Illuminating Case Law: The Legal Update

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In a year in which the climate crisis was almost as often in the media as Brexit; a "Climate Emergency" was declared by the UK Parliament, the Welsh Assembly, the Welsh Government and the Scottish Government;[1] Extinction Rebellion carried out over six thousand acts of civil disobedience on the streets of London alone; and discourse-shifting reports from the International Panel on Climate Change[2] and the UK's Committee on Climate Change[3] were published thick and fast, it is not surprising that environmental matters have repeatedly been before the courts. The first two sections of this paper therefore shine a light on these decisions.

The paper then examines the sole Supreme Court decision of the past 12 months: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* and variation of conditions. It also looks more widely at interpretation of conditions, s.106 agreements and developments in CIL. Staying with the question of interpretation, the next section gives an overview of cases which have illuminated various aspects of Policy Interpretation, including the meaning of as many paragraphs of the NPPF as possible, as well as the question of "silence" and "permissively" drafted policies.

Next, the paper looks at the Duty to Give Reasons, which has been the focus of a surprisingly large number of cases over the past 12 months or so. In particular, the paper shines a light on cases dealing with consistency in decision-making, drawing out how the result may in fact be encouragement to move away from placing numerous appeal decisions before inspectors determining s.78 appeals.

The paper then moves on to cases dealing with human rights and the public sector equality duty, including an illuminating visit to Tate Modern. Next, it deals with Heritage and Air Quality, and then alights on Enforcement, focusing in particular on cases concerning injunctions. The paper concludes with a section on Practice and Procedure, which includes an overview of the cases dealing with the jurisdiction of the courts to hear various challenges, as well as questions of procedural fairness in inquiries; extension of time limits and guidance on costs where permission is refused.

Inevitably, given the number of decisions made by the High Court and the Court of Appeal (addressed in more detail in the Conclusion), not every planning case in the past 12 months has been covered. It is hoped, however, that the cases chosen give a flavour of various trends in decision-making and, along the way, provide some illuminating practical insights of interest to developers, local authorities and others for whom planning is the sunny uplands within which they toil.

Climate Change

Climate Change Arguments in the UK

Given the title of this year's conference, it is apt to begin the legal update with a case about sunlight. In *R. (on the application of McLennan) v Medway Council* [2019] EWHC 1738 (Admin), the High Court

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[1] On 28 April 2019 the Scottish First Minister declared a climate emergency; the Welsh Government declared a climate emergency on 29 April 2019, followed by Welsh Assembly members voting to declare a climate emergency on 1 May 2019; the UK Parliament at Westminster approved a motion to declare an environment and climate emergency on 1 May 2019. Climate emergencies have also been declared by 220 local authorities across the whole of the UK.

[2] *Global Warming of 1.5°C Special Report* (October 2018); *Climate Change and Land Special Report* (August 2019).

[3] *Net Zero: The UK's Contribution to Stopping Global Warming* (May 2019); *Reducing UK emissions: 2019 Progress Report to Parliament* (July 2019).

confirmed that mitigation of climate change is a material planning consideration which decision-makers leave out of account at their peril. Lane J quashed the decision of Medway Council to grant planning permission for the installation of dormer windows and a rear extension on a house in Rochford. In granting permission, the Council had mistakenly believed that there would be no overshadowing of solar panels on a neighbouring property owned by the claimant, not realising that the orientation of the properties shown on a site location plan was wrong. In the proceedings, the Council accepted that it had made a mistake but sought to defend the claim on the basis that overshadowing of solar panels was not a material planning consideration.

After analysing legislation on the need to plan for climate change mitigation, and national and local policy on climate change, Lane J concluded that the Council could not rationally ignore the effect of overshadowing on solar panels. He held that mitigation of climate change "is a legitimate planning consideration" and there was "unanswerable force" in the claimant's submission that, particularly given what is now said at national level about climate change in relation to new development, the Council was not entitled to reject as immaterial, in planning terms, the effect that another development proposal may have upon a renewable energy system, such as the claimant's solar panels.[4] The modest nature of the role that small-scale renewable energy schemes can play in addressing the issue of climate change did not diminish the force of the claimant's argument.

The Court also rejected the Council's contention that the effect of daylight on the claimant's solar panels was concerned with a purely private right,[5] finding that this failed to appreciate that the interference with the solar panels was a matter which engaged the public interest because of the part played by them, "however modestly and on an individual scale", in addressing issues of climate change.[6]

In *Churchill Retirement Living v Bristol CC* [2019] J.P.L. 531, a s.78 appeal against a refusal to grant planning permission for the proposed redevelopment of a horticultural nursery site to form 33 retirement apartments for the elderly and associated facilities was dismissed. One of the grounds on which the decision was based was adaptation to climate change. Bristol's Core Strategy requires developments, in their design and construction, to provide resilience to climate change. The Inspector noted that national and local policy recognises that climate change will lead to more extreme weather conditions with hotter, drier summers and milder winters and that these effects can lead to residents of modern, well-insulated homes experiencing uncomfortably high internal temperatures (ie overheating). The Inspector agreed with the concerns of the Council's expert sustainability officer that the appellant had failed adequately to demonstrate that the design and layout of the development could adapt to climate change. Accordingly, he found a conflict with the objectives of the NPPF and the relevant CS Policy.

Many development plans contain policies on climate change mitigation similar to those in Bristol's Core Strategy. The decision is therefore illuminating as to the approach to design adapting to climate change and the seriousness with which it was dealt. It serves as a warning to developers to take such matters into account at an early stage of the design process—a more pressing need in light of the net-zero requirements discussed below. It may also give comfort to decision-makers who wish to take a robust approach to ensuring that the measures to adapt to climate change are adequately integrated into the design of new buildings.

Climate Change and Fossil Fuels

Two cases have shone a light on the arguably contradictory nature of the Government's stance on fossil fuels and addressing climate change through reducing greenhouse gas ("GHG") emissions.

[4] At [36]–[37].

[5] Relying on *Buxton v Minister of Housing and Local Government* [1961] 1 QB 278. The Judge also analysed *Westminster CC v Great Portland Estates Plc* [1985] 1 A.C. 661 and *Wood-Robinson v Secretary of State for the Environment* [1998] J.P.L. 976.

[6] At [45].

The case of *Stephenson v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin); [2019] J.P.L. 929 considered, amongst other things, the Government's in principle support for shale gas exploration. The claimant, who acted on behalf of the organisation Talk Fracking, argued that the Secretary of State's decision to adopt para.209(a) of the Revised NPPF was unlawful as it failed to give effect to the long-established policy to reduce GHG emissions under the Climate Change Act 2008. Paragraph 209(a) required mineral planning authorities to "recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction".

Dove J rejected the challenge on this basis (although other arguments succeeded; see further below). He accepted the Secretary of State's submission that para.209(a) had no impact on the Government's duty to act consistently with the obligations in the Climate Change Act 2008.[7] He held that para.209(a) has "no bearing at all" on the fact that, in order to meet that 2008 Act duty, the Government was obliged to comply with three tests concerning shale gas extraction, set by the Climate Change Committee ("the CCC"), which is the independent body required by the Climate Change Act 2008 and the Infrastructure Act 2015 to give scientific-based policy advice to the government.[8]

Dove J also recorded and accepted the Secretary of State's further submission: in the context of individual decisions on applications for shale gas development, it would be open to decision-makers to depart from the Government's in principle support for shale gas exploration in the NPPF in light of scientific evidence of "the impact of shale gas extraction on climate change", given that it is "very common" that the planning system has to resolve "planning policies within local or national policy documents … pulling in different directions".[9]

On one view it is a perfectly unremarkable proposition that policy support for development needs to be considered alongside other unsupportive policies and any objections and evidence against the development. On another view, however, it shines a light on a quite remarkable policy tension that the Secretary of State should emphasise the ability of decision-makers to step away from the Government's repeatedly-urged in-principle support for shale gas development, in light of evidence "that shale gas exploration would have a deleterious impact on [GHG] emissions"[10] and in light of the paragraphs of the NPPF requiring the planning system to take decisions which "contribute to radical reductions in [GHG] emissions" and plan proactively to mitigate and adapt to climate change.[11]

A similar policy tension, this time relating to coal extraction, was caught in the headlights of Ouseley J's analysis in *HJ Banks and Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin); [2019] J.P.L. 348. The Secretary of State had called in an application for an opencast coal mine in Druridge Bay, which would extract around three million tonnes of coal from six seams. One of the issues on which the Secretary of State specifically sought information when calling in the application was: "The effects of the proposed development on the emission of greenhouse gases (GHG) and climate change." The Inspector recommended that permission be granted. He accepted the argument that GHG emissions from the development would probably be less than would result from using the same quantity of imported coal but did not consider that "the argument that imported coal would substitute for Highthorn coal if the application was refused should hold sway".[12] He agreed that there was a need for coal and that, although the scheme would "overall" have an adverse effect on GHG emissions and climate

[7] At [71]–[72].
[8] CCC Report on *The Compatibility of Onshore Petroleum in Meeting the UK's Carbon Budget* (March 2016).
[9] At [73].
[10] At [71].
[11] Previously paras 93 and 94 of the 2012 NPPF, now paras 148 and 149 of the Revised NPPF.
[12] At [85].

change of "substantial significance, which should be given considerable weight in the planning balance", he concluded that planning permission should be granted.

The Secretary of State adopted most of the Inspector's conclusions but rejected the recommendation and refused permission. In so doing the Secretary of State gave very considerable weight to the adverse effects of the emission of GHG. The developer contended that this wrongly took account of the GHG that would be produced during the burning of the coal in power stations and that the Secretary of State had acted inconsistently with previous decisions in which he had excluded the significance of GHG emitted by burning of fossil fuels.

Ouseley J observed:[13]

> "What the Secretary of State had to explain … was how a proposal needed for the country's energy could be refused on the basis of the adverse impact of GHG, unless the gap was filled by renewables or low carbon sources. Given the significance of the issue, the detailed evidence at the Inquiry and those conclusions of the Inspector which he did accept, the DL fails to provide adequate reasoning as to how the Secretary of State reached his very different decision."

The difficulty was not that the Secretary of State had decided to use a planning application to effect what would ordinarily have to be a policy change—rejecting coal extraction on climate change grounds—but that the reasoning was inadequate as far as it could be followed.

Net-Zero by 2050: Potentially the Next Big Thing in Planning?

One of the key issues in achieving the objective of stabilising GHG emissions in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system[14] is the setting of various targets for the reduction of emissions below levels as measured in 1990.[15] Advanced industrial countries like the UK agreed in 2007 that they would achieve emissions reductions of 25–40% by 2020.[16] The EU Emissions Trading Scheme has since committed to a reduction of at least 40% by 2030 and 90–95% by 2050.

The national response to these targets has been the subject of various climate change cases across Europe. In the UK, in *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin); [2019] Env. L.R. 13, Supperstone J refused a renewed application for permission to apply for judicial review of the Secretary of State's refusal to revise the 2050 carbon target under the Climate Change Act 2008. The target was for an 80% reduction as compared to 1990 levels. Plan B Earth contended that the target should be tightened, in light of the Paris Agreement on Climate Change.[17] Plan B Earth did not suggest that the Paris Agreement was of itself legally enforceable in domestic law. Rather, it argued that the lawfulness of the refusal needed to be assessed in light of current international scientific consensus and the UK's commitments under the Paris Agreement. The Judge held that the setting of the target was an area in which the executive had "wide discretion"[18] and that the Secretary of State had neither frustrated the legislative purpose of the 2008 Act[19] nor failed to understand the advice, as it then stood, of the CCC.[20]

[13] At [96].
[14] See the wording of art.2 of the UN Framework Convention on Climate Change (1992) ("UNFCCC").
[15] 1990 levels were determined in 1992 to be the relevant benchmark in art.4 of UNFCCC.
[16] The Bali Action Plan agreed at the Conference of Parties ("COP") to UNFCCC.
[17] The Paris Agreement entered into force on 4 November 2016, 30 days after the date on which at least 55 Parties to the Convention, accounting in total for at least an estimated 55% of total GHG emissions, deposited their instruments of ratification, acceptance, approval or accession with the Depositary.
[18] At [49].
[19] At [37]–[38].
[20] At [28].

Supperstone J handed down his decision in the *Plan B Earth* case on 20 July 2018. Less than a year later, the CCC recommended in the Net Zero Report[21] that the target be tightened, and the government legislated to amend the target.[22]

The Climate Change Act 2008 (2050 Target Amendment) Order 2019 was laid before Parliament using the draft affirmative procedure on 12 June 2019. It came into force on 27 June 2019 and amends s.1(1) of the Climate Change Act 2008 to provide a 100% target for reduction in GHG from the 1990 baseline, i.e. to achieve "net-zero by 2050". Although expressed in terms of "carbon units", the reduction concerns all "targeted greenhouse gases" listed in s.24 of the 2008 Act, including carbon dioxide and methane.

Net-zero does not mean the UK must aim to stop producing all GHG emissions by 2050, as aviation, agriculture and some industry will continue to emit beyond that date. However, those residual emissions will be required to be balanced out by, for example, carbon capture and storage and by afforestation in the UK.

The net-zero obligation is of importance for practitioners because it has the potential to have a very significant impact on planning matters, from housing development to infrastructure. This was illustrated on the day that the amending legislation was laid before Parliament, in a statement by the CCC. The statement emphasised, echoing the Net-Zero Report, that the target must be reinforced by credible policies across government. Amongst other recommendations, the CCC advised:

a. **Heating in buildings:**

New homes should not be connected to the gas grid from 2025. Technologies such as heat pumps, hybrid heat pumps and district heating in conjunction with hydrogen will be rolled out, alongside a big push on energy efficiency. The CCC recommended government financial support for insulating the current housing stock; switching from natural gas to hydrogen and installing heat pumps to replace gas boilers across the existing housing stock, with large-scale deployment of these measures before 2030.

b. **Energy generation:**

The CCC recommended a move to renewable energy for electricity generation; to electricity and/or hydrogen for heating and cooking and to hydrogen for industry, with government support for some of that cost.

c. **National Infrastructure:**

The CCC highlighted that a big push will be needed to develop the infrastructure to support net-zero emissions by 2050. This includes:

- electric car charging and hydrogen fuel infrastructure (with all new cars and vans being either electric or hydrogen by 2035—the CCC Net Zero Report points out that there are sufficient materials currently available to achieve this);[23]
- 75GW of offshore renewables, including repowering current offshore wind with larger turbines and increasing offshore turbines to 7,500 (from the current 2,000);
- infrastructure developments to support carbon capture and storage technology (a key part of achieving net-zero GHG emissions) and hydrogen roll-out.

[21] *Net Zero: The UK's Contribution to Stopping Global Warming* (May 2019). The *Net Zero Report* encouraged the UK to be a leader in setting a net-zero target, not just because of the economic benefits that the CCC envisaged would result, but also because equity demands it. The UK has large cumulative historic emissions, despite making up only 1% of the global population, 2–3% of human induced global warming to date has resulted from GHG emissions in the UK.

[22] The UK was the first G7 country to legislate for a net-zero target, but it was not the first country in the world. It was preceded by Denmark, Sweden (which legislated to achieve net-zero emissions by 2045) and Norway (which entered into a binding agreement to reach net-zero by 2030). France became the second G7 country to legislate for net-zero, passing a law on 27 June 2019.

[23] And the Government has unveiled a £37 million investment for EV Charging Point infrastructure.

d. **Waste:**

The CCC advised that biodegradable waste streams should not be sent to landfill after 2025, requiring new regulation and enforcement with supporting actions through the waste chain, for example mandatory separation of remaining waste.

All of these measures will have repercussions for plan-making and planning decision-taking, both by local authorities and nationally in terms of infrastructure projects.

Furthermore, the Net-Zero Report, the international material on which it draws and the CCC's emphasis on the need for urgency in delivering reductions in GHG emissions means that not only is the climate change impact of development a material planning consideration (as the *McLennan* makes clear); it is one to which decision-makers would be justified in giving considerable weight.

Turning back to the case law, the decision of the Government not to revise the 2050 target in light of the Paris Agreement was one of the reasons that the climate change element of the challenge in *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) was refused permission. This was the challenge to the Secretary of State's decision to prefer the scheme to construct a third runway at Heathrow to the north-west of the existing runways and in designating the Airports National Policy Statement. It was brought by a range of parties, including various London Boroughs, the Mayor of London, Friends of the Earth, Plan B Earth and Greenpeace, all of whom opposed the expansion of Heathrow.[24] The climate change arguments were advanced by Plan B Earth and Friends of the Earth. Again, neither party sought to argue that the Paris Agreement was directly applicable in the law of the UK. Plan B Earth argued that the Paris Agreement should be understood to be part of "Government policy relating to the mitigation of, and adaptation to, climate change" under s.5(8) of the Planning Act 2008 ("PA 2008"). Friends of the Earth did not go so far, and merely contended that the Paris Agreement was a relevant material consideration under s.10(3)(a) of the PA 2008, which required the Secretary of State to "have regard to the desirability of mitigating, and adapting to, climate change".

The Court held that the Government's policy as reflected in the Climate Change Act 2008 was based upon the 2 C temperature limit, i,e. the global consensus, as it was in 2008, that it was necessary to keep global temperature rise to 2 C above pre-industrial levels.[25] The Court recognised that the Paris Agreement, ratified by the UK on 17 November 2016, comprised "a firm international commitment to restricting the increase in the global average temperature to 'well below 2 C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 C above pre-industrial levels'".[26] However:

a. The argument by Plan B Earth that the Paris Agreement should be taken to reflect the Government's policy in respect of climate change targets under s.5(8) of the PA 2008 was rejected because the statutorily "entrenched" Government policy was that reflected in the Climate Change Act 2008, which could not be overridden or undermined by the Paris Agreement, and

b. The argument by Friends of the Earth that the Paris Agreement was a material planning consideration relevant to the Secretary of State's duty under s.10 of the PA 2008 was refused permission on the basis that the Secretary of State had "a discretion as to whether to take into account" the international agreement, and "the statutory scheme in the [Climate Change Act 2008] and the work that was being done on it and how to amend the domestic law to

[24] Unsurprisingly, given the number of claims and multiplicity of complex issues, the judgment in *Spurrier* is a hefty tome: 669 paragraphs and three appendices ranged over 184 pages. For those seeking a way into the judgment, Appendix A sets out each of the grounds and, with relevant paragraph references, whether permission was refused or was granted and the application refused. Appendix B also provides a handy list of the issues before the court. Appendix C sets out the terms and abbreviations used in the judgment.

