and on this basis awarding only the nominal compensation of £82.50 referred to as appropriate in *Bocardo*. On one interpretation of Lord Brown's judgement, it may even be that the £82.50 is the nominal compensation for the whole of the underground land, and on this basis would need to be split between the number of land owners over whose land the right is to be taken. Either way, it does not seem sensible to have an expensive court procedure to determine the amount of compensation if it will ultimately be at this level.

It seems reasonable to assume that many of the people who see the existing 1966 Act procedure as beneficial are those who wish to use it to delay or block the development of the shale gas industry. While they may have legitimate concerns which should be heard, the appropriate forums for these concerns are the planning or environmental permitting processes, not the courts. There seems no reason, prima facie, why someone living one mile above hydraulic fracturing activity need have more or different concerns from someone living one mile to the east or west of it. Both should be allowed equal involvement in decisions which affect whether hydraulic fracturing takes place in their locality. Neither should be able to block such development in their capacity as land owner.

The Government's proposal

On May 23, 2014, the Government announced a 12-week consultation on its proposal to grant an automatic statutory right of access to land below 300m for extraction of oil or gas or geothermal energy. The consultation notes that the shale and geothermal industries have put forward a voluntary offer to pay £20,000 for each unique lateral (horizontal) well that extends more than 200m (the payment is only to be made once where a number of laterals are stacked above one another vertically). The industry is anticipated to provide more details of the payment scheme in due course, but the Government makes clear that they anticipate it to be some form of flexible community payment. The consultation notes that lump sum community payments of this kind will be more meaningful than nominal payments to individual land owners.

Precedented by Coal Industry Act 1994 section 51

The Government consultation states that: "To develop this proposal, we looked closely at s.51 Coal Industry Act 1994, given the parallels with shale and geothermal energy."

In terms of the extent of land affected, unconventional gas extraction is in many ways more similar to coal mining than to conventional gas extraction via vertical wells. Coal must be mined across a large area of land through which a coal seam runs. In the same way, shale gas is generally extracted from a stratum of shale which extends over a large area of land. Neither coal nor shale gas can be extracted simply by accessing a reservoir at a single point. They require both:

- access from one point on the surface; and
- extensive underground working of land.

In terms of regulation, coal (like petroleum):

- is owned centrally (by the Coal Authority) rather than by the land owner under whose land it happens to sit; and

- requires a licence from the Coal Authority to be obtained to extract it (that licence does not in itself grant the right to enter/use the underground land in which operations must be carried out to extract the coal to which the licensee is entitled).

In the cases of both petroleum and coal, it has been recognised that there must be a statutory means of gaining access to the licensed resource where land owners prove unwilling to agree access rights. The key difference is that coal benefits from two statutory provisions which facilitate access to the resource without land owner consent, whereas petroleum currently benefits from only one. The two statutory provisions which facilitate rights of access to coal are:

- 1966 Act s.1 ("Grant of working facilities") which allows the acquisition of "ancillary rights"; and
- Coal Industry Act 1994 s.51("Additional rights in relation to underground land").

It seems that the two rights are intended to be complementary: the former providing a procedure aimed at securing use of or access from the surface of land (securing these rights requires the licensee to go through the court procedure under the 1966 Act); and the latter giving the licensee an immediate statutory right to use underground land (without any further procedure required or compensation payable).

Currently, petroleum licence holders benefit only from 1966 Act s.1 ("Grant of working facilities"). It is easy to see how the same logic which led legislators to enact Coal Industry Act 1994 s.51 (and its predecessor, Coal Act 1938 s.15), should now be applied to onshore petroleum exploration—because such exploration requires extensive rights to underground land in just the same way that coal mining does.

It is no accident that the 1966 Act procedure is a lengthy procedure which requires consideration of evidence from land owners and a positive decision by the courts to grant or deny rights to the applicant. It is clearly appropriate that a formal application and decision-making process should apply where the surface of land is being affected. Equally, however, it seems entirely appropriate that no such application and decision-making procedure should apply in relation to access to underground land. The legislators who enacted Coal Act 1938 s.15 and Coal Industry Act 1994 s.51 clearly took the view that land owners would not be affected by any underground operations as long as safeguards were built into these sections (e.g. no interference with the surface etc). On this basis, it was clearly thought equitable for licensees to have a blanket right to carry out underground operations without need for consent or application for specific rights.

It is easy to see the argument that for the same reasons, an equivalent provision should apply in the case of underground operations for extraction of petroleum by the more land-extensive methods used today. Certainly without this change it is difficult to imagine the shale gas industry developing in the United Kingdom.

Challenges to be tackled in the future

Making community benefit payments work

One of the challenges for the industry and communities will be to decide what to do with the direct financial contributions the industry has promised.

The need to find a fair means of distributing a proportion of the financial benefits of shale gas extraction was recognised early on as part of the process of obtaining a "social licence" to operate. In January 2013, the UK Onshore Operators Group ("UKOOG") announced its "Community Engagement Charter", which committed UKOOG Members (90 per cent of the onshore oil and gas industry) to giving £100,000 to the local community per well site where hydraulic fracturing takes place and 1 per cent of revenues when operators enter the production stage. Cuadrilla has in fact been more generous in the contributions it has

promised at the exploratory phase: offering £100,000 per exploratory well (up to £800,000 across its two new Lancashire sites). We may see other operators follow suit. Such contributions are explicitly not mitigation for planning impacts, but rather payments outside the planning system. The industry treads a fine line. While some people feel that such contributions are fair, or perhaps not generous enough, others seek to label them as bribery. UKOOG has announced a pilot scheme under which it will partner with the UK Community Foundation ("UKCF") on behalf of the onshore oil and gas industry to administer exploration phase community benefit schemes through the Foundation's network of County-level trusts.[64]UKOOG's intention is that once planning consent for exploratory drilling is granted, UKCF will manage a consultation process to engage the local community in defining local priorities and needs, and a panel will be appointed to decide how the money will be spent. A similar approach, making use of UKCF's expertise, was adopted by EDF Energy in relation to the development of the Hinkley Point C nuclear power station, authorised in March 2013.

UKOOG is currently consulting a range of stakeholders on how to distribute the much larger funds which would be collected at the production stage. Based on production scenarios described in the Institute of Directors' report, the promised 1 per cent of production revenues could be worth in excess of £1.1bn across the United Kingdom over a 25-year production timescale. UKOOG estimates that this could equate to £5m-£10m of community benefits per site. The options for this fund could include direct payments to individual households or use of the UKCF model to distribute the funds for community projects. Early results from the consultation indicate that the public favours the latter. Certainly, there would be administrative difficulties with making payments to individuals: how widely should the boundary for beneficiaries be drawn (those nearest the site will not necessarily be most affected by any adverse transport impacts, for example); who within the household should get the payment; what if people move house during the year; what type of tenure would a land owner need in order to be eligible; should the payment vary by area of land held; and would the payment be subject to income tax? It is also easy to see that direct land owner payments could set up antagonism between neighbours where one receives the payment and another does no—as has happened to some extent in the United States. Another possibility would be to give local communities the right to buy into shale gas developments in their area, as is proposed for renewable energy projects under the Infrastructure Bill published in June 2014. However, given the early stage of the shale gas industry compared with the wind industry, there are likely to be too many unknowns to be discussing this type of scheme at this stage.

Long-term monitoring and liability for abandoned wells

Two influential reports on shale in the United Kingdom (the Institute of Directors' report and the Royal Society report[65]) refer to the need to establish a monitoring regime and liability "fund" for abandoned shale wells. The Institute of Directors' report states:

> "Shale wells will produce gas for several decades before abandonment, and DECC requires operators to submit an abandonment plan and obtain consent before operations to abandon a well are commenced. It will be important to ensure that wells are monitored post-abandonment, and that liability for any well-failure post-abandonment is vested in an appropriate body. Nuclear and coal provide good examples … Similar arrangements will need to be made for onshore oil and gas production, with operators contributing to a fund with liability for abandoned wells. The fund should also ensure that abandoned wells are properly monitored."

The EU Recommendation in January 2014 also stated that:

[64] UKOOG Press release: January 13, 2014.
[65] See above.

> "Member states should ensure that the operator provides a financial guarantee or equivalent covering the permit provisions and potential liabilities for environmental damage prior to the start of operations involving high volume hydraulic fracturing."

The driver for this proposal is partly the well-publicised phenomenon of "orphaned wells" in the United States. These are wells that were drilled by companies that have since become insolvent or otherwise disappeared. When orphaned wells are referred to in the US context, the concern generally relates to wells which were not "plugged" (sealed) before being "abandoned". Wells which have not been plugged have a potential to leak oil and gas into the environment which could cause significant environmental pollution. If the operator no longer exists, regulators have no corporate entity to pursue to rectify the situation.

The long history of oil production in the United States, going back decades before the existence of environmental regulation, means that the scale of this problem in the United States is significant. In the United Kingdom, we do not have the same intensive history of oil and gas production onshore, which means that we do not suffer from the problem of orphaned wells in the way seen in the United States.[66] However, faced with the prospect of increased onshore drilling, it is certainly legitimate to ask how we can ensure that the funds are available to cover the cost of properly plugging and abandoning wells where an operator disappears. There is already in fact provision in the 2004 standard onshore petroleum licence (licence condition 19(7)[67]) for DECC to require the provision of such security. In practice, however, DECC has not usually required the provision of such security from onshore operators. This may be partly because it is unclear who should have the benefit of such security, and the responsibility to implement any remedial works should they be necessary—DECC, HSE, the Environment Agency or a combination of all three? But in principle, no further legislative change is needed to deal with this risk. DECC already has the powers it needs.

An entirely separate issue is to what extent wells which have been signed off by DECC and HSE as properly plugged and abandoned should nevertheless be monitored in case their integrity is compromised at some point in the future. From a technical perspective, this has never previously been felt to be necessary for onshore wells (conventional or unconventional). Leaking is certainly rare, but research is ongoing into just how rare. Ultimately the question will be what level of monitoring is appropriate, over what period and by whom? And how can the cost of monitoring, rectification and liability for any environmental damage be funded by the industry in a way which is proportionate to the risk, and does not increase industry costs to an unviable level?

Will the European Union legislate for shale?

It is possible that the European Union will bring in further legislation relating to hydraulic fracturing. The EU Recommendation in January 2014 made it clear that the European Union would revisit the effectiveness of the Recommendation 18 months from its publication. Should the European Union decide that Member States have not adequately given effect to the "minimum principles" set out in the Recommendation over this period, the Commission stated that it may decide to put forward legislative proposals for the industry. This is something that the Government fought hard to avoid last year, on the basis that further regulation was unnecessary and would increase uncertainty for operators. It will not be helpful if, just at the point regulators are coming to grips with how to apply the existing raft of EU Directives to shale gas operations, further Directives are forthcoming.

[66] In the UK, we have an analogous problem to some extent with old abandoned coal mines. It was partly to deal with this problematic legacy that the Coal Authority was set up.

[67] The new model licence conditions set out in Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014 (SI 2014/1686) Sch.2 have an equivalent provision in licence condition 24(7).

Legislative provisions applied to the unconventional industry may affect the conventional industry

One of the ironies often discussed among oil and gas professionals is that so many of the processes used by the conventional and unconventional industries are identical and have been carried out for many years, yet recent concerns have often focused exclusively on the unconventional industry. One of the difficulties regulators face is not that the activities of the two parts of the industry are so different, but rather that they are so similar. In particular, the nervousness of both regulators and unconventional operators to ensure compliance with all potentially relevant EU legislation may lead them to apply for consents on a belt and braces basis. This may set precedents which will need to be applied also to the conventional industry.

Conclusion

The embryonic UK shale gas industry faces some formidable challenges, not least of which is obtaining the necessary consents to carry out exploratory operations. Without significant exploration over the next few years, we will not know whether it is possible to produce shale gas commercially from UK shale plays.

Planning decision-making in the United Kingdom by nature involves a significant degree of discretion by minerals planning authorities. This contrasts with the "zoning" approach to planning taken in the US, where shale gas exploration and production has flourished. The unpredictability of decision-making we are currently seeing is not conducive to the investor confidence which is essential to fund exploration, and any future production.

The Government has been vocal in its support for shale gas exploration, but there is a need for the public to be further convinced of its safety and the benefits it could bring if the industry is to obtain the social licence to operate which will be the real key to obtaining planning consents on a timely basis in future. It is to be hoped that the various initiatives being undertaken by the Office of Unconventional Gas and the UKOOG will have a positive effect. But the most powerful antidote to public concerns is likely to be seeing exploration carried out, safely and with the minimal local impacts predicted by EIAs. The small group of operators who will be seeking consents over the next year or so, and the minerals planning authorities to whom they apply, carry a heavy responsibility for the future of the industry.

Appendix

Excerpt from House of Lords Economic Affairs Committee report: "The Economic Impact on UK Energy Policy of Shale Gas and Oil"

"Chapter 7: Environmental impact of development of shale gas in the UK

275. Concerns about pollution of groundwater by fracking fluid seem largely based on reports of past practice in the US, where greater transparency is now enforced. The position in the UK is clear: the regulators require full disclosure of chemicals used in fracking fluid, they do not permit use of hazardous chemicals and operators do not use them. Provided that the regulator enforces this prohibition, hydraulic fracturing fluid poses no risk to groundwater in the UK. (Paragraph 133)

276. The weight of scientific opinion is that the risk of methane migrating up natural faults and into aquifers is 'difficult to conceive' and 'hard to imagine' in the UK. With strict regulatory oversight and monitoring, the risk of methane contamination of aquifers through natural fractures is very low.(Paragraph 142)

277. The only significant risk posed to groundwater by hydraulic fracturing is of methane or wastewater entering aquifers as a result of a poorly constructed or sealed well. This is also a risk for conventional onshore gas and oil production. The risk is low as long as independent monitoring ensures that wells are properly constructed and sealed. (Paragraph 147)
278. In the US, disposal of flowback water after hydraulic fracturing has in recent years aroused some environmental concerns, now being addressed. In the UK, by contrast, flowback water is subject to the regulations on mining waste and its disposal and treatment is carefully controlled. (Paragraph 158)
279. Fears of water shortages arising from shale gas development have been overplayed: demand for water from onshore shale operators, even at high levels of activity, would be comparable to demand by other industrial users; regulators will not permit levels of water consumption that threaten household supplies; and technological advances such as the substitution of saline water and recycling of flowback water are likely to reduce demand for fresh water. (Paragraph 164)
280. The Government have introduced stringent planning and monitoring requirements governing the activities of onshore oil and gas operators which might lead to induced seismicity. On the evidence we have heard, there should be no risk that seismic activity caused by hydraulic fracturing would be of sufficient magnitude to constitute any risk to people and property. (Paragraph 173)
281. Public Health England (PHE) has recently reviewed all the available evidence on the risks to public health arising from air emissions from shale gas activities, including US studies brought to our attention by opponents of shale gas development. We find persuasive the conclusion of PHE's preliminary report that the risks to public health from shale gas exploration and production are low with proper regulation. (Paragraph 180)
282. We find persuasive the view of Public Health England that shale gas development would be very unlikely to have a significant effect on radon levels in homes. (Paragraph 181)
283. The Committee recognises that development of shale, like any other industrial activity, would cause an increase in traffic and disruption in some places, especially during periods when wells were being drilled. Although planning controls may mitigate disturbance, there should be a role for the industry's community benefits scheme to compensate those affected individually. (Paragraph 185)
284. On the evidence available to us, Cuadrilla's operations at Balcombe appear usually to have observed prescribed noise limits, with occasional minor lapses. (Paragraph 189)
285. It is widely believed, by opponents and others, that exploration and production of shale gas in the UK would pose dangers to the environment and to public health. Government, regulators and the industry need to take these fears, legitimate and exaggerated, seriously and tackle them. We heard an impressive amount of scientific evidence that with a robust regulatory regime the risks to the environment and public health are low. With such a regime in place, we consider the environmental risks to be small, whereas the benefits if shale gas development takes place are substantial. (Paragraph 191)"

Planners as Alchemists: How to Deliver the Homes that we Need

Kate Davies

1. Introduction

Eight out of ten Britons think we have a housing crisis.[1] There is a shortage of housing in the UK and it is very expensive, in relation to salaries. The average London house is worth £400,404, more than eight times the average London first-time buyer's earnings—an historic high.[2] The Cambridge Centre for Housing and Planning Research ("CCHPR") suggests that the number of households in England will rise by a fifth in the next 20 years to 27m,[3] yet we are only building around 140,000 homes a year. In addition, the Empty Homes Agency suggests there are around 600,000 empty homes in the UK.[4] We need around 250,000 new homes a year to house a population that is growing due to births, immigration, family breakdown, changing family composition and longevity.

Where we build homes is important too. The CCHPR report suggests that two-thirds of the 250,000 new homes we need will be needed in the south, and around one-quarter in London.

The response of the Town and Country Planning Association (TCPA) is to propose a "new vision for housing and the development of new communities … whether as part of urban regeneration or through new garden cities".[5]

However, in much of London and the South East first time buyers simply cannot afford to buy a home. Without parental help few young households can afford to buy, and must rely on the Private Rented Sector ("PRS"). For the first time in a century the number of households renting from PRS landlords has overtaken the number living in social housing. Only four years ago around one in three 25-34 year olds were renting privately; now it's nearly every other one. This means that 40 per cent of the £23bn spent on housing benefit goes to private landlords.[6] In addition, longer term, the fact that an increasing proportion of older people have no assets in which they can live or sell, plus increasing housing costs, will mean the costs of pensions, care and housing benefit will have to be picked up by the taxpayer.

The Government knows that the housing shortage is reaching epic proportions, and the issue of housing supply is finally becoming an important one for politicians of all parties, who largely agree that we need:

- More homes overall, especially in London and the South East;
- More homes for less well-off households; and
- Good quality rented housing;

All of which at the lowest possible cost to the Government.

To date, those who are disadvantaged in the housing system have put very little pressure on the powers that be. It is possible, given the extreme circumstances we now have in parts of the UK, that they will finally make a stand. Growing inequality between the generations, and between rich and poor, are being

[1] Ipsos Mori: *http://www.ipsos-mori.com/researchpublications/researcharchive/3129/80-per-cent-agree-UK-has-a-housing-crisis.aspx*. [Accessed October 17, 2014.]

[2] Nationwide: *http://www.nationwide.co.uk/~/media/MainSite/documents/about/house-price-index/Q2_2014.pdf*. [Accessed October 17, 2014.]

[3] Cambridge Centre for Housing and Planning: *http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2014/Other-Publications/Housing-need-and-effective-demand-in-England*. [Accessed October 17, 2014.]

Also the TCPA: *http://www.tcpa.org.uk/resources.php?action=resource&id=1160*. [Accessed October 17, 2014.]

[4] Empty Homes Statistics 2013: *http://www.emptyhomes.com/statistics-2/empty-homes-statistice-201112/*. [Accessed October 17, 2014.]

[5] Kate Henderson CEO, TCPA, September 10, 2013: *http://www.tcpa.org.uk/resources.php?action=resource&id=1160*. [Accessed October 17, 2014.]

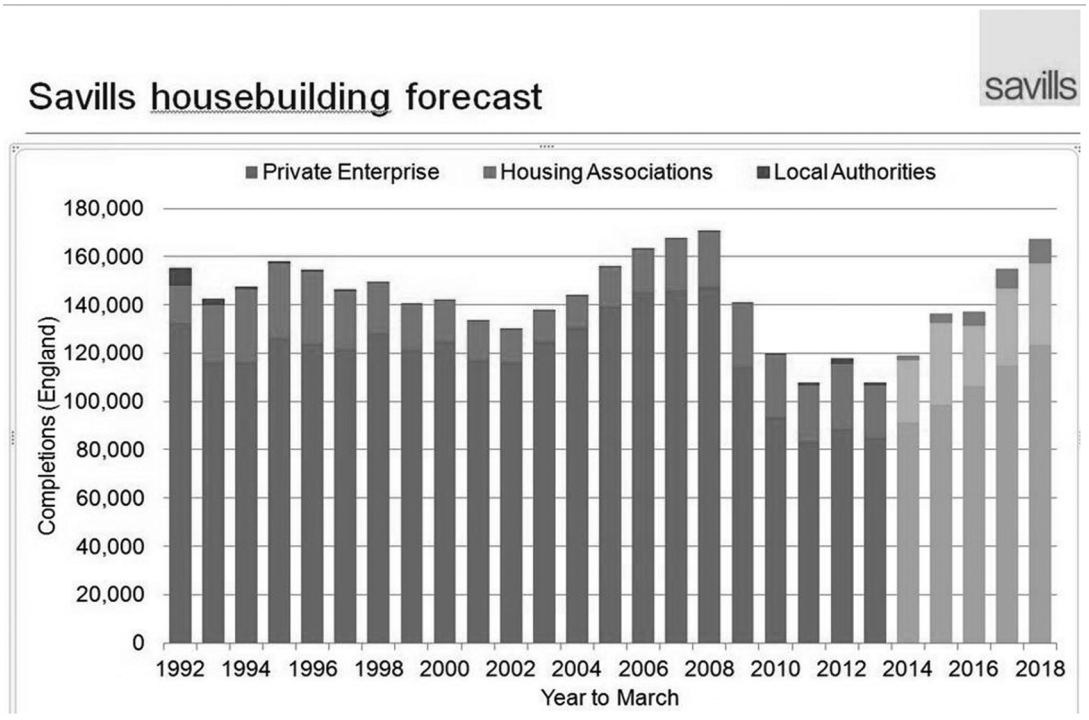
[6] DCLG *English Housing Survey: Households 2012–2013*: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335751/EHS_Households_Report_2012-13.pdf*. [Accessed October 17, 2014.]

exacerbated by the UK's unusual housing market. It could also be argued that the extraordinarily high cost of housing here is holding back our economic growth.

In this paper I will look at what local planning authorities and registered providers ("RPs") might be able to do to make a difference.

2 Who provides housing currently?

The graph below shows the proportion of housing provided by private enterprise, housing associations and local authorities.



(Graph reproduced by permission from Savills.)

3 What is necessary to encourage more homes to be built?

The elements that are needed to produce homes include:

- Land;
- Planning permission;
- Finance; and
- Construction.

Land is the key variable. While house prices went up 6-fold from 1983 to 2007, land prices rose 16-fold.[7] This increase in the value of inert land is not due to human labour, but due to a combination of land being a finite resource, demographics and low property taxes. Of course, the process whereby land becomes

[7] Danny Dorling, *All that is Solid* (2014): *http://www.dannydorling.org/books/allthatissolid/Figures.html#5*. [Accessed October 17, 2014.]

valuable is the granting of planning permission: Land plus planning permission equals value. Even without the work of constructing and selling homes, consented land is normally more valuable than unconsented, even allowing for the time and cost of gaining the permission.

a) Private sector

The private house-building companies in the UK react to the market and produce sufficient homes to realise their profit expectations. They will develop their landholdings when it is profitable for them to do so. Housebuilders and developers have produced around 150,000 homes a year since the early 1980s. However, the credit crisis had a significant impact and this has held back development, in favour of land hoarding. It is not realistic to expect significant additional growth to come from the private sector, but this sector does offer particular skills:

- Understanding and meeting the needs of the private housing market;
- Creativity and entrepreneurial skills; and
- Large scale project management.

b) Private rented sector

Only around three per cent of London's housing is purpose-built rented housing and most PRS housing is still provided by private landlords. What about Build to Rent, where the Government is encouraging institutional investors into the market at scale? Unfortunately there is still no evidence that this has had any meaningful impact, two years after £2.5bn of Government money was announced. Because house prices are rising much faster than rents, there is little incentive to hold housing stock rather than sell, and in fact many PRS landlords are selling existing stock. Significant private sector investment in housing is therefore unlikely, however, the PRS is flexible and available for those who cannot buy or rent social housing.

c) Local authorities

Traditionally, local authorities have made up the shortfall left by the private sector, particularly catering for those that cannot buy in the market. Around 153,000 homes were built by local authorities in 1976–1977, but when Margaret Thatcher left office it was 1,500 per annum.[8] Local authorities have tried to start building again but they lack expertise and confidence, as demonstrated by the small number of homes being built—around 2,000–3,000 a year.[9]

While local authorities argue for more power to borrow and build, their real significance is:

- democratic role (as representative of local people);
- significant landholdings; and
- planning powers;

Development is not their key strength.

d) Housing associations

Housing associations currently provide around 30,000 homes a year—an important contribution, but not enough. Bear in mind also that Right to Buy (now providing discounts of up to £100,000 in London) and

[8] Knight Frank, April 12, 2013: *http://www.knightfrankblog.com/global-briefing/news-headlines/which-pm-oversaw-the-highest-level-of-uk-housebuilding/*. [Accessed October 17, 2014.]

[9] DCLG Live Tables: Table 212: permanent dwellings started and completed, by tenure, Great Britain (quarterly).

the increasing conversion of rents to "affordable" levels, has led to a net loss of 35,000 socially rented homes.[10]

The strengths of housing associations are:

- Development skills;
- Specialism in affordable housing;
- Potential to scale up;
- Relatively easy access to relatively cheap money; and
- Reasonable management skills.

4. How can we deliver a big increase in the number of lower-cost rented homes?

The private sector is effective at producing homes for the market. The area that needs most attention is the provision of lower-cost homes for rent. As the market cannot, and will not, provide this we will need a national campaign and collaboration between a number of key players. That campaign will need to be orchestrated by Government, but it is essential that a national effort also involves the private sector, local authorities (especially their planning function) and RPs.

Table 1: The elements of development and the contribution of specific partners

Land	Nearly half of all land suitable for development is in the hands local authority/ public bodies[11]
Planning	Local authority
Finance	Private sector/RP
Construction	Private sector
Managing homes	Local authority/RP

The public sector has control of two of the jigsaw pieces: significant land holdings and the power to grant planning permission. It is essential, if we are to respond to the increasing housing crisis, that these resources are used for the public good.

I set out below what I see as the role of each player in the market.

a) Government's role:

- Creating the mood music—a national housing campaign;
- Making public land available, through the Homes and Communities Agency ("HCA") and Greater London Authority ("GLA");[12]
- Subsidising affordable housing through grant;
- Enabling/requiring the participants to work together;
- Removing barriers to growth;
- Investing in infrastructure; and
- Taking a long-term (and regionally sensitive) view for a change; say a 20-year settlement

[10] *Financial Times*: *http://www.ft.com/cms/s/0/4d9a68ea-166e-11e4-8210-00144feabdc0.html#axzz3B6Sh3jD9*. [Accessed October 17, 2014.]

[11] DCLG, *Accelerating the release of public sector land - update, overview and next steps*, October 2011: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6237/2001846.pdf*. [Accessed October 17, 2014.]

[12] DCLG, *Accelerating the release of public sector land — Progress report one year on*, May 2012: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6251/2140164.pdf*. [Accessed October 17, 2014.]

a) The uncomfortable truth is that we need a redistribution of wealth; £1tn of housing equity is in the hands of the over 65s, compared to £100bn for the under 35s (i.e. one tenth of the wealth).[13] Over the last eight years the proportion of first time buyers getting help with their deposit has gone up from one in three to two in three.[14] Older people are also downsizing in order to support the younger generation.

Less well-off households will need to receive some form of public subsidy to help them afford a home.[15] The multibillion pound Help to Buy scheme is one example, as is Right to Buy. These are Conservative initiatives to help stem the decline in home ownership. But there are downsides to these initiatives. Help to Buy may simply be helping to keep house prices up and may be holding back other objectives such as Build to Rent, especially outside London. Some, such as James Meek,[16] have argued that the Housing Act 1980 and the introduction of the Right to Buy have depleted the stock of social housing to such an extent (around 1,500,000 homes have been lost), that millions of Britons have been pushed into the PRS. The necessity of the taxpayer footing the housing benefit bill also redistributes resources from the public sector to the private landlord, many of whom have built up a large portfolio on the back of this state support.

Much more is needed, especially for those without the means to buy. Danny Dorling argues that the issue is not shortage of supply but inequality. He says: "There are more bedrooms per person in Britain than ever, but too many are in mansions." As rising property wealth enriches the majority of home owners, there is a case for considering capital gains tax on homes, although this is even more politically toxic than other solutions.

The Government needs to play the primary role in bringing about a redistribution of wealth. It must use its own land bank (held on behalf of the public) which has accumulated value exponentially as the house price index ("HPI") has risen faster than inflation. In the 2014 Budget, George Osborne[17] claimed the Government wanted to sell £5bn of public land on top of £1.3bn raised through land sales since 2010.[18] While this might help land supply, the real motivation is to get receipts into government. It is simply the liquidation of the family silver or "disposal." The Mayor of London, local authorities and the Government need to find a way to use public land assets to produce huge amounts of public housing assets which go beyond the short-term notion of disposal.

Sadly, although Government holds many of the cards, it lacks the drive to make money [from servicesand create social benefit. This is well expressed by Peter Vaughan, a director at architectural firm Broadway Malyan:

> "The vast majority of public-sector assets have long been under managed, resulting in the underuse of valuable resources and poor facilities for employees and public alike … We also see plenty of inefficient publically owned buildings that could be disposed of. This will release prime development opportunities, clear up old dinosaur public buildings that are totally unsustainable, spur construction activity to boost the economy and lay the foundations for better and more efficient services and built assets."[19]

We also need to consider why the UK lacks any real regional competition for London. The initiative by George Osborne to encourage the great Northern cities to work together to provide this counterbalance

[13] Savills research for FT: *http://www.ft.com/cms/s/0/5de50358-1a88-11e0-b100-00144feab49a.html#axzz3BVh2MVO2*. [Accessed October 17, 2014.]

[14] Report from Halifax.

[15] TCPA report with CCHPR, *New estimates of housing demand and need in England, 2011–2031*, (2013): *http://www.cchpr.landecon.cam.ac.uk/Downloads/HousingDemandNeed_TCPA2013.pdf/view*. [Accessed October 17, 2014.]

[16] *London Review of Books*, January 2014: *http://www.lrb.co.uk/v36/n01/james-meek/where-will-we-live*. [Accessed October 17, 2014.]

[17] *March 2014 Budget*: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293759/37630_Budget_2014_Web_Accessible.pdf*. [Accessed October 17, 2014.]

[18] Francis Maude MP, House of Commons, March 12, 2014: *http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140312/debtext/140312-0001.htm*. [Accessed October 17, 2014.]

[19] *Financial Times*, February 20, 2014: *http://www.ft.com/cms/s/0/ef844de0-9a4c-11e3-8232-00144feab7de.html?siteedition=uk#axzz3BVh2MVO2*. [Accessed October 17, 2014.]

is admirable.[20] There are significant numbers of empty homes in the North as a result of the depopulation which followed industrial decline. It is still possible, on ordinary wages, for first-time buyers to purchase a home in Sheffield, Manchester or Leeds. Council housing is also not impossible to obtain. House price increases in London and the South East will only start to ease off when we start to develop competitor regions. Any plan to revive and promote these areas needs to consider how the less well-off will be housed, as prosperity rises.

Consequently, I propose that we use public land to achieve public housing, to provide for those who cannot house themselves in the market, and to use public assets more productively. Housing associations, as successful social enterprises, show that it is possible to achieve productive development and growth. The resources historically invested in RPs to enable them to buy or build affordable housing have never been harvested but they allow us to continue to provide for millions of people at below market cost. The social enterprise model is a glorious invention. It is energetic and entrepreneurial, while using its assets for social good.

In the rest of this paper I will suggest what more could be done by RPs and local planning authorities to achieve this outcome.

b) Registered Providers' role

Housing associations are ideally placed to create a step change in the quantities of homes supplied. Registered providers are:

- Asset-rich;
- Long-term investors with a positive track record;
- Already developers and managers of homes;
- Expert professionals with a social ethos;
- Often well established in communities;
- Trusted (mostly) by residents and have existing relationships with local authorities;
- Cross-subsidising while creating mixed and balanced communities; and
- Profitable, with low cost borrowing.

Local planning authorities' role

Where you live affects everything, from the quality of your education to the age you will die, from how clean the air is to what sort of food you have access to. In addition to this geographical truth, human beings are generally committed to, and interested in, the quality of their local area.

As the UK population expands we need more homes, and new settlements in which to build them; otherwise we risk a reversion to Victorian housing conditions where families live in shared, dilapidated rooms or travel for hours to work in poorly paid jobs.

Local planning authorities are ideally placed to facilitate this change because the planning process is:

- Democratic—driven by the public interest rather than profit;
- Balanced—the needs of all, including the poorest, are considered;
- Local, with an obligation to protect and improve the local economy, environment and society;
- Sets standards of design, sustainability, and quality of life;
- Protects human interests, and engages residents, through the development process; and
- Professional with a social ethos.