[25] At [566], [607] and [615].

[26] At [580].

take into account the Paris Agreement" meant that the Secretary of State did not arguably act unlawfully in not taking into account the Paris Agreement.[27]

In light of the CCC's Net Zero Report, which relied heavily on the requirements of the Paris Agreement as justification for setting a net-zero target,[28] and the Government's swift response in amending the Climate Change Act 2008, it will be interesting to see the extent to which these developments will be considered relevant when the appeal in *Spurrier* is heard by the Court of Appeal on 17–24 October 2019.[29]

Heeding the Words of Mr Justice Dove: The URGENDA Case and Other International Developments

Anyone who attended the PEBA Conference in May will recall Mr Justice Dove, in his keynote address, asking who had heard of the Urgenda case and suggesting that it was one of the most important in the past year. Of the very large number of cases concerning climate change currently on foot around the globe,[30] *State of the Netherlands v Urgenda Foundation* (ECLI:NL:RBDHA:2015:7196, 9 October 2019)[31] has garnered much interest. It was brought by the Urgenda Foundation, an environmental group in the Netherlands, and challenged the Dutch government's target to reduce GHG emissions by the end of 2020. Initially Urgenda was successful in the Hague District Court on tort law principles. On appeal to the Hague Court of Appeal, however, the Court considered the challenge on the basis of alleged breaches of arts 2 and 8 of the European Convention on Human Rights ("ECHR"). The result is therefore of direct interest in the UK.

Urgenda's claim was that, in light of the scientific consensus and the various international agreements concerning climate change since 1992, the Dutch government's commitment to reduce GHG emissions by 16–21% by the end of 2020 constituted a violation of both the negative and positive obligations on the state under arts 2 and 8 of the ECHR and that the target should be at least 25% reduction. The Hague Court of Appeal held that:

a. The interest protected by art.2 of the ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life.[32]
b. Article 8 of the ECHR protects the right to private life, family life, home and correspondence. Article 8 of the ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity.[33]
c. A future infringement of one or more of the interests protected by arts 2 and 8 is deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event. As regards an impending violation of an interest protected under art.8 of the ECHR, it is required that the concrete infringement will exceed the minimum level of severity.[34][35]

[27] At [647]–[648].
[28] See, e.g. pp.16–22, 26, 28, 32, 37, 40, 44–45, 50, 75, 79, 84–86, 104, 109, 131, 139, 206, 258, 262 and 268 of the Net Zero Report.
[29] The Court of Appeal his listed the four appeals together (i.e. those of the London Boroughs of Hillingdon and Wandsworth; Heathrow Hub; Plan B Earth and Friends of the Earth) over six days from 19 October 2019. It has "rolled up" the climate change matters, such that the Court will deal at once with permission to appeal, and the substance of the appeal concerning permission to bring the judicial review and the substance of the judicial review. The hearing will be live streamed.
[30] For an overview see *http://climatecasechart.com*.
[31] The Court's unofficial English translation of the judgment is available *athttp://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/*.
[32] At [40].
[33] At [40].
[34] At [41].
[35] Citing, among other examples, *Oneryildiz v Turkey* (ECtHR, 30 November 2004, No.48939/99), *Budayeva et a v Russia* (ECtHR, 20 March 2008, Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), *Kolyadenko et al v Russia* (ECtHR, 28 February 2012, Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, and *Fadeyeva v Russia* (ECtHR, 9 June 2005, No.55723/00).

d. Regarding the positive obligation to take concrete actions to prevent future infringements, the European Court of Human Rights "(ECtHR") has considered that arts 2 and 8 of the ECHR have to be applied in a way that does not place an "impossible or disproportionate burden" on the government. This general limitation has been made concrete by the ECtHR by ruling that the government only has to take concrete actions which are reasonable and for which it is authorised in the case of a real and imminent threat, about which the government knew or ought to have known. The nature of the (imminent) infringement is relevant in this. An effective protection demands that the infringement is to be prevented as much as possible through early intervention of the government. The government has a "wide margin of appreciation" in choosing its measures.[36]

In light of this, the Court assessed whether climate dangers were capable of meeting the requisite level of "real and imminent threat". The Court concluded that they were. It set out evidence from reports by the IPCC and other bodies and, among other conclusions, found that:

a. Since pre-industrial times, the Earth has warmed by about 1.1 C. Between 1850 and 1980, the level of global warming was about 0.4 C. Since then and in under 40 years' time, the Earth has warmed further by 0.7 C, reaching the current level of 1.1 C. This global warming is expected to accelerate further, mainly because emitted greenhouse gases reach their full warming effect only after 30 or 40 years;[37] and

b. If the Earth warms by a temperature of substantially more than 2 C, this will cause more flooding due to rising sea levels, heat stress due to more intensive and longer periods of heat, increasing prevalence of respiratory diseases due to worsened air quality, droughts (accompanied by forest fires), increasing spread of infectious diseases and severe flooding as a result of heavy rainfall, disruption in the food production and potable water supply. Ecosystems, flora and fauna will also be affected, and biodiversity loss will occur.[38]

The Court therefore held that it was "appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life … [I]t follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat." The Court went on to find that, despite the margin of appreciation, the State had breached arts 2 and 8 by failing to pursue a more ambitious target for reducing GHG emissions by the end of 2020.[39]

The Dutch Government appealed and the Supreme Court heard argument on 24 May 2019.[40] It is yet to hand down its judgment.

The Urgenda decision is illuminating on many levels for practitioners in the UK,[41] but it is particularly informative in its approach to arts 2 and 8 on environmental matters, including the potential extent of the obligations which the rights entail, which may result in the need to legislate or amend legislation. Also of interest is the analysis of the climate threat, based on international documents accepted to be definitive (e.g. IPCC reports). Given that, and in light of the reports by the UK's own CCC about the impact of global warming in the UK, it is difficult to see how a different conclusion could be reached here about whether climate dangers would be capable of constituting a real and immediate threat and thus engaging arts 2 and 8 of the ECHR.

[36] At [42].
[37] At [44].
[38] At [44].
[39] At [71]–[76].
[40] *https://www.urgenda.nl/en/themas/climate-case/*.
[41] Such as the bases on which the Court dismissed the Government's various arguments that it was acting with sufficient celerity, particularly in light of overall GHG emissions internationally. At [54]–[69].

Interestingly, the Urgenda case is not the only litigation in which the courts have found the climate change poses a real and immediate risk to the lives and bodily integrity of individuals, resulting in potential breaches of human rights. In *Merriman & Friends of the Irish Environment v Fingal CC* [2017] IEHC 695,[42] the Irish High Court held at [244]:

> "Counsel for [Friends of the Irish Environment] contends, and the court accepts, that such materials as the above-referenced IPCC documentation, and the expert views of a distinguished academic commentator (Professor Bows-Larkin) can in truth leave no doubt but that climate change poses a real and immediate risk to, at least, the bodily integrity of members of [Friends of the Irish Environment], as well as to citizens more generally."

In light of this, the Irish High Court recognised a "constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large"[43] and that it was "difficult to see how the dignity and freedom of individuals is being assured if the natural environment on which their respective well-being is concerned is being progressively diminished".[44]

Environmental Impact Assessment

Assessing "Alternatives"

The implications of the comparatively new "alternatives" provision at art.5(3)(d) of the 2011 EIA Directive, introduced in 2014 by amending Directive 2014/52/EU, was considered by the CJEU in *Holohan v An Bord Pleanala* (C-461/17) [2019] PTSR 1054. The CJEU held that:[45]

> "… the developer must supply information in relation to the environmental impact of both the chosen option and of all the main *alternatives* studied by the developer, together with the reasons for his choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage"

The CJEU moderated this to a certain extent, holding that, since the obligation was only an "outline" of the main alternatives, the provision does not require "the main alternatives studied to be subject to an impact assessment equivalent to that of the approved project", rather, simply, a developer needs to supply "the reasons for his choice, taking into account at least the environmental effects".[46] In that respect, the obligation is considerably less onerous than that under the SEA Directive.

Holohan was applied in *R. (on the application of Lakenheath Parish Council) v Suffolk CC* [2019] EWHC 978 (Admin). HHJ Gore QC found that art.5(3)(d) had been met by an outline consideration of alternatives within an officer's report.[47]

Blewett and Defective EIAs

R. (on the application of Squire) v Shropshire Council [2019] EWCA Civ 888 is a rare example of an ES being found to be so defective as to justify the quashing of planning permission. The case concerned an intensive chicken farm, in which about 1,575,000 "broiler" chickens would be reared per annum, producing some 2,322 tonnes of manure. The ES failed to consider the odour and dust effects arising from storing and spreading the manure on land nearby the application site. Whilst an Environmental Permit under the

[42] *http://climatecasechart.com/non-us-case/friends-irish-environment-clg-v-fingal-county-council/*.
[43] At [261]–[264].
[44] At [252].
[45] At [69].
[46] At [66].
[47] At [70]–[71].

Environmental Permitting (England & Wales) Regulations 2016 would be required, it expressly excluded from its scope land outside "the installation boundary", which was drawn tightly around the chicken sheds. Lindblom LJ's threshold of an ES being unlawful because it was "incomplete",[48] might well be said to signal a lower threshold then that in *Blewett*[49] which was whether the ES was "so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations". Or perhaps it is just another way of putting the same proposition, as Lindblom LJ expressed the Court's view that the ES was unlawful by reference to *Blewett*.[50]

Squire has implications for all types of intensive farming, which commonly produce large quantities of manure, but which seldom subject the disposal of such manure to EIA. Previously reliance was placed on two matters: the permit (but without considering whether a gap would exist between the control under the permit and the control that should be exercised through the planning process;[51] and the fact that the spreading of manure is common agricultural practice which does not need planning permission. The Court of Appeal in *Squire* rejected both these as justifications for the approach taken by the ES and by the local planning authority: see [60] and [67] on the permit and [71]–[73] on the "common agricultural practice". Importantly, the Court of Appeal held that broad and generalised comments made by the Public Protection Officer on the basis of his "experience and expertise", did not amount to a coherent assessment in accordance with the regime[52] for EIA.[53]

Blewett was also the subject of discussion by the High Court in *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin). The submission that the Court should adopt a stricter approach to environmental reports than that in *Blewitt* was rejected by Hickenbottom LJ and Holgate J at [434], after a wide-ranging discussion of the EIA case law.[54] The Court observed at [432] that the *Blewitt* approach was "no more and no less than a practical application of the conventional *Wednesbury* principles of judicial review". Rather, the Court held that a challenge to the inclusion or non-inclusion in the ES of information on a particular subject or the nature and extent of analysis are "analogous" to "judicial review of compliance with the decision-maker's obligation to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a consideration which is legally relevant".[55] This, alongside Lindblom LJ's approach in *Squire*, should put paid to the suggestion that it is more difficult to show an ES to be unreasonable for failure to take into account a material consideration than would be the case for a different type of assessment by a public body.

Habitats

The Effects of People Over Wind

The effects of *People Over Wind v Coillte Teoranta* (C-323/17) [2018] P.T.S.R. 1668[56] have dominated the case law in Habitats over the last year. In *Canterbury CC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin) the High Court heard two claims together and confirmed that *People Over Wind* rendered domestic cases interpreting art.6(3), such as *R. (on the*

[48] At [80].
[49] *R. (on the application of Blewett) v Derbyshire CC* [[2003] EWHC 2775 (Admin); [2004] Env. L.R. 29 at [41].
[50] At [71].
[51] See, for example, *R. (on the application of Palmer) v Herefordshire CC* [2015] EWHC 2688 (Admin), which must now be doubted concerning its approach to the environmental permit.
[52] At [71].
[53] Accordingly, the approach of the judge below, who had accepted that such generalised comments were a sufficient assessment under the Directive and the Regulations (see [2018] EWHC 1730 at [44]), has been overturned.
[54] At [419]–[433].
[55] Citing the well-known decisions of *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 at 1065B; *CREEDNZ Inc v Governor-General* [1981] N.Z.L.R. 172; *In re Findlay* [1985] A.C. 318 at 334 and *R. (on the application of Hurst) v HM Coroner for Northern District London* [2007] A.C. 189 at [57].
[56] Followed by the CJEU in the subsequent *Grace v An Bord Pleanala* (C-164/17) and *Holohan v An Bord Pleanala* (C-461/17).

application of Hart DC) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin) and *Smythe v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, no longer good law.[57] Accordingly, the Secretary of State had erred in law when he followed the *Hart* approach by taking into account mitigation in deciding whether to undertake an appropriate assessment and applying the presumption in favour of sustainable development within the NPPF. The case is particularly illuminating in its approach to the Court's discretion whether or not to quash the decisions. Dove J found that, in circumstances where detailed and comprehensive information about likely significant effects had been provided (albeit not in the form of an appropriate assessment); Natural England had been satisfied with the mitigation measures and those measures had been the subject of a lengthy public inquiry, the Court could exercise its discretion not to quash.[58] That begs the question whether the decision would have been the same had it been a local authority decision to grant permission or an appeal determined via the written representations procedure, with a more limited scope for public involvement. Dove J was not prepared to exercise his discretion where the failure to undertake an appropriate assessment had led to the erroneous application of the presumption in favour of sustainable development within the NPPF as it then stood.[59]

In *R. (on the application of Wingfield) v Canterbury CC* [2019] EWHC 1974 (Admin) the High Court addressed the situation where the law on appropriate assessment changes between the outline and reserved matters stages of a consent. In *Wingfield* an appropriate assessment was not undertaken at the outline stage because it had been screened out in reliance on pre-*People Over Wind* authority. Just over a year and a half later, the Council granted reserved matters approval, following an appropriate assessment. Lang J held that, in the circumstances, the Council had lawfully conducted the appropriate assessment at the reserved matters stage. The Judge applied the case law on multi-stage consent processes and the Habitats Directive, which determined that the date of "approval" of a project under art.6(3) is when the "implementing decision" (i.e. reserved matters decision) is made.[60] Lang J noted that, unlike the EIA Directive, the Habitats Directive had no requirement that the assessment be undertaken "at the earliest possible stage"; instead the obligation is to ensure that the appropriate assessment is completed before the project is "given effect" or "approved".[61] Accordingly, it was lawful and proportionate to remedy an error at the outline stage by conducting the appropriate assessment at the reserved matters stage. In any event, Lang J held that the Court would have exercised its power under s.31(2A) of the Senior Courts Act 1981 to withhold relief, as there would be no adverse effect on the integrity of any habitats site by carrying out the assessment at the reserved matters stage.

While this pragmatic approach makes much sense given the significant change in the law brought about by *People Over Wind*, the decision should not in my view be read as a get-out-of-jail free card for making good a failure of appropriate assessment at outline permission stage by carrying out the assessment at reserved matters. The Court accepted that the grant of outline permission had been vulnerable to challenge;[62] it was only the extent to which such an application would have been out of time that stood in the way (although in light of the principles articulated in the *Thornton Hall Hotel Ltd* case, discussed below, it would have been interesting to see what the Court would have made of the delay point had the outline permission been challenged).

The subject of the NPPF's approach to the interaction between the necessity for an appropriate assessment and the presumption in favour of sustainable development was the subject of *Gladman Developments Ltd v Secretary of State for Hounsing, Communities and Local Government* [2019] EWHC 2001 (Admin). In

[57] At [77].
[58] At [100].
[59] At [114].
[60] See, e.g. *Commission v UK* [2006] QB 74 at [101].
[61] At [72]–[74].
[62] At [61] and [103].

its original form, the NPPF provided that where an appropriate assessment had been necessary, the presumption in favour of sustainable development was not to be applied. This policy continued into the 2018 NPPF, even after the result of the *People Over Wind* judgment was known. Realising that the combination of its own policy and the *People Over Wind* judgment resulted in a large number of schemes not benefiting from the presumption, MHCLG promulgated a Technical Consultation on 26 October 2018 which, amongst other things, proposed amending the policy to apply only where an appropriate assessment had concluded the proposed development would adversely affect the integrity of a habitats site.[63] Prior to the Consultation resulting in the amended NPPF in February 2019, the Secretary of State dismissed *Gladman*'s appeal in a decision letter in which the presumption was not applied. Dove J held that was perfectly lawful, as that reflected the present policy of the Secretary of State and the decision-maker was entitled to apply the present policy, albeit it was under review.

The Scope of Appropriate Assessment

Turning to the pragmatics of appropriate assessment, there have been three cases illuminating different aspects of the process. In *Holohan* (above), the CJEU went further than earlier cases in giving guidance as to the scope of an appropriate assessment. The CJEU held that a thorough assessment requires the cataloguing of the entirety of habitat types and species for which a site was protected and also those types and species for which it was not protected.[64] Moreover, the assessment must detail the implications for types and species found outside the boundaries of the application site, provided those implications were liable to affect the conservation objectives of the site.[65] This, the CJEU observed, was necessary in order to "dispel all reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected site".[66]

In the so-called "Dutch Nitrogen" joined cases of *Coöperatie Mobilisation for the Environment UA v College van gedeputeerde staten van Limburg* (C-293/17 and C-294/17) [2019] Env. L.R. 27, the CJEU considered the Dutch Government's general authorisation scheme for agricultural activities which caused nitrogen deposits in sites protected by the Habitats Directive. The Court's reasoning is therefore relevant to "high-level" appropriate assessment, on which multiple projects will rely (such as, in the domestic context, an appropriate assessment under a local plan). The Court held that whilst a "project" under EIA may constitute a "project" under art.6(3), the wider approach to "projects" in the Habitats regime meant that there the "mere fact that an activity may not be classified as a "project" within the meaning of the EIA Directive does not mean it falls outside of the habitats regime.[67] Also of note is the CJEU's finding that the Habitats Directive may embrace a project which initially authorises a recurring activity prior to the scheme of protection under the Directive applying to the site in question.[68]

Turning to "high-level" authorisation schemes, the Court held that art.6(3) does not authorise a Member State to enact national legislation which allows certain projects to benefit from "a general waiver".[69] However, a high-level appropriate assessment could be effective for multiple projects, despite not assessing the specific characteristics of each project:[70]

> "[A]rt.6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' within the meaning of that provision, carried out in advance and in which a specific

[63] NPPF para.177.
[64] At [37] and [40].
[65] See also AG Kokott's opinion at [28]–[31], which contains guidance on the extent of assessment.
[66] At [37].
[67] At [66].
[68] At [86].
[69] At [114].
[70] At [104].

> overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain."

The Dutch Nitrogen cases are also interesting for the way in which they approach the task of the national courts in ensuring that the requirements of art.6(3) are fulfilled. The language is fairly emphatic:

> "In order to ensure that all the requirements thus recalled are fulfilled, *it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of art.6(3) of the Habitats Directive* accompanying a programmatic approach and the various arrangements for implementing it, including inter alia the use of software such as that at issue in the main proceedings intended to contribute to the authorisation process. The competent national authorities may be entitled to authorise such an individual project on the basis of such an assessment only if the national court is satisfied that that assessment carried out in advance meets those requirements in respect of each specific individual project." ([101], emphasis added. See also [110]).

This language seems to go beyond the irrationality/unreasonableness standard of review, as it envisages a much more active scrutiny by the courts of the underlying scientific material in order to carry out the requisite "thorough and in-depth examination" of the scientific soundness of the appropriate assessment.

Finally, the CJEU also gave guidance in relation to mitigation—i.e. conservation measures, preventative measures or autonomous measures—at the appropriate assessment stage. The Court made it clear that, if the expected benefits are "uncertain" at the time of the assessment, either because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified and quantified with certainty, then they cannot be taken into account.[71] It follows that projected improvements in, for example, air quality, may be taken into account in an appropriate assessment under the Habitats Directive, provided the benefits are not "uncertain". However, the CJEU cautioned that where the anticipated benefits of autonomous measures were to be taken into account, the "certain or potential adverse effects" should also be included in any assessment.[72] This plainly has implications for the local plan process, as it will be relevant to mitigation through policy measures.

The Meaning of a "Project" or "Plan"

In *R. (on the application of Berks, Bucks and Oxon Wildlife Trust) v Secretary of State for Transport* [2019] EWHC 1786 (Admin) Lang J held that the Secretary of State for Transport's decision to accept Highways England's recommendation as to the preferred corridor for a new fast link road between Oxford and Cambridge was not a "plan" or "project" within the meaning of the Habitats Directive, but rather was a preliminary step in the identification of a "project". Lang J found that it was appropriate to have regard to the same factors as to whether it amounted to a "plan or programme" under the SEA Directive.[73] It is not entirely clear whether the Judge's observations in this respect were confined to this case or were intended to be of general application. If it is the latter, that might well give rise to subsequent litigation given the CJEU's deprecation of a unified approach to the term "project" in the Habitats and EIA Directives, expressed in the *Dutch Nitrogen* cases.

[71] At [130].
[72] At [131].
[73] At [69].

Strategic Environmental Assessment

In *R. (on the application of Friends of the Earth) v Secretary of State for Communities and Local Government* [2019] EWHC 518 (Admin); [2019] J.P.L. 960, the High Court found the NPPF did not require an SEA on the basis that, whilst it "set the framework for future development", it was not "required by legislative, regulatory or administrative provisions" because it was not "regulated by national legislative or regulatory regimes".[74] The Judge's analysis might well be said to be more restrictive than that of the CJEU in the *Inter- environment Bruxelles* case, which held that the test was whether the plan or programme was "regulated by rules of law" (not merely legislative provisions) even if adoption were not "compulsory".[75] It will be recalled that in *R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] 1 W.L.R. 3923, Laws LJ held that the Minister's power to promulgate planning policy was not limitless and was regulated by "legal constraints".[76] The issue of whether national policy such as the NPPF is subject to SEA would appear therefore not to be entirely settled. It a curious feature of the NPPF that it is omnipresent (and, some say, omnipotent) throughout both plan-making and decision-taking and yet it is not subject to any form of public environmental assessment.

Conditions, Section 106 Agreements and CIL

Variation of Conditions Under Section 73 of the TCPA 1990

This area has provided the sole Supreme Court decision of the past 12 months: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 W.L.R. 4317.[77] The appeal concerned retail premises which had originally been subject to a condition restricting sales from the premises to non-food items, which had not been repeated when the conditions were varied under s.73 of the Town and Country Planning Act 1990 ("TCPA 1990"). The purpose of the variation had been to widen the types of goods which could be sold, but had not intended to permit the sale of food items. The manager of the premises subsequently applied for a certificate of lawfulness that the premises could be used for unrestricted retail use, including the sale of food.

The central principle to emerge from the Supreme Court's Judgment is a restatement of the proposition that when seeking to interpret a planning permission the guiding principle is to give effect to "the natural and ordinary meaning" of the words used, viewed in their particular context and with a healthy application of common sense.[78] Where the operative part of the grant was clear and unambiguous that the local planning authority was approving an application for a "variation", with an accurate description of the relevant development as well as the condition(s) to be varied, then the reasonable reader would not be "left in any real doubt as to its intended meaning and effect",[79] and would read the variation and the original conditions together in order to understand the scope of the planning permission.

Accordingly, the "technical trap"[80] into which Lambeth BC had fallen by creating a new planning permission through granting a variation for a specific condition but without repeating all the previous conditions, could be avoided by a common-sense, plain language reading of the planning permission, against the background that the local authority's purpose was simply to vary the conditions.

[74] Applying *Inter-environment Bruxelles ASBL v Region De Bruxelles-Capitale* (C- 567/10); [2012] Env. L.R. 30 at [31].
[75] At [28].
[76] At [22].
[77] Although not the sole case argued: the Supreme Court heard on 22–23 July 2019 the appeal in *R. (on the application of Wright) v Forest of Dean DC and Resilient Ltd*, concerning whether, on an application for planning permission for a wind turbine proposed to be undertaken by a community benefit society, the distribution to the local community of a community benefit fund derived from the operation of the turbine was, in the circumstances of the case, a material planning consideration which the council could lawfully take into account when considering whether to grant planning permission.
[78] At [27]–[29] and [33].
[79] At [33].
[80] Lindblom LJ's description in the Court of Appeal decision, based on the observation that the approval of an application under s.73 requires the grant of a fresh planning permission rather than "merely the variation of an existing one": [2018] J.P.L. 1160 at [19].

The decision has generated much discussion among commentators. On one view, the case is highly fact specific and does not break new ground. On another, it shifts the law on "variation" of planning permission significantly, but opens the door to practical difficulties with understanding which conditions apply on sites with successive permissions created as a result of variation. In my view, the Supreme Court in effect brings the case law back to its previous "ordinary reading" approach,[81] while re-enforcing that the Court will seek to give effect to a common-sense interpretation of a planning permission by a reasonable reader where the grant of a s.73 permission has allegedly given rise to ambiguity. Understanding the background and purpose of s.73 was key: it was always intended to be a provision conferring a power to vary or amend a condition, so the reasonable reader would be unlikely to see any difficulty in giving effect to that "normal and accepted usage",[82] despite the fact that the common parlance is "legally inaccurate".[83]

No doubt local authorities who routinely grant variations in the "old style"—i.e. without repeating all the unvaried conditions in the new grant of planning permission created through the variation—will welcome the Supreme Court's judgment. However, Lord Carnwath noted that practical problems may arise where there are successive permissions and the original conditions are not specifically re-imposed on each grant.[84] It may be difficult to determine with certainty which conditions on earlier permissions continue to apply on sites with a number of successive permissions: Lord Carnwath emphasised it will always be a matter of construction. However, at least we now know that the Courts are likely to be required to look at the successive permissions to determine, as a matter of interpretation rather than implication, the applicable conditions.

The Supreme Court's judgment in the *Lambeth LBC* case is illuminating for a further reason. While professing to be a simple reiteration of the "reasonable reader" approach, it is in actuality a blend of the "plain language" and the "purposive" approaches to interpretation. In interpreting s.73, Lord Carnwath explicitly relies on its purpose of conferring a power to "vary" or "amend" a condition.[85] Although he couches this in the language of paying attention to the "background" of the section and recognising the "normal and accepted usage to describe section 73", it is a purposive analysis. In my view this is to be welcomed. The purpose of legislation, rather than its technical operation (described in this instance in [11] of the judgment) can helpfully inform statutory interpretation.

The question of variation of conditions was also the focus of *Finney v Welsh Ministers* [2018] EWHC 3073 (Admin); [2019] J.P.L. 402, in which permission has already been granted by the Court of Appeal. The case concerned an application to vary the height of two wind turbines from 100m to 125m, which some might consider amounted to a fundamental alteration of the permitted scheme. An inspector had allowed an appeal against the local authority's refusal to grant planning permission. While Sir Wyn Williams reiterated that an application to vary a condition under s.73 cannot result in a different condition being imposed which would amount to a fundamental alteration of the original proposal, he identified a degree of uncertainty arising out of the three main first instance decisions regarding the scope of s.73 applications.[86][87] He held that, following *Wet Finishing Works*, a variation pursued by s.73 can be lawful notwithstanding that it may necessitate a variation to the terms of the planning permission which preceded the s.73 application. The Judge described this as providing the "appropriate degree of flexibility" to the words of s.73—an approach which, in light of the Supreme Court's decision in *Lambeth LBC* case, may well find favour with the Court of Appeal.

[81] Laid down by Sullivan J, as he then was, in *Reid v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2174 (Admin).
[82] At [33].
[83] At [11].
[84] At [38].
[85] At [33].
[86] At [36]–[40].
[87] *R. v Coventry CC Ex p Arrowcroft Group Plc* [2001] P.L.C.R. 7, as applied by *R. (on the application of Wet Finishing Works Ltd) v Taunton Deane BC* [2018] P.T.S.R. 26 and *R. (on the application of Vue Entertainment Ltd) v York CC* [2017] EWHC 588 (Admin).

Sir Wyn Williams concluded that the Inspector did consider whether the application constituted a fundamental alteration of the original proposal and that it was proper to draw the inference from her decision letter read as a whole that she considered that it did not.[88] He recognised, however, that it was possible to take an alternative view, but held that he would not have been prepared to grant a quashing order if he had taken that view, because it was highly likely that the Inspector would still have allowed the appeal had she addressed the issue.[89]

Interpretation of Conditions

In *Swindon BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1677 (Admin), the local planning authority applied to quash a decision of an Inspector who had overturned the refusal of a certificate of lawful use or development. The local planning authority had granted a developer outline planning permission for employment development on a site, imposing 50 conditions. Condition 39 stated that the proposed access roads would be "constructed in a manner as to ensure that each unit was served by fully functional highways", to ensure that the development was served by an adequate means of access to the public highway. The developer applied for a lawful development certificate of "formation and use of private access roads as private access roads" arguing that the terms "fully functional highways" related to the construction standard of the roads and not to their legal status. The Inspector agreed with the developer and held that "highway" simply meant "road" and did not require the access roads once constructed to be open to the public.

Andrews J held that while conditions are not to be read as statutes such that "road" and "highway" could be read interchangeably, the condition had to be read in context and the reasonable and informed reader would not construe "road" as a mere synonym for "highway". The site had not been intended as a self-contained cul-de-sac business estate. It was part of wider major development to be connected to access roads for further development. The access roads were intended to link to that wider development and not just provide access to the site alone.

Conditions, like s.73 grants of planning permission, are not to be interpreted in a vacuum: it is vital to construe conditions in their context and to apply to the reasonable and informed reader test in the event of dispute of perceived ambiguity.

The question of whether a condition imposed on a planning permission prevented a stopping-up order being confirmed by the Secretary of State for Environment, Food and Rural Affairs under s.259 of the TCPA 1990 was the subject of *R. (on the application of Network Rail Infrastructure Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWCA Civ 2069; [2019] 2 J.P.L. 193. Eden DC had made a public path stopping up order because it was satisfied that it was necessary to stop up the footpath to enable development to be carried out in accordance with a planning permission it had granted for the construction of 142 dwellings. The relevant planning permission was subject to a condition, Condition 13, restricting the development to no more than 64 specified dwellings unless the circumstances in either of two "exceptions" should occur. The first "exception" was that a stopping-up order had been made and confirmed. The second was that the Secretary of State did not confirm the stopping-up order. Objections were made to the stopping up order and an inquiry was held, but the inspector determined as a preliminary issue that Condition 13 permitted the whole development to be carried out regardless of whether the Order was confirmed, and therefore that it was not necessary to divert the footpath to enable development to be carried out.

The Court of Appeal held, with a rare dissenting voice, that the Secretary of State had misinterpreted the condition. Lindblom LJ endorsed the approach to interpreting conditions set out by the Supreme Court

[88] At [45].
[89] At [46]–[47].

in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 W.L.R. 85, and held that, when one is construing a condition, one should avoid, if one can, a construction that defeats the obvious purpose of the condition and seek to give it the effect it was plainly meant to have.[90] The Secretary of State's interpretation of Condition 13 led to that condition predetermining the outcome of the very statutory process for which it provided and overlooked the fact that the condition provided expressly for a stopping-up order being made, for the possibility of that order being confirmed, and for the particular consequences of that decision, which it would have had no need to do if the order could never be confirmed in any event.[91]

Lewison LJ expressly agreed that, in accordance with normal principles of interpretation, one should try to validate a provision if possible; and that an interpretation should not defeat the purpose of the provision, unless no other interpretation is possible.[92] However, he held that the local planning authority could not, by means of a condition, confer on the Secretary of State a statutory jurisdiction that he does not have in relation to the necessity to stop-up the path. He disagreed that Condition 13 meant that it was never necessary to stop-up the highway under s.259 but found that the condition was nevertheless valid because it did not tie itself to any particular statutory power to stop up highways and other powers, such as that in s.119A of the Highways Act 1980, were available to achieve the desired outcome.

So, the overall message for practitioners is clear: conditions must be interpreted in their context, based on what a reasonable reader would understand when reading the condition in the context of the other conditions and of the consent as a whole, and if possible, avoiding a construction that defeats the obvious purpose of the condition.

Non-Material Amendments Under Section 96A of the TCPA 1990

In *R. (on the application of Fulford Parish Council) v York CC* [2019] EWCA Civ 1359, the Court of Appeal considered the scope of non-material amendments to planning permissions under s.96A of the TCPA 1990. Outline planning permission had been granted, subject to conditions, for a residential development project comprising 700 homes and the creation of public open space and community facilities. Many of the conditions required subsequent approval by the local authority. The local authority granted approval of reserved matters, subject to approval of a detailed bat mitigation strategy and a method statement. It subsequently approved a further application described as "non-material amendments" to alter approved plans and the bat mitigation strategy. The planning permission had already been implemented, in the sense that the overall scheme of development had begun. Section 96A(1) provides that a local authority could make changes to any planning permission if satisfied that the change was not material. The Parish Council submitted that s.96A was limited to making non-material amendments to a "planning permission" and that approval of reserved matters was not a "planning permission", such that the local authority did not have the power to make the amendment.

The Court of Appeal rejected that argument. Stripping the law relating to the grant of planning permissions back to first principles, the Court of Appeal recognised that the starting point was the primary source of the power to grant planning permission, s.70(1), which provided that the local planning authority could grant planning permission unconditionally or subject to conditions. Two matters flowed from that. First, the grant of outline planning permission was the grant of planning permission defined by the Act. Second as the grant was "subject to" conditions, the conditions had to be seen as an intrinsic part of the grant. The conditional approval of reserved matters was itself a condition subject to which the planning permission had been granted. Therefore, the planning permission to which s.96A referred consisted of the grant of planning permission together with any conditions to which the grant was subject, regardless of

[90] At [40].
[91] At [42]–[48] and [54]–[55].
[92] At [62].

whether the conditions were imposed at the time of, or subsequent to, the grant of permission. An application for an amendment to an approval of reserved matters was an application for the alteration of an existing condition. That was expressly permitted by s.96A(3)(b).

The Court of Appeal recognised that the power pursuant to s.96A was restricted to non-material changes. It therefore followed that a change in approved reserved natters could have no material impact and there could be no policy objection to that interpretation.

The significance in the case lies in the principle that s.96A is apt to allow applicants to amend reserved matters which have been approved by the local planning authority and that the use of the phrase "planning permission" within s.96A should be construed accordingly.

Section 106 of the TCPA 1990

In *York CC v Trinity One (Leeds) Ltd* [2018] EWCA Civ 1883 outline planning permission had been granted for a residential development subject to a s.106 agreement reached in 2003 requiring the developer to provide a number of affordable flats or the payment of commuted sums on the sale of each unit in default. That sum was to be calculated by reference to the amount of social housing grant ("SHG") necessary to secure affordable rented homes of equivalent type and size on another site in a similar residential area. The developer completed the development but was unable to supply the affordable housing required. The parties were unable to agree on the calculation of the commuted sums due as the SHG regime was no longer in place.

In 2013 ss.106BA and 106BC of the TCPA 1990 came into force. In 2016, the developer applied under s.106BA to modify the s.106 agreement to remove its obligation to pay a commuted sum. The developer appealed to the Secretary of State under s.106BC against the local planning authority's dismissal of that application. That appeal had been determined but remained the subject of ongoing judicial review proceedings. In those proceedings it was held at first instance that on a true construction of the s.106 agreement a commuted sum was payable because the parties must have intended that the developers were expected either to provide affordable housing or a commuted sum in lieu. The agreement was intended to provide a method of calculation which produced a sum as close as possible to the figure which would have been payable if the SHG still existed. However, s.106BA had retrospective effect such that the developer would be released from liability if it was successful in its appeal to modify the s.106 agreement.