[20] Chancellor's speech, June 23, 2014, *We Need a Northern Powerhouse*: *https://www.gov.uk/government/speeches/chancellor-we-need-a-northern-powerhouse*. [Accessed October 17, 2014.]

The public holds a paradoxical view: "we want more homes, but not here"; "we want housing to be more affordable for our children, but we like rampant HPI." However, as the reality of life in the "squeezed middle" (young people with education debt facing astronomical house prices) kicks in, attitudes are beginning to shift. For the first time in generations, rising house prices are only supported by 20 per cent of the population; 57 per cent disagreed that rising house prices are a good thing.[21]

This means that local planning authorities are in a difficult position; they currently occupy a highly contested role, between different interest groups. Planners attempt to be the honest broker between the public and "greedy developers" in situations where the government wants development but the public view is generally anti-development. The presumption in favour of development is often trumped by local resistance. The largest companies, active middle class objectors and the best funded can campaign and object. Neighborhood planning and new initiatives (e.g. the Local Plan process) have the potential to mobilise and involve local people but, as Sir Terry Farrell noted in his review of architecture for the government, we don't have the education or tradition to engage with it.[22] In addition, the Local Plan process is complex and inaccessible. There is also an argument that few communities have a notion of what the future may look like. The impact of technology on housing and workplaces, on transport and leisure has hardly been acknowledged. We still largely live in Victorian-designed environments, but the world around us is changing with the advent of the web and housing needs to keep pace. Many churches and public houses, cinemas and smaller high streets are hardly frequented. How much longer will it be before most offices become redundant as we work on the move or from home?

In a country with an anti-development mindset, planning is understood as a control function rather than seen as the biggest gun in the war on housing need. Politics is always local and planning is always political. With so much money at stake, private developers counter this mindset by often deploying experienced barristers against relatively junior planning officers. The level of knowledge and authority therefore rests with developers. While the principle of the public sector getting a share of the uplifted value created through the development process is understood through the Community Infrastructure Levy, section 106 etc, the local planning authority is often swayed in practice by viability, competing objectives and short-termism.

What can be done?

What is needed here is some alchemy. To take useless land and turn it into a social business that provides affordable homes and a long-term income. This is the essential idea behind the "garden city". A disused gravel pit is given planning permission to become a city and the long-term gains are sufficient to incentivise the private sector to pay for the city to be built. The redevelopment of the Heygate estate in Southwark is being led by a developer who will produce good outcomes for the council, but the gains for the public are considerably less than will be achieved on the Aylesbury estate where the redevelopment is in the hands of Notting Hill Housing Trust ("NHHT"). In Aylesbury the NHHT will produce double the amount of affordable housing than the private developer is committed to (ie 50 per cent of the units rather than 25 per cent)

We need a political response to housing need. I believe the Government should call in the RPs to work with planning authorities to turn around degraded estates, unused public buildings and brownfield (and polluted) land, and to help create garden cities. In my view, the obvious response is RP-led "Alchemy cities" and "Alchemy estates" which will provide the quantity of quality, affordable housing that we need if the UK is to remain attractive, liveable and competitive in the years to come. RPs are becoming more

[21] Ipso Mori: *House Price Rises are Not Good for Britain*: *http://www.ipsos-mori.com/researchpublications/researcharchive/3290/Public-House-price-rises-are-not-good-for-Britain.aspx*. [Accessed October 17, 2014.]

[22] The *Farrell Review*: *http://www.farrellreview.co.uk/*. [Accessed October 17, 2014.]

entrepreneurial and have the investment capacity and patience to achieve the social outcomes that are desired.

5. The Alchemy city

We haven't had a garden city for almost a century, although we have had some fairly uninspiring "New Towns". The Labour government's 10 "Eco-towns", which garnered some excitement until the maps appeared, were quietly dropped. In 2012, David Cameron made a number of passionate speeches about new garden cities: self-contained communities surrounded by countryside. Two years later, like Labour before him, the garden city is in the long grass. As Adam Marshall from the British Chambers of Commerce said, "I don't think any of the major parties have grasped the nettle, because they are too scared of the electoral consequences."[23] When 3.3m adults (age 20–34) are still living with their parents, you have to wonder why not.

Ebbsfleet in Kent is the only garden city now. Previously a chalk quarry, since the late 1990s it has been seen as the primary south-east site for tens of thousands of new homes. But, unlike the not-for-profit Letchworth Garden City, this is to be a private sector-led scheme. Land Securities, Britain's biggest property company, started filling in the quarry 10 years ago, and expects to take another five years to fill it. The company has been granted planning permission for 6,000 homes. The first 150 homes are being built, and a three-bedroom home will sell for around £250,000. A further 250 homes are planned. The developers think that it will take around 10 years to produce 3,000 homes in Ebbsfleet. George Osborne has promised £200m of investment for Ebbsfleet, but no-one knows how this will be allocated.

Instead of using private companies to deliver housing, a better model would be to identify publically-owned land which could be given to a not-for-profit RP or RP-led partnership in areas where there is a need for additional accommodation; say one hour's commuting time from the capital, like Ebbsfleet.. Working with people who cannot afford housing, local people, and with advice from town planners and other experts, RPs could draw up plans for these cities of the future. It is our experience that people who live in an area are quite good at specifying what makes communities work, but new cities could include jobs, transport, entertainment, uncultivated areas, water, high and low buildings, opportunities for education and leisure, and safe places for young children and older people. As organisations with experience of developing, with a commitment to communities rather than profit above all, RPs can be trusted to create long-lasting and balanced communities. We would not want to produce somewhere like Stevenage; a place where affordable housing dominates.

The Government also talks about the electorally safer topic of brown field development in urban areas, as many Conservatives fear that building in the countryside would cost them their seats. Let's have another look at the regeneration option.

6. The Alchemy estate

This idea is to produce a garden city in a city, say by redevelopment of an estate, such as Thamesmead, or by decontaminating industrial land. In southeast London there is a 30-acre site where contaminated soil from the docks was dumped in the Victorian era. At the time no one believed that the city would extend that far, but it now makes sense to clean up the land and build homes on it.

What is the case for the redevelopment of council estates?

The core of this argument is the view that the segregation of the poor into estates amounts to a kind of ghettoisation. The preferred model now is housing for a range of purchasers and renters which looks harmonious and beautiful. There is also a desire to bring back the traditional street patterns in London, so

[23] *Financial Times*, July 29, 2014: *http://www.ft.com/cms/s/0/25a7b844-1725-11e4-8617-00144feabdc0.html#axzz3BVh2MVO2*. [Accessed October 17, 2014.]

that housing for any groups (gated communities as well as inward-looking council estates) is not segregated or cut-off. Of course, the rising value of land in London and other thriving communities provides viability for these projects. If 1,000 social homes are pulled down, and 1,000 new social homes are rebuilt, this means we can create 1,000 additional homes for people to buy. These new homes will be more valuable than council homes, especially in a rising market. The sales proceeds would be sufficient to pay for the replacement social homes and create a profit for the developer. As the area improves commerce will move in, and the area will become more valuable. I run an association which started in Notting Hill when it was a notorious crime spot in the 1960s. Today the private homes in the area are some of the most valuable in the world.

The Government set aside £150m to support the redevelopment of council estates in the last Budget. This is clearly not enough to support all the regeneration needed, but it's a step in the right direction.

7. What changes are necessary for RPs?

Over the years, Government has provided around £50bn of social housing grant to the RP sector. In addition, it has provided a significant financial boost by allowing housing associations to be set up to take on ownership of council housing at knock down prices. However, having achieved a position where about a tenth of all homes in England are owned by RPs, all the Government aims to do is to preserve the status quo.

In my view the HCA should now recognise that there is a housing crisis in England. When the amount made in surpluses by RPs is roughly five times the amount of grant offered annually, we must ask how we could get more out of them. The HCA should put pressure on RPs that fail to add new homes to their stock each year, seemingly happy to just house those who are lucky enough to be housed already. If RPs are bringing in the cash and not reinvesting in new homes, I would suggest that the taxpayer should be reimbursed. Alternatively, those RPs that cannot use their assets should perhaps be required to transfer them to associations who can make better use of them.

Up to now RPs have used the public assets invested in them to grow into strong, successful, asset-based businesses. I think RPs, like local and national government, have an obligation to use these assets for the benefit of those squeezed out by the rapid increase in the value of homes. Risk-averse and complacent RPs need to be forced to play a leading role in providing new homes. There are a number of ways this can be done, such as forcing the vast majority of RPs (around 1,000 of them) which do not build homes to work with the 100 or so RPs who are developing.

8. What changes are needed at Government, local government and planning authority level?

Government, local government and local planning authorities need to:

- Accept responsibility for public engagement and use the democratic process to influence views (a National Campaign for Housing).
- Take a role in active master-planning and preparing the ground.
- Plan to meet housing need.
- Site assembly with appropriate planning consents.
- Create a collaborative rather than adversarial vision, involving the local community.
- Build support for the idea of new settlements, densification, redesignation and regeneration.

Conclusion

The fact that ordinary people can no longer buy a home of their own in the areas where jobs are plentiful is a national scandal. However, we have the resources to meet the need, which is to provide an additional 100,000 homes a year. We will need a national campaign. We will need commitment and energy. We will need to release public land resources which are unproductive at present. The involvement of the planning profession is key, and I believe RPs are the vehicle we need to deliver this vision. However, a government that is willing to set high targets and identify where new settlements can be created, and old ones transformed, is the precondition for answering the question: "How can we deliver the homes we need?"

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Making the Past—Delivering the Future

Kelvin MacDonald

This lecture was due to have been given by Professor Sir Peter Hall FBA, Bartlett Professor of Planning and Regeneration. Sir Peter died on July 30 this year and left behind him a void that no one else can fill. His breadth of knowledge, his ability to enthuse and to engage and his skills in communicating marked him as unique amongst those who have contributed to planning thought and planning practice. He combined superlative academic endeavour with the ability to operate, and influence, thinking and policy at the highest levels of Government. Above all, he combined passion with humour and with a love for people. I take on this task with trepidation.

The task that Peter took on for this paper, and which I seek to tackle, is, in the RTPI's centenary year, to provide an overview of the development of town and country planning in England and set out a view of how it needs to evolve to become the agent for achieving the development the nation needs. In doing so, I need to bear in mind Peter's warning in his first book—*London 2000*—that I need to try to be positive. "One cannot write on planning, one cannot scan through its enormous literature, without being conscious of a great pitfall. It is so easy to be virtuous and vague."[1]

The Town Planning Institute (the "Royal" came later) started at a time when there was a maelstrom of thinking both about the ways we should live and about the type of places in which we should live. *Tomorrow: A Peaceful Path to Real Reform* had been published 16 years earlier, itself encapsulating trails of thought coming from such thinkers as William Morris, Henry George, Thomas Spence and James Silk Buckingham.[2] Ideas on town and neighbourhood planning were coming in from overseas, particularly Germany and the United States, and there was an eagerness and openness to learn from international examples that is sadly lacking a century later.[3]

Other bodies such as the National Housing and Town Planning Council and Town and Country Planning Association were already promulgating ideas and good practice and books such as Raymond Unwin's *Town Planning in Practice* (1909) and Bentley and Pointon Taylor's 1911 *Practical Guide In The Preparation Of Town Planning Schemes*[4] had been published and Patrick Geddes was completing *Cities in Evolution* published in 1915. In America, Daniel Burnham had proposed his Chicago Plan and the plan for Australia's new capital, Canberra, had been set out. The first planning course had started in Liverpool and the first journals devoted to planning had been published—*Der Stadtebau* in Germany in 1904 and *Town Planning Review* in 1909. Letchworth had been developed, itself following on from the work of Robert Owen, Sir Titus Salt, George Cadbury, William Lever and Joseph Rowntree. Interestingly, in addition, the Planning Inspectorate had already been operating for five years before the professional body was formed.

The first planning legislation in modern UK planning, the 1909 Housing, Town Planning, Etc. Act, bringing in the forerunners of development planning and management, had been passed five years earlier in the same year as David Lloyd George's "People's Budget". In short, those thinking about planning and urging the need for it were on a mission.

Thus, these debates about planning were already swirling when a group of men, and one woman, the Countess of Aberdeen, came together to form an Institute. In one way, they came together to proselytise and amongst the first members and honorary members were public propagandists including Patrick Geddes,

[1] Peter Hall, *London 2000* (Faber and Faber Ltd, 1963).

[2] *National Evils and Practical Remedies. With the Plan of a Model Town* (Jackson Fisher & Son, 1849).

[3] Volume 1 of the *Town Planning Review* in 1910 contained articles on, inter alia, Vienna, the Champs des Mars, notes on German Villages, and Town Planning Schemes in America.

[4] E. G. Bentley, LL.B. and S. Pointon Taylor, A.R.I.B.A, *A Practical Guide In The Preparation Of Town Planning Schemes* (George Philip & Son, Ltd, 1911) at *https://ia600406.us.archive.org/17/items/cu31924024435764/cu31924024435764.pdf*. [Accessed October 8, 2014.]

Neville Chamberlain, George Cadbury and Seebohm Rowntree. They also came together to bring those from other professions, notably municipal engineers, surveyors and architects, to advance this study.

Their object was not, as it is today, "to advance the science and art of town planning for the benefit of the public"[5] but, subtly different, to join in with, and to contribute to, this heady mix of thinking and practice; to:

> "advance the study of town-planning, civic design and kindred subjects, and of the arts and sciences as applied to those subjects; and to promote the artistic and scientific development of towns and cities."[6]

Thus, the founding fathers of the planning profession did not set out to establish a protectionist professional guild but embarked on a search for knowledge and understanding fuelled by questing and debate. Yet just 50 years after this, John ("Jimmy") James OBE, Chief Planner at the Ministry of Housing and Local Government and then Professor of Planning at Sheffield University, told the Planning Summer School that:

> "… one has the feeling that in recent years we have all been caught up in the grinding, practical details of a massive machine and that there has been little advance in fundamental ideas."[7]

How this feeling rings down the years.

This paper is not designed to be simply a history lesson, although there is history enough in it, but is an encouragement to learn from the lessons of the past when we struggle to think about the future (Aldous Huxley said: "that men do not learn very much from the lessons of history is the most important of all the lessons of history, Andre Gide said that: Everything has been said before, but since nobody listens we have to keep going back and beginning all over again"). Indeed, the lack of such learning and of such thinking may well be one of the factors that has led to some stultification in planning practice, an erosion of the standing of planners themselves and a frustration with planning that is shared,—albeit for very different reasons,—across professionals, public and private sectors, communities, political spectra and commentators.

This is a huge issue to address in a short paper and presentation. In trying to approach this I want to focus on just four aspects of it, in themselves broad and somewhat woolly headings, before taking a brief look at the system itself. These aspects are:

- What is (should be) the focus of planning?
- Where do ethics come in?
- What are (should be) the values of planning?
- The need for visionary planning

I will deal with each of these in turn.

What is (should be) the focus of planning?

The official purpose of modern planning has long been a matter for interpretation. Put in simple terms, according to an American PhD student,[8] at America's first urban planning conference held in New York in 1898 a British planner asked whether he and his colleagues were striving for beautiful people or beautiful

[5] See *http://www.rtpi.org.uk/membership/professional-standards/*. [Accessed October 8, 2014.]
[6] See *http://www.rtpi.org.uk/about-the-rtpi/*. [Accessed October 8, 2014.]
[7] J. T. James OBE, *The Next Fifty Years*, Proceedings of the TCPSS (1964) at *http://www.rtpi.org.uk/media/793447/The%20Next%20Fifty%20Years.pdf*. [Accessed October 8, 2014.]
[8] See *http://www.citylab.com/work/2012/08/brief-history-birth-urban-planning/2365/*. [Accessed October 8, 2014.]

cities. Is urban planning about physical design, he wondered, or about making things easier for the people who live in our urban spaces?

If we start at the beginning, the 1909 planning legislation was a child of its time. Guided through Parliament by Rt. Hon. John Burns MP, the President of the Local Government Board (the equivalent of the modern Secretary of State for Communities and Local Government), a man who had been imprisoned for six weeks in 1887 for arguing for the right of free speech. On May 12, 1908 he introduced the Bill into Parliament stating:

> "The object of the Bill is to provide a domestic condition for the people in which their physical health, their morals, their character and their whole social condition can be improved by what we hope to secure in this Bill. The Bill aims in broad outline at, and hopes to secure, the home healthy, the house beautiful, the town pleasant, the city dignified and the suburb salubrious."[9]

Equally, if not more, telling is his rawer language a year later when describing planning:[10]

> "The next portion of the Bill is that portion which deals with town planning. This is a new departure in the legislation of this country. I regret that it has come so late. No one can go through the East End of London, or to places like Liverpool, Leeds, Manchester and Glasgow, and see the effect, both on the physique, morale, happiness, and comfort of men, women, and children, through lack of some such condition as this 100, or at least 50, years ago, but will come to one definite conclusion, that, late though it is, it is better late than never, and that the House of Commons should not lose this opportunity of giving to communities, especially growing and industrial communities, the opportunity of consciously shaping their own development in a better way than has occurred in the past."[11]

Here we have summed up the inter-related dichotomies that have dogged planning from the start: are we talking about a system designed to create great places,[12] are we talking about a system that exists in part to give people a greater say in shaping their own places, are we talking about an intervention, justifiable or otherwise, by the state in the workings of a market, or are we talking about a system that seeks social justice, equity and even re-distribution under the guise of planning and controlling the use of land?

One of the problems facing us, and leading to frustration and ineffectiveness, may be not only that this dichotomy remains unresolved but that planning is continuing to expanding in its focus and in the expectations placed upon it. To illustrate this, instead of looking at the ebbing and flowing of academic and political debates on the nature of planning (and there has been plenty of this![13]), it is worth looking at what the 2012 National Planning Policy Framework[14] ("NPPF") thinks we are meant to be doing and achieving.

The NPPF sets out 12 core principles of planning. Breaking these down and using key words, these are that planning should:

- "… empower local people to shape their surroundings …";
- "… drive and support sustainable economic development …";
- "… identify and meet the housing, business and other development needs of an area, …";

[9] *1909 Housing, Town Planning etc. Bill: Second Reading*: HC Deb May 12, 1908 vol.188 cc.947–1063 at *http://hansard.millbanksystems.com /commons/1908/may/12/housing-town-planning-etc-bill*. [Accessed October 8, 2014.]

[10] Interestingly, it was this quote that Arthur Greenwood MP, Minister of Health, chose to use to introduce the Second Reading of the Town and Country Planning Bill in 1931. See *http://hansard.millbanksystems.com/commons/1931/apr/15/town-and-country-planning-bill*. [Accessed October 8, 2014.]

[11] See *http://hansard.millbanksystems.com/commons/1909/apr/05/housing-town-planning-etc-bill#column_736*. [Accessed October 8, 2014.]

[12] In the speech that John Burns gave to the inaugural dinner of the Town Planning Institute on 30th January 1914 he talked of: "… a movement that has for its object the emancipation of all communities from the mark of the beast of ugliness."

[13] See, e.g. Lewis Keeble, *Town Planning at the Crossroads* (1961); David Eversley, *The Planner in Society* (1973); RTPI, *Planning and the Future* (1976); T. A. Broadbent, *Options for Planning* (CES, 1979); Yvonne Rydin, *The Purpose of Planning* (Policy Press, 2011).

[14] Department for Communities and Local Government, *National Planning Policy Framework*, (DCLG, 2012). See *https://www.gov.uk/government /uploads/system/uploads/attachment_data/file/6077/2116950.pdf*. [Accessed October 8, 2014.]

- "… be a creative exercise [but] take account of market signals …";
- "… secure high quality design …";
- "… promote the vitality of our main urban areas, …";
- "… protect the Green Belts around them …";
- "… support the transition to a low carbon future …";
- "… conserve and enhance the natural environment …";
- "… reuse land that has been previously developed …";
- "… encourage multiple benefits from the use of land …";
- "… conserve heritage assets …";
- "… manage patterns of growth …";
- "… make the fullest possible use of public transport, walking and cycling …"; and
- "… improve health, social and cultural wellbeing …"

There must be a serious question as to whether any professional activity can work to so many objectives with the overlaying problem that a number of them may well conflict with each other in practice. Part of me is pleased that the NPPF has recognised the extent of the potential influence of planning but another part wonders whether we are being set up for failure. This question has dogged planning for at least 40 years.

In 1973, American political scientist Aaron Wildavsky wrote that:

> "The planner has become the victim of planning; his own creation has overwhelmed him. Planning has become so large that the planner cannot encompass its dimensions. Planning has become so complex planners cannot keep up with it. Planning protrudes in so many directions, the planner can no longer discern its shape. He may be economist, political scientist, sociologist, architect or scientist, yet the essence of his calling—planning—escapes him. He finds it everywhere in general and nowhere in particular."[15]

Perhaps the real message from the article quoted lies in its title: "If planning is everything, maybe it's nothing."

To avoid this accusation, we need to turn again to the roots of modern planning in the United Kingdom. The 1944 Government *White Paper* that heralded the 1947 Town and Country Planning Act, the essence of which forms the framework for the system we operate today, was entitled simply and directly *The Control of the Use of Land*.[16] It set out all the objectives of the incoming Government in terms of the economy, health, education, welfare, housing et al and then stated in ringing terms:

> "… all these related parts of a single reconstruction programme involve the use of land, and it is essential that their various claims on land should be so harmonised as to ensure for the people of this country the greatest possible measure of well-being and national prosperity."

In these terms, a much stronger focus on land use places planning at the heart of a Venn diagram impacting on all aspects of national policy. In 1961, Lewis Keeble wrote that:

> "I believe that a strong and true land use planning policy is among the most potent weapons for producing a higher level of civilisation."[17]

This desirable focus on land use was summed up most recently by Barry Needham who has written:

[15] A. Wildavsky, "If Planning is Everything, Maybe It's Nothing" [1973] *Policy Sciences* 4, 127–153.

[16] For interest, see *The Spectator*'s contemporaneous comment on this—"The Land and The People" June 29, 1944, p.3 at *http://archive.spectator.co.uk/article/30th-june-1944/3/the-land-and-the-people*. [Accessed October 8, 2014.]

[17] Lewis Keeble, "Town Planning at the Crossroads" [1961] The Estates Gazette Ltd.

> "The defining characteristic of spatial planning is that it is concerned with how land is used, not land in general, but plots of land with specific locations. How land is used in one location can affect others in other locations, and also others in the future. Having access to (appropriate) land is necessary for human and non-human life. For these reasons, how one person decides to use land can have consequences for others, and those consequences can be very important."[18]

I set my argument in the context of the fact that, for example, Scotland already has a *Land Use Strategy*[19] whose *Foreword* echoes the emotion of the 1944 *White Paper* but sets its thinking firmly within the context of climate change.

> "There will always be difficult choices to be made about how best to use land. Increasing demands and expectations often exert considerable and competing pressures. In the relatively recent past we have witnessed: changing consumption patterns; a growing acceptance that we need to adapt our lives and the way we use resources in order to reduce greenhouse gas emissions; pressures on productive land from built development; changes to weather patterns which impact on productivity and which increase flood risk."

Five years ago the Government attempted to focus more on land use by establishing a "Foresight" project on *Land Use Futures*. The valuable report[20] on this project (which has not, like so many other reports, been airbrushed from history in the reorganisation of the Government website) concludes that:

> "Government has already made progress …, but a key conclusion of this Report is that there is a strong case to do more. Achieving a more coherent and consistent approach to guiding land use and management so that more sustainable and valued outcomes are delivered is a recurrent theme throughout this report."

In the United States, one of the key bodies driving forward thinking on planning is the Lincoln Institute of Land Policy which:

> "… strives to create a dialogue about issues surrounding the use, taxation, and regulation of land."[21]

In placing this emphasis on the core "currency" of planning—the use of land—I am not arguing a return to the days when a focus on that legislative phrase "the development or other use of land" led to ridiculous consequences. I was a planner in the Department of the Environment in the late 1970s and sat in on meetings in which policies in structure plans, such as those relating to public transport usage, were being struck out because they were not "land use" policies.

Nor am I arguing, although some would, that all that thinking on spatial planning took us into a cul-de-sac. As a profession we really do need to understand the interconnected consequences and possible outcomes on a range of players that arise from a decision at a particular time to promote or allow the allocation of a particular site to a particular use or uses at a particular density in a particular form, or of refusing to allocate that site.

Even in this brief description we can see that planning creates winners and losers and, therefore, cannot be value free. Hence, in order to learn from the past in looking to the future of planning, we need to re-visit the concept of the ethics of planning and the values inherent in it.

[18] G. Hoekveld and B. Needham, "Planning Practice between Ethics and the Power Game: Making and Applying an Ethical Code for Planning Agencies" [2013] *International Journal of Urban and Regional Research* 37.

[19] See *http://www.scotland.gov.uk/Resource/Doc/345946/0115155.pdf*. [Accessed October 8, 2014.] It is also worth recording that the second (2006) Barker Review was of the *Land Use Planning System* which stated that (2.11) "when the Government sets out one of the goals of sustainable development as being to ensure 'efficient use of land' it therefore needs to be clear that this does not imply minimal use of land but rather the best use of limited land resources, taking all factors into account."

[20] *Land Use Futures: Making the most of land in the 21st century* (2010) at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288843/10-631-land-use-futures.pdf*. [Accessed October 8, 2014.]

[21] See *http://www.lincolninst.edu/education/*. [Accessed October 8, 2014.]

Where do ethics come in?

In some ways, it is hard to pin down what exactly we are marking in celebrating the RTPI's centenary. Certainly the birthday of an institute and, now, of an institution. However, as set out at the beginning of this paper we are not marking the centenary of planning thought or of planning practice. I believe, however, that one of the things that we should be celebrating is the codification of a set of professional ethics.

In terms of planning, our ethical basis has been set out succinctly by academic Stephen McKay[22]:

> "The ethical basis for the planning profession is that planners obtain specialised knowledge and skill sets to serve society and protect the public interest with honesty and integrity."[23]

This definition focuses on a number of different elements: knowledge and skills, honesty and integrity, and the public interest.

At the heart of any professional approach to planning must be our base of knowledge and skills and our ability to put forward relevant evidence in an unbiased way. Relevantly, there is some literature on the selective or biased use or falsification of statistics by planners to support a case that a client or a political master is wedded to already. A recent article by Oxford academic Bent Flyvbjerg[24] takes the American Planning Association ("APA") to task for, in his estimation, "actively suppressing publicity of malpractice concerns and bad planning in order to sustain a boosterish image of planning". His research had dealt with the realm of what he called "uncomfortable knowledge".

In his article Stephen McKay compares:

> "… the balance sheet model of the accountant to the role of the lawyer, where in the former there is a duty to provide objective and equitable disclosure, yet in the latter the role is one of a partisan advocate; consequently, neither impartial nor even-handed. Until such time as planners are mandated to adopt the balance sheet model, practitioners, particularly those in the private sector, cannot be called to book for partisan activity unless they have failed in their overarching duty to act in the public interest."[25]

I believe that one of the bases for considering the role of planning in the future is that, in fact, they can be called to book for partisan activities that do not represent their own professional view.

Honesty and integrity are at the heart of any professional activity. I believe that the key part of the RTPI Code of Conduct is the clause that states that:

> "Members shall not make or subscribe to any statements or reports which are contrary to their own bona fide professional opinions and shall not knowingly enter into any contract or agreement which requires them to do so."

Nearer to home, and, perhaps, more prosaically than the APA example, at least one submission of evidence to the Communities and Local Government Select Committee inquiry on which I am working is from a local planning authority which has accused developers of deliberately overestimating costs and underestimating development value in order to avoid planning obligations, perhaps all just part of the increasing, almost routine, tussles between developers and local planning authorities on the viability of those schemes.

[22] See also Peter Marcuse, "Professional Ethics and Beyond: Values in Planning" [1976] *Journal of the American Institute of Planners* Vol.42, Issue 3 at *http://www.tandfonline.com/doi/abs/10.1080/01944367608977729#.VBL9gPlSYlA*. [Accessed October 8, 2014.]
Also Martin Wachs, *Ethics in Planning* (Transaction, 1985).

[23] Stephen McKay, "Efficacy and ethics: An investigation into the role of ethics, legitimacy and Power in planning" [2010] *Town Planning Review* 81(4) at *http://dx.doi:10.3828/tpr.2010.10*. [Accessed October 8, 2014.]

[24] Bent Flyvbjerg, "How planners deal with uncomfortable knowledge: The dubious ethics of the American Planning Association" [June 2013] *Cities* Vol.32, 157–163 at *http://www.sciencedirect.com/science/article/pii/S026427511200193X*. [Accessed October 8, 2014.]

[25] Stephen McKay, "Efficacy and ethics: An investigation into the role of ethics, legitimacy and Power in planning" [2010] *Town Planning Review* 81(4).

It is important to be clear that planning professionals cannot excuse partial views, or their selective use of information, on the grounds that they think they are acting in the public interest, by trying to ensure a particular development either goes ahead or is refused—evidence rules OK!

The focus on society and the public interest are very important. Remember that the object of the RTPI is "to advance the science and art of planning *for the benefit of the public*"[26] (my emphasis). This focus was clearly reinforced in the RTPI's 2000 *New Vision for Planning*[27] which stated that:

> "The New Vision sees planning as an activity undertaken by society as a whole: an activity that requires the active participation of all the people, communities and interests involved—an activity facilitated, but not owned, by professional planners."

To some this might undermine the very notion of a professional cadre or elite,[28] or to put it in less academic language, this places the professional planner firmly on tap and not on top, and it is a bold move to define a profession by its relationship with the public rather than with its clients and paymasters, or to its own members.

In part, this relationship to the public (dare I say to society) has been defined by our attitudes to community involvement/public participation.

Concern about the balance of technocratic planning and a type of planning that allows the public at least to have their say goes back way before the 1969 *Skeffington Report*.[29] In 1947, the then Minister for Town and Country Planning, Lewis Silkin told the House of Commons during the 3rd Reading of Town and Country Planning Bill that:

> "It is not merely landowners in the area who are affected or even business interests. Too often in the past the objections of a noisy minority have been allowed to drown the voices of other people vitally affected. These too must have their say, and when they have had it, the provisional plan may need a good deal of alteration, but it will be all the better for that since it will reflect actual needs democratically expressed. In the past, plans have been too much the plans of officials and not the plans of individuals, but I hope we are going to stop that."[30]

However, we do have to recognise that, even since 1947, senior planners have held, and do hold, a variety of views about communities, including views that reflect stances that many in planning would not own. For example, Sir Wilfred ("Wilf") Burns was the City Planning Officer in Newcastle. He wrote in 1963, five years before he became the Government's Chief Planner[31] that:

> "In a huge city, it is a fairly common observation that the dwellers in a slum area are almost a separate race of people with different values, aspirations and ways of living … One result of slum clearance is that a considerable movement of people takes place over long distances, with devastating effect on the social groupings built up over the years. But, one might argue, that is a good thing when we are dealing with people who have no initiative or civic pride. The task, surely, is to break up such groupings even though the people seem to be satisfied with their miserable environment and seem to enjoy an extrovert social life in their own locality."[32]

[26] See *http://www.rtpi.org.uk/membership/professional-standards/*. [Accessed October 8, 2014.]

[27] Royal Town Planning Institute (2000) *A New Vision for Planning* at *http://www.rtpi.org.uk/media/7142/new-vision-full.pdf*. [Accessed October 8, 2014.]

[28] W. Arthur Lewis went further and declared in 1949 that "We are all planners now,"—quoted in "We Are All Planners Now" [2008] *Planung und Dekolonisation in Afrika, Geschichte und Gesellschaft*.

[29] Skeffington Report, *Report of the Committee on Public Participation in Planning: People and Planning* (HMSO, 1969).

[30] Town and Country Planning Bill, HC Deb January 29, 1947, vol.432, cc.947–1075 at *http://hansard.millbanksystems.com/commons/1947/jan/29/town-and-country-planning-bill*. [Accessed October 8, 2014.]

[31] In 1968, he became Chief Planner at the Ministry of Housing and Local Government and in 1971 he became Deputy Secretary at the Department of the Environment.

[32] W. Burns, *New Towns for Old* (Leonard Hill, 1963).

I was at an event recently in which some 60 representatives of parish councils, local amenity societies and local campaigning groups were encouraged to have their say about planning. Perhaps what was not surprising was their antipathy to those developers whom, in their words, placed them "under siege". What was more surprising were wide ranging tales of the lack of involvement by, or even response from, local authorities and a widespread opinion that the new localism was just a sham.