The Court of Appeal upheld the Judge's interpretation at first instance. The decision puts a spotlight on the key element when interpreting s.106 agreements: just as with contracts, the focus should be on the undisputed intention of the parties. In this case, it was absolutely clear that the parties intended a commuted sum should be paid in default of the provision of housing. The sum of money was originally capable of quantification; it was only subsequent events that gave rise to uncertainty. Principles from the law of contract applied: where an event had occurred which was not contemplated by the parties, the court had to give effect to the parties' clear intention. Although the calculation of a sum equivalent to the SHG would be a departure from the literal words of the contract that was the only sensible solution.

The Court of Appeal further held that s.106BA(3) was in terms an interference with pre-existing rights and accordingly had retrospective effect. This was an example where a development could be demonstrated to be non-viable after implementation. Both developers and local authorities should note that the Court held that economic non-viability could occur before or after liability was triggered, meaning that the concept could apply to parts of a development already completed.

Community Infrastructure Levy ("CIL")

The Court of Appeal gave a concise overview of the statutory arrangements for and operation of CIL in [5]–[9] of *R. (on the application of Oates) v Wealdon DC* [2018] EWCA Civ 1304. The case concerned

whether a planning officer's report before the planning committee contained inaccurate or misleading advice as to the meaning and effect of reg.123 of the CIL Regulations 2010. Lindblom LJ held that, while the officer had failed to explain the true scope of reg.123, she had rightly advised that developers could not be required to provide highway improvements that were going to be funded by a community infrastructure levy, and her conclusion that there were no reasons in transport terms to justify a refusal of planning permission for a residential development was unassailable.[93]

The requirements of the Community Infrastructure Levy Regulations 2010 reg.40(7)(ii) were considered by the High Court in *R. (on the application of Giordano Ltd) v Camden LBC* [2018] EWHC 3417 (Admin). The Claimant owned a six-storey building which had been used as warehouse and office space. Planning permission had been granted in 2011 for a change of use to create six two-bedroom flats. At that time the local authority had not introduced a CIL charging regime and no payment was required when the development commenced. The development was lawfully commenced within three years of the grant of permission. However, the works were incomplete, and the building was vacant. In 2016, the Claimant applied for permission to convert the property into three rather than six flats. The local planning authority granted the application in 2017 and notified the claimant that it was liable to pay a CIL of £547,419 on commencement of the development. The local planning authority also found that the claimant was not eligible for a deduction pursuant to reg.40(7) of the CIL Regs 2010. The Claimant contended that he was eligible because he already had permission for residential use in the retained parts of the building and the intended use of the proposed development was also residential. The Claimant accepted that residential use had not yet been established but contended under permitted development rights it could establish residential use at a later date and then convert the six two-bed flats into three three-bed flats without planning permission.

Lang J held that the fact that a residential use could have been established at some future date did not assist the Claimant as the wording of reg.40(7)(ii) expressly required both the present and intended uses to match on the relevant date. A potential use was not sufficient. The conditions had to be met on the day before planning permission first permitted the chargeable development which was the day before the 2017 planning permission was granted. At that date the change of use had not yet occurred as the three floors of intended residential space comprised a shell and were incapable of being used for residential purposes.

The key principle to emerge from the High Court's judgment is that actual use, rather than potential uses, is relevant when determining whether an applicant was eligible for a deduction pursuant to reg.40(7) of the CIL Regulations. This will be subject to analysis by the Court of Appeal, which granted permission to appeal on 9 July 2019.

Policy Interpretation

In terms of policy interpretation this year, the inevitable focus has been on the Revised NPPF and in particular para.11 and the presumption in favour of sustainable development.

Paragraph 11 of the Revised NPPF

Of particular interest to practitioners will be the detailed judgment of Holgate J in *Monkhill Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1993 (Admin) where he addressed the question of para.11(d)(i) and (ii) and how the "tilted balance" is disapplied in various circumstances. In particular, the judgment focused on para.11(d)(i) and footnote 6; i.e. where the presumption in favour of sustainable development is disapplied because policies "that protect areas of assets of particular

[93] At [40]–[54].

importance" provide "a clear reason for refusing the development proposed" alongside interpreting para.172 of the NPPF in relation to development in an AONB.

Holgate J reiterated the well-established principle that "NPPF policies of the kind we are dealing with are to be interpreted in a straightforward manner and on the basis that their purpose is to guide or shape practical decision-making".[94]

Most usefully, Holgate J provided what he termed a "practical summary" which "may assist practitioners in the field". He discussed the meaning and effect of the NPPF in [39] and set out his conclusions again at [45]. They are worth quoting here in full:

> "• It is, of course, necessary to apply section 38(6) of the Planning and Compulsory Purchase Act 2004 in any event;
> • If the proposal accords with the policies of an up-to-date development plan taken as a whole, then unless other considerations indicate otherwise, planning permission should be granted without delay (paragraph 11(c) of the NPPF);
> • If the case does not fall within paragraph 11(c), the next step is to consider whether paragraph 11(d) applies. This requires examining whether there are no relevant development plan policies or whether the most important development plan policies for determining the application are out-of-date;
> • If paragraph 11(d) does apply, then the next question is whether one or more 'Footnote 6' policies are relevant to the determination of the application or appeal (limb (i));
> • If there are no relevant 'Footnote 6' policies so that limb (i) does not apply, the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6));
> • If limb (i) does apply, the decision-taker must consider whether the application of the relevant 'Footnote 6' policy (or policies) provides a clear reason to refuse permission for the development;
> • If it does, then permission should be refused (subject to applying s.38(6) as explained in paragraph 39 (11) to (12) above). Limb (ii) is irrelevant in this situation and must not be applied;
> • If it does not, then the decision-taker should proceed to limb (ii) and policies) provides a clear reason to refuse permission for the development;
> • If it does, then permission should be refused (subject to applying s.38(6) as explained in paragraph 39 (11) to (12) above). Limb (ii) is irrelevant in this situation and must not be applied;
> • If it does not, then the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and section 38(6))."

Having carried out the above analysis, Holgate J turned to the question of whether the first part of para.172 of the NPPF was a policy that fell within the scope of para.11(d)(i). He concluded that it was.[95] The "clear and obvious implication" of para.172 requiring great weight to be given to the conservation and enhancement of landscapes is that, if a proposal harmed those objectives, great weight should be given to the decision-maker's assessment of the nature and degree of harm. Where there would be harm to an AONB but also countervailing benefits, the issue for the decision-maker was whether the benefits outweighed the harm, the significance of the latter being increased by the requirement to give weight to it. For the judge, this connoted a simple planning balance. The great weight to be attached to the harm

[94] At [38].
[95] At [50]–[53].

was capable of being outweighed by the benefits, so as to overcome what would otherwise be a reason for refusal.

The High Court also grappled with para.11(d) in *Wavendon Properties Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1524 (Admin). Dove J made short shrift of the suggestion that, so long as only one of the most important policies for determining an application is out-of-date, the tilted balance applies. Dove J highlighted the importance of a holistic approach to decision-making, noting that an "overall judgment" must be made whether the most important policies for determining the application are out-of-date.[96] This, Dove J observed, is consistent with the NPPF's "emphasis (consonant with the statutory framework) that the decision-taking process should be plan-led". The application of the tilted balance in cases where only one policy of several of those most important for the decision was out-of- date and, several others were up-to-date and did not support the grant of consent, "would be inconsistent with that purpose".[97]

Dove J also addressed five-year housing land supply and the interpretation of "deliverable", observing at [67] that:

> "… by simply asserting the figures as his conclusion, the First Defendant has failed to provide any explanation as to what he has done with the materials before him in order to arrive at that conclusion, bearing in mind that it would have been self-evident that it was a contentious conclusion. Simply asserting the figures does not enable any understanding of what the First Defendant made of the Inspector's conclusions…by simply asserting the figures in a range makes it a matter of pure speculation as to how the First Defendant arrived at the figures which he did."

This should serve as a cautionary note for decision-makers to always provide sufficient evidence to support the housing land supply figures they reach. An unexplained number will not suffice.

Paul Newman New Homes Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 2367 (Admin) centred on whether one up to date policy could prevent the application of the tilted balance. The relevant single policy in the local plan was that dealing with the effect of the development on the character and appearance of the area. That was a main issue in the inquiry. The Inspector decided that the policy's aims were consistent with the NPPF and gave it full weight. While other policies concerning housing were recognised to be out of date, the Inspector concluded that the most important policy—the landscape policy—was not and so the tilted balance in para.11(d) of the NPPF was not engaged. The Claimant contended the Inspector's approach was erroneous, as that the wording of para.11(d) meant the Inspector should have considered a "basket of policies sufficient for the determination of the application".[98]

Mr Justice Ouseley rejected that contention, referencing *Wavendon Properties*. He held that it is necessary to identify the policies from the development plan which constitute those most important in determining the application and to take an overall view, but where there is a single up to date policy which is in fact the most important for determining the application, the wording of para.11(d) means that can be sufficient for blocking the second trigger.[99] The use of the plural "policies" within para.11(d) did not change that.

Finally, the *Paul Newman Homes* case clarifies that there are three separate triggers for the application of the "tilted balance": (1) no relevant policies in the development plan; (2) the policies in the development plan most important for the determination of the application being out of date; and (3) policies deemed

[96] At [58].
[97] At [58].
[98] At [13].
[99] At [35]–[36].

to be out of date because the Council lacks a five-year housing land supply.[100][101] They operate independently of each other and so should be considered separately.

Green Belt and "Openness": Paragraphs 79, 89 and 90 of the 2012 NPPF and 133, 145 and 146 of the Revised NPPF

The Supreme Court will this year consider the question of the interrelationship between visual impact and openness of the Green Belt, having granted permission to appeal on 5 November 2018 from the Court of Appeal's decision in *Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC* [2018] EWCA Civ 489. This case concerned a grant of permission for a 6ha extension to the operational face of a magnesian limestone quarry, located in the Green Belt about 1.5km south-west of Tadcaster. The central issue was whether the mineral planning authority misunderstood and misapplied the various NPPF policies concerning openness of the Green Belt, in particular former para.90 (now para.146), which provides that mineral extraction is not inappropriate in the Green Belt provided it "preserve(s) the openness of the Green Belt".

Lindblom LJ confirmed at [37]–[38] the ratio in *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466, in which the Court held that visual impact, as well as spatial impact, is "implicitly part" of the concept of "openness" and that to exclude visual impact, as a matter of principle, from a consideration of the likely effects of a development on the openness of the Green Belt would be "artificial and unrealistic". Lindblom LJ commented:

> "Whether, in the individual circumstances of a particular case, there are likely to be visual as well as spatial effects on the openness of the Green Belt, and, if so, whether those effects are likely to be harmful or benign, will be for the decision-maker to judge. But the need for those judgments to be exercised is, in my view, inherent in the policy."

The Court also confirmed that:

a. There may or may not be other harmful visual effects apart from harm in visual terms to the openness of the Green Belt; e.g. impact on landscape character and visual amenity generally;[102] and
b. That the absence of other harmful visual effects does not equate to an absence of visual harm to the openness of the Green Belt.[103]

On the facts of the case the planning officer's report was defective because it failed to make clear to members that visual impact on openness was a potentially relevant factor in their considerations.[104]

While the decision confirmed in clear terms that visual impact is capable of being relevant to the concept of openness of the Green Belt, it did not address the factors relevant to an assessment of the visual impact on the openness. For instance, is the fact that the proposed built development may be seen in the context of existing built development capable of affecting this assessment? And, if so, is it of relevance that the existing built development within or outside the Green Belt?

Safeguarded Land: Paragraphs 85 of the 2012 NPPF and 139 of the Revised NPPF

The concept of safeguarded land is included in paras 139(c) and (d) of the revised NPPF in materially the same terms as it had been in the original NPPF (para.85). These paragraphs require safeguarded land to

[100] At [12].
[101] This paragraph records Counsel's submissions, but the Judge does not take issue with the submissions or suggest the approach to be flawed later in the judgment.
[102] At [37].
[103] At [37].
[104] At [49].

be identified in Local Plans, where necessary, between the urban area and the Green Belt, in order to meet longer-term development needs. *Leeds CC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 682 (Admin) concerned a wide-ranging attack against an inspector's decision on appeal, at the heart of which was a complaint that the inspector had not properly grasped the concept of "safeguarded land" within the NPPF or the Local Plan. The gist of the City Council's arguments was that the inspector treated the safeguarded land designation as being equivalent to an allocation for housing development, and had failed to acknowledge the fact that, under both national and local policy, safeguarded land is only to be released for permanent development following a Local Plan review which proposes such development.

Kerr J robustly rejected the challenge, holding that the inspector had properly understood both local and national policy relating to safeguarded land.[105] The inspector's conclusion that, notwithstanding the breach of safeguarded land policy, the proposal was in overall compliance with the development plan was a judgement to which he was entitled to arrive and could not be characterised as irrational.[106]

"Isolated Homes in the Countryside": Paragraphs 55 of the 2012 NPPF and 79 of the Revised NPPF

In *Braintree DC v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610 the Court of Appeal upheld Lang J's interpretation of the meaning of "isolated homes in the countryside" in para.55 of the 2012 NPPF, explaining that it "simply connotes a dwelling that is physically separate or remote from a settlement".[107] Whether a dwelling is "isolated" in this sense is a matter of planning judgement, as is the question of what amounts to a "settlement", although in the Court's view that term would not necessarily exclude a hamlet or cluster of dwellings.

"Valued Landscapes": Paragraphs 109 of the 2012 NPPF and 170(a) of the Revised NPPF

In *CEG Land Promotions II Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 1799 Ouseley J had cause to revisit his decision in *Stroud DC v Secretary of State for Communities and Local Government* [2015] EWHC 488 clarifying two points in relation to the concept of "valued landscapes" within the meaning of para.109 of the 2012 NPPF. First, he confirmed that valued landscapes were not confined to landscapes which have a particular designation. Second, he clarified that in *Stroud* when referring to the site having "demonstrable physical attributes" he was not laying down a universal test to be applied in all cases.

No doubt in the next 12 months the courts will have to grapple with whether the meaning of "valued landscapes" has been changed by para.170(a) of the Revised NPPF given the additional wording requiring that such landscapes be protected or enhanced "in a manner commensurate with their statutory status or identified quality in the development plan". The additional wording raises the issue of whether all areas identified for their landscape quality in a development plan will necessarily be categorised as valuable landscapes and whether areas which are not so identified (particularly in plans put in place well before the amendment of the NPPF) must perforce no longer be regarded as valued landscapes. It will also be interesting to see the extent to which the approaches in *Stroud DC* and *CEG Land Proportions* are thought to continue to apply to para.170(a).

Appeal decisions under s.78 of the TCPA 1990 are already diverging on the correct approach to para.170(a). Some consider that the change in wording must mean that "valued landscapes" are limited

[105] At [66].
[106] At [63].
[107] At [31].

to those with a statutory designation or a local designation in the development plan, despite there not being any consultation of what many regard as a fundamental change to the understanding of "valued landscapes". Other appeal decisions have interpreted the new wording as providing a metric or mechanism for protection of some (but not all) valued landscapes, and that there are sound policy reasons for not interpreting the NPPF as revving the encouragement for local planning authorities to create "special landscape areas" or other such designations. This is certainly an area awaiting illumination by the courts.

Coal Extraction: Paragraphs 149 of the 2012 NPPF and 211 of the Revised NPPF

In *HJ Banks and Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin); [2019] J.P.L. 348, Ouseley J held that para.149 of the 2012 NPPF contained a two-stage approach: was the proposal environmentally acceptable and, if not, did national, local or community benefits outweigh the likely impacts? "Acceptability" covers both the beneficial, harmless impacts and also any harmful impacts which may be justified by benefits. The possibility of benefits exceeding the harm more naturally fell into the second stage question and therefore a failure by the Secretary of State to consider biodiversity benefits at the second stage, even though they had been taken into account at the first stage, was an error of law.[108] The Secretary of State's contention that the environmental impact had been "netted off" at the second stage and so those benefits had been included, was not accepted.

Unconventional hydrocarbons: Paragraph 209(a) of the Revised NPPF

The case of *Stephenson v Secretary of State for Housing and Communities and Local Government* [2019] EWHC 519 (Admin); [2019] J.P.L. 929, achieved a first: the quashing of a paragraph of the NPPF. The case was brought by Claire Stephenson on behalf of the organisation Talk Fracking and contended, amongst other grounds, that the Secretary of State failed to carry out a lawful consultation exercise in relation to the revisions to the NPPF. In particular the Claimant contended there had been an unlawful failure to take into account material considerations, namely scientific and technical evidence, which had been produced after the adoption of a Written Ministerial Statement on 16 September 2015 entitled "Shale Gas and Oil Policy". That 2015 WMS set out the Government's support for shale gas exploration, which was carried forward into a 2018 WMS. The Secretary of State admitted in evidence that neither the 2018 WMS nor the wording of para.209(a) of the Revised NPPF had taken into account scientific and technical evidence concerning the impacts of shale gas exploration which had emerged since 2015.

In March 2018, the government published the consultation version of the NPPF. Paragraph 204(a) of the consultation version was the draft wording for what was eventually adopted in para.209(a) of the Revised NPPF. Talk Fracking had responded to the consultation, placing before the Secretary of State detailed evidence that had emerged since the 2015 WMS concerning the changes in scientific knowledge about the impact of shale gas on climate change. The Secretary of State did not review the scientific evidence or take it into account in relation to para.209(a), as he considered the purpose of that paragraph of the Revised NPPF was simply to re-affirm the policy position set out in the 2015 WMS.

Dove J held that a reasonable reader of the public documentation associated with the consultation exercise would not have had any notion that the substance or merits of the draft wording of para.209(a) was outside the scope of the consultation.[109] The consultation exercise therefore breached the common law requirements in respect of consultation and was therefore unfair and unlawful.[110] The scientific material

[108] At [48].
[109] At [51]–[58].
[110] At [58].

provided by Talk Fracking was "obviously material"[111] and should have been taken into account by the Secretary of State when deciding whether or not to incorporate the substance of the 2015 WMS into the Revised NPPF, in order to consider whether the evidence base for the 2015 WMS remained valid.[112]

Dove J gave a separate judgment on relief on 14 May 2019, in which he quashed para.209(a) and confirmed that the effect of the quashing was that para.209(a) is "effectively removed" from the Revised NPPF.[113] However, the Judge refrained from making a mandatory order requiring the Secretary of State to undertake a fresh consultation exercise and publish a new policy. The judge made it clear that this was open to the Secretary of State, as were other options, including not replacing the quashed paragraph.