If planning really is to be for the benefit of the public, then we do all need to return to an approach to practice which puts an understanding of public concerns and a willingness to address them at its heart. I know that this is much easier said than done at a time when the planning service has suffered more than many parts of local government in the cuts. But maybe a willingness by local government to prioritise planning is tempered by a lack of appreciation of its worth by sections of the electorate.

What are (should be) the values of planning?

I have already briefly discussed ethics and the professional values of planning in terms of such attributes as integrity. It is useful now to talk about values in another sense, almost in terms of the beliefs inherent in planning. Here we can really teeter on the edge of Peter Hall's pitfall of virtue combined with vagueness.

In 1974, then radical magazine, *Time Out*, expressed some surprise, and maybe irritation, that planners even had values:

> "Over the years, the planners have carefully cultivated the image of detached professionals doing a technical job involving no value judgements for the good of society at large. But conflicts inside and outside the profession have shattered the notion of apolitical planning. … Even the RTPI journal now carries long articles on the ideology of planning."[33]

First, we need to step back and think about the fact that the whole basis of planning is radical. In January 1947, the American current affairs magazine *Time* stated that:

> "Britain's Labor Government this week proposed a revolutionary act — in its implications the most sweeping act since the Soviet Government's decree of forced collectivization of the peasants (1929). It was the 'Town & Country Planning Bill, 1947' drawn up by Lewis Silkin, Minister of Town & Country Planning."[34]

I should not have to argue as to whether or not planning is discriminatory in the purest sense of that word. The 1997 third report of the Committee on Standards in Public Life, the Nolan Review,[35] stated that:

> "Planning is clearly a subject that excites strong passions and for good reason. The planning system frequently creates winners and losers; it involves the rights of others over one's property; the financial consequences of a decision may be enormous."

The mere fact that any planning decision creates winners and losers means that it is potentially discriminatory.

We can take this radicalism further. Barry Needham's description of the nature of spatial planning ends with a reflection:

[33] "Planners on the Rampage" *Time Out*, No.240, October 4–10, 1974.
[34] *Time*, January 20, 1947.
[35] *Third report of the Committee on Standards in Public Life: Local Government* (HMSO, 1997) at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336864/3rdInquiryReport.pdf*. [Accessed October 8, 2014.]

> "It follows that the effects of spatial planning are almost always discriminatory: the consequences benefit some more than others."[36]

In one sense RTPI's *Code of Professional Conduct*[37] covers this explicitly by stating that:

> "In all their professional activities members shall not discriminate on the grounds of race, sex, sexual orientation, creed, religion, disability or age and shall seek to eliminate such discrimination by others and to promote equality of opportunity."

This phrasing could, of course, more easily be read more in the context of equal opportunities and human rights legislation than in the context of the planning acts. However, in our thinking about the type of planning that we may need in the future, we need to make this focus on discrimination a little harder edged.

For example, in the United States there has long been discussion and protest about the potential and actual discriminatory nature of zoning on the basis that, for example, zoning for a fairly low residential density for single dwellings at a low plot ratio could mean that those sections of society who could not afford such housing would be excluded from certain areas. Relevantly, this historic concern about discriminatory zoning extends to today.

The US Department of Justice has found it necessary to make it clear that the US Fair Housing Act makes it unlawful:

> "… to utilize land use policies or actions that treat groups of persons with disabilities less favorably than groups of non-disabled persons. An example would be an ordinance prohibiting housing for persons with disabilities or a specific type of disability, such as mental illness, from locating in a particular area, while allowing other groups of unrelated individuals to live together in that area."[38]

Just three years ago the Public Interest Law Center of Philadelphia issued a statement decrying the fact that proposed zoning changes in Philadelphia which banned group homes serving persons with disabilities and methadone clinics in residential areas would be discriminatory and against Federal law.[39]

Even more recently, on April 24, 2014, a Federal Judge has ruled that Garden City in Nassau County, NY must remedy practices that led to intentional discriminatory zoning:

> "According to the judgment, the Village of Garden City and its Board of Trustees must now implement changes to their residential housing practices to remedy the effects of their prior intentionally discriminatory conduct. The judgment comes on the heels of Judge Spatt's historic 6 December 2013 ruling that Garden City violated the Fair Housing Act, the United States Constitution, and other civil rights statutes by enacting a discriminatory zoning ordinance in 2004. The Court found that the Village's action illegally discriminated based on race and national origin against minorities and perpetuated segregation, which has allowed Garden City to remain a white enclave surrounded by predominantly minority neighboring towns."[40]

[36] G. Hoekveld and B. Needham, "Planning Practice between Ethics and the Power Game: Making and Applying an Ethical Code for Planning Agencies" [2013] *International Journal of Urban and Regional Research* 37.

[37] Royal Town Planning Institute, *Code Of Professional Conduct* (2011) effective from January 1, 2012 at *http://www.rtpi.org.uk/media/831098/code_of_professional_conduct_2012.pdf*. [Accessed October 8, 2014.]

[38] *Joint Statement of The Department of Justice and The Department of Housing and Urban Development on Group Homes, Local Land Use, and The Fair Housing Act* at *http://www.justice.gov/crt/about/hce/final8_1.php*. [Accessed October 8, 2014.]

[39] *Statement of the Public Interest Law Center of Philadelphia to the Philadelphia City Council Concerning Proposed Zoning Changes* (2011) at *http://www.pilcop.org/wp-content/uploads/2012/04/Housing_Advocacy_Zoning-Statement.pdf*. [Accessed October 8, 2014.] See also *http://www.fhcsp.com/Publications/Zoning_Fact_Sheet.pdf* [Accessed October 8, 2014] and Allison Shertzer, Tate Twinam, Randall P. Walsh, *Race, Ethnicity, and Discriminatory Zoning*, NBER Working Paper No.20108, May 2014.

[40] See *http://www.hoganlovells.com/newsmedia/detail.aspx?news=3087*. [Accessed October 8, 2014.]

One clear basis for the emergence of planning in the United Kingdom in the 19th century was a concern for the health of the working classes. In that sense, planning does have a heritage of not simply "not discriminating against" but discriminating in favour of particular groups in society.

In America, this duty is spelled out in the current American Institute of Certified Planners' *Code of Ethics and Professional Conduct*[41] which states that:

> "We shall seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration. We shall urge the alteration of policies, institutions, and decisions that oppose such needs."

This reference to "a special responsibility for" does need to be set in the context of the fact that the United States has a more explicit history of thinking about, and practicing, a closer relationship between professional planners with, for example, a state funded system of planners embedded in, and acting as advocates for, particular communities.[42] This was known as advocacy planning. Advocacy planning was described by its main proponent, Paul Davidoff, in 1965:

> "… Planners should be able to engage in the political process as advocates of the interests both of government and of such other groups, organizations, or individuals who are concerned with proposing policies for the future development of the community."

The RTPI has no such special responsibility to plan for the needs of the disadvantaged built into its code of professional conduct. Interestingly, however, on the international stage it is one of the founding signatories of a declaration that commits it to just such an approach.

The Global Planners Network ("GPN") was formed in advance of the 2006 UN World Urban Forum in Vancouver. The GPN's Vancouver Declaration, signed by the RTPI, states boldly that:

> "We have a responsibility, along with others, to future generations for custodianship of this planet and its habitats, and to those within our own generation who are disadvantaged, especially the poor and those who lack adequate shelter."

Also that:

> "We stand for Planning as an inclusive process. Planning is both strategic and local, integrative, participatory, creative, embracing cultural diversity and rooted in concerns for equity."[43]

Such sentiments may be seen to be apposite on the world stage. Planning is emerging from a period when it was seen as being part of the problem rather than as the solution in relation to poverty and global urbanisation. UN-HABITAT put this clearly in stating that:

> "Contemporary urban planning systems in most parts of the world have been shaped by 19th century Western European planning … Frequently, these imported ideas were used for reasons of political, ethnic or racial domination and exclusion, rather than in the interests of good planning."[44]

[41] *Code of the American Institute of Certified Planners/American Planning Association* June 1, 2005—revised 2009 At *http://www.planning.org/ethics/ethicscode.htm*. [Accessed October 8, 2014.]

[42] P. Davidoff, "Advocacy and Pluralism in Planning"[1965] *Journal of the American Institute of Planners* Vol.31 No.4. See also B. Checkway, (ed), "Paul Davidoff and advocacy planning in retrospect" [Spring 1994] *Journal of the American Planning Association*, Vol.60 No.2, 139–158 and the critique in Phillip Allmendinger, "Planners and Advocates" in Phillip Allmendinger, *Planning Theory* (Palgrave Macmillan, 2009), pp.148–171.

[43] World Planners Congress Vancouver Declaration 2006 at *http://www.globalplannersnetwork.org/pdf/06declarationenglish.pdf*. [Accessed October 8, 2014.] The subsequent GPN 2012 Naples Declaration slightly reduces the strength of the statement by talking about reducing discrimination at *http://www.globalplannersnetwork.org/pdf/naplesdeclaration.pdf*. [Accessed October 8, 2014.]

[44] UN_HABITAT, *Planning Sustainable Cities: Global Report on Human Settlements 2009* (Earthscan, 2009) at *http://mirror.unhabitat.org/pmss/listItemDetails.aspx?publicationID=2838*. [Accessed October 8, 2014.]

This can be raised in the context of, for example, enforced displacement using Planning legislation in Zimbabwe[45] and to planning in politically sensitive areas including occupied territories.[46]

Attitudes to the necessity for proper planning to tackle issues such as global warming, urbanisation and resource distribution are changing but there are indications that the type of planning adopted may no longer derive from the 1947 Act, as many planning systems and approaches around the world did. A recent article on development in Mumbai records that:

> "… the current discourse calls for a break away from the 'EuroAmerican' models of urban planning and advocates alternative urban theories with the perspective of 'seeing from the south'."[47]

The fact that a different approach to planning may be emerging globally does, I suggest, add urgency to UK planners' responsibility to think more about their responsibility, from a fairly privileged position, for the abilities of planning to act globally. Take just one set of statistics. The UN took a simple correlation[48] between the number of RTPI members and the total population of the United Kingdom to show that there were 37.63 planners per 100,000 population in 2011.[49] This is one of the, if not the, highest ratio in the world. Australia had 23.47 and the United States had 12.77. Ghana had 0.6, Nigeria had 1.44, Uganda had 0.24, India had 0.23.

Ultimately, I am arguing for the (re)introduction of a form of moral imperative in planning in the United Kingdom. The use of the concept of morality in terms of such a professional activity may seem strange. However, like so many points in this paper, it has a long history. I have already quoted John Burn's introduction to the 1909 Housing, Town Planning, Etc. Act in which he talks of improving the morals of the people. We might think that these are simply a reflection of the context of the time. But, at a much more specific level, are we not now involved in some form of implicit moral judgment when we, or, in this case, the DCLG, single out betting shops and pay-day loan companies for special treatment under the Use Classes Order. The recent "technical" consultation on planning,[50] for example, states that the proposals are a key part of *Gambling Protections and Controls* published on April 30, 2014 but do not evidence the effects on land use that these changes may bring.

I am also arguing that planning in England should make its values towards and responsibilities for those who are disadvantaged more explicit. Internationally, it will make sense to write that:

> "In many countries, a disproportionate amount of public investment, especially investment in infrastructure, goes to the larger cities, particularly national capitals. Attempts to 'decentralize' economic activities to secondary cities are unlikely to be successful unless the decentralization is supported by pro-poor investment in infrastructure and public services, and by the financial and institutional strengthening of local authorities."[51]

[45] Mrs Anna Kajumulo Tibaijuka, *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe*, UN-HABITAT (2005) at *http://ww2.unhabitat.org/documents/ZimbabweReport.pdf*. [Accessed October 8, 2014.]

[46] See, e.g. Peter Marcuse, "Ethical issues confronting planners in the West Bank" [2010] *Town Planning Review* Vol.81, No.6, 605–607. See also Vanessa Watson, "The planned city sweeps the poor away …: Urban planning and 21st century urbanisation" [October 2009] *Progress in Planning*, Vol.72, Issue 3, 151–193 at *http://www.sciencedirect.com/science/article/pii/S030590060900052X*. [Accessed October 8, 2014.]

[47] Abhay Pethea, Ramakrishna Nallathigab, Sahil Gandhia, Vaidehi Tandelc, "Re-thinking urban planning in India: Learning from the wedge between the de jure and de facto development in Mumbai" [2014] *Cities* 39 120–132 at *http://www.sciencedirect.com/science/article/pii/S0264275114000286*. [Accessed October 8, 2014.]

[48] Waheed Kadiri, *The State of Planning in Africa*: An Overview, UN-HABITAT (2013) at *http://unhabitat.org/the-state-of-planning-in-africa/*. [Accessed October 8, 2014.]

[49] I recognise that this statistic is not strictly accurate as a number of RTPI members work in other countries, notably in Hong Kong. I do not consider, however, that this discrepancy invalidates the overall point.

[50] Department for Communities and Local Government (2014) Technical consultation on planning, DCLG. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339528/Technical_consultation_on_planning.pdf [accessed October 23, 2014].

[51] *Sustainable urbanization: Thematic Think Piece* (UN Habitat, May 2012) at *http://www.un.org/millenniumgoals/pdf/Think%20Pieces/18_urbanization.pdf*. [Accessed October 8, 2014.]

In the United Kingdom however, such concepts as pro-poor investment may seem alien to us but let me give you other examples from day-to-day planning practice: the use of the planning system to deliver affordable housing, and, in part, the preference for public transport provision over the private car.

So we come to one of the difficulties in arguing that in planning in the future we should return in some measure to our ethical and moral roots. In becoming engaged even more in the political process, don't we ourselves move from professional to politician?

I can stand accused of wanting to change planning from an apolitical ethical activity to a (P)political one. I do not feel that planners can claim to be aloof from Political policy any more than they can claim to be aloof from their client's objectives. At a national level the history of planning has shown clearly that the planning we get results from the political philosophy of the government we get, perhaps because we have not been adept at articulating the core value and values of planning in the way that the RTPI is starting to do now.

The Hong Kong Institute of Planners makes this latter responsibility explicit in its *Code of Professional Conduct* concept of a relationship with the public further. In a section of the Code of entitled Responsibility to Society, it states that:

> "Members of the Institute in discharging their responsibilities to their employers and the profession shall at all times be cognisant of the interests of the general public in matters of town and country planning … Members are encouraged to extend public understanding of the planning profession, and to offer professional advice and comments to the government and related authorities on planning policies and implementation provided that any adverse criticism is neither malicious nor with improper motives."[52]

At the local level, as Norman Krumholz, former Planning Director of Cleveland in the US so pithily stated[53] some 13 years ago:

- "Planning is essentially a political activity, rife with value judgements.
- The simple notion that planners advise and politicians decide is a myth that has never reflected practical experience.
- A planner who undermines or embarrasses a powerful politician is skating on thin ice with the day rapidly warming.
- Those who own the most property generally also have the most influence in the law and in planning decisions."

This is a fine line for local planning officers, who need to advise applicants on the acceptability of their proposals, but clearly taking account of the known views of their planning committee members, such as whether they will favour or resist the provision of car parking, and seek a car-free scheme.

I suggest that knowledge of the political views and priorities of your elected members is part of that evidence base which, I have tried to argue, lies at the heart of proper planning. We are in what Donald Schon[54] called the "swampy lowland where situations are confusing 'messes' incapable of technical solution", whether we like it or not.

[52] Hong Kong Institute of Planners (1995) *Code of Conduct* July 1 at *http://www.hkip.org.hk/En/SubContent.asp?Bid=5&Sid=12*. [Accessed October 8, 2014.]

[53] N. Krumholz, "Planners and politicians: a commentary based on experience from the United States" [April 2001] *Planning Theory & Practice*, Vol.2 No.1, 96–100.

[54] D. Schon, *The Reflective Practitioner* (Arena, 1983), p.374.

The need for visionary planning

Visionary planners do not have to be impractical opium eaters. Thomas Sharp had written in the most desperate days of the second war that:

> "Any future planning must be positive planning: not merely planning that restricts and controls, but planning that performs."[55]

As is now becoming a theme of this paper, a focus on visionary planning is nothing new. The founding fathers of modern planning talked of vision. US planning academic Michael P. Brooks harks back to this when he wrote in 1988 that "we must confront and deal with the soul of the profession" and went on to state that:

> "… we sorely need to return to the utopian tradition in planning. The urban planning profession needs a new generation of visionaries, people who dream of a better world, and who are capable of designing the means to attain it. That, after all, is the essence of planning: to visualize the ideal future community, and to work toward its realization."[56]

One of the key parts of this statement is the twin and equal emphases on utopian dreaming and on designing the means to attain those dreams. The great Lewis Mumford[57] wrote in his introduction to the 1946 edition of *Garden Cities of Tomorrow* that:

> "Howard's prime contribution was to outline the nature of a balanced community and show what steps were necessary, in an ill-organised and disorientated society, to bring it into existence."[58]

Planning performs simply by sticking to the ethics that I have discussed above, the use of its skills[59] and knowledge with integrity and honesty in the interests of the public. Even starting from this point, we can and must bring a degree of creativity to everything we do. For example, the American Planning Association's Ethical Principles in Planning[60] include the requirement to:

> "Examine the applicability of planning theories, methods and standards to the facts and analysis of each particular situation and do not accept the applicability of a customary solution without first establishing its appropriateness to the situation."

Not going for the usual approach is a start but being visionary is something else.

I have mentioned Daniel Burnham's 1909 plan for Chicago. It was Burnham that captured one of the essences of visionary planning:

> "Make no little plans. They have no magic to stir men's blood and probably themselves will not be realized. Make big plans; aim high in hope and work, remembering that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with

[55] Thomas Sharp, *Town Planning* (Pelican Books, 1940).

[56] Michael P. Brooks, "Four Critical Junctures in the History of the Urban Planning Profession: An Exercise in Hindsight" [1988] *Journal of the American Planning Association*, 54:2, 241–248 at *http://dx.doi.org/10.1080/01944368808976481*. [Accessed October 8, 2014.]

[57] It was Lewis Mumford who wrote one of the greatest pieces of planning guidance: "Forget the damned motor car and build the cities for lovers and friends".

[58] Lewis Mumford, "The Garden City Idea and Modern Planning", introduction to Ebeneezer Howard, *Garden Cities of Tomorrow* (Faber and Faber, 1946).

[59] Although it is worth bearing in mind that sometimes the skills of the most visionary planners fall short. Sir Patrick Abercrombie's 1944 Greater London Plan embodied five assumptions:

- "that no new industry shall be admitted to London and the Home Counties except in special cases
- the [population] numbers in the centre will decrease, those in the outer area will grow
- the total population of the area will not increase but … will be slightly reduced
- If the Port of London ceases to thrive, London will decay
- It is assumed that new powers for planning will be available, including powers for the control of land values."

All but the last assumption were wrong.

[60] See *https://www.planning.org/ethics/ethicalprinciples.htm*. [Accessed October 8, 2014.]

> ever-growing insistency. Remember that our sons and grandsons are going to do things that would stagger us. Let your watchword be order and your beacon beauty. Think big."[61]

In another few years, will we remember and revere those planners who met the DCLG targets for speed of decision making no matter what the outcomes of those speedy decisions? Will we remember and revere those planners who failed to even set out a vision in a local plan for the area that they were meant to be caring for and about?

Will we remember and revere those planners who buried their professional opinions and values in the name of serving the client or a Political directive. It was that great patrician Sir Patrick Abercrombie who wrote in 1943 that:

> "The plan should not be in the hands of the drill sergeant nor should the city be under the domination of the muddler who will talk about the Law of Supply and Demand and the Liberty of the Individual."[62]

I suggest that we will remember those planners who had the vision, skill, tenacity and solid professional knowledge to drive through what the American Planning Association calls "transformationational" projects. Amongst these I list Jan Gehl, Danish urban designer; Larry Beasley, former co-director of Planning for the City of Vancouver; Alison Nimmo, Chief Executive of the Crown Estate; Jaime Lerner, planner and architect and Mayor of Curitiba in Brazil[63]; Mitch Silver,[64] formerly Director of Planning for Raleigh in North Carolina and now parks commissioner for New York City; Sir Terry Farrell, and, even, the planning department of Croydon BC.[65] You will, I hope, have your own list.

You may well also have your own list of transformational projects and ideas. Here, I will just mention two from my list. First, a project and then an idea that is yet to find its time.

The project is the recovery of the Cheonggyecheon River in Seoul described here by the Global Restoration Network:

> "An engineering survey conducted in 2000 revealed structural weaknesses in the roads and indicated a need for a costly renovation project. In lieu of investing in this congested traffic infrastructure, the Seoul City Government opted to demolish the roads and restore flow to the river … A two-year project costing nearly $1 billion was thus begun in 2003, and the river was re-exposed and made the focal point of a larger urban renewal effort. Traffic was re-routed, bridges were built across the river, public parks and recreational space were created, and sites of historic and cultural importance in the general vicinity were renovated. In the two years since the project's completion, more than 50 million visitors have flocked to the site, and investment in the downtown area has increased dramatically. Moreover, the reduction in traffic has resulted in a significant improvement in air quality and a decrease in local temperatures during the summer months."[66]

Next the idea. Peter Hall wrote about the Greater London Regional Planning Committee's interim report of 1929 which, he stated:

> "… proposed a complete reversal of the then planning system: instead of planning authorities trying to reserve pieces of land for open space, they should allocate certain areas for building, on the assumption that all the remainder be left open: towns against a background of open space."

UK architect Sir Terry Farrell brought this up-to-date when he proposed:

[61] See *http://articles.chicagotribune.com/1992-01-01/news/9201010041_1_sentences-chicago-architects*. [Accessed October 8, 2014.]
[62] Sir Patrick Abercrombie, *Town and Country Planning* (The Home University Library of Modern Knowledge, OUP, 1943).
[63] See *http://www.citiesforpeople.net/cities/curitiba.html*. [Accessed October 8, 2014.]
[64] See *http://www.theguardian.com/society/2013/jul/02/mitchell-silver-redesigning-way-live*. [Accessed October 8, 2014.]
[65] See a profile of Croydon's planners by Rowan Moore in the *Observer* on February 28, 2010.
[66] See *http://www.globalrestorationnetwork.org/database/case-study/?id=123*. [Accessed October 8, 2014.]

> "A deliberately, proactively and committedly designed 'Thames National Park' reaching right through the heart of the city to the limit of the tide at Teddington would truly celebrate London's urban/rural relationship. A high quality of stewardship and maintenance planned for and built in from the outset would provide greater certainty for investment and return."[67]

Think about the implications of flipping our perceptions about how we undertake major developments against a background of green rather than threading green infrastructure through a development, sometimes almost as an afterthought. Think about how carefully we would need to plan and deliver the Thames Gateway developments, including Ebbsfleet, if the area had been designated a national park.

Finally, I must mention a visionary initiative that has never happened in England: a national spatial plan. Instead the visionary work is being done by the RTPI with their work on a *Map for England*.[68] Once again, such work has a long history, in 1942, a group of campaigners funded by business interests, got together to draw up maps[69] that illustrated the points made in the Scott, Uthwatt and Barlow Reports as a precursor and an encouragement to what they hoped would be a Government post-war National Plan; an ambition that was never fulfilled.

I am convinced that we really do need a national spatial plan.

The system

Finally, we come back to the system. I have left it to the end not because it is an afterthought but because any thinking about the system must follow, and not precede, thinking about objectives and values for and in planning.

We know the problems with the system and have known them for some time:

> "Three main defects have now appeared in the present system. First, it has become overloaded and subject to delays and cumbersome procedures.
>
> Second, there has been inadequate participation by the individual citizen in the planning process … Third, the system has been better as a negative control on undesirable development than as a positive stimulus to the creation of a good environment."

We would certainly agree with the first and last points and maybe, even, with the second so it is salient to record that this analysis of the ills of the system was set out nearly half a century ago in the 1967 White Paper on *Town and Country Planning* and followed the evaluation of the system undertaken by the Planning Advisory Group set up 50 years ago this year.[70]

Fifty years on, after our many attempts to improve and reform the system, it remains cumbersome. Rather that participation being inadequate, we are in a position where we are asking for more consultation at more poorly understood strangely described stages of plan making, and this is not resulting in better participation. Rather than plan for a great urban areas, we proceed by turning down the bad stuff where we can, in the hope that the eventual outcome will somehow be good planning.

In fact, attempts to reform the system had started even earlier than the 1965 Planning Advisory Group report. Just two years after the first appointed day of the 1947 Act, Hugh Dalton, the last Minister for Minister of Town and Country Planning in Attlee's post-war Labour Government described the 1950 GDO which replaced the more stringent 1948 GDO as "an exercise in freedom".[71]

[67] See *http://www.terryfarrell.co.uk/data/profile/news/Thames%20Gateway_Core%20Vision.pdf*. [Accessed October 8, 2014.]
[68] See *http://www.rtpi.org.uk/knowledge/policy/map-for-england/*. [Accessed October 8, 2014.]
[69] *Maps for the National Plan* (RTPI, 1942).
[70] Ministry of Housing and Local Government, Scottish Development Department, Welsh Office (1967) *Town and Country Planning*, HMSO, Cmnd.3333.
[71] Quoted in Lewis Keeble,"Town Planning at the Crossroads" Estates Gazette Ltd, 1961.

Given this history of flawed responses to a flawed system, I, perhaps amongst others, thought that the commitment in the 2010 Coalition Agreement that "in the longer term, we will radically reform the planning system"[72] meant what it said.[73] I did my homework on all the possible ideas that the then new Government might alight on: legally binding plans as in France; zoning; design coding; selling air rights; auctioning planning permissions; the supposed lack of any development planning in cities such as Houston; and even Sir Peter Hall's no-plan plan.[74] But none of these radical ideas appeared.

So what was this radical reform? Regional Spatial Strategies were removed. The introduction of neighbourhood planning was radical but to me this smacks of treating the planning system as a game of Jenga where you take out more and more elements of an interrelated structure at the constant risk that the whole edifice will crumble. This appears to be making ill-thought through changes to the planning system, just to be able to show that you have taken action.

Dr Charles Mynors has stated in a paper given to the Modern Studies in Property Law conference in April this year that:

> "There are currently in force around 43 Acts that deal with land use and planning (including access and rights of way), and significant parts of a further 15 or so. Of those 58 Acts, about a third are relatively insignificant remnants of provisions that are now wholly or largely redundant. However, many of the remaining 40 or so are still substantial pieces of legislation, and are crying out to be rationalised and sorted out."

and that:

> "the 1946, 1947 and 1949 Acts together contained 161 sections and 18 Schedules. By contrast, the modern equivalent of the 1947 Act—the four 1990 Planning Acts—originally contained 479 sections and 26 schedules. But they have now been significantly lengthened, to around 550 sections, as a result of numerous amendments over the last 24 years; and they have been supplemented by separate provisions in other Acts (notably the PCPA 2004 and the Planning Act 2008) introducing a further 300 or so sections and numerous Schedules."

His paper carries on through a process of rigorous logic to propose that just nine Acts could cover the requirements of planning in straightforward, uncluttered and efficacious way. It is well worth a read. In terms of a new type of interventionist planning that acknowledges its responsibilities for specific sections in society, his suggestion for a Promotion of Development Act has its attractions as well as its potential pitfalls.

The need to simplify the planning system, carrying on from the work undertaken by this Government leading to the NPPF and National Planning Policy Guidance, seems undeniable. But this is not the same as changing the system.

I hope that this paper supports a view that it is how the system is used that is as important as the system itself.

Before embarking on any further full bloodied or salami sliced reform of planning, we do need to try to agree what it is that we are trying to achieve through it and whose interests are we trying to serve. Not

[72] HM Government, *The Coalition: our programme for government* (2010) at *http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf*. [Accessed October 8, 2014.]

[73] Maybe I should not have bothered. Nearly all the changes the Coalition implemented had been promulgated by the Policy Exchange, then led by Nick Boles, and, in particular, a 2006 report *Better Homes, Greener Cities*. This recommended, inter alia, that:

> "The planning system should be localised, with local authorities being placed in charge of densities, brown vs. green field ratios, design codes and Green Belt designation … The planning system should be made more flexible, with greater freedom to change between planning designations and an extension of permitted development rights."

See also, e.g. A. W. Evans and O. M. Hartwich, *The best laid plans: How planning prevents economic growth* (The Policy Exchange, 2007) at *http://www.policyexchange.org.uk/images/publications/pdfs/pub_52_-_full_publication.pdf*. [Accessed October 8, 2014.]

[74] Published in *New Society*, March 20, 1969.

the easiest of tasks but perhaps the RTPI could start by using its centenary to look again at its own values as expressed in its *Code of Professional Conduct*.

Earlier this year, I guest edited a section of the Centenary edition of *Planning Theory & Practice*.[75] One of the contributors was South African academic Vanessa Watson.[76] She stated that:

> "It is urgent that the RTPI begin a debate with other national professional planning bodies around the world, and within Africa, as to what are acceptable principles to guide planning processes and outcomes, accepting that contexts are highly diverse and there is no one urban model or process that will fit all circumstances. If the global planning profession is to build and retain public confidence then a strong ethical stance is imperative, and there is no reason why the RTPI should not lead the way."

Conclusion

How do we end?

In thinking about this, I can turn to the progenitor of this paper, Professor Sir Peter Hall. Not in one of his later works but in a piece that he wrote for the Observer Magazine in 1989.[77] This was a special edition that looked ahead 20 years to London as we might see it in 2010. Peter looked ahead to reflect that:

> "What might happen [in 2010] is more of the same. The developers would develop in response to 'market signals', and London would pick up the consequences: massive overbuilding in a few places, more congestion on the roads, more chaos on the tubes and on Network SouthEast. The irony is that everyone, including finally the developers, will lose."

But Peter was one of our visionary planning heroes and, in that article he argued strongly for such transformational planning projects as the building of the Heathrow Paddington Railink, Cross Rail and HS1 with an interchange at Stratford, most of which have come about. So there is some cause for optimism.

Change we must, but when all logical, dispassionate, evidenced based arguments fail then we need to rely on, and maintain, our own individual professional and moral compass and continue to act in the interest of the public in a way that our professional knowledge and ethics tell us is right.

One of the other visionary planners that we do remember and revere, faults and all, is Edmund Bacon, Executive Director of the Philadelphia City Planning Commission from 1949 to 1970 and author of *Design of Cities*.

His *New York Times* obituary in 2005[78] recorded that:

> "Mr. Bacon continued to assert his ideas for Philadelphia until his death, … In 2002 he protested the ban on skateboarding in the city's LOVE Park by illegally skateboarding through the park."

He was 92 at the time.

Socrates said that by far the greatest and most admirable form of wisdom is that needed to plan and beautify cities and human communities. Use that wisdom responsibly people, it's a moral jungle out there.

[75] Kelvin MacDonald, "Challenging theory: Changing practice: Critical perspectives on the past and potential of professional planning" [2014] *Planning Theory & Practice* Vol.15 No.1, 95–122 at *http://dx.doi.org/10.1080/14649357.2014.886801*. [Accessed October 8, 2014.]

[76] Vanessa Watson, "Will the profession speak out? Winners and losers in the future African city" [2014] *Planning Theory & Practice* Vol.15 No.1 at *http://dx.doi.org/10.1080/14649357.2014.886801*. [Accessed October 8, 2014.]

[77] *Observer 2010*, 3 December 31 (1989).

[78] See *http://www.nytimes.com/2005/10/18/arts/design/18baco.html?_r=0*. [Accessed October 8, 2014.]

Local Heroes: Neighbourhood Planning in Practice

Ruth Stanier

Summary

The Localism Act 2011 gave communities a new right to prepare a neighbourhood plan with statutory weight in planning decisions. The thinking behind this is twofold: as well as believing that communities should have a say in the planning process, the Government believes that giving communities more of a say over the type of development in their area will make them more accepting of that development. This will support growth and hopefully reduce the number of costly appeals.

Hundreds of communities have taken the first step towards making a plan, and there have been 34 successful neighbourhood planning referendums. Although neighbourhood planning is still in its infancy, these plans help to demonstrate that this new process can, and does, work. The process is also being tested, for example by judicial review, and is proving robust. Although small changes may be made to improve the process, the evidence suggests that neighbourhood planning is a valuable—and valued—addition to the planning process.

Neighbourhood planning: Linking localism and the need for growth

> "Planning should be a positive process, where people come together and agree a vision for the future of the place where they live. It should also—crucially—be a system that delivers more growth. Our aim with the Localism Bill is not to prevent new building, but to promote it."[1]

> "I believe, and this government believes, that neighbourhood plans are the key to unlocking more house-building (…) This government believes in localism. We believe that if you give people power, they will use it responsibly. If you explain to them what their community and their country needs, they will do their bit to make sure it is provided. And if you give them a stake in a future in which beautifully designed homes with easy access to green space are, once again affordable for working people on ordinary wages, they will do what it takes to bring that future about."[2]

Community planning has been with us for decades, but the Localism Act has given it teeth. The Coalition's Programme for Government included a commitment to reform the planning system to give neighbourhoods the ability to shape the places in which they live. This is part of the Government's wider commitment to supporting sustainable growth and enterprise. Neighbourhood planning is based on the principle that communities should have a say in the new development proposed for their neighbourhood, and that where they do, they are more likely to accept that development. This is backed by research: the British Social Attitudes survey found that a majority of respondents thought that a more localist planning system would make them more supportive of new homes.[3] Neighbourhood planning enables communities to come together to shape their community, through a real statutory plan that has the same weight as the local authority's plan. To date, 25 communities now have a "made" neighbourhood plan in place.

[1] Greg Clark, "Pro-localism and pro-development: A speech to the Adam Smith Institute" February 2, 2011 at *http://www.gregclark.org/articles~speeches/ministerial-speeches/17*. [Accessed October 11, 2014.]

[2] Nick Boles, "Housing the next generation" speech to Policy Exchange, January 10, 2013 at *https://www.gov.uk/government/speeches/housing-the-next-generation*. [Accessed October 11, 2014.]

[3] 63% of respondents said they would be more supportive of new homes if "local people were given greater control and say over what gets built in their local area". See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336769/20140723_Public_attitudes_to_new_house_building_FINAL.pdf* [Accessed October 11, 2014] (or *http://tinyurl.com/koeld68*). [Accessed October 11, 2014.]

This power comes with an appropriate level of responsibility. A neighbourhood plan must pay appropriate regard to national planning policy, and be in general conformity with the strategic vision for the wider area set by the local authority in their Local Plan. The National Planning Policy Framework is clear that a neighbourhood plan should not promote less development than that proposed by the local authority. Provided the plan meets these, and other legal and policy requirements, local people will be able to vote on it in a referendum. If the plan is approved by a majority of those who vote, and is compatible with European and human rights law, then the local authority will bring it into force. This means that planning applications will be determined in accordance with the policies in the neighbourhood plan as well as the Local Plan unless other material considerations indicate otherwise, giving local people the opportunity to influence decisions that make a big difference to their lives.

The scope of neighbourhood planning is wide. Communities may use it simply to set out broad design principles for their area, or they could choose to allocate land for homes and other development. They could use its sister provision, a Neighbourhood Development Order ("NDO"), to grant full or outline planning permission in areas where they most want to see new homes and businesses. Once the plan or order is made, this will make it easier and quicker for development to go ahead.

An added incentive for communities is the neighbourhood element of the Community Infrastructure Levy ("CIL"). The CIL is a tool for local authorities in England and Wales to help deliver infrastructure to support the development of the area, via a levy payable on certain types of new development, including new homes. A proportion of CIL is allocated to neighbourhoods: 15 per cent of CIL where there is no neighbourhood plan in place, rising to 25 per cent where a plan has been made. This funding is passed directly to the parish or town council, where they exist. In other areas the funding is held by the local authority but must be spent in consultation with the community. Spending of the neighbourhood portion of CIL can be on a wider range of infrastructure than the local authority element: regulations[4] state that, as well as the "provision, improvement, replacement, operation or maintenance of infrastructure", neighbourhood CIL can be used for "anything else that is concerned with addressing the demands that development places on an area".

Practicalities: How does a community prepare a plan?

The Localism Act 2011 introduced a new right for communities to develop Neighbourhood Plans. They can be prepared by parish or town councils, or in non-parished areas by a Neighbourhood Forum of at least 21 local residents, business representatives and elected members of local councils. The forum or parish is known as the "qualifying body". The first stage is to establish the area to be covered by the plan, and apply for this to be designated by the local planning authority. Where the qualifying body is a parish council, this will often follow the parish boundary (but does not have to do so). In urban or other un-parished areas, the neighbourhood area needs to be defined by the community, and the forum must also be designated by the local authority.

The Act also provides for the local authority to designate any neighbourhood area that it considers to be "wholly or predominantly business in nature" as a business area. In such areas there will be two referendums, one each for businesses and residents. Should the outcomes be different, it will be for the local authority to determine whether to make the plan.

Once the area, and where appropriate the forum, is established, the process of community engagement begins in earnest. The foundation of a strong neighbourhood plan is good engagement: finding out what the community likes and doesn't like, and how residents and businesses would like to shape the future of their neighbourhood. Neighbourhood planning communities use a range of ways to find this out, from traditional questionnaires to online platforms and events including fetes and even a neighbourhood play.

[4] See *http://www.legislation.gov.uk/uksi/2013/982/regulation/8/made*. [Accessed October 11, 2014.]

As well as feeding into the policies of the plan proposal, good community engagement is vital for success at the final hurdle: the referendum. At the time of writing there have been 34 referendums, all passed successfully on a good turnout and with a very strong vote in favour, averaging 88 per cent.

Before the referendum stage is reached, the community needs to draw together the findings of its local engagement and translate these into planning policies that will be used to determine planning applications in their neighbourhood. Once a plan proposal is drafted, there are two statutory periods of consultation (though note that the Government has recently consulted on whether this is excessive and should be reduced; see below). The first, before plan is submitted for examination, is carried out by the community. This pre-submission consultation and publicity period is an opportunity for local residents, businesses, developers and landowners to offer their thoughts on the plan, and for those comments to be taken into account and changes made to the proposals before they are submitted to the local authority. In some areas, significant revisions have taken place following this consultation. In others, the plan has remained largely unchanged. Once any changes have been made, the plan can be submitted to the local authority and from this point cannot be amended, except to meet statutory requirements or correct errors. Provided the correct information has been supplied by the qualifying body along with the plan proposal, the local authority must "publicise" the plan (the second statutory period of consultation), and act as a post-box for any representations received, before passing these to the examiner.

An independent examiner is appointed by the local authority, with the agreement of the qualifying body. The examiner must be "suitably qualified", independent of the local authority and qualifying body, and have no interest in land in the area. To facilitate this, The Royal Institute of Chartered Surveyors ("RICS") and others, including the Department of Communities and Local Government ("DCLG") and the Royal Town Planning Institute ("RTPI"), have established the Neighbourhood Planning Independent Examiners Referral Service, "NPIERS", a panel of impartial and highly qualified professionals. They are committed to providing the service at a fixed price per day. The majority of examinations to date have used members of the NPIERS panel.

An examiner can look only at whether the plan complies with certain statutory requirements, including meeting the Basic Conditions. For neighbourhood plans,[5] these are:

(a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the plan;
(b) the making of the plan contributes to the achievement of sustainable development;
(c) the making of the plan is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area);
(d) the making of the plan does not breach, and is otherwise compatible with, EU obligations; and
(e) prescribed conditions are met in relation to the plan and prescribed matters have been complied with.

These tests are different to the test of soundness against which a Local Plan is judged. The recent *Tattenhall* case,[6] considered later in this paper, supports this distinction.

Having considered the plan against the Basic Conditions, the examiner's report must recommend one of three options: submit the plan to referendum, make specified modifications to the draft plan and then submit it to referendum, or refuse the proposal. The examiner's report is not binding, but if the local

[5] Additional conditions apply to neighbourhood development orders:
- having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order; and
- having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order.

[6] *BDW Trading Ltd (t/a Barratt Homes) v Chester West and Chester BC* [2014] EWHC 1470 (Admin).

authority is satisfied that the plan meets the Basic Conditions (or would do so with modifications), they must continue to a referendum. If a majority of those voting are in favour, then the local authority must "make" the plan so that it becomes part of the Local Plan for their area. The only exception is if doing so would breach obligations under EU or human rights law.

Role of the local planning authority

It is clear from the description of the neighbourhood planning process that the local authority has a role throughout, and experience suggests that a supportive local authority can add significant value. As well as their role at various fixed stages (area and forum designation, publicity, appointing the examiner and holding the referendum), the local authority has a duty to give advice and assistance.[7] The Planning Practice Guidance[8] suggests that a local authority should:

- be proactive in providing information to communities about neighbourhood planning;
- fulfil its duties and take decisions as soon as possible, particularly regarding applications for area and forum designation;
- set out a clear and transparent decision-making timetable and share this with those wishing to prepare a Neighbourhood Plan or NDO; and
- constructively engage with the community throughout the process.

By engaging throughout the process, local authority planning officers can give advice and assistance on planning matters, including conformity with their Local Plan and with national policy, to help ensure that the final plan is likely to meet the Basic Conditions. They may help with drafting, to make sure that the policies as drafted have the effect that the community intends. They can also give a view on whether Strategic Environmental Assessment is likely to be required and give advice on likely timescales of various stages, as well as assistance with project management if needed. Other staff at the authority, such as those with particular expertise in regeneration or community engagement, may also be able to offer advice.

What support is available for neighbourhood planning?

Recognising that neighbourhood planning is new and that planning itself may be unfamiliar to most of those who wish to take it up, the Department provides support via Locality, a nationwide network of community-led organisations. Locality and partners, including Planning Aid England, are administering a £10.8 million government fund to support communities in creating Neighbourhood Plans. The support programme is in two main parts: direct support—the provision of direct advice and support, tailored to meet the needs of supported neighbourhoods; and grant payments of up to £7,000 per neighbourhood area, to contribute to costs incurred by the group preparing a Neighbourhood Plan or NDO. A further three year package, to start in April 2015 and outlined later in this paper, is currently being procured.

It is still early days to determine the likely cost of a Neighbourhood Plan. The cost will vary depending on the scale of the plan, and early plans may cost more because of the need to establish the process. We expect that in general terms the cost of a plan will reduce over time. Early indications are that a plan is likely to cost around £15,000–40,000, but some may be less and a small number may exceed that.

Local authorities have a duty to support neighbourhood planning and are also required to pay for the cost of the examination and the referendum. DCLG is committed to meeting new burdens which any legislation places on local authorities, and has £10m available in 2014/2015 to support local authorities

[7] Town and Country Planning Act 1990 Sch.4B para.3: (1) A local planning authority must give such advice or assistance to qualifying bodies as, in all the circumstances, they consider appropriate for the purpose of, or in connection with, facilitating the making of proposals for neighbourhood development orders in relation to neighbourhood areas within their area.
(2) Nothing in this paragraph is to be read as requiring the giving of financial assistance.

[8] See *http://planningguidance.planningportal.gov.uk/*. [Accessed October 11, 2014.]

in neighbourhood planning. Reflecting this commitment, local authorities can claim at various stages: £5,000 for each area designated and £5,000 for each forum designated (with a cap of 20 per year and five per year respectively), £5,000 for each plan submitted and £20,000 for each successful examination. An additional £10,000 is available for successful examinations in designated business areas.

There are also other less formal means of support. DCLG has established a network of neighbourhood planning Champions around the country, drawn from a cross section of community representatives, planning officers and election members. Champions are able to share their skills and expertise with each other and with others embarking on or already in the process of neighbourhood planning. There is also support of a different kind from many planning schools, for example, students from Oxford Brookes University are supporting plans in Headington in Oxford, and Bartlett School of Planning students are helping a number of groups across London.

Neighbourhood planning in practice: How is it working on the ground?

There has been significant take up of neighbourhood planning. Over 1,000 areas have now been designated as neighbourhood planning areas, and plans are coming to fruition, with 33 plans and 1 NDO now successfully passed at referendum. At the time of writing, another 14 have passed examination, 78 in total submitted for examination, and over 120 draft plans have been prepared and are being consulted on within their community.

Neighbourhood Plans can be, and are being, prepared in rural and urban, wealthy and deprived areas. Currently, the majority of areas are parishes, representing around 90 per cent of the designated areas. Although activity is fairly well distributed across the country (see map), early interest showed a concentration in areas with particular development pressure, such as the south east. Critics have suggested that this reflects a NIMBY's charter, indicating that communities initially began work on a Neighbourhood Plan in the hope that they could use it to stop growth. However, experience on the ground suggests that while groups may initially turn to neighbourhood planning in the hope of stopping development, they soon realise that it cannot be used in that way. Rather than turning their backs on neighbourhood planning, many groups have come to realise that some form of development is inevitable, and that they can use a Neighbourhood Plan to shape that development on their own terms.

The picture across the country has changed over the last two years, and although take up is slower in the north east and north west, we are now seeing some level of activity in most areas. Take up has also been slower in unparished areas, but there are signs that this is changing, and several forums now have plans past referendum. Initiating a Neighbourhood Plan in an unparished area often takes a little more time than in a parish, which often has straightforward boundaries. The area needs to be defined, and a forum established. In some places this has happened quickly, others have taken longer to get right, often via extensive engagement with local people to establish where they feel the boundary to their neighbourhood is.

Government guidance offers some pointers as to what might be used to establish boundaries—for example, the area where formal or informal community groups operate, the catchment area for walking to local services such as shops, schools or the doctors' surgery, or the physical appearance of the neighbourhood, such as buildings of a consistent scale or style. However, communities will often have their own, and varying, views in some cases. Ultimately the local authority must decide whether the area applied for is appropriate. In cases where applications overlap, the local authority will be the arbiter and may, on planning grounds, designate only part of the area applied for (but it must designate some part of the area applied for if that area is not already designated).

The Court of Appeal in the *Daws Hill*[9] case confirmed the broad discretion that the legislation gives to a local authority in determining whether the area applied for is appropriate. While this procedure may mean that the process of starting a Neighbourhood Plan may take longer in unparished areas, once it has taken place communities quickly move on from the detail of defining their area to thinking about the content of the plan itself.

As the strength of a plan rests to a great extent on how far it reflects the views of local residents and businesses, most communities put a great deal of effort into effectively engaging with their neighbourhood. As well as traditional techniques such as questionnaires and public meetings, communities have devised innovative ideas to try to reach as many sectors as possible. Many groups have involved primary schools, which raises awareness not only with children but potentially their parents. Tattenhall in Cheshire held a rave, the entry "price" for which was completion of a neighbourhood planning survey; West Ealing also used a similar entry price for the 100+ audience of a play of the history of the area, written and performed by members of the neighbourhood forum.[10] Many communities have used existing events, such as summer fetes, to raise awareness and garner views. One approach used in a number of areas is a "wishing tree", a concept that has resonance for people from many backgrounds, where they can tie their hopes for the area onto the branches.

Community engagement frequently results in a long wish list, of varying degrees of deliverability, and often not all related to spatial planning. As a result, the next challenge is a combination of prioritisation, expectation management and learning what spatial planning actually is. A statutory Neighbourhood Plan must be about spatial planning, but often it is related projects that get the community interested and engaged. Some plans, such as Exeter St James for example, have carefully combined these: the planning policies are clearly highlighted and form the basis of the statutory plan, but there are also a series of related "projects" which the community would like to see delivered, to bring about the plan's vision for their area as:

> "a vibrant and balanced neighbourhood … known for its strong and diverse community, rich urban character, attractive green streets and spaces and thriving natural environment."

The examination is a daunting stage for the community in particular, though a supportive local authority can help offer reassurance throughout the process that the plan meets the necessary Basic Conditions. So far, 41 plans have successfully passed examination, subject to varying levels of modification. Only one to date has failed: Slaugham, in Mid Sussex, was judged not to meet the requirement to fulfil European obligations, in that a Strategic Environmental Assessment had not been properly carried out.[11]

During the early stages of neighbourhood planning, DCLG's engagement with communities showed a particular level of apprehension about the referendum stage of the process. Although some nervousness still exists because each referendum is an unknown quantity, the experience to date gives a lot of reassurance: of 34 referendums, all have been passed with an average yes vote of 88 per cent. This strongly suggests that where plans are drawn up in consultation with their community, there is a strong buy-in for their proposals, demonstrated at the polling booth.

Villages turn out and show their support for growth that is on their terms

Woodcote: In 2008, 70 per cent of residents said "no" to any new housing in a survey for the parish plan. Six years later in 2014, 91 per cent of residents vote yes at referendum to a plan allocating land for 76 homes across five sites (with two contingency sites for 36 homes). Turnout: 59 per cent.

[9] *R. (on the application of Daws Hill Neighbourhood Forum) v Wycombe DC* [2014] EWCA Civ 228.
[10] See *http://www.wecnf.org/come-to-see-our-play/*. [Accessed October 11, 2014.]
[11] See *http://www.midsussex.gov.uk/8952.htm*. [Accessed October 11, 2014.]

Cringleford: A village parish of 1,300 households on the edge of Norwich, Cringleford was earmarked for significant development but wanted to avoid becoming a Norwich suburb. The Neighbourhood Plan allocates 1,200 new homes, nearly doubling the size of the village. It passed referendum in January 2014 with a 30 per cent turnout and 93 per cent yes vote.

Testing the process: Neighbourhood Plans under Judicial Review

Neighbourhood planning was put to the test in the High Court in the recent *Tattenhall* case.[12] Residents of Tattenhall, a parish in Cheshire West, and Chester DC ("CW&C"), voted overwhelmingly in favour of their Neighbourhood Plan in October 2013 (96 per cent Yes vote; 52 per cent turnout). However, CW&C agreed not to make the plan pending the outcome of a Judicial Review brought by two developers, Barratt Homes and Wainhomes Developments Ltd, against the CW&C's decision to put the plan to a referendum. The challenge was on a number of grounds, including failure properly to comply with the Strategic Environmental Assessment Directive,[13] breach of duty to ensure that the Neighbourhood Plan met the Basic Conditions, and introduction of a policy limiting the number of homes on each development site without meaningful evidence. The latter challenge was based on the fact that CW&C did not have an up-to-date Local Plan, and therefore (the claimants argued) the plan should be subjected to a more stringent evidence test.

Since statutory neighbourhood planning was first put forward, commentators have questioned whether a Neighbourhood Plan can come forward in the absence of an up-to-date Local Plan. Guidance[14] has since made clear that this is possible. As spelt out in the guidance, to meet the Basic Conditions, a plan must be in general conformity with the strategic policies of the development plan that is in force for that area. This applies even if that plan is out of date. But although a Neighbourhood Plan is not tested against the policies in an emerging Local Plan, the reasoning and evidence informing the Local Plan process may be relevant.

The High Court judgment in the *Tattenhall* case was handed down on May 9, 2014. Supperstone J. found that none of the grounds of challenge succeeded and dismissed the claim. On the critical challenges of whether the Basic Conditions were met and whether the level of evidence was sufficient to support the policy on housing allocation, the judgement determined as follows.

Firstly, whereas a Local Plan needs to be "consistent with national policy", the examiner of a Neighbourhood Plan has a level of discretion to determine, e.g. whether a plan shall proceed "having regard to" national policy and guidance and whether the plan is in "general conformity" with the strategic policies contained in the development plan. The judgment accepted CW&C's submission that the only statutory requirement imposed by Basic Condition (e) is that "the Neighbourhood Plan as a whole should be in general conformity with the development plan as a whole".

Secondly, the judge was "satisfied that there was a proper evidential basis" for Policy 1, which promoted a limit of 30 dwellings on individual developments. The judgement stated that the examiner did not need to apply the test of soundness for a Local Plan whereby the plan "should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence". The judgment quotes a CW&C witness statement: "the decision in relation to the limit of 30 homes was a planning judgment made by the steering group following the consultation with the community."

[12] *BDW Trading Ltd (t/a Barratt Homes) v Chester West and Chester BC* [2014] EWHC 1470 (Admin).

[13] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.

[14] See *http://planningguidance.planningportal.gov.uk/blog/guidance/neighbourhood-planning/what-is-neighbourhood-planning/what-is-a-neighbourhood-plan-and-what-is-its-relationship-to-a-local-plan/para009* [Accessed October 11, 2014] (or see *http://tinyurl.com/ndlaeud* [Accessed October 11, 2014]).

Supporting localism throughout the planning process

The Government's support for localism and neighbourhood planning was recently underlined in a Written Ministerial Statement (July 10, 2014) announcing an additional criterion for consideration of the recovery of planning appeals. The Statement emphasised the principle of giving local people the power to ensure they get the right types of development for their community, while also planning positively to support strategic development needs. To support this, the Secretary of State has amended the criteria for consideration of the recovery of planning appeals to include proposals for residential development of over ten units in areas where a qualifying body has submitted a Neighbourhood Plan proposal to the local planning authority or where a Neighbourhood Plan has been made. This will enable him to give particular scrutiny to planning appeals in, or close to, Neighbourhood Plan areas so he can consider the extent to which the Government's intentions are being achieved on the ground.

Delivering on the ground

Ultimately, neighbourhood planning is not about the process or even about the plans themselves: it is about making a difference on the ground. Clearly it is still early to see significant change, but already Neighbourhood Plans are being used to make planning decisions, and we are seeing planning applications made and permissions granted that would not have happened before neighbourhood planning.

In Upper Eden, the first plan to pass a referendum and be made, planning permission has been granted under the Neighbourhood Plan's affordable rural exceptions housing policy, which enables new homes to be built where only one other dwelling exists. Under the Local Plan policy, there needed to be at least three other dwellings, so these cases would not have been granted permission.

In Thame, the Neighbourhood Plan allocates 770 homes across six different sites, instead of one or two large sites proposed by the local authority. Planning permission has so far been granted for two of the sites set out in the Neighbourhood Plan.

The 50+ plans that have been submitted for examination allocate around 10,000 homes, defying the view that Neighbourhood Plans are only taken forward by NIMBYs. Over 250 of these homes are additional to Local Plan targets, for example, Winsford in Cheshire, which is allocating land for over 3,000 homes and 15 employment sites.

Review of Neighbourhood Plans: Streamlining and simplifying

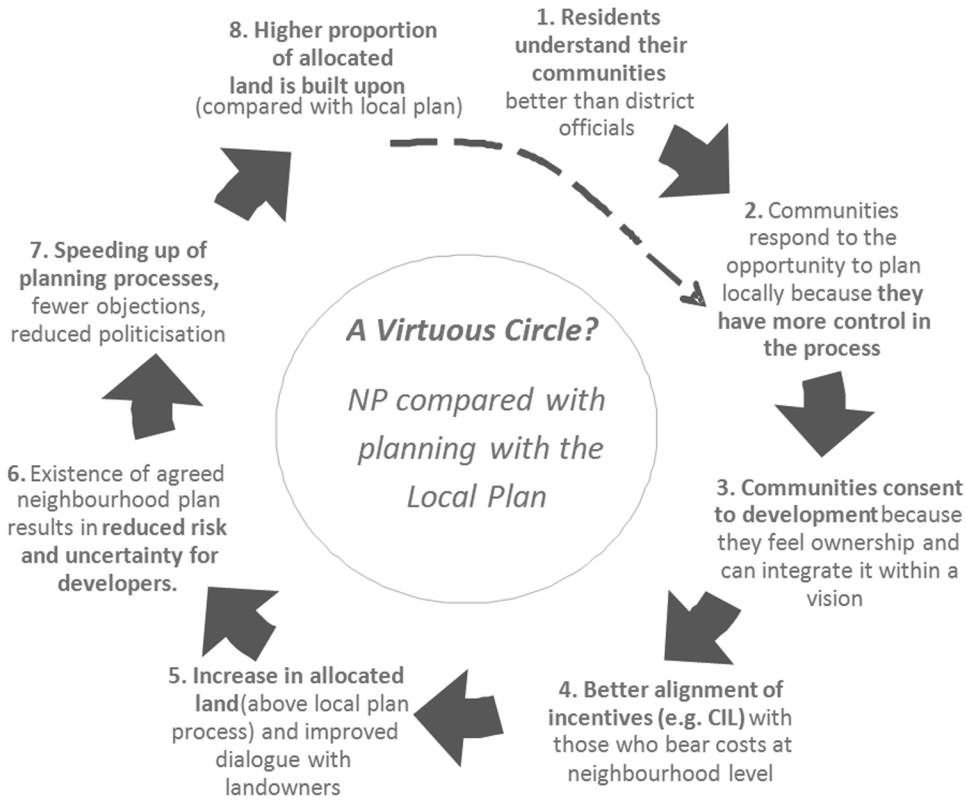
Neighbourhood planning is still in its infancy as a statutory tool. The successes to date have shown that it can, and does work. But ongoing engagement with those putting it into practice, including communities, local authority planning departments and elected members, and consultants and academics, suggests that small changes could make the process quicker and simpler. DCLG has consulted on some of those changes, and subject to that consultation hopes to bring forward regulatory reform. These changes could include setting a time limit for local authorities to determine area designations where the application follows an existing parish or ward boundary and there is no existing designation or application for designation, as well as removing the "double consultation" of the pre-submission consultation and publicity period and the post-submission publicity period.

In addition there are other, non-regulatory actions we can take to make the process of preparing a Neighbourhood Plan easier. From 2015, the support will target areas where neighbourhood planning is more difficult or complex, or could bring about particular benefits. This will include deprived areas, business areas, forums, clusters of parishes, areas that are proposing more growth than in the Local Plan, and areas proposing NDOs. In response to calls from communities and others, a package of "off the shelf" tools and templates will help with particular aspects. These could include "how to" guides and template policies on, for example, housing need studies, land surveys, evidence gathering, commissioning consultants,

setting up a forum and community engagement. The support will also include a specific element for Strategic Environmental Assessment, enabling those communities with draft plans that propose development which needs an environmental report to receive bespoke expert advice and support.

Conclusions

Part of the premise behind neighbourhood planning was that communities are empowered to define the future of their area are more likely to accept future changes in their neighbourhood. Communities are best placed to say what is right for their area. If this includes new homes and businesses, then they are best placed to say where that development should go and what it should look like. And once they have had their say, then development proposals that fit with their vision will be more likely to be accepted by that community. That could speed up the process of delivering growth in the form of new development, as communities focus on the positives that development brings, rather than opposing it. The theory can be set out as a virtuous circle, as shown below.



We have seen that communities are keen to come together to write positive Neighbourhood Plans that support growth. We are beginning to see that growth delivered on the ground, in line with the Neighbourhood Plan and with the community's support. We have seen some developers try to test the system. As with any new process, there can be teething problems and detractors who believe it will not work. The evidence on the ground shows that it can work, and that the virtuous circle may be completed. As more plans are made, and more homes allocated and delivered, communities and developers alike will

come to realise that it is possible for development to help to realise a community's aspirations. And hopefully a little less time, money and emotional effort will be spent in legal battles over new developments.

Glossary

Basic Conditions:

Requirements to be met by a Neighbourhood Plan or Neighbourhood Development Order ("NDO"). The independent examiner can only consider a Plan or NDO against the Basic Conditions.

Community Infrastructure Levy ("CIL"):

A levy allowing local authorities to raise funds from owners or developers of land undertaking new building projects in their area.

DCLG:

Department for Communities and Local Government.

Local Plan:

The plan for the future development of the local area, drawn up by the local planning authority in consultation with the community. In law this is described as the development plan documents adopted under the Planning and Compulsory Purchase Act 2004. Current core strategies or other planning policies, which under the regulations would be considered to be development plan documents, form part of the Local Plan. The term includes old policies which have been saved under the 2004 Act.

National Planning Policy Framework ("NPPF"):

A document that sets out the Government's planning policies for England and how these are expected to be applied.

Neighbourhood area:

An area designated by a local planning authority for the purposes of neighbourhood planning.

Neighbourhood forum:

a body, designated by a local planning authority, comprising a minimum of 21 people, each of whom lives or works in the neighbourhood area, or is an elected county council, district council or London borough council member.

Neighbourhood Development Order ("NDO"):

an order which grants planning permission in relation to a particular neighbourhood area, for development specified in the order or development of any class specified in the order.

Neighbourhood Plan (neighbourhood development plan):

a plan which sets out policies (however expressed) in relation to the development and use of land in a specified neighbourhood area.

NPIERS:

Neighbourhood Planning Independent Examiners Referral Service.

Pre-submission consultation:

A qualifying body must publicise the draft Neighbourhood Plan or NDO for at least six weeks and consult any of the consultation bodies whose interests it considers may be affected by the draft plan or order proposal (see Neighbourhood Planning (General) Regulations 2012 reg.14 and reg.21[15]). The consultation bodies are set out in Sch.1 to the Regulations.

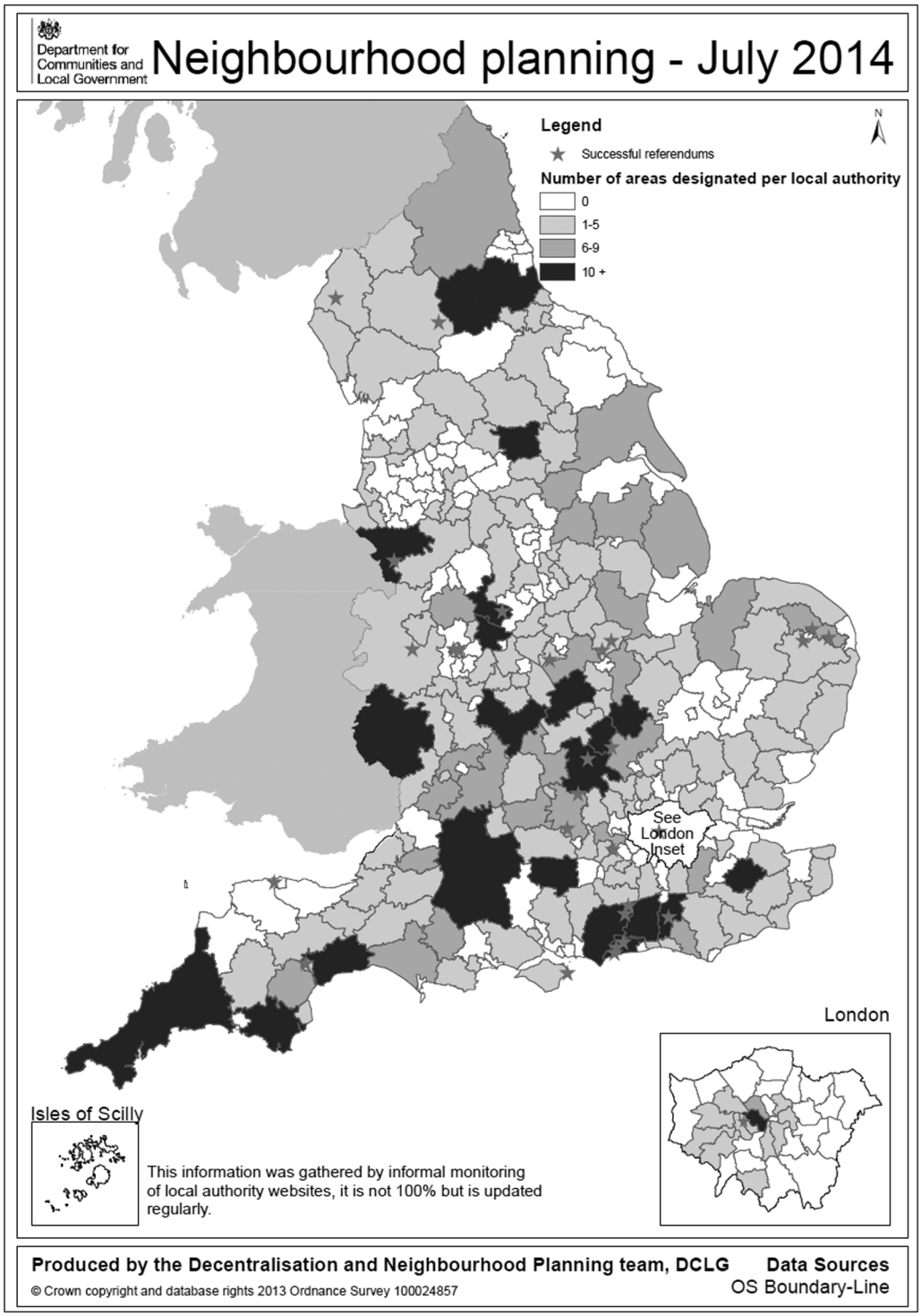
RICS:

Royal Institution of Chartered Surveyors .

RTPI:

Royal Town Planning Institute.

[15] Neighbourhood Planning (General) Regulations 2012 (SI 2012/637).