"Silence" and "Permissively" Drafted Policies

The question of how "permissively" drafted policies should be interpreted and when a development plan is "silent" in the sense of para.14 of the 2012 NPPF was the focus of *Gladman Developments Ltd v Canterbury CC* [2019] EWCA Civ 669. The relevant saved policies of the development plan were saved Policy H1, which permitted residential development on allocated sites and on previously developed land within an urban area, and Policy H9, which permitted residential development (in excess of minor development) on previously developed land within villages, subject to the application of four criteria. The inspector found that the proposal for a housing scheme of up to 85 dwellings of land close to, but outside of, the settlement of Blean, was not in conflict with either policy and that the local plan was silent or absent in relation to development in the countryside.

Lindblom LJ took the opportunity to remind everyone that polices must be interpreted "in their full context … [which will include] the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text."[114] Turning to the correct approach to "permissive" policies, both Dove J at first instance and the Court of Appeal concluded that the inspector's interpretation was wrong. The "natural and necessary inference" was that a housing development of a kind or in a location other than those explicitly supported in the saved polices could not be regarded as being in accordance with the development plan. Indeed, it would conflict with the development plan, because it would conflict with the plan's comprehensive strategy for housing development.[115] This was plain from the policies in their own terms and when read together. It was also reinforced by the supporting text, which emphasised the intention of the policies to steer housing development to existing urban areas and previously developed land, and away from undeveloped sites in the countryside.[116] Accordingly, the development plan could not properly be said to be "silent", as there was not an absence of relevant policies.[117][118]

By contrast, in *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2386 (Admin); [2019] J.P.L. 141, the High Court upheld an inspector's decision to the effect that a neighbourhood plan was permissive in respect of development within the settlement boundaries (Policy 1) and allocated sites (Policy 2) but was silent in respect of development outside the settlement boundary. The neighbourhood plan examiner had commented in his report that an original reference to development outside the settlement boundaries had been deleted on the basis that the issue should be left to the local plan; the appeal inspector referred to this. The appeal inspector concluded that the proposal in question, which was located outside of the settlement boundary, was at "odds" with the Neighbourhood Plan's aims but did not conflict with its policies. Upper Tribunal Judge Grubb (sitting as a deputy Judge

[111] At [66].
[112] At [63] and [68].
[113] At [2].
[114] At [21].
[115] At [34].
[116] At [34]–[35].
[117] At [33].
[118] Interestingly, the "proper interpretation of the relevant policies" was a sufficiently interesting question to draw a concurrence from Sir Terence Etherton MR, emphasising the importance of the supporting text. At [52]–[60].

of the High Court) found there was nothing irrational in the inspector's approach. Although not entirely clear from the judgment it would appear that no argument was advanced that the inspector misinterpreted the neighbourhood plan.

The Court of Appeal heard the appeal in the *Chichester* case on 23 July 2019. Although every development plan must, of course, be interpreted on its own terms, and with reference to its particular context, at first blush at least there would appear to be a degree of tension between *Chichester* and *Gladman*.[119]

Identifying "Land for Potential Development"

If a development plan document identifies "land for potential development", then s.15C of the Commons Act 2006 provides that the right to apply for registration of a town or village green under s.15(1) is suspended. Whether land is so identified therefore makes a significant practical difference to the application of s.15(1) and, thereby, to the potential to sterilise land for development. In *Wiltshire CC v Cooper Estates Strategic Land Ltd* [2019] EWCA Civ 840, the Court of Appeal held that the mere fact that land is included within a settlement boundary is not sufficient to suspend the right to register as a town or village green,[120] but found that policies which identified settlements where "sustainable development *will* take place" and that within the settlement boundary "there is a presumption of sustainable development" did identify land as "for *potential* development".[121]

Lindblom LJ emphasised that, in order to avoid a 'slippery slope', it was "imperative" to interpret "land for potential development" in "accordance with the policy underlying the change" in the Commons Act 2006 that introduced s.15C and the cessation of the right to register upon a "trigger event" occurring. He held: "That policy, as I understand it, was that whether or not to protect a piece of recreational land with identified development potential should be achieved through the planning system and not by means of registration of a [town or village green]."[122] Against that background, the Court of Appeal held that allowing the registration of a town or village green within a settlement boundary for a settlement where the development plan envisaged significant development (over 1,000 new homes), would "frustrate the broad objectives of the plan".[123] In such circumstances, that was precisely why Parliament had decided a town or village green should not be registered, but "instead, the question of development should be left to the planning system."[124]

Safeguarding Community Facilities

Fans of Evelyn Waugh's *Decline and Fall* will enjoy reading the decision in *Thompson v Conway CBC* [2019] EWHC 746 (Admin), which concerned the Fair View Inn in Llanddulas, where Waugh was a patron and which features as "Mrs Robert's Pub" in the novel. The claimant objected to a grant of planning permission for the conversion of "Mrs Robert's Pub" into apartments. The local authority's development plan included a policy aimed at safeguarding community facilities, including pubs. In effect this meant that, where no similar facilities existed, development that would lead to the loss of facilities would only be permitted if it had been clearly demonstrated that the building was no longer viable for its existing use and that there was no continuing community need for those facilities. The planning committee had been advised by officers that the policy did not apply because the village had another pub.

[119] *Chichester DC* has already been cited with approval: see [15] of *Bassetlaw*.
[120] At [41].
[121] At [45].
[122] At [47].
[123] At [48].
[124] At [48].

The claimant's main ground of challenge was that the planning committee had misinterpreted the policy. The Claimant submitted that the phrase "where no similar facilities existed" meant that the facilities of the closed pub had to be considered, such as parking and family-friendly facilities, which were not available with the other pub. Refusing the claim, Dove J explained that the planning committee had not in his view misinterpreted the relevant development plan policy. The phrase "no similar facilities" related to facilities of a similar type to those listed in the policy. It did not mean facilities of that type and of a similar quality to the facility that was to be lost.

Dove J reminded the parties that the policy was not a statute or contract and had to be interpreted consistently with the policy's purpose. The purpose of the policy was to prevent a community being left without any of the five types of protected facilities, rather than to preclude the loss of one such facility when others were available.[125]

Coda: "Policies" and "Objectives"

In *Bassetlaw DC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 556 (Admin), the District Council appealed an Inspector's decision to allow a scheme for residential development at Sutton-cum-Lound, Nottinghamshire. The Council had originally refused permission for two reasons: first, because the proposed development would have been contrary to policies in its local development framework and, secondly, because it was contrary to the "priorities and objectives" of the emerging neighbourhood plan.[126]

The Council appealed the Inspector's decision on the basis that he had failed to address the second reason for refusal or, alternatively, that he had erred in interpreting the neighbourhood plan. Andrews J dismissed the claim. She emphasised that although "the meaning of a policy is a matter of interpretation for the court, the court must exercise caution to avoid treating it like a statute or a contract". In her view, the Inspector had disagreed with the pivotal finding of the Council that the scheme would be out of keeping with the character of the village. It followed that regardless of whether this was put in terms of council policies or the neighbourhood plan, "the real objection that was being made … was that the development was not in keeping with the character" of the area.[127]

In any event, the Judge noted that the Council was effectively trying to re-characterise its second reason for refusal by suggesting it was in respect of policies of the neighbourhood plan rather than the "community objectives", which were identified in the plan and to which the second reason for refusal had referred. Andrews J was wary of that approach, emphasising in [16]:

> "[W]hilst the stated aims or objectives in a neighbourhood plan may cast light on how the policies in that plan are to be interpreted, they are no substitute for the policies themselves, and the fact that a proposed development is assessed as being contrary to the objectives stated in the neighbourhood plan, does not mean that it conflicts with the plan itself."[128]

[125] At [27].
[126] At [2].
[127] At [38].
[128] Later in the judgment, Andrews J had some firm words for the Council on the attempted re-characterisation of the reason for refusal: "It is too late to try and come up with a new justification for refusing planning permission for this development, and if the LPA expressed itself in an inelegant fashion the first time round, it only has itself to blame." At [42].

Duty to Give Reasons

Reasons for a Grant of Planning Permission

There has in the past year or so been an upsurge in cases in which reasons challenges have been successful. In *R. (on the application of Gare) v Babergh DC* [2019] EWHC 2041 (Admin), Martin Rodger QC sitting as a Deputy High Court Judge, held that the minutes of a local authority planning committee meeting were insufficient to provide adequate reasons for the decision to grant planning permission. This was particularly in light of the fact that the decision was contrary to the officer's recommendation and failed to address any possible conflict with the development plan.

It should be noted that the decision appears to have been highly fact specific. It arose in circumstances whereby this had been the third occasion within three years on which a decision had been taken in relation to the site, and the local authority had again taken a different view from that which it had originally formed in April 2016. Furthermore, the decision was a redetermination following the quashing of the planning permission granted in February 2018 for an admitted lack of reasons and this was also significant in the judge's reasoning. The judgment should be read carefully by monitoring officers and others involved in running planning committee meetings and drafting minutes.

In particular, it was noted that the claimant and other members of the public were entitled to expect that the same error would not be made again and that the local authority would explain its thinking on the redetermination. Whilst the minutes of the planning committee meeting in December 2018 had recorded the discussion and resolution, they made no attempt systematically to record the reasons of any individual councillor, or those of the committee as a whole. The minutes did not identify the extent of the proposal's conflict with the development plan, or the extent of the benefit required to outweigh it.

Finally, to the extent that the minutes could be regarded as the local authority's reasons, they were not sufficiently clear to demonstrate that the s.38(6) duty had been complied with. It followed that the decision to grant permission was quashed.

One of the key questions in another successful reasons challenge in *Corbett v Cornwall Council* [2019] EWHC 1022 (Admin) was whether the local authority's reasons for granting planning permission were adequate. The Court said that they were not. The first failing was that the report should have made it plain to the committee that the development plan, in saved Policy 14, required the application to be refused, but that it could be granted if the committee were satisfied that material considerations indicated that result. It should then have indicated what the material considerations were. The report therefore contained a distinct and material defect.

The second issue was that whilst the report identified material considerations weighing in favour of the application, those were only the considerations which would be applicable if the application were covered by the general policies relating to developments in the countryside, in particular Policy 23, without consideration of the special requirements in relation to an AGLV. It could not be sufficient to say that the material considerations meriting a departure from the development plan were precisely the same as those which would have justified the decision in the absence of the relevant provision of the development plan. Rather, it was likely to be necessary to identify further factors in favour of the application, going beyond what would have been necessary for any development in the countryside, and some consideration of whether those factors were sufficient to amount to a reason to depart from the clear provisions of the development plan.

In the Court's view, the committee had not appreciated that they were making a decision which did not accord with the development plan and did not identify or assess any relevant material considerations for departing from it. Accordingly, the decision was unlawful and the grant of planning permission was quashed.

Reasons, Five-Year Housing Land Supply and Applying Well-Known Planning Policy

In *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] J.P.L. 63 the Court of Appeal confirmed that while there is no "hard and fast rule", a decision-maker will ordinarily have to determine both whether there is a five-year supply of housing land and, if there is, the "broad magnitude of the shortfall".[129] To fail to do so risks a reasons challenge. This is particularly because the degree of shortfall will be one factor that will inform the weight to be given to the delivery of new housing, alongside other factors such as how long the shortfall is likely to persist, the steps being taken to address it, and the contribution that will be made by the development in question.[130]

The Court went as far as to says that "logically … one would expect the weight given to [restrictive] policies to be less if the shortfall in the housing land supply is large, and more if it is small",[131] although plainly this expectation should not be confused with a proposition of law.

However, the Court made it clear that the NPPF does not require an exact quantification of the shortfall. The degree of precision required is a matter for the decision-maker and will not be the same in every case.[132] The Court also countenanced the possibility that there may be cases where an inspector would not be required, or would not be able, to quantify the broad magnitude of the shortfall, however these are likely to be exceptional.[133]

The decision in *Hallam Land* thus has something for everyone. Developers who wish to lead detailed evidence on housing land supply and the potential significance of the extent of any shortfall are justified in so doing, given the importance of the extent of the shortfall to the decision-making process. The criticism that such exercises are expensive, time consuming, and inevitably half-informed, as developers of other sites in the area will not be at the inquiry, do not diminish the relevance of the issue. However, exact quantification is neither required nor, indeed, justified, given the difference between a s.78 appeal and a local plan process. Accordingly, there is much for local authorities to take from *Hallam Land*. Perhaps it will be a spur to greater agreement before parties prior to the inquiry as to the extent of any shortfall.

The case of *Gladman Development Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 128 (Admin) shows that there is no shortcut when an inspector is faced with the often tricky task of determining whether an authority can demonstrate a five year housing land supply. The inspector, in dismissing the appeal, had declined to determine the five-year housing land supply question, but justified his approach on the basis that he applied the "tilted balance" in any event. One can have some sympathy with the inspector, as he was faced with a "very wide gap" between the parties on the issue (the Council's position was that it had slightly in excess of nine years' supply, whilst the appellant's position was slightly below two years: [4]), against the background of an ongoing examination into the emerging local plan (parts of the evidence from which the appellant had put before the Inspector).

Dove J held that, even though the inspector had applied the tilted balance and had stated that the weight he gave to the benefit of the provision of housing would have been the same whether or not there was a five-year supply, his approach was not lawful. Applying *Hallam Land*, he found that a conclusion on the extent of the five-year housing land supply would be required "unless there are clear and legitimate reasons adequately expressed [for not doing so]".[134] Dove J acknowledged that there may be scenarios where an assessment may not be required (for example, where there is critical data missing or a conclusion on an aspect of the calculation would be hopelessly speculative), but they would "almost certainly be the exception

[129] At [52] and [82].
[130] At [51] and [83].
[131] At [47].
[132] At [48], [52] and [84].
[133] At [84].
[134] At [25].

rather than the rule".[135] Given the importance of the decision-maker engaging at least in broad terms with the extent of the shortfall and with the impact that this will have on the "weight to be attached to the ingredients or elements to be weighed in the tilted planning balance", "cogent and clearly justifiable reasons for not reaching any finding in respect of the five-year housing land supply position" would be needed.[136]

Dove J concluded that the reasons given by the inspector did not justify him declining to reach a conclusion on the housing land supply position. In particular, the large difference between the parties did not absolve the inspector of the requirement to reach his own view on the issues; the fact that there was an ongoing local plan examination was not a reason justifying the inspector's approach, as any conclusion reached would not be binding on the local plan inspector; and, finally, the fact that the tilted balance was being deployed anyway did not render it unnecessary to undertake the assessment, as the degree of shortfall was potentially relevant to other elements of the planning balance, such as the weight to be given to the delivery of housing and restrictive policies. This was not one of the exceptional cases where a conclusion on housing land supply could not be reached or where there was other justification for not coming to a conclusion.[137]

Green Lane Chertsey (Developments) Ltd v Secretary of State for Housing, Communites and Local Government [2019] EWHC 990 (Admin) demonstrates the limits of the assumption that planning inspectors are aware of central and commonly applied tenets of planning policy and that the courts must start from the presumption that they have understood the policy framework correctly.[138] HHJ Gore QC quashed an inspector's decision on a written representations appeal in circumstances where the local planning authority had explicitly accepted that it could not demonstrate a five year supply of deliverable housing sites, but the inspector had failed to consider the ramifications of this concession. In particular, the inspector did not consider whether the tilted balance was engaged. The court found that presumption in favour of sustainable development in para.11 of the Framework was a "fundamental requirement of planning policy", and a material consideration to which the inspector ought to have had regard, notwithstanding that the issue was not raised by either party.

The difficulty for the Court was that the inspector had not referred to the tilted balance, nor had he used language consistent with its application. Although the inspector had given several reasons for refusing permission, he had not expressed those as constituting a "clear reason" for displacing the effect of the tilted balance under para.11(d)(i) of the NPPF, nor did he express himself to the effect or characterise those reasons as "significantly and demonstrably" outweighing the benefits under para.11(d)(ii) of the NPPF.[139] As such the Judge suggested:[140]

> "To uphold the decision of the inspector, I would have to be justified in inferring such findings. The language of the decision and the reasons given does not, in my judgment, justify such inferences."

The implication of this decision appears to be that Inspectors must be very careful to be seen to refer to and consider the tilted balance when it may be engaged even if the parties have not relied upon it.

Finally, *Goodman v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2226 (Admin) dealt with a different kind of need: that for HMOs. The claimant sought to challenge an Inspector's decision to dismiss the appeal from the local authority's decision to refuse planning permission for the conversion of a property into an HMO. The Claimant's challenge focused on one ground, namely that there was a failure by the Inspector to provide any adequate reasons for rejecting the Claimant's

[135] At [25].
[136] At [26]–[27].
[137] At [33].
[138] *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] 1 W.L.R. 1865 at [25].
[139] At [32].
[140] At [32]

evidence as to the need for HMOs in the area, and further or alternatively that the Inspector misinterpreted the relevant local plan policy in concluding that the appellant was required to demonstrate a need for an HMO in the immediate area.

In a judgment that gave relatively short shrift to the Claimant's arguments, Rhodri Price Lewis QC (sitting as a Deputy Judge of the High Court) set out the well-established principles in *Bloor Homes* and referred to the summary in respect of reasons challenges provided by Lord Carnwath in *R. (on the application of CPRE Kent) v Dover DC* [2017] UKSC 79 at [35].

Turning to the case at hand, the Judge held that the Inspector had read the relevant policy in the context of the provisions of the development plan as a whole, [25] and while need "was therefore a sub issue of [the] first main issue", the Inspector's reasoning on the issue was "clear, intelligible and adequate."[141] It followed that it was for her planning judgment to decide whether the evidence persuaded her and "she explained that [it did not] because the evidence did not provide sufficient quantitative objective analysis of housing supply and demand in the area … to have to go further would be to find a duty to provide reasons for reasons".[142]

In relation to the question of policy interpretation, the Judge noted that the Inspector "accurately set out the policy [and] looked carefully at each of the criteria. She addressed the identified need criterion accurately and fully in para.7 of her decision letter".[143] The use of the phrase "persuasive need" had not indicated that the Inspector misunderstood the policy. Rather, "she needed to be persuaded that the criterion of there being an identified need had been met …".[144]

In any event, and dismissing the appeal, the Judge explained that in his view, "the appeal would indeed have been dismissed even if the need was identified" as a result of the identified harm to the character of the area and the conflict of the proposal with strategic policies.[145]

Reasons and Statutory Consultees

In *R. (on the application of Baci Bedfordshire Ltd) v Environment Agency* [2018] EWHC 2962 (Admin) the Claimant was seeking judicial review of a decision of the EA to grant an environmental permit for an energy recovery facility at a site in Bedfordshire. The issue arose whereby the Interested Party's operating procedure for the site stated that any heavy metals from the process would be present as insoluble salts which would be collected by filters designed to intercept suspended solids and grease from entering the rainwater drainage systems. However, it was subsequently conceded by the EA and the interested party that many heavy metals would dissolve in water rather than be present as suspended solids; they could not therefore be filtered out.

The Claimant challenged the EA's decision on the basis of that it was irrational for it to rely on the interested party's mistake of fact and that the decision was irrational as a result. The EA admitted the error but argued that it had not been relied on in the grant of the permit.

Addressing the matter in clear terms, the Judge noted that in absence of any disclaimer by the agency, it was understandable that the Claimant had believed the agency and had employed the same mistaken assumption as the interested party. However, it was a matter of "elementary science" that heavy metals dissolved in water and the agency was the statutory regulator, with a wide experience of energy recovery facilities. Its officers had considerable scientific expertise and it was implausible that it would make the same mistake. This finding was supported by the fact that the permit expressly referred to the monitoring of metal emissions as "soluble fractions" in the bottom ash and the issue was raised in the consultation

[141] At [28].
[142] At [28].
[143] At [29].
[144] At [29].
[145] At [30].

responses. It followed that the EA's decision to grant a permit for an energy recovery facility was therefore not irrational.

Pagham Parish Council v Arun DC [2019] EWHC 1721 (Admin) raised the question of whether a planning officer needed to give reasons for departing from expert opinion given by Historic England. In support of its submission, the Claimant cited *R. (on the application of NHS Property Services Ltd) v Surrey CC* [2016] 4 W.L.R. 130 concerning registration of a village green, in which Gilbart J had decided that the committee making the decision was under an obligation to give reasons for disagreeing with any well founded objections. Andrews J, however, took the view that "The situation in the present case is not even arguably analogous."[146] She went on to hold:[147]

> "[The Planning Officer] does not have to give reasons in his report for disagreeing with an assessment made by an expert who has expressed an opinion on a matter within his expertise, let alone where (as here) the expert has expressed a view on a matter which the decision maker has to determine, applying planning judgment. There is no such obligation, even on the decision maker, who is not the planning officer. Even in a situation in which, unlike the present case, the decision maker is under a duty to give reasons for his decision, he does not have to give reasons for those reasons."

Furthermore, the Judge explained that in any event, "harm" to a landscape setting is not something that can be assessed by objective criteria using some recognised technique … The planning officer was in just as good a position as a consultant on listed buildings to form a view about whether the slight impact on a long-distance view of the Church tower, from the angle and positions to the north-east described in the [Heritage Impact Assessment], (or indeed from anywhere else) failed to preserve the special qualities of the setting of the Church. Ultimately that was a matter of planning judgment, not a matter of expert opinion."[148] The claim was dismissed.

Consistency in Decision-Making: The North Wiltshire Principle and Reasons for Departing from Previous "Like Cases"

A surprisingly high number of cases in the past 18 months have considered the application and scope of the proposition that "like cases", in the sense of being indistinguishable on an issue of critical importance, will be a material consideration in planning decision-making: the so-called *North Wiltshire*[149] principle. While decision-makers are not bound to decide like cases alike, they must take the earlier decision into account and give reasons for any departure from that decision.

In *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] EWCA Civ 1305; [2018] J.P.L. 1268, the Court was concerned with two decisions of the Secretary of State in which the question of whether or not a Local Plan policy was "up to date" had been determined in quite different ways. In the first, the Secretary of State had found the relevant policy to be up to date on the basis that it was not inconsistent with the NPPF. In the second decision, issued only nine weeks later, the Secretary of State concluded the same policy was out of date. The second decision was made without reference to the first, it not having been placed before the Secretary of State by either of the parties.

Lindblom LJ outlined a number of general principles applicable to such circumstances:

a. First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering, even where the previous

[146] At [52].
[147] At [56].
[148] At [57]–[58].
[149] *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P. & C.R. 137.

decision had not been specifically brought to his attention.[150] However, Lindblom LJ rejected as "unrealistic and unworkable" the contention that, as a matter of law, the Secretary of State ought to be aware of every previous decision taken in his name, whether by himself, a predecessor or an inspector.[151] Whether it is unreasonable not to have regard to the earlier decision will depend on the facts and circumstances of the particular case.

b. Second, the Court refused to prescribe or limit the circumstances in which a previous decision can be a material consideration. However, Lindblom LJ gave three (obviously non-exhaustive) examples of when a case may be "alike": because it relates to the same site; or to the same or a similar form of development on another site to which the same policy of the development plan relates; or to the interpretation or application of a particular policy common to both cases.[152]

c. Third, he endorsed Dove J's conclusion that "the Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further inquiries about any matter, including about other … decisions that may be significant."[153]

Finding that the two cases were indistinguishable on an issue of critical importance in their determination—the interpretation and application of a relevant and significant policy in the development plan—the Court held that the failure to engage with the earlier decision, let alone explain the inconsistency between the decisions, was an error of law.

A case which was "alike" because it related to a decision made on the same site formed the basis of the challenge in *R. (on the application of Tate) v Northumberland CC* [2018] EWCA Civ 1519. In 2009 an inspector dismissed an appeal for a dwelling house on the appeal site, finding that it was not "infill" development. In 2016 the local planning authority had granted permission for a two-storey dwelling house on the same site on the basis that the proposal constituted "limited infilling" for the purposes of the 2012 NPPF and therefore was not inappropriate development. Although it appended the 2009 inspector's decision, the officer's report had said nothing about the inspector's approach or conclusions.

The Court of Appeal held that the planning permission was vitiated by an error of law, on the basis that neither the officer's report, nor the planning committee, gave reasons for departing from the approach and conclusions of the previous inspector. The fact that the issue was one of planning judgement and relatively straightforward did not remove the need for reasons.

In *HJ Banks and Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin); [2019] J.P.L. 348, Ouseley J took issue with the suggestion that the *North Wiltshire* principle established "some special rule requiring reasons hen a purportedly or actually indistinguishable previous decision was raised".[154] Ouseley J emphasised that the *North Wiltshire* case in fact does not create any different rule for reasons about previous decisions than for any other material consideration—the issue is not materiality, but whether the decision goes to an important issue and whether it illuminates a principal area of controversy.[155] He went on to hold that appeal decisions which were not in fact cited to the Secretary of State would simply have been "material" and were in any event distinguishable by reference to arguments raised and addressed and by the passage of time.[156] The fact that the Secretary of State was adopting a deliberately different approach on a critical issue (i.e. the weight to be given to reducing GHG

[150] At [34].
[151] At [36].
[152] At [34].
[153] At [34].
[154] At [112].
[155] At [112].
[156] At [121].

emissions) did not call for reasoning specific to the previous decisions, but rather for overall clear reasons for the change in position.[157]

In *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 127 the Court faced a situation in which a series of inspector's appeal decisions had addressed the issue of whether a particular Local Plan policy was out of date, and the weight to be afforded to it. They had not done so consistently. In the decision under challenge the inspector had dealt with the earlier decisions perfunctorily, concluding that the weight to be afforded to a particular policy was a matter of planning judgement, dependent not only on the information presented, but the way in which it is presented.

Dove J held that the inspector erred in law, explaining:

a. This was a case in which the *North Wiltshire* principle plainly applied. The fact that there were a significant number of decisions falling on both sides of the line in the debate over the specific policy was not a reason for not applying the principle.[158]

b. The fact that issues of whether the policy was out of date and the weight to be afforded to it were matters of planning judgement did not absolve the inspector of the duty to "have careful regard to those earlier decisions … and without giving consideration to the application of the *North Wiltshire* principle in arriving at a conclusion on the point."[159]

c. In the circumstances the inspector's brief reasons for departing from the most recent appeal decision—one in which that inspector had risen to the task of examining the earlier decisions, and explaining his rationale for departing from some of them—were legally inadequate.[160]

In *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] J.P.L. 63, the Court of Appeal held that the Secretary of State had erred in law when assessing the housing land supply position by failing to take account of two recent inspectors' decisions addressing this very issue, despite them having been brought to his attention and further representations being made to him about them after the inquiry. They qualified as material considerations under the *North Wiltshire* principle, and ought to have been addressed. However, the Secretary of State had not been required to take into account an unpublished inspector's report in a different appeal, which was yet to be the subject of a decision by the Secretary of State. Such an approach would be a distortion of the *North Wiltshire* principle "because the basis for it would not be consistency between one decision and another, but consistency between a decision and a non-decision, a decision yet to be made."[161]

From a practitioner perspective, this run of cases may, counter-intuitively, be helpful in encouraging a move away from placing numerous appeal decisions before an inspector determining a s.78 appeal. The reasons are threefold:

a. The guidance in *DLA Delivery* on when a previous appeal decision will be sufficiently "alike" is helpful—an appeal decision from a different authority with a different set of local plan policies is unlikely to be a material consideration just because it deals with the same broad type of development;

b. Ouseley J's observation in *HJ Banks* that materiality is not sufficient, but rather that the issue is whether the previous appeal decision goes to an important issue which is a principal area of controversy is also very helpful in winnowing down even those appeal decisions which are "alike"; and

[157] At [121].
[158] At [28].
[159] At [29].
[160] At [33].
[161] At [75].

c. If inspectors truly engage with past relevant appeal decisions and give cogent reasons for agreeing or disagreeing, that should mean those appeal decisions do not make appearance after appearance in the core bundles of successive inquiries.

Finally, a slightly different aspect of consistency in decision-making: *R. (on the application of Bates) v Maldon DC* [2019] EWCA Civ 1272, which concerns consistency in decision-making within an authority. Maldon DC had, in 2015, granted planning permission for the conversion of agricultural buildings into a dwelling on land in the countryside, subject to various conditions (including one prohibiting any development between April and October to protect nesting birds). The Council had done so contrary to the recommendation of the planning officer, who had recommended that permission be refused, in circumstances where the Council could not demonstrate a five-year housing land supply. The permission was not implemented and in early 2018 the applicant applied again for permission to carry out identical development.

By the time the officer came to write her report (this time recommending approval) the 2015 permission was soon to expire and could not be lawfully implemented because of the ecology condition. In addition, while in 2015 the Council had been unable to demonstrate a five-year housing land supply (and thus the "tilted balance" had applied), by 2018 it could demonstrate such a supply. At various places in her 2018 report, the planning officer gave "significant weight" to the 2015 permission, which was still (just) extant but could not be implemented. The Claimant was the adjacent landowner, unhappy with the grant of permission. He argued that the planning officer had gone wrong in her approach to the 2015 permission in a variety of ways, but the central point was that she had not explicitly acknowledged the change in the housing land supply position.

This was rejected by the Court of Appeal. Hickinbottom LJ held that the officer had properly understood that the 2015 permission could not be implemented but was nonetheless still a material consideration.[162] The criticism of the officer's language in parts of her report, where she said she was "bound to give" the previous permission significant weight, was not an expression of fettered discretion but a conclusion as to the weight she considered should be attached, which was a matter for her judgment.[163] On a fair reading of the report as a whole, the change in the housing land supply position had been taken into account and the officer had properly stepped back and considered the overall planning balance in her conclusion, having weighed the findings of the 2015 permission in various respects.

The Court of Appeal observed that the position was different from those cases in which an officer might have to "grasp the intellectual nettle" of disagreeing with a previous decision because here the officer was agreeing with the previous decision—that was a "different nettle" to grasp, and the officer had done so.[164]

Reasons for Refusing to Call In an Application

In *R. (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137 the Court of Appeal considered a challenge to a "decision" by the Secretary of State that he would no longer give reasons when he refused to call in a planning application. This decision reversed the position established in a written ministerial statement in Parliament in 2001. The "decision" was, in reality, a change in practice: no publicly available decision to withdraw the earlier ministerial statement had been made. From a practitioner point of view, the case illuminates two matters:

[162] At [38].
[163] At [32].
[164] Lindblom LJ added that the principles that apply to the way in which a planning officer's report must be read, as set out in *Mansell v Tonbridge & Malling BC* [2017] EWCA Civ 1314 (that the court will only intervene where there has been a distinct and material defect) apply just as much to reports written under delegated authority as they do to reports to committee. At [27].

a. First, a decision by the Secretary of State to call in a decision under s.77 of the TCPA 1990 was an "exercise of procedural discretion" and therefore was not the type of decision in relation to which the common law imposed a duty to give reasons,[165] (although it is worth noting that Singh LJ indicated that he would not go as far as to hold that the common law could never impose a duty to give reasons in respect of a "procedural discretion").
b. Second, a mere change in practice is not a lawful means of withdrawing a promise giving rise to a legitimate expectation. The 2001 written ministerial statements was such a promise: it had given rise to a legitimate expectation that reasons would be given for refusals to call in planning applications. The Court emphasised the distinction between expectations which arose by express promise (such as in the present case), and those which arose by a practice. Where an unequivocal promise had been made to operate a particular procedure, then "as a matter of good administration and transparent governance, any change to that policy also had to be announced publicly".[166]

The Court of Appeal thus reversed Lang J's judgment and found that the legitimate expectation could not be withdraw merely by a change in practice. The situation was made worse by the fact that the change of practice occurred entirely in ignorance of the express promises that had earlier been made in written ministerial statement. Not to be deterred, on 26 March 2019 the Secretary of State issued a further written ministerial statement announcing that the 2001 statement was withdrawn and that, from that date, he would not give reasons for calling in or declining to call in planning applications.

Human Rights and the Public Sector Equality Duty

The Public Sector Equality Duty

Planning is centrally concerned with shaping sustainable development and directing development to appropriate locations, having regard to the impacts (both positive and negative) on the people who will be using the development, as well as those living nearby or visiting the area. Little surprise, therefore, that the public sector equality duty ("PSED") in s.149 of the Equality Act 2010 applies. This duty requires a public authority, in the exercise of its functions, to have "due regard" to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Having "due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it" includes taking steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it and specifically taking account of disabled persons' disabilities (s.149(4)). The relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief and sex.

In *R. (on the application of Buckley) v Bath and North Somerset Council* [2018] EWHC 1551 (Admin); [2018] J.P.L. 1231, Lewis J held that a grant of outline planning permission was an exercise of a local authority's statutory function under s.70 of the TCPA 1990 and was therefore subject to the PSED, so the local authority had to have "due regard" to the s.149 equality considerations when granting the permission.[167] The fact that the application was for outline permission and that certain reserved matters were to be considered at a later stage in the process did not prevent the duty applying, although it might affect the

[165] At [24]–[25].
[166] At [48].
[167] At [30].

content or scope of the duty in particular cases.[168] Focusing on the specific protected characteristics in issue—age and disability—Lewis J held that in deciding whether to grant the outline planning permission the local authority had been obliged to have due regard to the impact of the demolition of existing homes and adapted dwellings on elderly and disabled residents, but it had failed to do so. This failure to discharge the public sector equality rendered the grant of outline planning permission unlawful and the Judge therefore quashed the permission.

Breach of the PSED has subsequently been raised in a number of challenges, none of which has been successful. *Stroud v North West Leicestershire DC* [2018] EWHC 2886 (Admin) examined whether there had been inadequate consideration of the effect of the closure of a local shop on local residents with one of the protected characteristics, i.e. the elderly. The PSED was not specifically referred to in the Officer's report or at the meeting, but HHJ David Cooke accepted that the duty was sufficiently discharged by the officer recording that, among the objections raised, references had been made to elderly users of the shop, because those representations "did not appear to be putting any case (and neither the officer nor the decision takers themselves considered that any issue arose) that such persons would be unable to make use of, or be materially affected by having to make use of, the alternative shops that were available."[169]

In *Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2019] Env. L.R. 13; [2018] EWHC 1892 (Admin), Supperstone J accepted that the impacts of climate change will affect people differently, but did not agree that the PSED required the Secretary of State to give differential consideration to those interests in deciding whether to amend the 2050 target, as the Secretary of State aimed "to set targets that have a good prospect of assisting all groups".

In *R. (on the application of Lakenheath Parish Council) v Suffolk CC* [2019] EWHC 987 (Admin), HHJ Gore QC accepted that the approach adopted to the PSED was "not on its face adequate" where the officer's report made no mention of the PSED and there was no extraneous evidence that the decision-maker had it in mind.[170] However, the Judge emphasised that the requirement of the PSED is to have "due regard" to the equality considerations, rather than to "achieve a specific result"[171] and held that in substance the local planning authority gave due regard to the relevant equality considerations as steps were taken to remove disadvantages for those with protected characteristics.

Article 8 of the ECHR

Other human rights matters were also raised in the *Lakenheath Parish Council* case. The challenge concerned a grant of planning permission to itself by a local authority for a new primary school for up to 420 pupils and a further 60 preschool places near a major United States Airforce Base in Lakenheath. The Parish Council challenged the subsequent grant of planning permission on the basis of alleged failure to have regard to art.8 (or alleged disproportionate interference with art.8) because, during the school day, in the outdoor areas, there would be what HHJ Gore QC described "neutrally" as "excessive noise levels".[172] The Claimant also contended this amounted to a failure to have proper regard to the best interests of the child under art.3 of the United Nations Convention on the Rights of the Child, or to treat those interests as a primary consideration. Importantly, the Judge accepted that the question of whether or not to grant planning permission did engage art.8 and the best interests of the children. He held at [57]:

> "I entirely accept the proposition that what is protected by Art.8 is not merely the physical and psychological integrity and wellbeing of citizens, but extends to the physical and psychological space necessary for personal development and the development of social relationships, social identity and

[168] At [31].
[169] At [41].
[170] At [62]–[63].
[171] At [62].
[172] At [2].