Department for Communities and Local Government
Neighbourhood planning - July 2014
Legend
Successful referendums
Number of areas designated per local authority
0
1-5
6-9
10 +
N
See London Inset
London
Isles of Scilly
This information was gathered by informal monitoring of local authority websites, it is not 100% but is updated regularly.
Produced by the Decentralisation and Neighbourhood Planning team, DCLG
Data Sources
OS Boundary-Line
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Neighbourhood Planning on the Ground

John Walker

Introduction

This paper will look at neighbourhood planning on the ground, examining the practicalities of setting up the areas, the actual forums, how they might or might not work and test the Government's vision that neighbourhood planning is a "new way for communities to decide the future of the places where they live and work".[1] Is neighbourhood planning a new idea or an old one repackaged? Whilst it is too early to judge how successful this key pillar of the Localism Act will be, this paper will highlight some of the practical issues being faced, look at how they may develop and make recommendations for changes to improve neighbourhood planning.

Neighbourhood planning origins: The Skeffington Report "People and Planning" (1969)

Until the 1960s planning was a top-down process. However, post-war urban renewal, particularly housing improvement areas, were starting to have a significant impact on existing communities. The feeling was that communities were being told what was best for them and that they had no place at the table to convey any concerns. The Town and Country Planning Act 1968 finally introduced the need to consult the public. The Minister of Housing and Local Government, Arthur Skeffington, was mandated:

> "… to consider and report on the best methods, including publicity, of securing the participation of the public at the formative stages in the making of development plans for their area."[2]

The Town Planning Institute's submission sounds all too familiar today:

> "… planning is unpopular with many members of the public. The difficulty of measuring public gain against private loss, real or imagined, is accentuated in the case of planning by the very fact that to a considerable extent the public gain has to be taken on trust … This 'we' and 'they' attitude, 'we' being the public at the mercy of 'they' the planners is all too prevalent, and is indicative of the extent to which public participation in the sense of full public involvement in, and responsibility for, planning is not being achieved at present."[3]

The Skeffington Report emphasised the need for planners to encourage people to participate. It recognised the distinction between "joiners" and "non-joiners" within the public. The latter required a more proactive approach, and are now more usually referred to as "hard to reach" groups. Skeffington defined public participation as:

> "… the act of sharing in the formulation of policies and proposals. Clearly, the giving of information by the Local Planning Authority ('LPA') and of an opportunity to comment on that information is a major part in the process of participation, but it is not the whole story. Participation involves doing as well as talking and there will be full participation only where the public are able to take an active part throughout the plan-making process."[4]

[1] Neighbourhood Planning CLG, November 2012.
[2] Skeffington Report, "People and Planning" (1969).
[3] [July/August 1968] *Journal of the Town Planning Institute* 343–344.
[4] Skeffington Report, "People and Planning" (1969).

Skeffington's report was not well received at the time. Many of his ideas were unpopular in local government circles, for example introducing Community Development Officers, and he was booed and jeered at the Labour party local government conference in 1969. Notwithstanding the criticism, Skeffington had laid the foundations for community planning.

Early neighbourhood planning: The Sparkbrook Community Plan 1972

Work started on the Sparkbrook Community Plan in 1969 to address the poor housing stock of the area and the issue of crowded housing. The Sparkbrook Association worked with Birmingham City Council to look at "the future form which development in the area may conceivably take".[5] A number of study groups were formed and 25 third year graduates from the Birmingham School of Planning carried out a comprehensive physical, economic and social survey of the area including door-to-door questionnaires.

The aspirations of the community included:

- Direct contact with each resident in the community as far as practically possible;
- Consultation at each stage between the study groups and the community; and
- Presentation of the study and plan to the Sparkbrook Association.

The Sparkbrook Association ("the Association") was an independent community association with representatives from the local churches, clubs, leaseholders association and individuals. It was seen as an "aggressive link"[6] for the wider community where there were large pockets of sub-standard housing, houses in multiple occupation ("HMO") and high population mobility. A progressive housing development was key to the Association. Their drive and commitment resulted in a detailed area improvement scheme that involved everyone in the community.

The plan was a very detailed document. For example, it observed that houses which had more than one tenant often had neglected communal areas and gardens, whilst individual tenants kept their own rooms clean and tidy. Tenants had become demoralised. They recommended the burden of looking after these areas should rest with the landlord and the upkeep be financed through a service charge.

The plan recommended plots marked for redevelopment should be cleared and used for parking or play areas until such time as new development was ready to commence. This would help eradicate the problem of fly-tipping. The plan was comprehensive, including details about how the high street could be pedestrianised, parking regulation, traffic and pedestrian separation, and telephone boxes.

Whilst today neighbourhood planning has Local Development Orders and Community Right to Build Orders, in those days there were other tools available. Neighbourhood renewal was high on the Government's agenda and the 1969 Housing Act introduced General Improvement Areas ("GIAs"). The idea was based on community self-help by empowering residents to apply for improvement grants. Neighbourhood renewal areas were assessed prior to designation by regional DoE officers with sufficient local knowledge, in cooperation with local authority, housing association and residents' representatives. GIAs were aimed at relatively stable communities where most of the property was owner occupied. To address poorer areas, the Government introduced Housing Action Areas ("HAAs") along with new compulsory improvement powers through the 1974 Housing Act.

The Marylebone Station Community Plan

In the early 1980s British Rail ("BR") Marylebone Station was in decline. The facilities were crumbling and in 1983, only 6,000 passengers alighted daily at the station. The station was due for closure and the National Bus Company commissioned a study to convert the station into a new coach terminus.

[5] Sparkbrook Community Plan 1972.
[6] Sparkbrook Community Plan 1972.

The St Marylebone Society began an intensive campaign against the coach station. They worked together with the local councillors, the Greater London Council ("GLC"), Save Britain's Heritage ("SAVE"), the Georgian Group, the Civic Trust, the Society for the Protection of Britain's Heritage ("SPAB") and the Victorian Society. They also engaged with neighbouring amenity societies, such as the Regent's Park Conservation Area Advisory Committee ("RPCAAC") and St John's Wood Society. In order to counter a planning brief for the station, they pooled their resources to start work on their own Neighbourhood Plan for the station. They considered uses such as a steam railway centre and a specialist-shopping destination. £1,650 of GLC funding was granted to them to submit an alternative planning application for the Marylebone Station site in November 1985.

Their final plan envisaged the site being used for housing and community facilities and it was launched with panache by staging a "Monopoly Board" event in Dorset Square.

Marylebone Station was finally saved and today is a thriving station. Whilst the St Marylebone Society community plan for the station was happily not needed after all, it was the community's strong views that saved the station. The St Marylebone Society still exists and continues to support the conservation and improvement of this historic station, which is considered to be the hub of the Marylebone neighbourhood.

The new neighbourhood planning: The future of planning

Neighbourhood planning was reintroduced in England through the Localism Act 2011 and the Neighbourhood Planning (General) Regulations 2012.[7] This alleged new concept empowers communities to agree planning policies for the development and use of land in their neighbourhood. At the RTPI conference in 2013, the Secretary of State called neighbourhood planning, "the future of planning".[8]

Whilst Parish Councils were given a mandate to write their own plans, the most significant change brought forward by the Act was enabling other communities in towns and cities to become neighbourhood forums and write their own plans. The Neighbourhood Plans have to take into account the local council's assessment of housing and other development needs in the area and the LPA must provide support to help people develop their Neighbourhood Plan. The council must organise the independent examination of the neighbourhood development plan and referendum. The plans must meet a number of conditions before the referendum is held. These conditions include:

- they must have regard to national planning policy;
- they must be in general conformity with strategic policies in the development plan for the local area (e.g. such as in a core strategy); and
- they must be compatible with EU obligations and human rights requirements.

An independent qualified person checks that the neighbourhood development plan meets these conditions before it can go forward to the local referendum. A simple majority in the referendum is all that is needed for the plan to come into force. The LPA is under a legal duty to bring them into force.

Neighbourhood plans and the National Planning Policy Framework ("NPPF")

Neighbourhood Plans must be in general conformity with the strategic policies of the Local Plan, reflect them and positively support them. The plans "should not promote less development than set out in the Local Plan or undermine its strategic policies".[9]

However, once a Neighbourhood Plan is adopted, its policies take precedence over existing non- strategic policies in the Local Plan. A key change to earlier neighbourhood planning is that those plans only carried

[7] Neighbourhood Planning (General) Regulations 2012 (SI 2012/637).
[8] Eric Pickles, RTPI Conference, July 15, 2013.
[9] NPPF para.184.

informal status whilst the new breed of plans carry considerable weight. Paragraph 198 of the NPPF states that:

> "where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."[10]

This statement is not only very powerful for neighbourhood planning, it is about the only negative statement in the NPPF. When the community speaks via a Neighbourhood Plan there is little scope for a developer to depart from it, at least in theory.

Big Brother Eric is watching over you!

A Written Ministerial Statement was issued on July 10, 2014 that could be seen as a shot across the boughs of anyone who thinks they can ignore a Neighbourhood Plan when assessing new development. The statement made was to clarify that the Secretary of State for Communities and Local Government Eric Pickles MP is keen to give particular scrutiny to planning appeals in, or close to, neighbourhood plan areas to "enable him to consider the extent to which the government's intentions are being achieved on the ground".[11]

The statement claims that the Secretary of State is keen that all planning appeal decisions should reflect the government's clear policy intention when introducing neighbourhood planning:

> "which was to provide a powerful set of tools for local people to ensure they get the right types of development for their community, while also planning positively to support strategic development needs."[12]

The Government will therefore amend the criteria for consideration of the recovery of planning appeals to include proposals for residential development of over 10 units in areas where a qualifying body has submitted a Neighbourhood Plan proposal to the LPA, or where a Neighbourhood Plan has been "made". Since the announcement five appeals have been recovered for developments in Wellingborough, Northamptonshire, West Sussex and East Devon. This provoked two developers into withdrawing their appeals as their proposals did not accord with the neighbourhood plans.

The new criteria will be applied for a period of 12 months from July 10, 2014, after which it will be reviewed.

The practicalities of setting up neighbourhood areas

Whilst boundaries and long established Parish Councils are an obvious and easy target for neighbourhood planning, setting up completely new areas where they do not exist is a long and painful process.

Neighbourhood area applications are submitted by the community, and as set out in the legislation, should contain a map highlighting the proposed neighbourhood, a statement explaining why the area is appropriate to be designated as a neighbourhood area, and a further statement that the body submitting the application is capable of becoming a neighbourhood forum. The application is therefore an opportunity for the applicants to not only justify the proposed boundaries of their neighbourhood, but to also publicise the likely establishment of a neighbourhood forum. The Neighbourhood Planning (General) Regulations 2012 state that neighbourhood area applications should be publicised by the LPA for a period of not less than six weeks (the formal "period for representations") before the City Council can formally designate each area.

[10] NPPF para.198.
[11] Nick Boles *Written Ministerial Statement*, July 10, 2014.
[12] Nick Boles *Written Ministerial Statement*, July 10, 2014.

Advice from the Government is clear that neighbourhood areas should be self-defined, i.e. it is up to the local community to specify what their neighbourhood is. It is also expected that LPAs should be relatively "light touch" in their decision-making, and not overly dictate what the neighbourhood area should be.

Consideration of the responses received during the period for representations is a crucial component of providing an indication of a community's wishes. However, it is also clear that in places like Westminster, many of the proposed neighbourhood areas overlap (the City Council cannot designate overlapping areas), and therefore a degree of arbitration and directive decision-making is required, taking into account an assessment of the proposed neighbourhoods and representations received.

There is no set definition of what constitutes a "neighbourhood". It can be defined by number of characteristics, such as character and function; urban grain and scale; pattern of land use; sense of place; existing defined boundaries, etc. The amount of weight given to each of these considerations may vary depending upon the circumstances of the specific neighbourhood. Within an urban environment like Westminster, assessing the delineation of a neighbourhood can be quite problematic, especially if boundaries are major roads where opposite sides of the street, with very similar characteristics, are in different areas. There is also no size limit to the extent of a neighbourhood. In order to provide guidance, the City Council has stated that applications for neighbourhood areas should accurately reflect whole neighbourhood areas that are clearly identifiable, established and recognised areas of Westminster.

Boundary treatment

High-density urban areas are multi-tiered, hold conflicting interest groups and do not necessarily have a one size fits all area or group. Businesses and residents are not natural bedfellows. Westminster City Council has taken a proactive role in helping its communities form neighbourhood forums. However, merging different interest groups into coherent communities, with little guidance from the Government, has proven to be very challenging and has, to a certain extent, destabilised long-established community groups. The Council is already covered by 16 recognised amenity groups. They work both independently, commenting on planning applications and plan-making in their areas and together via their own collective group known as the Westminster Amenity Societies Forum. Businesses likewise have their own established groups through the six Business Improvement Districts, Central London Forward and the Westminster Property Association which represents all the business owners and property developers within the West End. Their boundaries do not sit comfortably within the residents' amenity groups.

Whilst boundaries can fit neatly in traditional English villages this is a major problem in urban areas, particularly in London. The Business Improvement Districts ("BIDs") were naturally keen to form Business Neighbourhood Forums based on their existing boundaries. These almost exclusively business but linear boundaries did not sit comfortably with the amenity group boundaries. For example, the New West End Company BID's area is based on the shopping streets of Oxford Street, Regent Street and Bond Street. However, these streets act as boundaries for the traditional neighbourhoods of Mayfair, Marylebone and Soho.

In Bridport, several Parish boundaries cut through the town centre. The Town Council could only interest two of the Parish Councils in Neighbourhood Planning leaving them with the dilemma of writing a plan that would miss out crucial parts of the town centre. This was further complicated because two Parishes that were interested have boundaries that include outer areas of the town. The other Parishes reluctance to participate was due to concerns over not having enough volunteers to get involved in the process, the amount of resources needed and being "outvoted" when making decisions. West Dorset DC spent several months meeting all the relevant Parish Councils to explore their issues and reach an acceptable resolution. If an agreement had not been reached, West Dorset DC would have had to decide between choosing a sensible area and the neighbourhood plan not proceeding because of a lack of cooperation

from some of the parishes, or choosing a less sensible area with a fragmented plan for the town, that was not reflective of the way the community functioned on the ground.

In terms of resourcing, the level of funding support that has been offered by locality isn't influenced by the size and complexity of the neighbourhood area. This has meant that Parish Councils are less inclined to work together (as a group of four small Parish Councils would prefer to be awarded 4x £5,000 rather than work together efficiently on a single plan and only be awarded 1x £5,000 (not 1x £20,000)). The costs to the wider tax payer from undertaking four different processes and examinations is likely to be much higher overall.

Cross-borough applications

Cross-borough applications raise their own problems. A Neighbourhood Forum would have to work with two political organisations and write a Neighbourhood Plan that must comply with two sets of strategic policies. The practicalities of two local authorities handling a cross-boundary forum, agreeing their Neighbourhood Plan and running a joint referendum adds to the complexity. The Fitzrovia Forum Steering Committee applied for a cross-boundary Neighbourhood Forum in Westminster and Camden. The Fitzrovia West Forum Steering Committee applied for an area that excluded the Camden side.

After negotiations Fitzrovia West neighbourhood area was agreed and the overlapping Fitzrovia neighbourhood area application was turned down. However, they amended their neighbourhood area to lie within Camden LBC only.

Land ownership is another issue. Owners naturally want their land holdings to be situated within the same neighbourhood area for convenience. If you take Soho and Mayfair you would expect the middle of Regent Street to form a natural boundary for two forums. However, Regent Street is owned and run by the Crown Estate, who were not keen to see their estate split into two forums. In the absence of any guidance from the Government on this matter, it was decided to draw the boundary east of Regent Street so the whole of the street would be within the Mayfair Neighbourhood Forum. Whilst this accommodated the Crown Estate's needs, the eastern boundary sits uncomfortably within what is traditionally known as Soho.

It is clear that many Neighbourhood Forums are being business-led. The Victoria business improvement district applied for their area covered by their business district. They were asked to increase the size of their forum area to include residents.

Many representations were received against Forum Area applications. Some were on the grounds the group behind the Forum were not representative of the area or their part of the area. Some passionate objections were even received over the actual proposed name of the Forum.

The Daws Hill Neighbourhood Forum Area

Deciding the areas for neighbourhood forums is challenging for the LPA. In the absence of Government guidance, areas have been open to dispute and legal challenge. The first legal test soon came when, in the absence of strong guidance, an area designation was tested. The Court of Appeal eventually upheld a High Court decision on the designation of a neighbourhood planning area in Daws Hill, Wycombe.[13] The Daws Hill Neighbourhood Forum took Wycombe DC to court over its decision to remove Handy Cross and RAF Daws Hill from its designated area. Supperstone J. threw out the forum's claim in the High Court in March 2013, but residents took the case a stage further and the Court of Appeal upheld Supperstone J.'s judgment that Wycombe DC had acted lawfully in exercising its power of designation in setting the neighbourhood area.

[13] *R. (on the application of Daws Hill Neighbourhood Forum) v Wycombe DC* [2014] EWCA Civ 228.

When it contested the original decision, the Daws Hill Neighbourhood Forum said that Wycombe DC had ridden roughshod over new legislation introduced by the Government to give more power to communities over planning issues in their areas. They argued that, in designating them a forum, Wycombe DC wrongly excluded from their Neighbourhood Area the only two major sites for development that might affect them.

Wycombe DC argued that the provisions in the Localism Act gave them a broad discretion over which locations may be suitable for planning within a neighbourhood area and they had already approved an outline planning application for a new sports centre, hotel, office blocks and a coachway park-and-ride at Handy Cross.

Neighbourhood area sizes and lining up the boundaries

In the absence of any guidance over the size of neighbourhoods, local authorities have been faced with further headaches. Again, whilst long-established parishes do not pose any problems, this is not so easy in London. Requests have come in for a range of areas. One for a single street in the West End, one for drawing a line around a development site (Chelsea Barracks) and several that either overlap with other area applications or stop short of others. Where do you put a Royal Park that borders several neighbourhoods? In the case of Westminster, Hyde Park, Regent's Park and St James's Park have been omitted from the neighbourhood areas at the request of Royal Parks. However, it can be argued these are precisely the areas communities are most interested in and want to have a say about.

Not all neighbourhood areas respect local authority boundaries. In Westminster, Knightsbridge, Covent Garden and Fitzrovia cross over into other authorities. Westminster has been reluctant to agree cross-boundary neighbourhood areas because of the administrative complexities of conducting cross-boundary referendums, having councils with different political aims and applying plans to two sets of local authority policies.

Competing bids and what is in a name?

There is also no guidance on competing bids. The idea that everyone will get together and amicably agree an area has not been borne out. For example, the long-established Knightsbridge Association applied for an area representing their traditional area. This did not stop the Knightsbridge Village Society from making a counter application for a smaller area comprising 13 streets.

The application from the Knightsbridge Village Society was turned down. It was concluded that whilst the area applied for did exhibit some distinctive characteristics in terms of its character and function, it did not represent a separate neighbourhood in comparison to the wider surrounding area. It was noted the application received no support during its respective consultation period. It is also considered that the term "Knightsbridge Village" did not accurately reflect an area that is centred upon Montpelier Square and Trevor Square. The wider Knightsbridge neighbourhood area was deemed to be a more accurate delineation of the neighbourhood in this part of Westminster and therefore got the nod.

Determining business neighbourhood forums

Strong opposition from residents groups has arisen to designating business neighbourhood forums. They do not like the idea of businesses having a vote and many strongly disagree their area is "predominantly business in nature".[14]

In the absence of guidance, Westminster City Council has had to make up its own criteria for determining whether neighbourhoods are designated as business forums or not. An area can look mainly residential

[14] Neighbourhood Planning (General) Regulations 2012 (SI 2012/637).

with most of the streets consisting of houses and flats. However, analysis can give a totally different picture. Marylebone residents were not happy with the idea of a business area.

Marylebone Business Neighbourhood Area

- Area: 198ha.
- Total Population: 25,124.[15]
- Number of employees in the area: 114,910.[16]
- Average Income: £46,929.[17]
- Unemployment rate: 2.8 per cent.[18]
- Number of Businesses: 4,510.[19]
- Number of Residential Properties: 15,126.[20]
- Proportion of Land Use: 61 per cent Business and 39 per cent Residential.[21]

	Floorspace m^2	**%**
Commercial	2,139,921	61
Residential	1,374,741	39

- Eight Conservation Areas within/intersect the neighbourhood area:

Regent's Park	East Marylebone	67 per cent (133ha) of Marylebone
Dorset Square	Molyneux Street	Neighbourhood Area is covered by
Lisson Grove	Stratford Place	Conservation Areas.
Harley Street	Portman Estate	

Not surprisingly the above information led the Council to conclude Marylebone, for all its residential streets, should be designated a business forum.

Neighbourhood Forums v Residents amenity groups

One of the biggest concerns for residents is how a Neighbourhood Forum relates to their relationship with the LPA and the fear it will undermine them. Many amenity groups include members from local businesses. Many include members that do not work or reside in their defined area. Examples include members who live just outside, but use, the area and members who have since moved away but use their membership to keep in touch. Amenity groups that wish to convert to a Neighbourhood Forum are concerned they will lose members and many are concerned over the uncertainty about charging a fee for membership. Whilst some have decided to charge a small fee it is doubtful you could deprive an individual membership if they refused to pay the membership fee. Again, lack of guidance from the Government has not helped.

Most amenity groups have decided to remain as such but still apply to be a separate Neighbourhood Forum. They still want to be consulted over planning applications because they may have different views

[15] Source: Mid-year estimate 2012 ONS.
[16] Source: Business Register and Employment Survey ONS 2013.
[17] Source: Census 2011.
[18] Source: Census 2011.
[19] Source: National Non-Domestic Rate NNDR Westminster Council 2013.
[20] Source: Council Tax Register Westminster Council 2013.
[21] Source: Land Use and Development Statistics Westminster Council 2013.

to the Forum. A concern is that the local authority may give greater weight to the comments of the Forum rather the amenity society. The Neighbourhood Forum is also consulted over planning applications. It will be interesting to see what weight an inspector will give to objections made by the Forum on appeal decisions.

Neighbourhood planning was seen as the new dawn for localism. If you listened to the speech from Bob Neil at the Planning Law Conference[22] before the Coalition Government was elected, you would believe the people would suddenly get involved in planning. The reality is the usual suspects are running neighbourhood planning, be it Parish Councils, forums or business forums.

Do numbers equal success?

The Government will point to the numbers of applications for forums (covered in the other paper in this conference) as an indication of success. Many established communities have very reluctantly joined the Neighbourhood Forum bandwagon. The reasons for this vary but they are clearly centred on the fear someone else might get together and apply to be a forum and therefore undermine the existing community. The 21 person threshold for applying was considered to be very small and a threat for groups who may have several hundred members. There is a general feeling of being forced into it and for some the driving force is via the businesses who have the time and resources to fund the forum. Many decided to become a Neighbourhood Forum but with no intention of writing a plan.

Constitutions

Even these have proven to be problematic and need close examination. One application for the St James's area to be a forum included a provision within their constitution excluding businesses from having a vote.

Subscriptions

Once again, the lack of Government advice has left a big question over whether a Neighbourhood Forum can charge a subscription. Most have pointed out the absence of an annual subscription means they have no means to raise finances to write plans or run even run the forum. It remains to be seen if someone wishes to raise their right to be part of a forum but refuses to pay an annual subscription. Concerns have been raised about the opportunity some forums may take to price lower income households out of the forum by raising the membership fee. Most forums seem to be charging a relatively small administration fee of between £5 and £10.

What will neighbourhood forums deliver?

Parish plans v Neighbourhood Forum plans

Setting up and agreeing a Neighbourhood Forum has been difficult in the absence of clear advice from the Government. However, once set up will the remainder of the process be easy?

It is not surprising that Parish Councils see Neighbourhood Plans as a means of giving them the opportunity to have a bigger say in their locality. They are long-established and know their community. They have a democratically elected spread of Councillors to represent their area. The downside is they are not necessarily representative of businesses. Where is the business representation in Parish plans? It seems perverse to give businesses such a big say in Neighbourhood Forums but not parishes. With Parish Councillors elected by residents and no business vote, there is a strong presumption these plans will have

[22] Oxford Planning Law Conference 2009.

a resident bias. This problem could have been overcome by giving a compulsory business feed into these plans. The Sparkbrook Community Plan included business collaboration.

Neighbourhood planning has the opposite problem. Many urban forums are led by local businesses who are financing the plan production. They will want to have a big say over the plan content. The members do not necessary want the same goals and already there are signs of friction over the content of a plan. Established residents want less development and to protect their community from further growth whilst businesses want the opposite.

Geographically it will be interesting to see how these plans work out. The north of England is likely to be more positive as communities are anxious to see growth and jobs. The south east is a different proposition with the risk of NIMBYs[23] taking over the process.

The Winslow Neighbourhood Plan Judicial Review

This summer, Gladman Developments applied to the High Court for an interim injunction to prevent the referendum taking place for the Winslow Neighbourhood Plan ("WNP") in Buckinghamshire.[24] The plan allocates five sites for 455 new homes up to 2031. Gladman is involved in two outstanding planning appeals for 311 homes in the Winslow Neighbourhood Plan area but they are located outside the sites allocated in the document.

Gladman argued there are no strategic policies for the Neighbourhood Plan to be judged against because the Aylesbury Vale Local Plan was withdrawn in February 2014. They also claimed the plan cannot go ahead because it is in compliance with a Local Plan that was found to be unsound. They questioned the Government's Planning Practice Guidance ("PPG") advice that a Neighbourhood Plan can be adopted in the absence of a Local Plan. A further contention was that the adoption of the Neighbourhood Plan would be at odds with the NPPF because it seeks to restrict development.

They also alleged the examination hearing was not conducted fairly and alternative sites, including Gladman's, were not properly considered. Gladman project director, Martyn Twigg, pointed out the Neighbourhood Plan has the same status as a Local Plan, but it won't go through the same process:

> "In general, a Local Plan has three or four weeks of examination and lots of consultation. This has had a couple of hours and the examiner did not allow a fair and proper hearing—which is one of the grounds in the challenge."[25]

The judge ruled against Gladman and said cancelling the referendum would not be in the public interest. The judge concluded the developer had other courses of action available should the referendum result in the WNP be adopted. Gladman's application for judicial review to overturn Aylesbury Vale Council's decision to allow the plan to proceed to referendum will be considered at a later date.

The referendum took place on July 24, 2014. The referendum question was:

> "Do you want Aylesbury Vale District Council to use the WNP for Winslow to help it decide planning applications in the neighbourhood area?"

A total of 2,270 people voted "yes" and 41 voted "no", an endorsement of 98 per cent. The turnout was 59.5 per cent, the highest of any Neighbourhood Plan referendum to date.

[23] Acronym for the phrase often used to describe objectors attitude to planned development: "not in my back yard".
[24] *R. (on the application of Gladman Developments Ltd) v Aylesbury Vale DC* , Unreported, July 22, 2014.
[25] Martyn Twigg Gladman Developments Ltd.

The Norland Neighbourhood Plan

The Norland Neighbourhood Plan was one of the first to be adopted in London and is a product of the Norland Conservation Society. The Norland Conservation Society was one of the first organisations in the country to apply to their Council to designate a neighbourhood area and a neighbourhood forum in April 2012. After a six-week consultation period, the Council designated the group and the area on June 15, 2012, granting them the right to produce their own Neighbourhood Plan. The speed of agreeing Norland its forum status was down to Kensington and Chelsea jointly processing the area and forum application simultaneously. The Neighbourhoold Planning (General) Regulations 2012 do not permit this. Better guidance from Government would have prevented this from happening.

The Norland Conservation Society was founded in 1969 to:

> "protect and preserve, and stimulate public interest in the area; to promote high standards of town planning and architecture in the area; and to secure the preservation, conservation, development and improvement of features of general public amenity or historic or public interest in the area."[26]

It has approximately 370 members. Geographically it is a very small residential area.

The Conservation Society's vision is to:

- enhance and protect the character and historic features that define Norland's sense of place, in terms of townscape, streetscape, landscape, neighbourhood;
- protect our Listed buildings, as well as those which may not be of Listing quality but whose architectural features are important to the character of Norland;
- protect and enhance our open spaces, gardens and trees, private as well as public;
- protect and enhance the aspects that add to the quality of life including tranquillity and security;
- discourage and reduce traffic noise and disturbance through residential areas;
- strive for retention of local and heritage characteristics, both architecture and local and social amenity (shops, pubs, post offices);
- make it easy for pedestrians to move freely and safely in Norland;
- manage new development in such a way as to conserve local character;
- maintain a mix of uses and try to retain a diverse range of small businesses;
- maintain social diversity; and
- encourage neighbourhood pride and local involvement of individuals and organisations.

The Norland Neighbourhood Plan is an extensive document covering alterations to properties in great detail.

Paragraph 17 of the NPPF states the planning system should:

> "be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency."[27]

The Government has made it clear that Neighbourhood Plans must be positive and allow for more development. The Norland Neighbourhood Plan does not do this. It is a control-freak of a document and severely restricts development. Objections were received during the independent examination. One objection raised the plan's designation of Darnley Terrace as an area where no changes at roof level are

[26] Norland Conservation Society.
[27] NPPF para.17.

to be considered. The objector pointed out that 33 per cent of houses already had changes at roof level. Another objector questioned the categorisation of Darnley Terrace saying this was unnecessarily punitive and suggested it should be re-categorised as "additional storey may be acceptable" or "on its merits".

The Norland Conservation Society is very concerned about basement extensions and went as far as stating an art.4 direction should be made. The inspector would not allow this and advised the relevant text should be removed. The inspector also criticised the new forum for commenting on what would require listed building consent and also recommended this be removed from the plan. The inspector acknowledged there was little capacity for new development in the Norland Neighbourhood Area. The Neighbourhood Plan does not make site allocations, but does recognise there will be some new development.

The Norland Neighbourhood Plan passed the referendum on December 5, 2013. The question asked in the referendum was:

> "Do you want The Royal Borough of Kensington and Chelsea to use the neighbourhood plan for the Norland Neighbourhood Area to help it decide planning applications in the neighbourhood area?"

429 voted in favour and 152 against with a 25 per cent turnout.

The NPPF says: "Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies."[28] However, there can be no doubt the Norland Neighbourhood Plan is a conservation-based document that allows less development.

Paragraph 185 of the NPPF says:

> "Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains take precedence over existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict."[29]

The most compelling reason for writing a Neighbourhood Plan comes in para.198 of the NPPF:

> "Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."[30]

In my opinion, this gives a Neighbourhood Plan a higher status than a local authority's plan. It is one of the very few negative statements in the NPPF and it will be interesting to see how planning inspectors handle schemes that do not comply with the plan.

So the Norland Neighbourhood Plan does not fit in with the Government's claim that Neighbourhood Plans will allow more development.

"Neighbourhood Planning—Plan and Deliver": The Turley Report, March 2014

The Turley report is the most comprehensive review of neighbourhood planning to date. Over 4,000 pages of draft Neighbourhood Plans which have been published for consultation were examined. Turley sought to look at:

- whether the plans being promoted by local communities make provision for development or act to preserve the status quo;
- how demography, geography and relative affluence influence the neighbourhood planning process;
- evidence of emerging tensions between localism (as expressed in neighbourhood planning policy), and centralism (in particular, the Government's economic growth agenda); and

[28] NPPF para.184.
[29] NPPF para.185.
[30] NPPF para.198.

- how the development industry is responding and whether it is engaging with neighbourhood planning to further its development objectives.

The report comments on the lack of prescription. Neighbourhood Plans are not tied to pre-defined geographical boundaries or limited to specific, identified policy areas and his has resulted in a significant diversity in geographical areas, with some forming blocks of several urban streets to hundreds of square kilometres of villages and open countryside.

There has also been noticeably less progress in the preparation of business neighbourhood plans compared with those promoted by parish councils or neighbourhood forums. This is not surprising because there is likely to be more scope for friction between businesses and residents in these areas. At the time of the report 75 plans had been published in draft and eight approved. The report found that:

- 91 per cent of draft plans have been prepared by Parish or Town Councils;
- plans vary significantly in scope and in the size of the plan;
- the average population of each Neighbourhood Plan area is approximately 7,000;
- neighbourhood Plans principally relate to areas of above average affluence, areas of below average affluence are less likely to enter into the neighbourhood planning process;
- 67 per cent cover rural neighbourhood areas and 33 per cent urban areas;
- 73 per cent of plans have been produced in authorities with Conservative-controlled councils and 9 per cent of Labour-controlled; and
- 75 per cent of plans have been produced in the south of England.

Turley concluded that a key theme of 55 per cent of all Neighbourhood Plans is the preservation and protection of that which currently exists, like the Norland Neighbourhood Plan. Policies were being put in place to ensure "significant restrictions on new development".[31] However, the report also discovered that in urban areas, 60 per cent of plans contained "pro-development" policies compared with 37 per cent in rural areas. A significant number of emerging plans, especially those in rural locations, have been prepared with the aim of protecting neighbourhood areas from new development. Evidence also suggested a need for businesses to engage with the neighbourhood planning process at an early stage. However, outside of the relatively few business-led areas, the opportunity for meaningful engagement will be determined by local communities.

The Tattenhall and District Neighbourhood Plan: An anti-growth plan?

The *Tattenhall* case[32] demonstrates the lengths that developers may be prepared to go to challenge Neighbourhood Plans. This 20-year plan was passed at a referendum on October 24, 2013 by 905 votes to 38, but it placed specific restrictions on new residential development, requiring future housing schemes to be limited to no more than 30 homes.

Barratt Homes and Wainhomes Developments launched a judicial review against the decision by Cheshire West and Chester BC ("the Council") to allow the plan to be put to a local referendum. The judge rejected the developers' claim that the Council had failed to undertake a proper strategic environmental assessment ("SEA") during the preparation of the plan in accordance with EU rules. Supperstone J. said the sustainability appraisal process conducted by the Council complied with EU rules and that the level of consideration of alternatives to the policy was sufficient to meet requirements.

A claim that the Neighbourhood Plan should not be progressed in advance of the Council's emerging Local Plan because its 30 home policy did not comply with regulations was also rejected. He said that the

[31] "Neighbourhood Planning—Plan and Deliver" the Turley Report, March 2014.
[32] *BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin).

only statutory requirement was that the Neighbourhood Plan as a whole should be in general conformity with the adopted development plan as a whole:

> "Whether or not there was any tension between one policy in the Neighbourhood Plan and one element of the eventual emerging Local Plan was not a matter for the examiner to determine."[33]

The judge also rejected a claim that the examiner of the plan was biased because he is the commercial director of a rival developer. He concluded that a "fair-minded and informed" observer, having considered the relevant facts, would conclude that there was no "real possibility"[34] that the examiner was biased.

The issue of compliance with SEAs has been an issue in other cases such as the Slaugham case. In January 2014, the examiner concluded that the Slaugham Neighbourhood Plan should not proceed to local referendum due to the inadequacy of the accompanying SEA and the failings of other evidence relating to housing targets.

Two Community Right to Build Orders were also refused because the examiner concluded that consideration should have been given as to whether Environmental Impact Assessments ("EIAs") were needed to comply with EU regulations.

It is not surprising that legal challenges have been made and more are likely to be lodged. Whilst some Neighbourhood Forums and Parishes have expertise in the planning field, many do not, yet they have the task of writing a plan. Mistakes are going to happen. The Government grant of £7,000 will not get them very far and some will rely heavily on the under-resourced LPA to help them out.

Uppingham Neighbourhood Plan (Rutland) Judicial Review: Being left out

Uppingham was one of the frontrunners of Neighbourhood Planning. The key objectives set out in its Plan are to:

- protect the town's heritage appearance and modernise its infrastructure;
- affirm which areas of the town should remain as open space;
- strengthen community spirit, community health and community safety;
- improve community life with particular regard for the vulnerable, disadvantaged and disabled by strengthening community services;
- improve the sustainability of the town's retail centre;
- attract public and private sector investment;
- attract new employers and help create local jobs;
- increase housing by around 170 dwellings with approximately 35 per cent of them being "affordable properties" and an estimated six being single dwelling sites;
- ensure new housing developments are designed as clusters incorporating green space;
- ensure new developments comply with the Design Statement; and
- enhance the visitor offer and attract the next generation of tourists.

In July 2012, Larkfleet Homes launched a legal challenge[35] to prevent the Uppingham Neighbourhood Plan from being adopted. Uppingham was designated a Neighbourhood Plan area in November 2012. The examiner recommended a modified version of the plan for referendum in May 2014. With a 26 per cent turnout, 90 per cent of those voting backed the plan in the referendum on July 10, 2014. The Plan allocated three sites for development in the market town for 170 homes between 2013 and 2026.

Larkfleet are promoting a site that is not allocated in the Plan. The developer claims the Uppingham Neighbourhood Plan is flawed in several areas and therefore not legally valid. Larkfleet's main issue is

[33] *BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin).
[34] *BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin).
[35] *Planning Magazine*, July 22, 2014.

that they feel that the County Council should decide where housing should be located (the "site allocation" process) rather than the being delegated to the Uppingham Neighbourhood Plan.

Larkfleet's press release said:

> "We do not believe that this is an appropriate way of delivering the county council's core strategy, which sets out how Rutland will meet future housing need, as the core strategy expressly states that the location and details of future housing development should be determined through the site allocation policies."[36]

The examination report considered the objections from Larkfleet Homes, whose site was not allocated in the Neighbourhood Plan. It dismissed the objections to the housing allocation by citing the Government's PPG, which states: "A neighbourhood plan can allocate sites for development".[37]

Larkfleet also submitted a legal opinion claiming the adoption of the plan would be contrary to European Union legislation because it failed to comply with the SEA Directive.[38] The examination report concluded that no SEA was needed for the plan because there would be no significant environmental effects, and the Council's decision was "appropriate and in line with the relevant guidance".[39]

The outcome of the judicial review was outstanding at the time of writing this paper.

The Loxwood Neighbourhood Plan Judicial Review

The Loxwood Neighbourhood Plan in the Chichester district was approved in a referendum on Thursday July 24 by 98 per cent of voters with a 42 per cent turnout. However the developer, Crown Hall Estates, is challenging Chichester DC's ("CDC") decision to hold a referendum on the plan, after accepting the independent examiner's recommendations and proposed modifications. The plan, drawn up by Loxwood Parish Council, proposes a minimum of 60 homes up to 2029 and allocates two sites for housing.

Further details were unavailable at the time of writing this paper.

The Boles Bribe: Community Infrastructure Levy ("CIL")

London has long-established residents' amenity groups. The vast majority were happy with the planning system as it was. They had a strong lobbying voice and saw their role as a counter to rich developers and landowners who could throw vast resources into convincing local authorities that their vision for an area was the right one. Neighbourhood Forums were seen, and still are seen, as a threat. Many amenity groups were concerned a Neighbourhood Forum would undermine them. Many asked who would be given greater weight when commenting on planning applications or Council policies. The bizarre situation was the Neighbourhood Forum could comprise 21 members whilst the residents group may have a 1,000-plus members. It also became clear during discussions that many residents' amenity groups include commercial members and members who live and work outside their area. Some have decided to convert to a Neighbourhood Forum to protect their interests. Others have joined collaboratively in a Forum but retained their amenity society status.

There were very few groups who originally intended to write a plan. Instead they were becoming Neighbourhood Forums to protect their interests and to stop others from moving in on their patch. The announcement by Nick Boles, the Parliamentary Under-Secretary (Department for Communities and Local Government) (Planning) to give Neighbourhood Forums 15 per cent of CIL payments to play with and 25 per cent as an extra incentive to write a plan has changed the game. The incentive is too much to turn

[36] Larkfleet Press Release, July 19, 2014.
[37] Larkfleet Press Release, July 19, 2014.
[38] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.
[39] *Uppingham Neighbourhood Plan Examiner's Report*, May 2014.

down and, whilst it is too early to come to any conclusions, many are likely to write any sort of plan where CIL money is likely to fill their coffers. Some forums have indicated they will merely repeat existing Council policy with a few tweaks to ensure they get the 25 per cent CIL. In reality, once they embark on a plan it is likely they will want more detailed policies than originally envisaged. The Norland Neighbourhood Plan is a good example of this.

Whilst Parish Councils will receive the money, the local authority will hold onto it and spend it in consultation with the Neighbourhood Forum. Money is easy to spend, but the Forums will have to learn that maintenance is another matter and local authorities will not want to be burdened with annual bills from ill-thought-out Forum expenditure.

Finally, CIL money is being taken away from the LPA to spend on much needed infrastructure projects. It is unsustainable to have a system where the LPA must go through an Examination in Public ("EIP") to justify its CIL but lose such a large slice to local community projects that have not had a similar examination.

The bun fight

If you want to raise CIL money in your neighbourhood area, it pays to make sure you designate an area that includes a regeneration or opportunity area. Paddington Special policy area, for example, borders on several amenity society areas. They all know whoever succeeded in having Paddington included in their neighbourhood area would bring in money.

A flawed voting regime?

In Parish Councils the electorate has a right to vote for a plan. Businesses have no vote. In business neighbourhood forums businesses do get a say, however, the voting system does not reflect the businesses interests for an area. For example, a large department retail store, such as Selfridges, employs 3,000 people, who all qualify to become part of the Neighbourhood Forum, yet the entire store gets as many votes as the individual market stall holder, namely one vote.

What is the Planning Authority's role?

The role of the LPA has become crucial. It has become the referee over boundary disputes, representation disputes and membership disputes. This has put a lot of pressure on the resources of the LPA where there is a lot of interest in neighbourhood planning. Dedicated posts have had to be created to handle the workload.

However, it is important that the LPA takes a back seat in neighbourhood planning. LPAs have a supporting role but they are not there to instruct neighbourhood forums and parishes how to run their forum.

Exeter St James Neighbourhood Forum undermined?

On June 16, 2014, Exeter City Council's Planning Committee gave permission for the redevelopment of the local cricket pavilion into four blocks of student residential accommodation and a replacement pavilion for the Cricket Club.

The Exeter St James Neighbourhood Forum ("ESJF") commenced a legal challenge against the City Council claiming the application contravened the Exeter St James Neighbourhood Plan. The Forum stated:

> "We had not opposed the principle of redevelopment … but with safeguards to protect such a sensitive site with heritage importance. There is the principle of standing up for the Neighbourhood Plan, a statutory planning document … We can't let the Plan's policies be sidelined without a challenge."[40]

The Neighbourhood Plan had not been adopted until July 16 but the Forum clearly thought their efforts were not being taken seriously by the Council. The Forum's Design Panel (set up to monitor important planning applications) was still not happy with the proposed building which they considered was not sufficiently iconic for such an important site, too bulky, and built with materials not suitable for a conservation area.

The developer, Yelverton Properties Developments, went directly to the Forum and agreed design changes to avert the legal action. As a consequence the judicial review was dropped, but the case demonstrates the high aspirations of the Neighbourhood Forum and its concerns about being undermined by the Council:

> "The neighbourhood plan is a statutory document, but the forum is not a statutory consultee. The council did not have to formally consult us or to check whether we were satisfied with their interpretation of neighbourhood plan policies before making its recommendation to planning committee. And they didn't."[41]

Discussions are in progress with Exeter City Council about closer working. In the absence of proper guidance, it is left to the local authority to decide how much attention they will give to their Neighbourhood Forums.

The New Romney Neighbourhood Plan that never got off the ground

In February 2013, New Romney Town Council decided to work on a Neighbourhood Plan, starting with a questionnaire sent out to all residents in March seeking suggestions over what should be included in the plan. However, by July 2014 the work on the plan was cancelled due to a lack of interest from residents with few responding to the questionnaire.

The vast majority of those who responded to the questionnaire were over 61 years of age and most of them made it clear they did not want any change. The Parish Council decided the lack of support for any change and potential costs involved in making a plan (estimated at between £20,000 and £70,000) meant they could not proceed:

> "New Romney Town Council had great difficulty in coming to the decision but the general consensus of opinion of the majority of Councillors present at the meeting was that whilst it was extremely disappointing to cease the development of a Neighbourhood Plan for the Parish of New Romney it was a sensible one bearing in mind the need to protect taxpayers' money."[42]

Not all neighbourhoods want change, even when they are presented with a golden opportunity to have a direct say on the matter. This does not mean Neighbourhood Planning is failing, but it is an indication that the appetite and resources will not always be there.

The conversion of Neighbourhood Forums to Parish Councils

The Government is keen to see the roll out of Parish Councils where they do not currently exist. Queens Park Parish Council commenced in June this year and is the first in London for nearly 50 years. Others

[40] The Exeter St James Neighbourhood Forum website.
[41] The Exeter St James Neighbourhood Forum Website.
[42] New Romney Town Council press release, July 2014.

are expected to follow. On September 9, 2013, Communities Minister Don Foster announced new measures to bring parish powers back to the towns and cities of England:

> "Parish councils are a fundamental part of our local democracy, giving the people who live within a community, direct powers to run their local services. For too long the power of the parishioner has only been exercised by people who live in the countryside."[43]

Town and Parish councils can directly run local facilities such as leisure centres and theatres, manage parks, establish bylaws, run job clubs, fund community groups, use the community rights and help stop the clock on the sale of local assets such as pubs and green space. The changes are designed to make it easier to create a parish council by:

- cutting by a quarter the number of petition signatures needed to start the new parish creation process, from 10 per cent of the local population to 7.5 per cent;
- reducing the time local authorities can take to decide on parish council applications to a maximum of a year; and
- making it easier for community groups that have created a Neighbourhood Plan to kick-start the process by removing the need for them to produce a petition.

The creation of Neighbourhood Forums is seen as a stepping stone to the establishment of new Parish Councils. The incentive is the CIL money which is retained directly by the Parish Council. The downside is that this will push out commercial representation. Business Neighbourhood Forums give businesses not only a say, but a vote. Parish Councils are another matter, answerable to residential voters only. In dense urban areas, where there are more businesses, there is an advantage to retaining Neighbourhood Forums over Parish Councils; businesses not only get a voice but they are more likely to fund any Neighbourhood Plan.

Neighbourhood planning undermined

As the Localism Bill passed through Parliament, an obvious issue began to appear. How could Neighbourhood Planning marry up with the growth agenda? Would neighbourhoods really boost growth or would they control development to a degree that has never been realised in this country? The Turley report shows the early plans were negative. The Government response has been to undermine neighbourhood planning by stealth. Introducing more and more permitted development has greatly undermined neighbourhood planning. As the forums are drawn up and plans are being devised, the very things a Neighbourhood Plan will aim to control is being systematically removed by the Government. From domestic rear extensions to changes of use, the very things forums and Parishes want to have a say on are being taken away.

Short-term letting in London is the latest right to be removed by the Government. This is a particular control that was brought in as a direct result of complaints from local communities and is an example of a local issue over which forums and Parishes should continue to have a say. Many groups have been disillusioned by the changes in permitted development rights.

A second issue is that there are no controls over who runs the committee of a Neighbourhood Forum once it is set up. For example, Church Street contains more committee members who live outside the forum area than members who live within the area. Members of the public can attend but not speak at their meetings.

[43] Local Government Minister, Don Foster, September 9, 2013.

Assets of community value

This is the biggest let-down for local communities. It is still misunderstood and groups seem to think that by designating a use or property as an asset of community value will protect the use. They do not understand this merely holds up the transfer of a property to another owner and not necessarily to the community group who identified the asset. Permitted development rights still exist to change a local pub to a restaurant, for example, and most communities' hopes are dashed because they do not have the money to buy an asset.

More could be made of an asset of community value if the NPPF referred to it and gave weight to protecting any use that is identified as an asset of community value. So far the Government is silent on this issue.

The legislation is bad legislation. Not only does it dash the hopes of communities but it holds up commercial transactions. The legislation is anti-business and anti-growth and needs to be revoked as soon as possible.

Local Development Orders ("LDOs") and Community Right to Build Orders ("CRTBOs")

With so many Neighbourhood Plans being on the cautious side, it is no surprise to see that very few LDOs and CRTBOs have been pursued. Very few Parish Councils or Neighbourhood Forums are going to take up these tools. In fact, more are keen on art.4 directions to curb permitted development rights than they are in allowing more development. Certainly in the first instance they will be more interested in getting established and writing plans to get their hands on CIL money.

The Cockermouth Neighbourhood Development Order ("NDO")

One exception is the Cockermouth Neighbourhood Development Order which was passed on July 17, 2014. Following the flood of November 2009 there were incidences where the restoration work was delayed because of the need to apply for planning permission. It was felt something should be done to address this which led to a wider debate as to what types of development should be allowed to proceed without the need for planning permission.

Cockermouth Town Council has taken the decision to use its neighbourhood planning powers to develop a Neighbourhood Development Order that would grant automatic planning permission for certain types of development and changes of use. The Town Council considers that the types of development that would be permitted by the Neighbourhood Development Order would bring wider environmental, social and economic benefits to the town.

The Cockermouth Neighbourhood Development Order permits:

- commercial properties in the town's historic Market Place area to be converted into cafés, bars and restaurants;
- the conversion of the upper floors of commercial properties on two town centre streets into a maximum of four flats per property;
- traditional timber shopfronts to be installed without an application in the same two streets; and
- timber sliding windows and doors to be installed in five other residential streets.

There was a 19.3 per cent turnout for the referendum, in which 772 votes were made in favour of the proposals, compared to 496 against. The expectation was that the types of development permitted by the NDO would bring "wider environmental, social, and economic benefits to the town".[44]

Sparkbrook revisited

The pioneering Sparkbrook community have also formed a Neighbourhood Forum so what lessons can we learn from their 1972 Community Plan.

The Sparkbrook Plan was an innovative piece of work at the time that genuinely involved the whole community. However, it was reliant on others implementing it because the community had no resources or responsibility to carry out the recommendations in the plan. It did bring the community together, but when investment was identified and agencies parachuted in, they excluded the community until the next round of funding. In 1975, there were riots on the streets due to community tension. There was a feeling the community had been "hijacked" by agencies to seek a larger funded scheme which widened the capture area. They felt the extreme deprivation of Sparkbrook was used to justify funding and allocate expenditure in other affluent areas. For example, in 2000, Sure Start invested about £1m but the community wanted one thing and the agency wanted another:

> "The agencies won—no real parent participation on board. There is a perception that community should be done onto rather than work with. There is no power of asset value for residents in the eyes of professionals—they are the decision makers—they decide best because they are the experts in the field of community development."[45]

DCLG technical consultation on planning

The Government announced proposed changes for Neighbourhood Planning in August 2014.[46] The proposed changes include:

- a requirement that an application for a neighbourhood area designation to be determined by a prescribed date. This is likely to be ten weeks after a valid application is made. This should apply only where the boundaries of the neighbourhood area applied for coincide with those of an existing parish or electoral ward; and there is no existing designation or outstanding application for designation, for all or part of the area for which a new designation is sought;
- the removal of the requirement for a minimum of six weeks consultation and publicity before a Neighbourhood Plan or Order is submitted to a LPA;
- a requirement that those preparing a Neighbourhood Plan proposal must consult the owners of sites that they consider may be affected by the Neighbourhood Plan as part of the site assessment process;
- a new statutory requirement (basic condition) to test the nature and adequacy of the consultation undertaken during the preparation of a Neighbourhood Plan or order; and
- a statutory requirement that either: a statement of reasons. an environmental report, or an explanation of why the plan is not subject to the requirements of the SEA Directive must accompany a Neighbourhood Plan proposal when it is submitted to a LPA.

[44] Sheila Brown, town clerk for Cockermouth Town Council.
[45] Interview with Naeem Qureshi, Sparkbrook Neighbourhood Forum, July 23, 2014.
[46] *Technical consultation on Planning*, July 31, 2014.

Other improvements to Neighbourhood Planning that the Government should consider

The following changes might strengthen and improve neighbourhood planning:

- Introduce a formal time period for "expressions of interest" in neighbourhood planning. Six months would be a sufficient period for anyone to consider their options and not be forced into making last minute applications because someone else has beaten them to it.
- Published Government guidance for instances of multiple (overlapping) applications rather than leave it to each LPA to make it up.
- Introduce a three-month time limit for making the forum application following a Neighbourhood Area designation. It is presumed if you are making a neighbourhood area application that you are interested in applying for forum status, however not all successful applications for areas are being taken forward to forum status.
- Greater encouragement for groups to look ahead, i.e. to begin to set up a Forum prior to area designation.
- Committee members must live or work in the forum area.
- Introduce standard information required on a Neighbourhood Forum application. There is a discord between what information the application has to contain and what the LPA is required to assess (representative nature of the forum). For example it should be mandatory that a list of all individuals involved be submitted.
- Introduce a time limit for the LPA to designate the Forum (already proposed in the Technical consultation on Planning). This would prevent LPAs from sitting on applications.
- Join the two formal consultations together, e.g. regs 14 and 16 (pre-submission consultation by the neighbourhood forum and post-submission consultation by LPA). This would speed up the process and allow the submission of the plan and then both NF and LPA carry out consultation jointly before submission for examination. This enforces an element of co-cooperation/joint working.
- Make the examiner's report binding. Currently the Neighbourhood Plan examiner's report is not actually binding.
- Join together regs 19 and 20. The LPA has to publish a decision (to make) a Neighbourhood Plan, and then subsequently publicise the Neighbourhood Plan.
- Prevent the conversion to Parish Councils where an area is predominantly business in nature, e.g. Business Neighbourhood Forums.
- Provide guidance on what "predominantly business in nature" actually means.
- Give Neighbourhood Forums proper recognition by making them a statutory consultee for planning applications.
- Where a Parish Council area is predominantly business in nature, introduce a referendum for businesses, similarly to the procedures in business neighbourhood forums.
- Revoke assets of community value or give them a higher status for protection in the NPPF.

Conclusions

Neighbourhood planning is here to stay. It will be a brave Government that will take it away. The system provides a golden opportunity for locals, particularly residents, to have a bigger say in their area. However, it remains to be seen whether business neighbourhood forums can work together and produce a plan that both sectors will support.

It is questionable whether neighbourhood planning was really needed in view of a democratic system, where locally-elected councillors have been responsible for plan-making. Why the extra level where

minutia planning is going to take place? The more detailed the policies, the more certainty for developers, but on the other hand the less scope for innovation and change. From a purist planning perspective, neighbourhood planning has to be right, at least in theory. However, it sits very uncomfortably with the Government's growth agenda and it is being heavily undermined by the succession of measures to take a lot of development out of the planning system.

Legal Update: What Have Been the Key Issues Emerging From Cases Over the Past Year?

Richard Harwood OBE QC

The most important change in planning litigation in the last year has been the speeding up and increased specialisation of the High Court's role in dealing with challenges to planning decisions. The "Planning Fast Track" was introduced in the Administrative Court in July 2013 with major planning cases being overseen by Lindblom J. In April 2014, this was replaced by the Planning Court, again under the control of Sir Keith Lindblom. More is said about the working of the court in due course, but there certainly seem to have been more judgments.

Westlaw gives 170 planning judgments in the Administrative Court (including the Planning Court) in the year to July 31, 2014, as against 128 in the previous 12 months and 91 in the year to July 31, 2012.[1] Court of Appeal judgments on planning matters in these periods were 42 to July 31, 2014, and 26 in each of the periods to 2013 and 2012. The increase has been driven by more cases being heard and, as a secondary factor, more planning judicial reviews. The numbers of High Court challenges to Planning Inspectorate decisions have been almost static (at around 135pa) and success rates have increased substantially, which suggests more submissions to judgment and so fewer hearings on those cases.[2] Planning judicial review claims filed were 150 in 2010, 194 in 2011, 187 in 2012, 242 in 2013, and 123 in the first half of 2014.[3]

Development plans

There have been a steadily increasing number of development plan challenges.

In *Gallagher Homes v Solihull MBC*,[4] established Green Belt boundaries had been altered to move the claimant's sites from white land to Green Belt status. There were two keys errors in this decision which were identified by the court. The first was that the Inspector was mistaken in treating the Regional Spatial Strategy review as having identified the objectively assessed housing need for Solihull. Having sought to follow the National Planning Policy Framework's ("NPPF") requirements to identify that need, the extremely experienced Inspector was found to have misunderstood the exercise which had been carried out. Whilst put in argument in a number of different ways, this was essentially an error of fact: see [76]–[81].

The other error identified was that the Inspector was not entitled to find that the circumstances which he had identified were exceptional circumstances for the purpose of justifying a change to the Green Belt boundaries. Simon Brown L.J.'s judgment in *Copas v Windsor and Maidenhead RLBC*[5] was in emphatic terms (at [40]):

> "I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present—where the revision proposed is to *increase* the Green Belt—cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event."

[1] In the Administrative Court there were 84 judgments in the year to July 31, 2011. The subject/keyword for the search was "planning" and the Court "Administrative Court" and "Court of Appeal". The "Administrative Court" search does pick up the Planning Court cases.

[2] Numbering between 135 and 137 cases a year in the Planning Inspectorate's statistical years (ending March 31) for 2011/2012, 2012/2013 and 2013/2014. Quashing rates are 19%, 27% and 40% respectively: *http://www.planningportal.gov.uk/planning/planninginspectorate/statistics*. [Accessed October 13, 2014.]

[3] Analysis of *Court statistics (quarterly): April to June 2014* at *https://www.gov.uk/government/statistics/court-statistics-quarterly-april-to-june-2014*. [Accessed October 13, 2014.]

[4] *Gallagher Homes v Solihull MBC* [2014] EWHC 1283 (Admin); [2014] J.P.L. 1117.

[5] *Copas v Windsor and Maidenhead RLBC* [2001] EWCA Civ 180; [2001] J.P.L. 1169.

That the use of the site for housing would not be sustainable development is not in those terms, exceptional.

An authority's approach to housing figures was upheld in *Zurich Assurance Ltd v Winchester CC*.[6] Both the assessment of housing requirements and whether the duty to co-operate had been complied with were matters for public law review. Sales J. held that the housing requirement for 2011–2031 did not have to include any shortfall from previous years since the modelling for that period was self-contained (at [94] and [95]). On the duty to co-operate, the court emphasised that (at [110]):

> "Deciding what ought to be done to maximise effectiveness and what measures of constructive engagement should be taken requires evaluative judgments to be made by the person subject to the duty regarding planning issues and use of limited resources available to them. The nature of the decisions to be taken indicates that a substantial margin of appreciation or discretion should be allowed by a court when reviewing those decisions."

In *Grand Union Investments Ltd v Dacorum BC*,[7] Lindblom J. emphasised that the guidance on soundness in the NPPF "was policy, not law, and it should not be treated as law" and it was not unlawful or unsound for a plan not to follow national policy in every respect (at [59]). The Inspector had found that the Council had failed to undertake a proper assessment of the housing needs of its area (contrary to [47] of the NPPF) and had not done what it should to establish whether and how much of the objectively assessed need for market and affordable housing could be met (at [63]). He found that the unsoundness of the core strategy as a result of these errors could be cured by main modifications providing for a partial review (at [68]). The court agreed this was a pragmatic, rational and justified approach (at [69]).

The issues which need to be considered in a development plan will depend upon its position in the planning policy framework. In *Gladman Development Ltd v Wokingham BC*,[8] Lewis L. held that the Wokingham Managing Development Delivery Local Plan did not need to identify the objectively assessed need for housing in the area. This particular document was intended simply to allocate sites to meet a requirement which had already been set out in the adopted Core Strategy (at [60]–[69]).

Saving development plans

In *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC*,[9] the Secretary of State's direction saving a policy in a 2000 local plan also saved the reasoned justification associated with that policy (at [79]–[87]). The court held that it was not possible to challenge the reasoned justification of a local plan on the basis that it was policy, not reasoned justification, after the end of the six-week challenge period (at [62]).

Richards L.J. in the Court of Appeal in *Cherkley Campaign*[10] held, in respect of a pre-2004 style development plan (at [16]):

> "in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed *policies* for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a *reasoned justification* of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the

[6] *Zurich Assurance Ltd v Winchester CC* [2014] EWHC 758 (Admin).
[7] *Grand Union Investments Ltd v Dacorum BC* [2014] EWHC 1894 (Admin).
[8] *Gladman Development Ltd v Wokingham BC* [2014] EWHC 2320 (Admin).
[9] *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC* [2013] EWHC 2582 (Admin); [2014] 1 P. & C.R. 12.
[10] *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567.

> plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the polices will be implemented."

However he agreed with the High Court that the reasoned justification was saved as (at [18]):

> "To blue-pencil the supporting text would risk altering the meaning of the policy, which cannot have been the legislative intention. It seems to me that the true effect of the statutory provisions was to save not just the bare words of the policy but also any supporting text relevant to the interpretation of the policy, so that the policy would continue with unchanged meaning and effect until replaced by a new policy."

Neighbourhood planning

The first neighbourhood planning challenge was to the boundaries of the Daws Hill neighbourhood. The local planning authority had decided to exclude two major sites from the area. The Court of Appeal's dismissal of the criticism of the District Council's decision to leave the two strategic sites of former RAF Daws Hill and Handy Cross Sports Centre out of the neighbourhood area was not a surprise. The discretion available in defining the area is put widely. The strategic nature of the sites and the progress towards their redevelopment was certainly relevant to whether they should be subject to a new round of plan preparation.

Argument had moved on from the High Court and required the Court of Appeal to deal with what in isolation is a perplexing provision: s.61G(5) of the Town and Country Planning Act 1990, which provides that if the application area is not considered by the local planning authority to be the right area, then they must still designate "some or all of the area", whether in the applied for area or another area or areas. That would appear to mean that an application cannot be refused in its totality. Or put another way, however bad the idea of a neighbourhood may be, it cannot be a wholly bad idea. Even if it is.

Sullivan L.J. dealt with this by taking s.61F on the designation of neighbourhood fora (or forums, if you prefer) with s.61G on the designation of neighbourhood areas. If the local planning authority exercises its discretion to refuse to designate a neighbourhood forum (s.61F(3),(5),(6)) then there will be no neighbourhood area to designate. If the forum is designated then the authority are able to limit the designated area to some of the application area if they wish.

This interpretation works neatly enough for neighbourhood fora. However, if the application is by a parish council for land in its area or in another parish's area with that parish council's consent (see s.61F(1), (2)) then the authority's sole power is over boundaries and it must designate some of the application area under s.61G(5). This may be explained by parish councils being presumed to be capable of undertaking these planning functions and the only question then being whether part of their proposed area should be excluded, perhaps for *Daws Hill* reasons.

Challenges are beginning to be made against proposed neighbourhood development plans. The first full judgment is in *BDW Trading Ltd (trading as Barratt Homes) v Cheshire West and Chester BC*.[11] The High Court considered that the Strategic Environmental Assessment ("SEA") of the draft Tattenhall Neighbourhood Plan was adequate. Somewhat surprisingly, it was said that the only reasonable alternative to be assessed was not having a plan at all (at [20], [71], [75]). The court drew a distinction between the role of an examiner of a local plan, who has to consider soundness, and a neighbourhood plan examiner who addresses whether the basic conditions have been met. However, it must be said that whilst the statutory duties are differently expressed, for the purposes of a public law review, those differences may not prove to be so substantial.

[11] *BDW Trading Ltd (trading as Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin).

In *R. (on the application of Crownhall Estates Ltd) v Chichester DC*,[12] the local authority have accepted that the decision to take the Loxwood Neighbourhood Development Plan to a referendum falls because the decision not to require Strategic Environmental Assessment was unlawful. To cap inadequate reasoning and a failure to consult statutory bodies, the officer making the screening decision did not have authority to do so.

Concepts of development

In *Reed v Secretary of State for Communities and Local Government*,[13] the Inspector had found that doubling the number of residential caravans from one to two amounted to a material change of use of the land. He offered no explanation as to why that should be the case, beyond simple mathematics, and did not say that there had been a change in the character of the use of the land, let alone why he thought that was the case. In those circumstances the decision was robustly quashed by Sullivan L.J.

R. (on the application of Sellars) v Basingstoke and Deane BC,[14] is a reminder that the planning unit might be larger than the area which is the subject of a lawful development certificate application. There ,a certificate was sought in respect of model aircraft flying from a farm. The application was in respect of a limited part of the farm but was quashed because the local planning authority failed to appreciate that determining the lawful use of the application site might require consideration of the use of a land beyond that site. A more conventional example can be taken of a building which is being used for the storage of equipment. If a lawful development certificate application is made for the building alone, and no wider land is considered, that use could be seen as a storage use within Use Class B8. However, if the building is within a sports ground, and the equipment is used for the maintenance of the grounds or for playing sport, then the building has a D2 assembly and leisure use as part of the D2 use of the sports ground. In that example the planning unit would be the sports ground rather than the building.

The sports ground example is a more obvious one than the mix of activities on Blacklands Farm, but the principle was the same. Identifying the use of land, and determining whether it has become lawful by the passage of time, depends upon the identification of the planning unit.

Environmental Impact Assessment and Habitats Directive

Challenges to Environmental Impact Assessment ("EIA") decisions have normally focussed on screening decisions that an EIA is not required. This is perhaps because of three factors:

- There are more negative EIA screening decisions than EIAs carried out.
- Those concerned by an application may be happier (and better informed) if an EIA is carried out than if it is not.
- The potential for legal error is greater in screening decisions than in an Environmental Statement itself.