> the development of "the self". Educational space and its appropriateness are important to this. However, to constitute breach of Art.8(1) the interference must be sufficiently adverse to constitute interference and must not be based on hypothetical factors which are not substantiated."[173]

The Judge was concerned about the lack of reference in the officer's report to various matters, but concluded on the basis of all the evidence that it was not reasonably arguable that there was an interference with art.8(1) and, in any event, the local planning authority undertook the necessary exercise under art.8(2) when they balanced the overall benefits of the new school against the disbenefits of the noisy environment.

Article 8, art, architecture, privacy and nuisance came together in a fascinating way in *Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Admin). The claimants reside in Neo Bankside, three heavily glazed high-rise buildings on the south side of the Thames adjacent to Tate Modern. The new extension of the museum—the ziggurat-shaped Blavantic Building—includes a 10th floor walkway giving visitors a 360-degree panoramic view of London. However, as those of us who have enjoyed visiting the new building and the walkway can attest, that view also takes in the living areas of some of the flats in Neo Bankside. The Claimant claimed that constituted both an actionable invasion of privacy and a nuisance. From a planning perspective the nuisance argument was illuminating in two ways: first, in the court's approach to the interaction between nuisance and development which benefits from a grant of planning permission; and second in the application of nuisance to residential amenity/overlooking.

Mann J was prepared to accept that art.8 of the ECHR had resulted in the law of nuisance being capable of protecting privacy rights. This is interesting given that nuisance generally entails some form of pollution, such as smoke or noise, emanating from the defendant's land and adversely affecting the claimant. In the instant matter, there was no such emanation, but rather the development permitted users to stare at the occupants of adjoining premises. Acceptance of this as potentially constituting a nuisance develops the case law that use of the defendant's land can amount to a nuisance, particularly if it causes an "interference" with the neighbours' enjoyment of their premises.[174]

On the interaction between planning permission and nuisance, Tate Modern relied on the grant of planning permission for the building as significant when considering whether a nuisance arises, citing *Coventry v Lawrence* [2014] A.C. 822. This did not find favour with Mann J. In *Lawrence*, the planning authority had given full consideration to the issues which went to the nuisance in question when they determined the planning application. That was not the case in the instant matter.

On the facts, the Judge dismissed the claim. He found that the viewing platform was a reasonable use of the land and that the claimants' use of their properties was "oversensitive", in that they had chosen to live in flats with very large windows which allowed views into the living area.

Heritage

What Amounts to a "Listed Building"?

What amounts to a "listed building" and who makes that decision? This was the central issue in the case of *Dill v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2619. In the course of an appeal against a listed building enforcement notice, an inspector had concluded that it was not open to him to go behind the fact that an item—in this case two limestone piers—appears on the list (compiled by the Secretary of State) as a listed *building*. The Court of Appeal found that this was the correct position in law. It was clear from the wording of the Planning (Listed Buildings and Conservation Areas) Act 1990

[173] The Judge observed that he did not need citation of authority to support those propositions, but in any event cited Baroness Hale in *R. (on the application of Countryside Alliance) v Attorney General* [2008] 1 A.C. 719 at [116]; MacDonald J in *Sutton LBC v MH* [2017] 2 F.L.R. 263 at [93]; *Hatton v United Kingdom* (2003) 37 E.H.R.R. 28 at [93] and *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 25 at [46].

[174] See, eg, *Thompson-Schwab v Costaki* [1956] 1 W.L.R. 335, for a discussion, in language of a bygone era, of whether use of premises can cause a "sensible interference with the comfortable and convenient enjoyment of neighbouring premises".

("PLBCAA 1990") that, for the purposes of applications for listed buildings consent and enforcement notice appeals, being on the list is determinative of the status of the subject matter as a listed building.[175] The Supreme Court granted permission to appeal on 22 May 2019.

Section 66 of the PLBCAA

A recent example of a decision maker not giving 'considerable importance and weight' to the desirability of preserving listed buildings and their settings,[176] contrary to the s.66(1) duty, is found in *R. (on the application of Liverpool Open and Green Spaces Community Interest Company v Liverpool CC* [2019] EWHC 55 (Admin). The proposal involved the building of 39 new dwellings and the conversion of a Grade II listed building into apartments. Kerr J found that, despite reference being made to s.66 in the officer's report, and even reading the report with a 'benevolent eye', the local planning authority had not properly applied the statutory duty when deciding to grant planning permission.

Conservation Areas and Section 72 of the PLBCAA

R. (on the application of Historic Buildings and Monuments Commission for England) v Milton Keynes Council [2018] EWHC 2007 (Admin); [2019] J.P.L. 28 concerned the grant of planning permission for the demolition of buildings at the Wolverton railway works site, where the first locomotive was built in 1845. The site lies within the Wolverton Conservation Area. The Claimant objected to the proposals on the grounds that the extensive demolition of non-listed heritage assets involved in the proposals would entail substantial harm to the significance of the Conservation Area which was not justified.

The local planning authority's position was that the proposal, which would maintain the historical use of the site for railways purposes, was of greater importance than retaining the non-listed buildings, and it was this rationale which underpinned the decision to grant permission.

As part of a wide range attack on the decision, it was argued that the judgement reached by the authority misunderstood the statutory purpose of conservation areas (set out in s.69 of the PLBCAA 1990) and particularly the statutory duty to pay special attention "to the desirability of preserving or enhancing the character and appearance of the area" under s.72(1) of the PLBCAA 1990. The central submission was that it is wholly inconsistent with these statutory provisions to conclude that the retention of a historic use could preserve the character or appearance of an area when it was accompanied by the demolition of all the historic (albeit unlisted) buildings in the conservation area. Dove J rejected that submission concluding in [63]:

a. That the phrase "character or appearance" in s.72 is not confined simply to the historic built fabric of the area. Whilst the historic built fabric will be integral to the "appearance" of the area, the term "character" is capable of encompassing non-visual matters such as historic uses.
b. There is no basis from the statutory language for concluding that the built fabric is to be regarded as of paramount importance or that it takes pre-eminence over other dimensions of the historic interest of the area.
c. The weight to be attached to the various historic dimensions of the area is a matter for the decision-maker in the individual case.

[175] At [33].

[176] This "considerable importance and weight" must be understood against the background of the section 66(1) duty, which gives rise to a "strong presumption" against the grant of planning permission where there is harm to a listed building or its setting: *South Lakeland* [1992] 2 A.C. 141 per Lord Bridge. If the harm to the setting of a listed building would be less than substantial, the Court of Appeal in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 45 held "that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed." At [28].

Air Quality

Promoting Schemes in Air Quality Management Areas ("AQMAs")

The Court of Appeal has, in *Gladman Developments Ltd v Secretary of State for Communities and Local Government & CPRE (Kent)* [2019] EWCA Civ 1543, given a key ruling for developers when promoting schemes with an effect on AQMAs: they will need to show clearly how a financial contribution (calculated in accordance with the DEFRA model) will translate into tangible measures which will avoid a worsening in air quality.

Gladman had sought to quash the decision of Inspector Clews to refuse planning permission for 140 new homes in Newington, Kent. CPRE (Kent) appeared as a Rule 6 Party at the inquiry arguing that the appeal should be dismissed due to a failure to mitigate the adverse effects on the designated Newington and Rainham AQMAs. The Inspector agreed. Gladman had proposed a fund, calculated in accordance with the DEFRA damage cost analysis model. However, the Inspector found there to be no evidence of the likely effectiveness of the indicative mitigation measures to reduce private petrol and diesel vehicles, and thus reduce NO2 emissions.

Gladman challenged that conclusion on a number of fronts, including that the inspector had failed to understand and then apply the ratio of *R. (on the application of Client Earth (No.2)) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin) and should have considered imposing a Grampian condition. Lindblom LJ held:

a. The Inspector was not obliged to embark on "predictive judgments about the timing and likely effectiveness of the Government's response to the decision in ClientEarth (No.2), and the requirement to produce a national air quality plan compliant with the Air Quality Directive".[177]

b. Paragraph 122 NPPF (now para.183 in the 2019 NPPF) was not engaged by reference to the UK Government's obligations under the Air Quality Directive. Paragraph 122 NPPF "was directed to situations where some proposed process or operation liable to cause pollution is subject to control under another regulatory regime … its purpose was to avoid needless duplication between two schemes of statutory control". That was not the case with the national air quality regime.[178]

c. As to the DEFRA damage-cost analysis: "[i]t was not the methodology that was in contention. It was the likely effectiveness of the financial contributions themselves when translated into practical measures".[179]

d. There is no principle of law or statement of policy that an Inspector must always, even if entirely unprompted by any of the parties, "seek to make an unacceptable proposal acceptable by imposing a planning condition in 'Grampian' form to prevent the development going ahead until a particular objection to it is overcome" although there may be cases where failing to consider a condition would be unreasonable.[180]

e. As the essential purpose of the air quality action plans is to improve air quality in the Air Quality Management Areas development which was likely to worsen air quality in a material way was inevitably inconsistent with the relevant Air Quality Plans.[181]

[177] At [35].
[178] At [45].
[179] At [52].
[180] At [63]–[64] and [69].
[181] At [77].

Airports National Policy Statement ("ANPS")

A number of grounds in *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) concerned air quality, all of which were refused permission.[182]

The Limits of Air Quality Enforcement

The ClientEarth litigation, which gave last year's Conference its theme, showed that the courts in the UK were prepared to go quite far in enforcing the binding commitments under Directive 2008/50/EC and the Air Quality Standards Regulations 2010. The case of *R. (on the application of Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22; [2019] 2 C.M.L.R. 14 considered, against that background, the question of whether the Secretary of State acted unlawfully in deciding not to call in for his own determination a proposal for 4,000 dwellings and other developments in an Air Quality Management Area ("AQMA") in Canterbury.

The AQMA had been declared because of high levels of nitrogen dioxide. The Council's planning officer advised the planning committee that there would be adverse impacts on air quality, during both the construction and operational phases of the development. However, she also advised the committee that proposed mitigation measures would ensure that air quality impacts in the city would be in conformity with local and national planning policy and recommended, taking all factors into account, that planning permission be granted. The committee resolved to grant planning permission. Certain objectors requested the Secretary of State to call-in the application for his own determination, but he refused to do so.

The Court of Appeal held that it was not possible to construe the provisions of the Directive and the regulations as constraining Secretary of State's very wide discretion whether to call in an application for planning permission when various limit values under the Directive had not been complied with, or when an Air Quality Plan had not been put in place or had proved to be deficient or ineffective.[183] None of the provisions of the Directive engaged with the process of making decisions to authorize individual projects of development. Lindblom LJ recognised that the issues of whether a proposed development would cause a limit value to be breached, or delay the remediation of such a breach, or worsen air quality in a particular area, were relevant and material considerations in the Secretary of State's decision whether to call in an application, they did not place him under an obligation to exercise his discretion.[184] As the call-in discretion was not cut down by the air quality legislation, the Secretary of State's freedom to exercise that discretion one way or the other without lapsing into irrationality had to be considerable and, in the instant matter, the Court of appeal held that the decision had not been unreasonable in the *Wednesbury* sense.[185]

Enforcement

Injunctions against "persons unknown"

As attempts to explore shale and gas by fracking continue, so too does the strong opposition to such operations. It is therefore unsurprising that one of the important enforcement related cases of the last year played out in the context of fracking. In *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 W.L.R. 100, a group of companies and individuals in the fracking business sought injunctions against "persons unknown" in order to restrain potentially unlawfully acts in the course of anticipated protests. The injunctions were sought in the Chancery Court and focused on the possibility for commercial

[182] At [255]–[278].
[183] At [40]–[47].
[184] At [48]–[49].
[185] At [58].

disruption and blocking of the highway, rather than on the potentially significant restriction of the right to protest which would be achieved via wide-ranging injunctions against "persons unknown".[186]

The Court of Appeal held that while there was no legal prohibition on suing "persons unknown", the court should be inherently cautious about granting an injunction against persons unknown as the reach of such an injunction was difficult to assess in advance. Longmore LJ held at [30]–[34] that broad principles were difficult to formulate for such scenarios, but that the following requirements might be thought to be necessary before such an order could be made:

(1) there must be a sufficiently real and imminent risk of a tort being committed to justify relief against "persons unknown";
(2) it is impossible to name the persons who are likely to commit the tort unless restrained;
(3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;
(4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;
(5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and
(6) the injunction should have clear geographical and temporal limits.

On the facts before the court, these requirements were only made out in respect of certain categories of persons unknown, and the matter in respect of those defendants was remitted to the first instance judge to consider the issue of interim relief in light of s.12(3) of the Human Rights Act 1998 and the appropriate temporal limit for the injunctions.

It is likely that the *Ineos* case will become the leading case on injunctions against persons unknown. It was cited and its approach followed by HHJ Stacey, sitting as a Deputy Judge of the High Court, in *Kingston-upon-Thames RLBC v Persons Unknown* [2019] EWHC 1903 (QB). The claimant local authority sought judgment and applied for the continuation of an interim injunction restraining rights of access against persons unknown occupying land, depositing waste and fly-tipping on land belonging to the local authority. The injunction was granted, with the Judge running through the list of requirements in *Ineos* and demonstrating how they were satisfied.

Injunctions Restraining Breaches of Planning Control

Two cases dealt with the power of local planning authorities to obtain injunctions restraining breaches of planning control (pursuant to s.222 of the Local Government Act 1972 and s.187B of the TCPA 1990); both involved members of the traveller community. In *Nuneaton and Bedworth BC v Corcoran* [2019] EWHC 917 (QB), Mr Straker QC concluded it was proportionate to grant a district-wide interim injunction to prevent travellers from setting up encampments in breach of planning control. The Council's evidence, which was accepted by the judge, demonstrated that there had been some 103 unauthorised encampments within the area in an almost four-year period, with a consequent detrimental impact on open green space, business sites and schools as well as damage to land and associated financial costs. The Council had previously attempted to use its powers under the Criminal Justice and Public Order Act 1994 (ss.61 and 77), but the travellers would simply move to another site in the area. In the circumstances, the judge was satisfied that a district-wide interim injunction was appropriate, noting in particular that the proposed order had made provision for the welfare of children.

[186] The case should be read alongside that of *UK Oil and Gas Investments Plc v Persons unknown* [2018] EWHC 2252 (Ch) decided by John Male QC, sitting as a Judge of the Chancery Division decided in September 2018, and which made reference to the first instance decision of Morgan J in this case.

In *Chelmsford CC v Lee* [2019] EWHC 756, HHJ Dight did not grant a permanent injunction restraining members of the travelling community from using land within the Metropolitan Green Belt for the stationing of their caravans. He preferred, instead, to accept their undertakings to abide by the outcome of a pending appeal against the local authority's refusal of planning permission. The judge's reasons included that he did not consider the breach to be flagrant; there had been no physical or environmental damage or disturbance; the result of the appeal was likely to be known within 12 months; and the interim injunction had been complied with over a three-month period. However, had no undertakings been offered, the judge noted that he would have granted an immediate final injunction, applying the well-established principles set out in *South Buckinghamshire DC v Porter* [2003] 2 A.C. 558. He further noted that, contrary to the submissions of the respondents, the local authority could not be criticised for pursuing an injunction rather than taking some other form of enforcement such as service of a stop notice or an enforcement notice and that the authority had acted appropriately in the circumstances.

Control of Advertisements

In the last 12 months, the Court of Appeal also considered a discontinuance notice issued pursuant to regulation 8(1)(b) of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007, i.e. in respect of the use of a particular site for the display of advertisements for which there is deemed consent where the local planning authority is satisfied it is necessary to remedy a substantial injury to the amenity of the locality or a danger to members of the public.

In *Putney Bridge Approach Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2268; [2019] J.P.L. 264, Coulson LJ held that neither the Council nor the planning Inspector was obliged to consider hypothetical alternatives to the actual advertisement that had been displayed on the site before issuing, or upholding, a discontinuance notice in relation to that site, pursuant to reg.8(1)(b). This interpretation was supported by a consideration of the overall context; in particular, that the notice only brought to an end deemed consent and had no effect whatsoever on express consent, for which the appellant could have made an application but did not do so. The width of inquiry suggested by the appellant was both unrealistic and outside the scope of the Regulations.

Enforcement Notices

Two further cases in the last year have dealt with the proper approach to enforcement notices. In *Oates v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2229; [2019] J.P.L. 251, the Court of Appeal was concerned with an enforcement notice that required the complete demolition of three "new buildings" whose construction had incorporated parts of the buildings previously on the site. The appellant contended that the surviving parts of the original, lawfully erected buildings could not properly be enforced against. The court rejected that argument and held that the Inspector did not err in law in reaching her decision to uphold the enforcement notice. The decision letter, when read as a whole, made it clear that the Inspector was alive to the possible mischief of over-enforcement.

Lindblom LJ held that the Inspector was entitled to conclude that the buildings on site were "new buildings", even if partly composed of the previous buildings—this being classically a matter of fact and evaluative judgment for her as a decisionmaker. The court also rejected the application of the *Mansi* principle to this case. While it was a moot point on the facts of this case, Lindblom LJ noted that even if the principle could extend to operational development (as well as lawful use rights), it was difficult to see how it could offer any greater protection against over-enforcement than is already provided by the statutory scheme.

In *NR Algul Ltd v Secretary of State for Housing and Local Government* [2019] EWHC 2023 (Admin), Keyser J refused permission to challenge the Secretary of State's decision to dismiss the applicant's appeal

against an enforcement notice. The alleged breaches of planning control were the erection of side-to-rear extensions, roof extensions and basement as well as a building in the rear garden of a residential property. While there were five grounds of challenge, the main argument was whether the Inspector wrongly concluded that she could not consider alternatives proposed by the applicant as part of its ground (f) appeal, having regard to the fact that there was also a ground (a) appeal. Applying the principles set out in a long line of cases, starting with *Tapecrown Ltd v First Secretary of State* [2006] EWCA Civ 1744, the judge held that upon reading the decision letter in an appropriate manner, the Inspector had concluded that the alternative schemes put forward by the applicant were not part of the development to which the enforcement notice related, but went beyond the development. That was a matter of planning judgment, with which the court could not properly interfere. There was accordingly no error of law.