Litigation has come in waves. It was in *Berkeley v Secretary of State for the Environment*,[15] and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999,[16] that the duty to screen was recognised. Much of the litigation of the early 2000s concerned a failure to consider screening at all, or planning authorities taking a very narrow view of the scope of the regime. It took the Court of Appeal to point out in *R. (on the application of Goodman) v Lewisham LBC*,[17] that a

[12] *R. (on the application of Crownhall Estates Ltd) v Chichester DC* CO/3299/2014.
[13] *Reed v Secretary of State for Communities and Local Government* [2014] EWCA Civ 241; [2014] J.P.L. 725.
[14] *R. (on the application of Sellars) v Basingstoke and Deane BC* [2013] EWHC 3673 (Admin); [2014] J.P.L. 643.
[15] Initially in the Court of Appeal at *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [1998] Env. L.R. 741.
[16] Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293).
[17] *R. (on the application of Goodman) v Lewisham LBC* [2003] EWCA Civ 140; [2003] Env. L.R. 28.

"Big Yellow Warehouse" self-storage facility might be an urban development project. Screening litigation then tended to revolve around the extent to which an error could be identified in the varying amounts of explanation which might have been offered, the Court of Appeal in *R. (on the application of Marson) v Secretary of State for the Environment, Transport and the Regions*,[18] having decided that reasons did not have to be given. Such challenges met varying degrees of success.

Litigation took another swerve with the decision of the European Court of Justice that the reasons for not requiring an EIA had to be apparent from the material produced at the time or from an explanation provided in response to a subsequent request: *R. (on the application of Mellor) v Secretary of State for Communities and Local Government*.[19] That invited a more penetrating analysis by the court of the reasoning which was actually given, for example, in *R. (on the application of Bateman) v South Cambridgeshire DC*[20] and *R. (on the application of Friends of Basildon Golf Course) v Basildon DC*.[21] The terms of *Mellor* did though allow the authority's thought process to be pieced together from documents, such as any screening request and consultation responses at the screening stage: see, for example, *R. (on the application of Berky) v Newport CC*.[22] This could then be supplemented by a further explanation in response to a pre-action letter or (contrary to the intent of *Mellor*) a witness statement in litigation. There was a degree of benevolence in the willingness of the courts to cobble together coherent and lawful reasoning from a range of documents, or to allow witness statements to explain away what were prima facie legal errors in the contemporaneous documents.[23] The broad trend of the post-*Mellor* cases was that if the decision-maker provided some decent amount of reasoning without clear-cut errors, then it was unlikely to find itself successfully challenged.

The ability to explain a decision later is pregnant with the possibility of what the courts call *ex post facto rationalisation*, which, in English, is making it up in response to the criticism raised. Since the challenge may first arise on the grant of planning permission the position is unsatisfactory for all concerned. An explanation may be first sought two years after the screening decision and a screening opinion which relies upon much later reasoning is unreliable for all concerned, including the developer.

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011[24] introduced a requirement in England that the screening opinion or direction "be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion".[25] The written statement may be contained in the same document as the screening opinion or direction, but in any event must be published at the same time. Internal notes are not sufficient for this purpose.

The issues that arise are the standard expected of such reasons and whether later statements can correct omitted, unclear or defective reasoning. In *R. (on the application of Embleton Parish Council) v Northumberland CC*,[26] H.H. Judge Behrens held that whilst a screening checklist which answered many questions with simply "no" would have been adequate, with other material, under the 1999 Regulations post-*Mellor* (at [103]):

[18] *R. (on the application of Marson) v Secretary of State for the Environment, Transport and the Regions* [1999] 1 C.M.L.R. 268.

[19] *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* (C-75/08) [2010] P.T.S.R. 880; [2009] E.C.R. I-3799; [2010] Env. L.R. 2.

[20] *R. (on the application of Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157.

[21] *R. (on the application of Friends of Basildon Golf Course) v Basildon DC* [2010] EWCA Civ 1432; [2011] Env. L.R. 16.

[22] *R. (on the application of Berky) v Newport CC* [2012] EWCA Civ 378; [2012] 2 C.M.L.R. 44.

[23] See, e.g. *R. (on the application of Holder) v Gedling BC* [2013] EWHC 1611 (Admin); [2013] J.P.L. 1426 and the comments of Sullivan L.J. in the subsequent permission hearing [2013] EWCA Civ 599; *Aston v Secretary of State for Communities and Local Government* [2013] EWHC 1936 (Admin); [2014] 2 P. & C.R. 10.

[24] Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824).

[25] Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) reg.4(7). Wales continues to use the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) which do not include a duty to give reasons for a negative screening decision and so are subject to the *Mellor* requirements. For recent consideration of EIA screening in Wales, see *R. (on the application of Plant) v Pembrokeshire CC* [2014] EWHC 1040 (Admin).

[26] *R. (on the application of Embleton Parish Council) v Northumberland CC* [2013] EWHC 3631 (Admin); [2014] Env. L.R. 16.

> "[The 2011] regulations require a written statement giving 'clearly and precisely' the 'full' reasons for the decision. To my mind the check list is not such a statement. It does not purport to be such a statement. It does not purport to explain the reasons for the decision. It is a check list intended to help users decide whether an EIA is required."

However, he declined to quash the decision on the basis that no prejudice was caused to the claimant as it was "possible to glean the reasons from the documents on the register" and there would be no different decision if the screening opinion was made again (at [106]).

In *R. (on the application of Gilbert) v Secretary of State for Communities and Local Government*,[27] Supperstone J. considered that reasons in a Secretary of State's screening direction complied with the 2011 EIA Regulations but said that these must be read together with a Planning Inspectorate screening checklist. Whilst that checklist was quickly disclosed on request, it was not part of the published statement of reasons.

Lindblom J. dealt with the effect of revisions to a development proposal on the validity of a screening opinion in *R. (on the application of CBRE Lionbrook (General Partners) Ltd) v Rugby BC*,[28] saying (at [47]):

> "the concept of a development having been the subject of a screening opinion is broad enough to include a previous screening process for an earlier version of the proposal, so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through."

The EIA and Habitats regimes are under scrutiny in *R. (on the application of Champion) v North Norfolk DC*.[29] A planning application was made for the erection of two silos and the construction of a lorry park at Crisp Malting's plant at Great Ryburgh. The lorry park site was to be drained, ultimately, to the River Wensum, a Special Area of Conservation ("SAC") noted for its outstanding chalk stream fauna including white-clawed crayfish. It was common ground that if pollution from the lorry park, such as run-off containing hydro-carbons, reached the river then significant harm to the SAC could result. Following receipt of the application the local authority adopted a negative EIA screening opinion and decided not to carry out appropriate assessment, subject to appropriate pollution prevention measures being put in place. A month later, both the Council and Natural England decided that the measures proposed were inadequate. A series of revisions were made to the scheme over the next 16 months and at a final committee meeting, members decided that EIA and appropriate assessment were not required and planning permission should be granted. However, they attached planning conditions requiring surveying and remedial measures if pollution of the SAC occurred.

The claimant challenged both screening decisions, contending, in particular, that the proposed mitigation could not be taken into account (especially given its uncertainty), the screening decision had to be taken at the start of the application process, not having put in further changes at the end, and the planning condition contradicted the committee view that an EIA and appropriate assessment ("AA") was not required. James Dingemans QC held in the High Court that the original screening opinion was unlawful since there was insufficient information at that stage to conclude that significant effects were not likely.[30] He quashed the final screening decisions on the basis that they were inconsistent with the conditions and the Council's stance was therefore irrational.

[27] *R. (on the application of Gilbert) v Secretary of State for Communities and Local Government* [2014] EWHC 1952 (Admin).
[28] *R. (on the application of CBRE Lionbrook (General Partners) Ltd) v Rugby BC* [2014] EWHC 646 (Admin); [2014] Env. L.R. D3.
[29] *R. (on the application of Champion) v North Norfolk DC* [2013] EWCA Civ 1657.
[30] *R. (on the application of Champion) v North Norfolk DC* [2013] EWHC 1065 (Admin); [2013] Env. L.R. 38.

The unlawfulness of the original screening decision was not challenged on appeal but the Court of Appeal rejected the view that the conditions and the absence of EIA/AA were inconsistent.[31] The conditions, they said, guarded against lesser harm.

Permission to appeal has been granted by the Supreme Court on the wider basis that:

> "The Court of Appeal erred in failing to appreciate that the process by which the defendant Council reached its decision not to have EIA and AA was unlawful. This was so because:
>
> a. **(Habitats Directive AA screening):**
>
> The AA process had or should have automatically begun when the planning application was received or at the latest when Natural England originally identified that there was a risk of pollution to the Natura 2000 site as a result of surface water run off from the lorry park. It was not possible for the process not to start and/or to end prematurely on the basis that mitigation measures were later identified. Having been identified, it would have been possible for an AA to have been signed off at any stage up to and including the grant of permission, but that had to be done. To do otherwise was contrary to the scheme of Article 6(3) of the Habitats Directive.
>
> b. **(EIA screening):**
>
> It was not open to the defendant Council to decide at the very end of the decision-making process that EIA was not required on the basis that significant environmental effects were unlikely as a result of taking account of mitigation measures. The matter plainly shows that, at the time this decision should have been taken, that there were going to be significant environmental effects. This should have been followed by the structured input required, including in the light of an ES from the general public, other consultees, and the decision makers.
>
> c. **(Mitigation measures):**
>
> It was irrelevant to both EIA and AA processes that mitigation measures were later identified, which were said to reduce these effects to an insignificant level. First, if it is lawful to take mitigation measures into account in a screening process, they were not identified at the relevant time i.e. at or before the application for planning permission was made. Secondly, it was in any event unlawful to take mitigation measures into account in that process: it is contrary to EU law to do so."

The competence of councillors

The courts have continued to ponder the competencies of councillors. In *R. (on the application of Timmins) v Gedling BC*[32] Green J. said (at [82]):

> "It also needs to be borne in mind that the Officers' report is not the Decision of the Planning Committee itself. It is guidance to them which includes advice and recommendations. In the absence of detailed reasons from the Planning Committee itself a Court can *prima facie* assume that the guidance, advice and recommendations contained within that report were accepted: See paragraph [46] above. However, sometimes the notes of the Planning Committee will themselves be available and can be assessed: see e.g. *Heath & Hampstead* (ibid) paras 39 *et seq*. In this connection the Courts have recognised that the members of Planning Committees are well versed in the issues that relate

[31] *R. (on the application of Champion) v North Norfolk DC* [2013] EWCA Civ 1657; [2014] Env. L.R. 23.
[32] *R. (on the application of Timmins) v Gedling BC* [2014] EWHC 654 (Admin).

to their locality and come to the decision they are required to take with local knowledge and understanding. They can also, as a collective, be treated as having some experience in planning matters: See e.g. per Sullivan J. in *Fabre* (ibid) at p.509. It is not therefore to be assumed that every infelicity of language or expression by the Officer or every mis-description of the relevant test will necessarily have exerted any material impact upon the Committee even in respect of reports that are accepted by the Committee. To conclude otherwise would mean that even if the decision of the members was taken in an altogether impeccable manner with experienced members directing themselves perfectly, their decision would nonetheless be at risk of being quashed because the Officers report contained infelicities or ambiguities which the Committee had recognised and ignored."

He followed the approach of Sullivan J in the Inspector's Green Belt decision in *Doncaster MBC v Secretary of State*[33] in being more concerned at infelicities in drafting where the planning decision was finely balanced.[34]

In *R. (on the application of Bishop's Stortford Civic Federation) v East Hertfordshire DC*[35] the High Court upheld the ability of a Council Cabinet member to speak at a planning committee meeting considering a planning application for the redevelopment of council-owned land. Nothing in the Council's constitution, standing orders or procedures prevented him from doing so. Curiously (and wrongly) the Council itself had found that the councillor's appearance had been a breach of the Council's Code of Conduct by bringing the councillor's office into disrepute. As a former Member of Parliament, Mr Justice Cranston will have dealt with councillors before going to the Bench. He explained:

"40. Apart from these practical issues, it seems to me that there are more fundamental issues as to the appropriateness of courts delving too deeply into the debates of democratically elected politicians. In the planning context, one possible aspect is expertise. The court have cautioned against undue judicial intervention in policy judgments by expert tribunals within their areas of special competence (*AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 A.C. 678 at [30] per Baroness Hale), and this reticence has been applied to considering the decisions of planning inspectors on issues of planning judgment: *Wychavon DC v Secretary of State for Committees and Local Government* [2008] EWCA Civ 692; [2009] P.T.S.R. 19 at [43] per Carnwarth L.J. Arguably, the same applies to experienced planning committees with their training and codes of conduct.

41. More importantly, planning committees comprise democratically elected politicians, seeking to respond to their local communities and ultimately answerable to them. The job is not easy, especially when passions on an issue are high and rational argument is squeezed. Large numbers of the public may attend committee meetings to voice their concerns. It is not just that the non-elected judge, sitting in the relative tranquillity of The Strand or Parliament Square, is unlikely to have experience these pressures and how debate in these circumstances is shaped. It is also that excessive forensic analysis of political debate has an appearance of fettering the democratic process. To my mind the taking of statements when councillors are asked to explain their voting, is especially to be deplored. Prudence is the sensible judicial approach in this context."

Hickinbottom J. sought to summarise the principles on councillors and committee reports in *R. (on the application of Trashorfield Ltd) v Bristol CC* at [13].[36] He emphasised the need for the report to be read fairly and as a whole (at [43]).

[33] *Doncaster MBC v Secretary of State* [2003] EWHC 995 (Admin).
[34] *Timmins v Gedling BC* [2014] EWHC 654 (Admin) at [83].
[35] *R. (on the application of Bishop's Stortford Civic Federation) v East Hertfordshire DC* [2014] EWHC 348 (Admin); [2014] J.P.L. 852.
[36] *R. (on the application of Trashorfield Ltd) v Bristol CC* [2014] EWHC 757 (Admin).

R. (on the application of McCellan) v Lambeth LBC[37] concerned the decision of the Council's Cabinet to fell a "tree of heaven" (of the species *ailanthus altissima*) on Council owned land within a conservation area. None of the reports referred to the conservation area status of the land. To the delight of newspaper journalists, the case was heard by H.H. Judge Sycamore.[38] The local authority sought to argue that the Cabinet would have known that the tree was in a conservation area. H.H. Judge Sycamore disagreed (at [21]):

> "There is a significant distinction in my judgment between the factual background in this case and that in *Trashorfield* and *Fabre* … The decision of 22 October 2012 was made, not by a Planning Committee of the defendant but by the defendant's Cabinet. In my judgment this is a significant distinction and it cannot be assumed that the same extent of local and background knowledge in the context of planning and conservation issues applies to Cabinet members as would apply to a Planning Committee."

Excessively detailed interpretation of a committee report can count against councils as well as claimants. In *R. (on the application of Holder) v Gedling BC*,[39] the Council argued that telling members that representations summarised as "permission *for this application* would set a precedent for further turbine development nearby" were "non-material considerations", was officer advice that "precedent is a potentially material consideration, it merits little or no weight in this case". Maurice Kay L.J. disagreed (at [13]):

> "It is necessary to construe the planning officer's advice having regard to how a reasonable planning decision maker would understand it … [the committee] was being provided with a list headed 'Non-material Planning Issues'. It seems to me that the wording which followed would only be understood by the Planning Committee as meaning that precedent was, as a matter of law or policy, of no materiality whatsoever—not that the circumstances of this particular proposed development were such that they reduced to zero the materiality which it might otherwise have had. I do not consider that the inclusion of the words 'permission for this application' would be understood as meaning that, as a matter of judgment, what would be potentially material in another Green Belt case is, for some undisclosed reason, of no materiality here."

The assumption that if a committee agrees with an officer's recommendation it will do so for the reasons in the officer's report, unless there is evidence from what happened at the meeting that different reasons were behind the decision, holds good. If the committee disagree with their officers then the reasoning must be found in the events at the meeting and the knowledge of the members. In *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC*, private golf and hotel facilities had been approved against officer advice. Detailed reasons were adopted, although these were drafted by officers. There is a sense that the High Court put more faith in the Council's officers and expert consultees, than in the committee's judgment (at [155]):

> "the Council majority could not rationally have come to the conclusion in para.[7] of their Reasons that the overall landscape character '*would not be compromised*' (with our without the site visit which they made). The decision simply flew in the face of the unanimous and trenchant views expressed by the landscape experts that the effects would be '*major ... adverse, long-term and permanent*' and the changes were of '*of such magnitude*' that the landscape character would be '*fundamentally, and probably irreversibly, altered*' (see e.g. the passages quoted above). The planning officers also advised unequivocally that the proposals would be '*seriously detrimental*' to the visual amenity."

[37] *R. (on the application of McCellan) v Lambeth LBC* [2014] EWHC 1964 (Admin).
[38] e.g. "Judge Sycamore saves 80-year-old 'tree of heaven' from Lambeth council giving it the chop" at *http://www.standard.co.uk/news/london/judge-sycamore-saves-80yearold-tree-of-heaven-from-lambeth-council-giving-it-the-chop-9545369.html*. [Accessed October 13, 2014.]
[39] *R. (on the application of Holder) v Gedling BC* [2014] EWCA Civ 599; [2014] J.P.L. 1087.

The Court of Appeal disagreed, observing that the members were not bound by the advice which they had received, and in that case the expert opinions were not all one way (at [53] and [56]).

Planning appeals

A natural area of interest for the courts is the fairness of proceedings. They have made a number of notable interventions in recent years. Some general principles were set out by Jackson L.J. in *Hopkins Development Ltd v Secretary of State for Communities and Local Government* at [62];[40]

"i) Any party to a planning inquiry is entitled (a) to know the case which he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.

ii) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector's decision.

iii) The [Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000] are designed to assist in achieving objective (i), avoiding pitfall (ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness.

iv) A rule 7 statement or a rule 16 statement identifies what the Inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the Inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds.

v) The Inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so.

vi) If a main party resiles from a matter agreed in the statement of common ground prepared pursuant to rule 15 , the Inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged."

He emphasised (at [61]):

> "The Rules provide a framework, within which both the Inspector and the parties operate. It remains the duty of the Inspector to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the hearing."

Jackson L.J. also expressed the view that the "crack of the whip" metaphor, repeated ever since *Fairmount Investments Ltd v Secretary of State for the Environment*,[41] was of little assistance. This may be a disappointment for those who imagine that the judiciary were partial to that sort of thing.

In *Hopkins* the issue had been sufficiently ventilated—both main parties having submitted evidence on the point—so the Inspector's handling of it was fair.

If a new point arises during an appeal then it may be necessary for the public to be given a further opportunity to comment beyond the statutory period. In *Phillips v First Secretary of State*[42] a new point arose in that the telecommunications operator set out a larger area of search for alternative sites in its written representation appeal submissions. The High Court held that the public should have been able to comment on this new point. Richards J. held (at [55]):

[40] *Hopkins Development Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470; [2014] J.P.L. 1000.
[41] *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 W.L.R. 1255.
[42] *Phillips v First Secretary of State* [2003] EWHC 2415 (Admin); [2004] J.P.L. 613.

> "The need to invite further representations in the interests of fairness is likely to arise very infrequently. The sequence of representations provided for in the regulations will normally be sufficient to achieve fairness. But the opportunity to make additional representations can and should be given if a new point is raised which the Inspector ought to take into consideration and which cannot fairly be taken into consideration without giving such an opportunity. Whether fairness requires it depends entirely on the particular facts of the case."

In *R. (on the application of Ashley) v Secretary of State for Communities and Local Government*,[43] the appellant had submitted potentially contentious expert evidence on noise just before the close of the period for public comments on the appeal. The Inspector's decision was quashed as an opportunity for comment should have been given.

The ability of third parties to cross-examine opposing parties was considered in *Aston v Secretary of State for Communities and Local Government*.[44] Dr Aston, a local resident who was a sustainability consultant with expertise in flooding, objected to the housing development on flooding grounds.[45] She produced detailed representations at the application and appeal stage. Whilst not a r.6 party, she gave oral evidence in her own right and was cross-examined. Her request to cross-examine the appellant's flooding witness was refused, even though no other party was taking flooding at the inquiry. In a less-than-persuasive judgment, the High Court held that the Inspector was entitled to refuse to allow cross-examination on the basis that flooding was not likely to be a determining issue (at [84]).

The error in *San Vicente v Secretary of State for Communities and Local Government*[45] was that local objectors had not been notified of the hearing date. A further hearing session was arranged, before the same Inspector. The local residents and councillors had considered that the second hearing had not been sufficiently thorough. That was a risk inherent in using the same Inspector and it was highly likely that it would occur. Collins J. considered the re-run to have been unfair and quashed the decision.

The High Court's decision on planning appeal costs in *Scrivens v Secretary of State for Communities and Local Government*[46] contains two salutary lessons. The first is that submitting an excessive amount of material might be considered unreasonable and subject to a partial award of costs. The second is the need for a costs award to be sufficiently certain to be capable of detailed assessment by the High Court. An award of costs "so far as they related to the quantity of material submitted" does not give a costs judge much to go on and the Secretary of State ultimately agreed to its quashing on that basis. Parties seeking partial awards of costs and Inspectors need to think how a potential costs award would be capable of being worked out. It may be that points to costs for a particular time period, on discrete elements of the evidence and submissions or just a rough and ready proportion of the costs. That will not necessarily be easy or seem scientific but, like a trial judge, the appeal inspector is in the best position to determine what the effect of unnecessary or excessive evidence is.

The Secretary of State's role in decision-making

Gypsy and traveller sites in the Green Belt will almost invariably be inappropriate development. The question for the planning decision-maker is whether there are very special circumstances that clearly outweigh the harm by reason of inappropriateness and any other harm caused by the proposal. There may well be different views as to where the balance lies in a particular gypsy and traveller case. *Ball v Secretary of State for Communities and Local Government*[47] is a good illustration of this. The Inspector recommended that a permanent permission be granted but that a temporary permission could not be justified. Civil

[43] *R. (on the application of Ashley) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 559; [2012] J.P.L. 1235.
[44] *Aston v Secretary of State for Communities and Local Government* [2013] EWHC 1936 (Admin); [2014] 2 P. & C.R. 10.
[45] *San Vicente v Secretary of State for Communities and Local Government* [2013] EWHC 2713 (Admin); [2014] J.P.L. 217.
[46] *Scrivens v Secretary of State for Communities and Local Government* [2013] EWHC 3549 (Admin); [2014] J.P.L. 521.
[47] *Ball v Secretary of State for Communities and Local Government* [2014] EWCA Civ 372; [2014] J.P.L. 1016.

servants came to the opposite view, whilst saying it was a difficult case. The Minister disagreed with both and refused permission.

When it reached the Court of Appeal, the claim proceeded on the basis of a perception (or risk) of bias. The allegations of actual bias which had been made in the High Court were no longer pursued. The risk of bias issue started with the fact that the planning appeal was in the constituency of the Secretary of State, Eric Pickles, who had opposed the scheme in "vigorous terms" (at [5]) as the local MP. However, in accordance with CLG's *Guidance on Planning Propriety Issues*, Mr Pickles had no role in the decision and so there was no reasonable basis for a perception of bias on that account (at [22] and [33]). Arguments about bias had therefore devolved to concern at the Treasury Solicitor's reluctance to hand over documents at the High Court stage[48] and the absence of notes of the Ministerial meetings about the appeal. However, the Minister's views were known; the decision was to be drafted on a certain basis. Since the decision was rational in planning terms, there was no greater need for an explanation to rebut any concern about pre-determination bias.

A series of decisions by Ministers to refuse appeals for gypsy and traveller sites in the Green Belt were challenged in *Connors v Secretary of State for Communities and Local Government*.[49] Lewis J. considered that the ministerial decisions to recover jurisdiction over the s.78 planning appeals could only be challenged by judicial review rather than a s.288 application. The recovery of jurisdiction over an enforcement appeal could be challenged under s.289 but time for bringing those proceedings arose from the decision to recover rather than the determination of the appeal (at [135]–[142]). He rejected the argument that the ministerial decisions to dismiss the appeals displayed any differential treatment in terms of the decisions on appeals by Travellers and Gypsies in relation to sites in the Green Belt as compared with non-Gypsy and Traveller appeals in such cases (at [150]). The claimants' case had been built on statistics of appeal decisions which did not give evidence of differential treatment and witness statements from persons with experience of such appeals—the latter not assisting the court (at [149]–[150]).

The presumption in favour of the development plan

Cases have dealt with the duty in s.38(6) of the Planning and Compulsory Purchase Act 2004 for planning authorities, Ministers and Inspectors to decide applications in accordance with the development plan unless material considerations indicate otherwise. Lindblom J. held in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government*,[50] that duty remains following the introduction of the National Planning Policy Framework ("NPPF"), which does not displace it.

Enforcement

Ioannou v Secretary of State for Communities and Local Government[51] explores the extent to which an Inspector can approve a scheme other than the unlawful development in an enforcement notice appeal. The issue was a pure matter of legal powers as the appellant had raised the possibility of turning the five residential units into three residential units and the Inspector had identified that as his and the Council's preferred option. However, he considered that he did not have the power to grant such a planning permission. In respect of the deemed planning application and the ground (a) appeal, that was right; permission could not be granted for the whole or part of the breach or land and achieve that result, even when subject to conditions.

[48] See the High Court judgment, *Ball v Secretary of State for Communities and Local Government* [2012] EWHC 3590 (Admin) at [64]–[74].
[49] *Connors v Secretary of State for Communities and Local Government* [2014] EWHC 2358 (Admin).
[50] *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin).
[51] *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin); [2014] J.P.L. 608.

The court suggested that the potential solution would have been to vary the notice on the basis of a ground (f) appeal to convert four of the flats into two (at [38]). The consequence would be that those two new flats and the remaining flat would become lawful because of compliance with the notice under s.173(11) of the Town and Country Planning Act 1990. Whether that course could be pursued depended, in the court's view, on whether the change from five to three units was so substantial that it offended the *Wheatcroft* principle (at [47]–[48]). In very broad terms, the question would be whether the change affects those who might wish to be consulted upon it. This reads in the interests of third parties, as the Inspector's power to vary or correct in s.176(1) is only expressly subject to not causing injustice to the appellant or the local planning authority.

The ability to vary an enforcement notice following a ground (f) appeal is problematic for a reason not explored in the judgment. The purpose of issuing an enforcement notice may be to end the breach of planning control, remedy any injury to amenity or for both purposes (see s.173(3),(4)). In *Wyatt Bros (Oxford) Ltd v Secretary of State for the Environment, Transport and the Regions*,[52] it was held that the ground (f) appeal "that the steps exceed what is necessary to remedy any injury to amenity" only apply if the enforcement notice (or that part of the steps) are concerned with remedying such injury to amenity rather than ending the breach of planning control. Enforcement notice steps which were targeted against a breach of planning control could not be varied to simply remedy any harm to amenity. The reasons for the present enforcement notice mentioned the substandard internal accommodation provided which resulted in the loss of a property better used as a single family dwelling house, so it might be that this was in part an "amenity" notice.

A further caution is that a local planning authority drafting an enforcement notice, or an Inspector varying one, so as to grant planning permission under s.173(11) will need to have in mind that such permission is unconditional. That may be a potent reason against proceeding by a variation.

An appeal is pending in *Ioannou*.

In *Stadium Capital Holdings No.2 Ltd v Secretary of State for Communities and Local Government*,[53] the period to be allowed for compliance with a discontinuance notice under the advertising regime could take into account the financial consequences for the advertiser. These notices of course require the removal of lawful advertisements.

Historic environment

The statutory duty to have special regard to listed buildings was thoroughly reviewed by the Court of Appeal in *Barnwell Manor Wind Energy Ltd v East Northamptonshire DC*.[54] Following the High Court's quashing of a wind farm planning permission which had been granted by a planning inspector, the developer appealed. The developer submitted that s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 did not require the decision-maker to give considerable weight to harm to a listed building or its setting, but provided that the question of whether there was harm was considered very carefully, the weight to be attached was a matter for the decision maker. Sullivan L.J. considered the main authorities, identifying that the "special attention" duty for conservation areas in s.72(1) was subject to the same approach (at [16]). The general proposition in planning that the weight to be attached to a material consideration is a matter for the decision-maker, subject only to irrationality, did not apply where statute or planning policy required particular weight to be attached (at [26]). Sullivan L.J. held (at [29]) that:

[52] *Wyatt Bros (Oxford) Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1560; [2002] P.L.C.R. 18.
[53] *Stadium Capital Holdings No.2 Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3548 (Admin); [2014] J.P.L. 533.
[54] *Barnwell Manor Wind Energy Ltd v. East Northamptonshire DC (also known as East Northamptonshire DC v Secretary of State for Communities and Local Government)* [2014] EWCA Civ 137; [2014] J.P.L. 731.

> "Parliament's intention in enacting s.66(1) was that decision-makers should give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise."

This considerable importance and weight applies to all harm, although with greater force the more substantial the harm is or the more important the listed building (at [28]).

Barnwell Manor did not mention two recent High Court decisions which must now be viewed with caution. In *Bedford BC v Secretary of State for Communities and Local Government*,[55] the High Court held on s.66 (at [36]):

> "The focus is on the regard, not on the according of weight pursuant to that regard. Special regard may lead to the giving of special weight, but it does not necessarily do so."

That view is inconsistent with *Barnwell Manor*. In *Colman v Secretary of State for Communities and Local Government*,[56] special regard was said to have been achieved by a careful and detailed assessment of the impact although the court also left open the possibility of applying special weight to the impact (at [68]). It did assert that if special weight was attached to the impact then "the overall negative effects were limited and could not outweigh the benefits of the development".

A decision shortly before *Barnwell Manor*, but consistent with it, is the judgment of Lindblom J. in *Forest of Dean DC v Secretary of State for Communities and Local Government*.[57] There the court found that the Inspector, in a gypsy site case, had recognised the high hurdle of s.66 and complied with it (at [49]). In *R. (on the application of Forge Field Society) v Sevenoaks DC*,[58] the Council considered that less than substantial harm was caused to the setting of a listed building and a conservation area. Whilst the statutory duties were referred to, Lindblom J. considered that the authority had failed to give considerable importance and weight to that harm. He said (at [55]):

> "The officer equated 'limited' or 'less than substantial' harm with a limited or less than substantial objection. He appears to have carried out a simple balancing exercise between harm to heritage assets and countervailing planning benefits without heeding the strong presumption inherent in sections 66 and 72 of the Listed Buildings Act against planning permission being granted in a case such as this."

The learned judge also held that the statutory presumption "implies the need for a suitably rigorous assessment of potential alternatives" (at [61] and also at [85]).

The error as to weight made by the Inspector in *Barnwell Manor* was not uncommon. The Secretary of State has relied heavily on the Court of Appeal's approach in recent decisions, particularly to overturn Inspector's recommendations. Shortly after the Court of Appeal judgment, the Secretary of State agreed to submit to judgment on that point in another wind turbine case, *Green v Secretary of State for Communities and Local Government*.[59]

Policy and the courts

Tesco Stores Ltd v Dundee CC,[60] gave, confirmed, or restored the role of the court in interpreting planning policy as a matter of law rather than leaving the meaning of policy to the decision maker subject to a rationality review. This has encouraged challenges based on the construction of policy. There have been many decisions on housing (e.g. *Hunston*), Green Belt (*Fordent*, *Europa*, *Cherkley Campaign*, *Redhill*

[55] *Bedford BC v Secretary of State for Communities and Local Government* [2013] EWHC 2847 (Admin).
[56] *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin).
[57] *Forest of Dean DC v Secretary of State for Communities and Local Government* [2013] EWHC 4052 (Admin).
[58] *R. (on the application of Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin).
[59] *Green v Secretary of State for Communities and Local Government* CO/17368/2013.
[60] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13; [2012] P.T.S.R. 983.

Aerodrome), heritage (*Barnwell Manor*) and odd bits like Areas of Outstanding Natural Beauty ("AONBs") (*Aston*).

Unsuprisingly *Tesco v Dundee* applies to the interpretation of national planning policies set out in the NPPF: *Hunston Properties Ltd v Secretary of State for Communities and Local Government*.[61] Further, the NPPF should be construed as a whole: *Bayliss v Secretary of State for Communities and Local Government* at [18].[62]

Housing Policy

The NPPF expects local planning authorities to (at [47]):

> "use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework …
>
> identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer …"

Where local plans are not up to date, these issues tend to be argued out on applications. In *Hunston Properties Ltd v Secretary of State for Communities and Local Government*, planning permission was sought for 116 dwellings on a Green Belt site in St Albans where there was no up to date local plan. The Inspector took the Government's household projections and then identified a constrained figure based on the restrictions in the area, particularly Green Belt, from the former East of England Plan. On the basis of that figure, she found that there was a five-year housing land supply. The Court of Appeal upheld the High Court's quashing of the decision. The Inspector ought to have considered the objectively assessed need for housing, without taking into account constraints, in deciding whether there was a five-year supply. Sir David Keene held that she was "mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure" (at [26]). However, that was not the end of the matter. In deciding whether there are very special circumstances justifying the development, the existence of constraints which give rise to a housing shortfall are relevant. In the application process, the Green Belt was relevant to whether the shortfall should be met rather than the calculation of the housing need.

South Northampton Council have brought a series of challenges to Inspector decisions on housing appeals. Two judgments were handed down on the same day by Mr Justice Ouseley: the present case, *South Northamptonshire CC v Secretary of State for Communities and Local Government and Barwood Homes Ltd* ("*Barwood Homes*")[63] and *South Northamptonshire CC v Secretary of State for Communities and Local Government and Barwood Land and Estates Ltd* ("Barwood Land and Estates").[64] These cases followed on from, and *Barwood Land and Estates* expressly agreed with, the decision of Lewis J. in *South Northamptonshire CC v Secretary of State for Communities and Local Government and Robert Plummer*[65] (which probably now has to be known as "Plummer"). All of these concerned the determination of the objectively assessed housing need by Planning Inspectors on appeal in the absence of an adopted development plan figure.

In the absence of an adopted figure, planning authorities and Inspectors on appeal have to do the best which they can from the material available, which can include the evidence base from now revoked regional

[61] *Hunston Properties Ltd v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1610; [2014] J.P.L. 599.
[62] *Bayliss v Secretary of State for Communities and Local Government* [2013] EWHC 1612.
[63] *South Northamptonshire CC v Secretary of State for Communities and Local Government and Barwood Homes Ltd* [2014] EWHC 570 (Admin); [2014] J.P.L. 1026.
[64] *South Northamptonshire CC v Secretary of State for Communities and Local Government and Barwood Land and Estates Ltd* [2014] EWHC 573 (Admin).
[65] *South Northamptonshire CC v Secretary of State for Communities and Local Government and Robert Plummer* [2013] EWHC 4377 (Admin).

strategies. These decisions illustrate that the court will treat this as a matter of planning judgment and will give quite a bit of leeway to the decision-maker to reach their own view. Since any legal challenger, whether a local planning authority, developer or third party, has a hurdle to show that the decision-maker's approach was adopted unlawfully, they need to be able to point to their contrary approach as being legally sound. A consistent, thought-through approach to the critique is therefore highly desirable and almost essential. If the challenger's method of calculating the housing need has kept changing or not been clearly explained, then the court is more likely to consider that the decision-maker was doing their best in a difficult situation and acted lawfully.

Green Belt

What is the collective noun for a group of Green Belt challenges? A sprawl is the most common shape to a range of cases. However, a coalescence reflects the degree of consistency in recent decisions, which tend to show the difficulties in supporting development.

In development management decisions there are two principal Green Belt questions:

- Is the development inappropriate in the Green Belt?
- If so, are there very special circumstances which clearly outweigh the harm by reason of inappropriateness and any other harm?

Here, a coalescence of decisions has emphasised the limited categories of development which are not inappropriate.

Fordent Holdings Ltd v Secretary of State for Communities and Local Government,[66] was the first indication that the NPPF might have unexpected, and unwelcome, meanings. Judge Pelling QC held that the NPPF (at [89] and [90]) provided a closed list of operations and uses which were not inappropriate development in the Green Belt. Any material changes of use outside those lists was inevitably inappropriate development which could only be approved if there were very special circumstances, even if there was no conceivable harm to Green Belt openness or purposes.

Outdoor sport, outdoor recreation and cemeteries

Exceptions to new buildings being inappropriate (NPPF para.89) include:

> "Provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it."

This text is reasonably similar (although not quite the same) as PPG2 para.3.4. Local planning authorities are encouraged to plan positively "to provide opportunities for outdoor sport and recreation" in the Green Belt (NPPF para.81), a reflection of a Green Belt objective in PPG2 para.1.6. What then of the ability to use land for these purposes?

Newlyn Dean v Secretary of State for Communities and Local Government,[67] concerned livery and paintballing uses in the Bournemouth Green Belt. The Court of Appeal held that the former wording in PPG2 para.3.4 did not deem outdoor sport and recreation or cemeteries to be outside the categories of inappropriate development (at [22]).

Timmins v Gedling BC,[68] dealt with cemeteries under the NPPF policy. NPPF para.89 was held to be concerned with new buildings in cemeteries not being inappropriate, if they did not conflict with openness

[66] *Fordent Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin); [2014] J.P.L. 226.
[67] *Newlyn Dean v Secretary of State for Communities and Local Government* [2014] EWCA Civ 193.
[68] *Timmins v Gedling BC* [2014] EWHC 654 (Admin).

and purposes, not with treating a use as not inappropriate. Consequently, a cemetery itself is inappropriate development (at [23]) and so a new cemetery can only be approved in very special circumstances.

An appeal is pending in *Timmins*.

The effect of these decisions is that new uses of land in the Green Belt which authorities are encouraged to positively plan for will be inappropriate development. It is not obvious that this was intended by the Minister when the NPPF was adopted.

Oil and gas

The Court of Appeal have upheld the decision of Ouseley J. that oil and gas exploration and appraisal is part of mineral extraction for the purposes of NPPF para.90: *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* upholding.[69] Consequently such operations are not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt.

Mobile homes

In case anyone was in any doubt, the Court of Appeal held in *Lloyd v Secretary of State for Communities and Local Government*,[70] that the National Planning Policy Framework does not include a mobile home within the term building. Consequently the replacement of a mobile home with a house (or log cabin) is not "the replacement of a building" within the categories of building construction, which are not inappropriate development under NPPF para.89. Consequently very special circumstances had to be shown to justify this development in the Green Belt.

Very special circumstances

Paragraph 88 of the NPPF is in similar terms to PPG2 and advises:

> "When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

The factors relevant to whether inappropriate development should be approved in the Green Belt were considered in *R. (on the application of Holder) v Gedling BC*.[71] On a wind turbine application, members had been advised that on and off-site alternatives, the precedent effect of approving the scheme, and the energy generation and efficiency of the proposed turbine were not material considerations. The High Court upheld the decision but this was overturned by the Court of Appeal. On precedent, Maurice Kay L.J. said that it is significant that the features said to constitute "very special circumstances" were essentially generic features (the benefits of renewable energy generation and income for a farm) which could be claimed in relation to comparable sites (at [15]). Alternatives, in particular less intrusive forms of renewable energy provision, were also relevant (at [17]). The Council were (at [22]):

> "… simply wrong in [their] submission that, having regard to the full range of applicable policy, matters such as volume and efficiency are irrelevant and can be left to the working of the market. I do not accept that the Green Belt has been sold out to the market in this way. The position remains

[69] *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825 and upholding at [2013] EWHC 2643 (Admin); [2014] 1 P. & C.R. 3; [2014] J.P.L. 21.

[70] *Lloyd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 839.

[71] *R. (on the application of Holder) v Gedling BC* [2014] EWCA Civ 599; [2014] J.P.L. 1087.

> that the proposed development is, by definition, inappropriate development which can be justified only in very special circumstances. Any consideration of such circumstances must necessarily embrace assessment of the benefit which is likely to ensue. It cannot be the case that a very large but unproductive and inefficient installation ranks equally with a small but extremely efficient one when it comes to evaluating 'very special circumstances'. Size, efficiency and ability to meet need are all considerations relevant to the issue of 'very special circumstances'."

On July 1, 2013, the Parliamentary Under-Secretary of State for Communities and Local Government said in a Written Ministerial Statement:

> "The green belt is not always being given the sufficient protection that was the explicit policy intent of Ministers.
>
> The Secretary of State wishes to make clear that, in considering planning applications, although each case will depend on its facts, he considers that the single issue of unmet demand, whether for Traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the 'very special circumstances' justifying inappropriate development in the green belt."

In *Copas v Secretary of State for Communities and Local Government*,[72] Supperstone J. viewed this as clarifying existing policy set out in the NPPF rather than introducing new policy or changing existing policy (at [32]).

The issue in *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government*[73] was whether "any other harm" in NPPF para.88 was confined to harm to the Green Belt in addition to harm by reason of inappropriateness or included any other harm from the proposal. In *R. (on the application of River Club) v Secretary of State for Communities and Local Government*,[74] Frances Patterson QC held that any other harm within PPG2 para.3.2 included any harm caused by the proposal, whether it was to the Green Belt or other interests. On its face, the text of NPPF para.88 is not materially different from that in para.3.2 of PPG2. However in *Redhill Aerodrome* the same judge (now Patterson J.) considered that the NPPF led to a different result. Essentially, she considered that the NPPF set particular thresholds for refusal on particular issues, such as noise. If those impacts did not reach the refusal thresholds then they could not be considered in any other harm for the purpose of the Green Belt judgment. Sub-threshold harm could not be considered on a cumulative basis, as the learned judge said (at [57]):

> "To permit a combination of cumulative adverse impacts at a lesser level than prescribed for individual impacts to go into the evaluation of harm of a Green Belt proposal seems to me to be the antithesis of the current policy. It would re-introduce a possibility of cumulative harm which the NPPF does not provide for."

Permission to appeal has been granted and it is understood that the appeal is to be heard in early October 2014. Notwithstanding the judgment, a cumulative approach appears to be inherent in the NPPF's presumption in favour of sustainable development to grant planning permission in the absence of up to date development plan policy unless (at [14]):

> "• any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
> • specific policies in this Framework indicate development should be restricted."

[72] *Copas v Secretary of State for Communities and Local Government* [2014] EWHC 2634 (Admin).
[73] *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 2476 (Admin).
[74] *R. (on the application of River Club) v Secretary of State for Communities and Local Government* [2009] EWHC 2674; [2010] J.P.L. 584.

The *Redhill Aerodrome* judgment did not address the 2013 Ministerial Statement which explicitly says that other harm includes non-Green Belt harm: "outweighs harm to the green belt and other harm to constitute the 'very special circumstances'."

National Parks, the Broads and Areas of Outstanding Natural Beauty

Statutory countryside designations are National Parks, the Broads and Areas of Outstanding Natural Beauty. Paragraph 116 of the NPPF says:

> "Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest."

The meaning of "major development" in this text has been considered in two cases, both in the Surrey Hills AONB in Mole Valley.

Aston v Secretary of State for Communities and Local Government[75] concerned a 1.94ha site on which planning permission was sought for 14 houses. This was "major development" within the definition in the Town and Country Planning (Development Management Procedure) Order 2010[76] concerning publicity for planning applications and in the directions for reference of applications to the Secretary of State. Wyn Williams J., however, held that this meaning did not carry over to the NPPF. Instead a normal meaning applied and the Inspector was entitled to hold in that case that the scheme was not major development under para.116 (at [93] and [94]).

In *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC*,[77] Haddon-Cave J. held that the inclusion of a fairway and a tee within the AONB meant that a golf and hotel scheme was major development in the designated area as para.116 "is plainly intended to include 'major developments' which physically overlap with designated areas or visually encroach upon on them" (at [147]).

On appeal, Richards L.J. disagreed (at [44]):

> "The paragraph provides that permission should be refused for major developments '*in*'. an AONB or other designated area except where the stated conditions are met: the specific concern of the paragraph is with major developments in a designated area, not with developments outside a designated area, however proximate to the designated area they may be. In this case the only part of the development *in* the AONB would be the 15th fairway and 16th tee. I do not think that the creation of one fairway and one tee of a golf course could reasonably be regarded as a major development *in* the AONB, even when account is taken of the fact that they form part of a larger golf course development the rest of which is immediately adjacent to the AONB."

The finality of decisions

You can wait a long time for a decision to definitively decide a basic point of principle, and then three judgments on the same point come at once.

The courts have for a long time suggested that local planning authorities were not able to issue a second planning decision on one application: see, e.g. *R. v Yeovil BC Ex p. Trustees of Elim Pentecostal Church, Yeovil* at 44;[78] *Heron Corp Ltd v Manchester CC* at 271–272.[79] Those comments were obiter.

However, in two judgments in 2013, the courts held that local planning authorities could not withdraw and re-issue decision notices to correct errors. The English decision on the point was *R. (on the application*

[75] *Aston v Secretary of State for Communities and Local Government* [2013] EWHC 1936 (Admin); [2014] 2 P. & C.R. 10.
[76] Town and Country Planning (Development Management Procedure) Order 2010 (SI 2010/2184).
[77] *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC* [2013] EWHC 2582 (Admin); [2014] 1 P. & C.R. 12.
[78] *R. v Yeovil BC Ex p. Trustees of Elim Pentecostal Church, Yeovil* 70 L.G.R. 142; (1972) 23 P. & C.R. 39.
[79] *Heron Corp Ltd v Manchester CC* 5 L.G.R. 298; (1977) 33 P. & C.R. 268.

of Holder) v Gedling BC[80] where a council had issued a planning permission omitting large parts of an approved condition. Following a pre-action letter the Council then issued a second (but only partially) corrected notice. After a deal of resistance, it ultimately accepted at trial that it had not had the power to issue a second decision notice (*Holder* at [54]).

The issue was more fully considered by the Scottish Court of Session (Outer House) in *Archid Architecture and Interior Design v Dundee CC*.[81] The Council had issued a notice which said it granted planning permission subject to conditions, but contained no conditions and under the reason for the decision set out what was plainly a reason for refusal. Six months later the Council said that the decision notice was incorrect and sent out a new notice which stated that planning permission was refused. Lord Glennie reviewed the English and Scottish authorities extensively (although not including *Holder*) and held that the first notice was valid unless and until the court ruled otherwise. The Council had no power to issue a further decision until that had been done.

The same approach applies to the Secretary of State, only more so. In *R. (on the application of Gleeson Developments Ltd) v Secretary of State for Communities and Local Government*,[82] the Minister had decided to recover jurisdiction over a planning appeal. Later that same day the Inspector's decision allowing the appeal was issued by the Planning Inspectorate. The Minister then purported to withdraw the planning permission and issue a refusal. It is not obvious what was the most astonishing: the decision of the Department that it could simply rip up a planning permission by letter; or the High Court's judgment that this was lawful. The developer, Gleeson, appealed. The Court of Appeal did not feel the need to call on the appellant, Sullivan L.J. holding in typically forthright terms that the Secretary of State could not withdraw a planning permission once it had been issued:. The judge said:

> "22. If a planning permission has been granted, whether on appeal by the Secretary of State or by an appointed person, or on an application for planning permission by a local planning authority, there is no power to 'withdraw' that planning permission on the basis that there has been an administrative error at some stage in the decision making process. Once granted, a planning permission may be revoked only under the procedure contained in ss.97–100 of the Act. Although [Leading Counsel for the Secretary of State] criticised the appellant's reliance on the well known proposition that the Planning Acts form what has been described as 'a comprehensive code', there can no doubt that they do comprise a very detailed and highly prescriptive legislative code. The code prescribes how planning permissions, once granted, can be revoked, and in ss.56 and 59 of the Planning and Compulsory Act 2004 it describes the extent to which and the manner in which errors in planning decisions can be corrected under the 'slip rule'.
>
> 24. … A planning permission confers a substantive right, often a very valuable substantive right, and it is therefore by its very nature irrevocable, save under the procedure which is contained in ss.97–100 of the Act which make provision for compensation."

Sullivan L.J. had also held that the Inspector had still had the power to issue the decision, since the direction to recover jurisdiction had to contain the reasons it was being made and be served on the Inspector.[83] What had happened prior to the Inspector's decision being issued was that Communities and Local Government had informed the Planning Inspectorate's casework unit of the Minister's desire to recover the appeal and asked PINS to arrange the necessary letters. The recovery letter was sent out, by the Inspectorate, two days later. So, the Court of Appeal concluded, the Inspector still had the power to determine the appeal when his decision was issued. There was an administrative error in that the decision

[80] *R. (on the application of Holder) v Gedling BC* [2013] EWHC 1611 (Admin); [2013] J.P.L. 1426.
[81] *Archid Architecture and Interior Design v Dundee CC* [2013] CSOH 137; [2014] J.P.L. 336.
[82] *R. (on the application of Gleeson Developments Ltd) v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1118.
[83] Town and Country Planning Act 1990 Sch.6 para.3(2).

was issued as the Minister had decided to recover the case. Obviously the issue of the decision should have been stopped whilst the recovery letter was prepared.

The Court of Appeal's conclusion that the Inspector still had the power to act fed into its analysis that there was no power to withdraw the permission. They distinguished an Australian decision, relied upon by the High Court, on the ability of their Immigration Review Tribunal to reopen a decision taken when it was unaware of an application for an adjournment: *Minister for Immigration v Bhardwaj*.[84] Sullivan L.J. said:

> "25. In the present case there was no error on the part of the decision taker. In the absence of any direction under para.3 prior to the issue of his decision, the inspector, as the appointed person, had authority to issue his decision. He intended to allow the appeal and to grant planning permission, and he did so. While an administrative error did occur elsewhere within the Planning Inspectorate, to confer on the Secretary of State a power to 'withdraw' a planning permission that has been lawfully granted, on the basis of some administrative error at some stage in the process by a person other than the decision taker cannot, by any stretch of the imagination, be described as 'an implicit auxiliary power' which facilitates the exercise of any of the powers that are expressly conferred by the Act."

The court did not therefore have to go further into any claimed withdrawal of an unlawfully granted decision, but given the approach in the local authority cases and s.284 of the Town and Country Planning Act 1990 which prevents a challenge to the validity of planning appeal decision except by application to the High Court an unlawful decision cannot simply be withdrawn. It can, of course, be challenged by a s.288 application. There may be occasions when a decision is so obviously defective on its face as to not be a decision: pages may be clearly missing, or it may fail to identify the application or say whether it is granted or refused.

Community Infrastructure Levy ("CIL")

R. (on the application of Fox Strategic Land and Property Ltd) v Chorley BC[85] concerns the first challenge to a Community Infrastructure Levy charging schedule. [9]–[32] offer a useful primer on the charge setting process.

The nature of the exercise is discussed most helpfully at [100]–[107] of *Fox*. Setting a charge is an exercise for the local authority to decide a figure within what in practice are fairly broad parameters. The examiner's responsibility is to decide whether an appropriate balance has been struck rather than to decide what figure he would have set (at [106]). In the maze of potential sources of information on viability and approaches to it, the court did not find any particular decisive matter. Deciding on the appropriate charging rate was therefore a matter of reaching a judgment having regard to different sources of evidence. In those circumstances there was less need to reach a firm conclusion on any particular matter. This is different to litigation—as Lindblom J. pointed out at [107]—but also to many of the issues on planning appeals which can and need to be decided in a yes or no fashion.

Reasons at the time and after the event

Several issues are arising on reasons. Is the revocation of the duty to give summary reasons for granting planning permission making any difference to the courts' approach? How is the duty to give reasons for Environmental Impact Assessment decisions being applied? What toleration is there of post-decision explanations in witness statements after *R. (on the application of Lanner Parish Council) v Cornwall*

[84] *Minister for Immigration v Bhardwaj* (2002) HCA 11.
[85] *R. (on the application of Fox Strategic Land and Property Ltd) v Chorley BC* [2014] EWHC 1179; [2014] J.P.L. 1152.

Council?[86] In *Lanner*, a planning officer produced a witness statement explaining how he considered the planning committee had understood and applied a policy, contradicting the reasons on the decision notice. Jackson L.J. held:

> "63 There is a point of principle here, which is of some importance. Judicial review proceedings involve challenges to the actions and decisions of public bodies. Such cases generally proceed on the basis of the primary documents and records, supplemented by any necessary written evidence (for example, to establish facts relevant to a human rights claim). Oral evidence is only occasionally taken in judicial review proceedings under Part 54 of the Civil Procedure Rules : see, for example, *R. (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) at [15]–[29] per Scott Baker L.J., delivering the judgment of the court. This approach is efficacious and leads to a saving of costs. In judicial review proceedings under Part 54 the court should be cautious before entering into disputed issues of fact, whose proper resolution may require oral evidence.
>
> 64 Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officer's report, the minutes of the Planning Committee meeting and the stated reasons for the grant of planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. … The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Council's own official records."

Lanner has been relied upon by claimants repeatedly since, with varying degrees of success.

Ioannou v Secretary of State for Communities and Local Government,[87] is notable, and quotable, for a robust reaffirmation by Ouseley J. of the inappropriateness of Inspectors producing witness statements to expand upon their statutory reasons (at [51]–[53]):

> "51. I add that I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law. In my view, the statement is not admissible, elucidatory or not.
>
> 52. However, if that is wrong, the question whether the statement elucidates or contradicts the reasoning in the decision letter, and so is admissible or inadmissible on *Ermakov* principles, can only be resolved once the decision letter has been construed without it. To the extent that a court concludes that the reasoning is legally deficient in itself, or shows an error of law for example in failing to deal with a material consideration, it is difficult to see how the statement purporting to resolve the issue could ever be merely elucidatory. A witness statement would also create all the dangers of rationalisation after the event, fitting answers to omissions into the already set framework of the decision letter, risking demands for the Inspector to be cross-examined on his statement, and creating suspicions about what had actually been the reasons, all with the effect of reducing public and professional confidence in the high quality and integrity of the Inspectorate.
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> 53. Inspectors could be required routinely to produce witness statements when a reasons challenge was brought or when it was alleged that a material consideration had been overlooked, since

[86] *R. (on the application of Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290.
[87] *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin); [2014] J.P.L. 608.

> the challenging advocate would be able to say that, in its absence, there was nothing to support the argument put forward by counsel for the Secretary of State, when there so easily could have been, and he must therefore be flying kites of his own devising. This is not the same as an Inspector giving evidence of fact about what happened before him, which can carry some of the same risks, but if that is occasionally necessary, it is for very different reasons."

Either the reasons are good enough, or they are not.

Asking councillors to produce witness statements explaining why they made certain decisions in committee was "deplored" by Cranston J. in *R. (on the application of Bishop's Stortford Civic Federation) v East Hertfordshire DC* at [41].[88] Similarly, an officer's view in a witness statement as to whether a particular decision was perverse was legally irrelevant: *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC* at [53].[89]

The court's exercise of discretion

Finally, discretion not to quash is being invoked more frequently in planning cases. The reasons are not the principle of the approach but judicial understanding of the possibility of different outcomes and the ancillary nature of some of the grounds of challenge.

In *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)*[90] the House of Lords drew a distinction between the approach to quashing in domestic and European Union cases. Lord Bingham of Cornhill said at 608:

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow. In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still …"

Lord Hoffmann held that it did not matter if an EIA would not have affected the final decision and said:

> "Although section 288(5)(b) , in providing that the court 'may' quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell L.J. in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P & CR 343 at 353 Mr Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

[88] *R. (on the application of Bishop's Stortford Civic Federation) v East Hertfordshire DC* [2014] EWHC 348 (Admin); [2014] J.P.L. 852.
[89] *R. (on the application of Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567.
[90] *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603.

Lord Carnwath has been critical of the *Berkeley* approach for many years: see *Bown v Secretary of State* at [47];[91] *R. (on the application of Jones) v Mansfield DC* at [59].[92] He returned to the topic in *Walton v Scottish Ministers*[93] at [124]–[140] concluding, in a Strategic Environmental Assessment context (at [139]):

> "Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

In *West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC*,[94] there had been a failure to produce a post-decision statement following what was otherwise a lawful SEA of a supplementary planning document (at [204]). Lindblom J. held, having regard to *Walton* and *R. (on the application of Richardson) v North Yorkshire CC*,[95] that all that was required was an order that such a statement be produced (at [205]–[209]). That illustrates the narrow compass of the debate. A procedural error which does not go to the decision itself will not lead to a quashing, although there may be ancillary or declaratory relief.[96] That was the approach in European law cases following *Berkeley* and in practice there has always been little difference between the *Berkeley* and *Walton* approaches.

The Court of Justice of the European Union then looked at the issue in the context of the impairment of a right in standing under art.11 (formerly art.10a) of the EIA Directive[97] in *Gemeinde Altrip v Land Rheinland-Pfalz*.[98] The court said:

> "48. … as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that Directive.
>
> 49 Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.
>
> 50 In that regard, it should be borne in mind that article 10a of that Directive leaves the member states significant discretion to determine what constitutes impairment of a right: see the *Bund für Umwelt* case [2011] E.C.R. I-3673 at [55].
>
> 51 In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of sub-paragraph (b) of article 10a of that Directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked."

Oxford Diocesan Board v Secretary of State for Communities and Local Government,[99] dealt with the effect of not considering policy. In the High Court there had been a variety of submissions made as to

[91] *Bown v Secretary of State* [2003] EWCA Civ 1170.
[92] *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env. L.R. 21.
[93] *Walton v Scottish Ministers* [2012] UKSC 44; [2013] P.T.S.R. 51.
[94] *West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC* [2013] EWHC 2834 (Admin).
[95] *R. (on the application of Richardson) v North Yorkshire CC* [2003] EWCA Civ 1860; [2004] 1 W.L.R. 1920.
[96] e.g. *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC* [2009] EWHC 2856 (Admin); [2010] J.P.L. 594.
[97] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.
[98] *Gemeinde Altrip v Land Rheinland-Pfalz* (C-72/12) [2014] P.T.S.R. 311.
[99] *Oxford Diocesan Board v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1718; [2014] J.P.L. 530.

whether a Ministerial Statement had been omitted from the Department's consideration, whether it applied to the appeal and its status in the hierarchy.[100] Lang J. had held quite briefly (at [31]):

> "I cannot rule out the possibility that it could have made a difference."

The Court of Appeal held that it could not have made a difference. Sullivan L.J. said (at [8]):

> "It is not enough to say that a policy document was a material consideration which the decision taker should have taken into account, unless there is some rational basis for concluding that the policy document might have led the decision taker to reach a different conclusion. There is no such basis in the present case; indeed, the reverse is the case."

Where a potential material policy has been overlooked, there is a need to identify in what respect it may have added to the case against the decision which was reached, for example, by changing a policy approach, adding a new factor or giving a particular point greater or lesser weight.

Developers should not feel any confidence that building out the scheme in the face of legal proceedings would provide any protection against a quashing order. In *R. (on the application of Holder) v Gedling BC*,[101] the farmers proposing to erect a wind turbine ordered the turbine and began construction after the High Court had ruled in their favour but whilst an appeal was underway. The Court of Appeal quashed the permission. Maurice Kay L.J. held (at [31]):

> "Whilst I accept that the consequences of quashing the permission would be detrimental and damaging to Mr and Mrs Charles-Jones, I find these submissions to be wholly unpersuasive. They were not compelled to proceed as they did. They chose to and must be assumed to have appreciated the risks. Planning permission is not simply a private matter. It is a decision of a public authority in discharge of statutory obligations the purpose of which is to serve the public interest: see *R. (Tata Steel UK Ltd) v Newport City Council* [2010] EWCA Civ 1626, at [13]–[15], per Carnwath L.J. The present case is a world away from the sort of legitimate expectation which resulted in a discretionary refusal of relief in *R. (Majed) v London Borough of Camden* [2009] EWCA Civ 1029 … I can see no good reason why this successful appeal establishing the legal invalidity of the planning permission should leave the appellant without the normal fruits of such success. I would not expect the Council to take enforcement proceedings in advance of reconsideration by the Planning Committee, but if that reconsideration were to be adverse to Mr and Mrs Charles-Jones, they would only have themselves to blame for their precipitate action."

Remitting development plans

For statutory applications and appeals to the High Court, the remedies available to the court are set out in the planning legislation. The court does not have the full range of judicial review remedies available to it. Historically, if a development plan was found to be unlawful then the court's only remedy was to quash in whole or in part.[102] This inflexibility has been a source of concern to the courts.[103] By the Planning Act 2008, s.113 of the Planning and Compulsory Purchase Act 2004 was amended to allow the court to remit the plan or part of it to the decision maker. This would allow the plan process to go back specified steps, rather than have to start all over again. This power has been used on several occasions. In *Heard v Broadland DC*,[104] Ouseley J. ruled that the inclusion of the North East Growth Triangle, involving up to

[100] *Oxford Diocesan Board v Secretary of State for Communities and Local Government* [2013] EWHC 802 (Admin); [2013] J.P.L. 1285.
[101] *R. (on the application of Holder) v Gedling BC* [2014] EWCA Civ 599; [2014] J.P.L. 1087.
[102] See Town and Country Planning Act 1990 s.287 and s Planning and Compulsory Purchase Act 2004 s.113 (as originally enacted).
[103] See, e.g. Buxton L.J.'s comments in *First Corporate Shipping Ltd (t/a Bristol Port Co) v North Somerset CC* [2001] EWCA Civ 693; [2002] P.L.C.R. 7 at [38].
[104] *Heard v Broadland DC* [2012] EWHC 344 (Admin); [2012] Env. L.R. 23.

9,000 houses and commercial development, in the Greater Norwich Joint Core Strategy was unlawful because of a failure to consider reasonable alternatives under Strategic Environmental Assessment. He remitted the relevant parts of the plan on April 25, 2012. Following a further consultation and examination, the Joint Core Strategy was adopted, with various main modifications, on January 10, 2014.

Remission was also ordered in *University of Bristol v North Somerset CC*.[105] The housing requirements of the core strategy had been found unlawful because of a failure to give adequate and intelligible reasons for accepting that there was sufficient allowance for latent demand. In a detailed addendum judgment on March 7, 2013, Judge Alice Robinson remitted nine of the core strategy policies. At the present time the core strategy is back in examination, with the Council having proposed to increase the housing requirement from 14,000 (2006–2026) in the adopted plan to 17,130 at the start of the new examination and to a further height of 20,985.[106] There is likely to be a delay in the resumption of the examination.

Both of these cases have involved huge numbers of dwellings and the desirability, if practicable, of remission rather than quashing is obvious. They are the more difficult types of issue to remit—unlike the future of a small site.

In *Heard*, the remission appears to have saved some time over a modification to the core strategy, but it remains to be seen whether remission works given the scale of changes now proposed in *North Somerset*.

The effect of the Planning Court

The rules and practice direction changes for the Planning Court are covered in Simon Ricketts' paper. I want to add a few observations on how it is operating.

There were two essential challenges for the High Court in dealing with planning cases: speed of determination and the quality of decision-making. To take speed first, the delays in the Administrative Court in London prior to 2012 were horrendous. A commonplace example is the stately progress of *Newlyn Dean v Secretary of State for Communities and Local Government*.[107] Enforcement notice appeals had been determined by an Inspector on April 16, 2010. Various of these were challenged within the 28-day period by a s.289 appeal. Permission to appeal was granted at an oral hearing on January 19, 2011 and the substantive appeal heard on July 12, 2012, with judgment handed down over three months later. There were no unusual factors in the High Court case. Section 288 applications would routinely take over a year to be determined. It must be remembered that these periods were down to the court's workload and capacity. The rules for s.288 applications are highly efficient judicial review procedures could be quicker, but these have not historically delayed cases. It has been rare for parties to seek to formally stay or informally delay a planning challenge in the High Court. The loss of a hearing date because of a party's act, such as the late production of evidence, has been exceptional.

The opening up of the Regional Administrative Court led to much faster decision-making out of London, but brought into relief the second concern, which was the quality of decision-making. When strenuous efforts were made to reduce the backlog in the Administrative Court in general, and planning work in particular, cases were being put in front of judges with little, if any, real public law experience and mostly no planning experience whatsoever. Government's concern was that such cases took longer to hear. There is some truth in that, but not enough to materially affect listing. Of course, judges are intelligent and capable of listening and understanding what is explained to them, but the difficulty of getting the decision right must not be underestimated. If two or more parties are taking a case to a substantive hearing in the

[105] *University of Bristol v North Somerset CC* [2013] EWHC 231 (Admin); [2013] J.P.L. 940.

[106] Inspector's letter to North Somerset CC, August 12, 2014 at *http://www.n-somerset.gov.uk/Environment/Planning_policy_and-research/localplanning/Documents/Core%20Strategy/Core%20strategy%20re-examination/Inspector's%20response%20to%20NSC%20letter%2012%20August%202014%20(pdf).pdf*. [Accessed October 13, 2014.]

[107] *Newlyn Dean v Secretary of State for Communities and Local Government* [2014] EWCA Civ 193.

High Court then there should be something to be said for each side, absent a major miscalculation or desperation.

There have been few surprises amongst the judges sitting in the Planning Court. They have for the most part been High Court judges with substantial planning or public law expertise, or deputies with planning experience in practice.

The strict timetables for the disposal of cases applies only to significant planning cases, but virtually all cases have been treated as significant. Few cases appear to be missing the deadlines, which include final disposal in the High Court within six months of the proceedings being commenced.