Scotland and Wales

Planning Policy Wales

For those who operate in both England and Wales, or those in Wales who look to English decisions for assistance with interpreting Planning Policy Wales ("PPW"), the case of *Waterstone Estates Limited v The Welsh Ministers* [2018] EWCA Civ 1571 contains an important warning: it is a "dangerous" assumption that planning policy in Wales is the same as in England.[187] The case concerned the substance of the Retail and Commercial Development chapter (Ch.10) of PPW. The Court of Appeal found that, on a proper construction of PPW, it was substantively different from the NPPF. Paragraphs 10.2.9–10.2.12 of PPW, which focused on the need for retail development, clearly indicated that there was a discrete requirement for need to be established which, if not satisfied, amounted to a breach of PPW policy. Paragraph 10.2.12 referred to there being "no need to identify additional sites" if no need for further retail use had been established. Looked at broadly and in its proper context, para.10.2.12 indicated that, outside town centres, need was a discrete requirement and, if it was not satisfied, then there was no need to proceed to consider whether there was any sequentially preferable site.

Hickinbottom LJ noted by way of postscript that, in light of the devolved nature of town and country planning and the enactment of the Planning (Wales) Act 2015, it is to be expected that both planning policy and the substantive law will increasingly diverge.

Scotland: Policies on Making a "Positive Contribution"

An important Scottish case illuminates the correct approach to policies in development plans which support development where it makes a "positive contribution" to a particular aim or objective, such as regeneration.[188] *Persimmon Homes Ltd v The Scottish Ministers* [2019] CSIH 30 concerned a local plan policy which supported the building of housing on brownfield land but required two further tests to be met: a demonstration that the proposal would improve the tenure mix in the area and that it would make a positive contribution to the regeneration objectives of the area. The reporter (the inspector) did not consider the tests to be met and held that the proposed development for residential development on brownfield land in Dundee was contrary to the local plan policy. The Lord President (Lord Carloway) held that the reporter had misinterpreted the brownfield land policy. The second test—making a positive contribution to the regeneration objectives of the area—should be regarded as positively supporting development which achieved that aim rather than being read negatively.[189] The reporter had further failed

[187] At [90].

[188] Note that, while this is different from the permissively worded policies in issue in the *Gladman* case discussed at [102]–[103] above, there is a tension between the approaches of Lindblom LJ and Etherton MR in *Gladman* and that of Lord Calloway in the instant case.

[189] At [35]–[37].

to take into account a material consideration, in the form of non-statutory supplementary guidance adopted by the authority, which set objectives for housing development on brownfield land.[190]

Scotland: Beware the Emerging Local Development Plan

In an illuminating case for those practising on both sides of the Cheviot Hills, *Graham's The Family Dairy Ltd v Scottish Ministers* [2019] CSIH 3; [2019] SLT 258 considered the need to take account of changes in circumstance between a reporter's report and the decision by the Minister relying on that report. The case concerned refusal of planning permission for a large housing development in the green belt. The reporter had requested an update on the process for a replacement local development plan ("LDP"), which was on foot at the time of the examination. The report acknowledged that there was a shortfall in the supply of housing land, but stated that there was an "expectation" that the emerging LDP would "properly address the shortfall". However, when the new LDP was approved in May 2018, it produced a shortfall in the supply of housing land. The Ministers issued their decision in June 2018. The decision letter simply stated that they accepted the reporter's conclusions and recommendations and adopted them for the purpose of their own decision.

The appeal was allowed. The Lord President held that the material considerations taken into account by the reporter were clear an unambiguous, and included a "critical factor" – reliance on the emerging LDP, which was relevant to a significant and contentious issue, including to the planning balance.[191] The Lord President remarked:

> "[The Ministers'] wholesale adoption of the reporter's reasoning betrays a somewhat careless approach to decision making or at least the provision of adequate reasons; since it adopts a ground for refusing permission (prematurity) which was, on any view, no longer valid. It is not a sufficient explanation now to assert that the redundancy of the reason would be obvious to the parties and therefore did not require to be dealt with at all."

The Lord President held that the Ministers had failed to take into account a relevant material consideration (that the LDP process had been practically completed and produced a housing land supply shortage for which no solution was offered) and instead took into account an irrelevant consideration (that there was an ongoing LDP process which would resolve the shortage).[192] He further held that the reasons for the Ministers' determination were defective in light of *Hopkins Homes*.[193]

Scotland: Enforcement and Natural Justice

Finally, the case of *Taylor v Scottish Ministers (No.2)* [2019] CSIH 11; [2019] SLT 681 illustrates the requirement on the parties to place relevant information before a decision-maker. While the Court held that a decision-maker could take into account information which was obviously relevant but which had not expressly been mentioned by the parties, the decision-maker is not expected to "embark on a frolic of his or her own and thus to seek out and found upon information which has not been placed before him or her".[194] A decision-maker to whom an enforcement notice appeal is delegated operates within a statutory framework which sets out the procedure which the adversarial parties must follow.[195] Indeed, the point of the statutory appeal process is to focus the issues and to confine the material, which is thought to be

[190] At [33]–[34].
[191] At [31]–[32].
[192] At [31].
[193] At [36].
[194] At [34].
[195] At [32].

relevant to the issues, within reasonable bounds, preserving natural justice.[196] Accordingly, the decision-maker could not be criticised for sticking to that task.

Practice and Procedure

Extension of Time Limits

The case law on time limits has given us decisions on two ends of the spectrum: total inflexibility and remarkable elasticity. In *R. (on the application of Warren Farm (Wokingham) Ltd v Wokingham BC* [2019] EWHC 2007, Mr Ockelton held that a planning authority has no power to extend the 56-day time limit for determining an application for prior approval under Class Q (agricultural buildings to dwelling houses) of Part 3 of Sch.2 to the GDPO. The failure to determine the application in time meant that permission was deemed to have been granted. This decision is plainly of considerable significance, as Mr Ockelton observed that the "format of class Q follows the model of a number of other classes in Schedule 2".[197] Accordingly, both those applying for prior approval and the local authorities dealing with such applications must be astute to the running of the 56-day period. It is notable, however, that the issue will only arise where the development for which prior approval is sought properly falls within the relevant class of the GDPO.[198]

Turning to the other end of the spectrum, in *R. (on the application of Thornton Hall Hotel Ltd) v Thornton Holdings Ltd* [2019] EWCA Civ 737 the Court of Appeal upheld an order quashing a grant of planning permission made more than five years earlier.[199] The Court went out of its way to emphasise the uniqueness of the facts, which involved an unconditional planning permission mistakenly being given when the Council had resolved to grant a temporary permission subject to conditions; the Council "concealing its error"[200] and the developer being well aware of the mistake but remaining quiet and looking to capitalise on the error.[201] The Court of Appeal emphasised that the more than five-year extension of time set "no precedent".[202] But it took the opportunity to set out eight "broad principles", drawn from relevant case law, applicable when considering whether a claim for judicial review of a planning permission has been issued too late.[203] They include the importance of the claimant acting promptly; seeking to strike a fair balance between the interests of the developer and the public interest; the relevance of the merits (particularly where ultra-vires is alleged) and that generally the court "will not exercise its discretion to extend time on the basis of legal advice that the claimant might or should have received".

The discussion of the balance between the interests of developers and the public interest exhibits a noteworthy shift in the emphasis from earlier cases. For example, the Court of Appeal in *Thornton Hall Hotel Ltd* observed that "objectors aggrieved by the grant of planning permission may reasonably be expected to move swiftly to challenge its lawfulness", and landowners "may be expected to be reasonably alert to proposal for development in the locality that may affect them."[204] In *R. (on the application of Burkett) v Hammersmith LBC* [2002] 1 W.L.R. 1593, which dealt with whether objectors living adjacent to proposed development should be refused permission to challenge an outline grant of planning permission on the basis of delay because they did not challenge the resolution to grant but instead the much later

[196] At [31] and [34].
[197] At [5].
[198] See *Keenan v Woking BC* [2017] EWCA Civ 438; [2018] P.T.S.R. 697.
[199] For those particularly keen to see how the arguments were developed, the hearing was webcast and can be found on the Court of Appeal's YouTube Chanel. (Dear readers, I feel I must break away to reflect on how extraordinary the final few words are of the sentence I have just written, and to acknowledge that the millennials among you will not find them remarkable in the least.)
[200] At [29].
[201] At [30].
[202] At [51].
[203] At [21].
[204] At [21(2)].

decision notice, Lord Steyn also considered the public interest. He took into account that "the preparation of a judicial review application, particularly in a planning matter, is a burdensome task", creating a "heavy burden" on individuals.[205]

In *Burkett*, Lord Steyn also discussed, as the first policy consideration relevant to the operation of the time limit, that it "may deprive a citizen of the right to challenge an undoubted abuse of power. And such a challenge may involve not only individual rights but also community interests, as in environmental cases."[206] The potential loss of "fundamental rights to challenge an unlawful exercise of power"[207] strongly influenced the interpretation of the procedural rules adopted by Lord Steyn in *Burkett*. By contrast, the Court of Appeal in *Thornton Hall Hotel Ltd* did not mention this at all.

It is also remarkable that the Court of Appeal described as "undoubtedly relevant" to the exercise of discretion that the Claimant did not "check" that the Council had behaved properly and correctly issued the decision notice, but instead "relied on the council's administrative competence".[208] There is an odd equivocation in these paragraphs. They do not assert that it would be unreasonable to require an objector to "police the council's performance of its statutory functions as local planning authority", including the requirement to issue a decision notice that faithfully reflected the decision actually taken.[209] Instead the lack of such policing by the claimant is noted and is held to be relevant; but then the court observes that the Claimant would have been faced with a confusing and later misleading picture had it taken steps to police the Council's conduct.

There is in the Court of Appeal's language and approach an important message for landowners and developers concerned about neighbouring or competing proposed development—if you are given proper notice of an application for planning permission, you must be alert to its progress and you must sufficiently scrutinise the steps taken by the local planning authority to be aware quickly if anything has arisen that provides a ground for challenge.

Jurisdiction

Interestingly, there have been three cases in the last year dealing with whether challenges fall within the jurisdiction of the court. They are closely aligned with matters concerning time limits, but fall to be considered separately because the ultimate question for the court is not whether it should exercise discretion to extend time, but whether it has any jurisdiction at all to hear a claim brought outside the relevant time limit.

In *Croke v Secretary of State for Communities and Local Government* [2019] EWCA Civ 54; [2019] J.P.L. 665, the Court of Appeal considered whether the six-week time limit for bringing a section 288 claim is absolute, "even if the applicant is not himself entirely responsible for the late filing of the application".[210] The Court relied on long-established authority that the time limit of 6 weeks in s.288(4B) is absolute: it begins on the day after the date of the decision letter and effectively expires when the court office closes on the 42nd day. It cannot be extended by even a single day.

The Court's ratio[211] identified only two exceptions to that immutable rule:

[205] At [50].
[206] At [45].
[207] At [46].
[208] At [32]–[33].
[209] At [33].
[210] At [1].
[211] The "ratio decidendi" of a case has been defined as any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the reasoning adopted by him or her (see *R. (on the application of Al-Skeini) v Secretary of State for HD* [2007] QB 140 at [145]). The ratio encapsulates the binding precedent set by the decision. On the other hand, the "obiter dicta" are any rules of law not constituting a necessary step in the conclusion of the court—these are still persuasive and are often worthy of close attention.

a. Where, on the 42nd day, the court office is closed (due to it being a non-working day), the deadline expires on the next working day.[212] However, that exception does not apply where a party simply turns up late on a day when the court office was open for business but has closed, even if that lateness was not entirely the party's fault (for example, the court security staff preventing access before the official closing time);[213] and

b. Where, in exceptional circumstances, the time limit should be extended on human rights grounds because the strict imposition of the statutory time limit would impair the very essence of the right of appeal, contrary to art.6(1) of the European Convention on Human Rights.[214][215]

The Court of Appeal did, however, discuss, obiter, a third possible exception: where an applicant attends the court office within the six-week limit but the court office wrongly refuses to permit the application to be lodged, resulting in the applicant having to make the application outside the six-week period.[216] This might happen, for example, if the court office mistakenly considered the application was required to be made on a particular form when that was not the case.[217]

From a jurisdictional perspective, *Croke* is very interesting. Of the many time limits apt to cause practitioners paranoia, the six-week limit for a s.288 claim ranks particularly highly. While *Croke* reinforces that there are good reasons for that paranoia, it also shows that the six-week limit is not entirely immutable.

What is apparently immutable, however, is that the Court of Appeal does not have any jurisdiction under s.289(6) of the TCPA 1990 to hear an appeal against the High Court's refusal of leave to appeal in an enforcement appeal. The appellant in *Binning Property Corp Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 250; [2019] 8 J.P.L. 884 asked the Court of Appeal to depart from its previous well-known decisions on this lack of jurisdiction,[218] given the legislative and procedural changes since they were decided. In particular, emphasis was placed on the fact that the Court of Appeal has jurisdiction to entertain appeals against the refusal of leave in challenges under s.288 of the TCPA 1990 and in claims for judicial review, and that the Aarhus Convention costs protections make it clear that all such proceedings, including appeals under s.289(1), should be treated alike. Lindblom LJ was firm in his rejection of these arguments,[219] finding that the "policy reasons" justifying lack of jurisdiction in s.289 cases persist,[220] and that an application under s.288 is a "planning statutory review", whereas an appeal under s.289 is not.[221]

Finally, the Court of Appeal has given important guidance in *R. (on the application of Oyston Estates Ltd) v Fylde BC* [2019] EWCA Civ 1152 concerning challenges to neighbourhood development plans. The appellant contended that a plain language interpretation of s.61N of the TCPA 1990, which gives the court jurisdiction to hear legal challenges at three stages of the plan-making process, means that a challenge could be brought to the final decision to make the neighbourhood plan which could in substance have been brought at either of two earlier stages in the decision-making process. The Court of Appeal rejected this interpretation, holding that the court does not have jurisdiction to hear a challenge to the final plan if

[212] Described as the "principle" in *Kaur v S Russell and Sons Ltd* [1973] 1 QB 336. See [14]–[18] of *Croke*.
[213] At [29]–[30].
[214] At [40].
[215] See *Yadly Marketing Co Ltd v SSHD* [2017] 1 W.L.R. 1041.
[216] At [58].
[217] For those beloved of all matters procedural, there is a fascinating exposition of the genesis of Form N208 PC and the subsequent confusion as Practice Direction 8C continues to refer for form N208: see [55]–[57].
[218] *Wendy Fair Markets Ltd v Secretary of State for the Environment* The Times, 1 March 1995; *Prashar v SSETR* [2001] 3 P.L.R. 116 and *Walsall MBC v Secretary of State for Communities and Local Government* [2013] J.P.L. 1183.
[219] At [25]–[32].
[220] At [33].
[221] At [34].

the challenge is "in truth" to one of the earlier stages, even if the alleged unlawfulness applies equally to the final making of the plan.[222]

Lindblom LJ held that s.61N of the TCPA 1990 is a bespoke and complete statutory regime that provides for proceedings to be pursued before a neighbourhood plan was made.[223] As a result, if a challenge to a the making of a neighbourhood plan is in truth a challenge to the earlier consideration by the local authority of the examiner's report, then the claim must be brought within six weeks from the day after the local authority's decision, and the court has no discretion to extend the time limit.[224]

There is one rider to the Court of Appeal's decision—where a challenge pertains to any EU obligation or any Convention right, it may be brought at the stage when the plan is made, even if it arose much earlier in the process (e.g. the examiner's report or the local authority's consideration of the report).[225] This is because s.38A(6) of the Planning and Compulsory Purchase Act 2004 requires the local planning authority, when it undertakes the final assessment of whether to make a neighbourhood plan in light of the referendum result, to consider whether the making of the plan would breach, or be otherwise incompatible with, any EU obligation or any Convention right.

The decision of the Court of Appeal has important ramifications for practitioners. Any individual, developer or organisation that may wish to challenge the making of a neighbourhood plan must, unless the challenge squarely concerns any EU obligation or any Convention right, make the challenge during the plan process or risk losing the right to raise the same substantive point when the plan is made. And local authorities should be astute to whether any challenge to the making of a neighbourhood plan is in reality a challenge to the examiner's assessment or the local authority's consideration of the report, because if so, there is a knock-out jurisdictional point to be taken.

Predetermination

One of the grounds in *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) on which permission was granted concerned predetermination. The allegation was that the Secretary of State failed to carry out the required statutory consultation with an open mind (i.e. actual predetermination) or, in the alternative, that there was a real risk of the Secretary of State having proceeded with a closed mind (i.e. appearance of predetermination). The Court provides a valuable exploration of the authorities on predetermination[226] and proceeds on the basis that either actual or apparent predetermination could in principle suffice to establish a ground of challenge to a ministerial decision.[227] The Court held that the evidence did not establish predetermination as opposed to a strong predisposition in favour of a particular outcome—something which was "not open to legal challenge".[228]

Procedural Fairness

In a judgment that is particularly illuminating for those who represent objectors or third parties, Andrews J reviewed the rules on procedural fairness in planning inquiries in *Barlow v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 146 (QB); [2017] J.P.L. 707. The claimant challenged an inspector's decision to admit an updated traffic management plan and his refusal to adjourn the inquiry to allow consideration of the document. Andrews J made a number of important observations on the application of the law of procedural fairness to third parties at a planning inquiry, including:

[222] At [31]–[35].
[223] At [31].
[224] At [33].
[225] At [55]–[56].
[226] At [508]–[533].
[227] At [252].
[228] At [546]–[549].

a. emphasising that considerations of procedural fairness should apply to all who are entitled to have a say at the inquiry, not just the planning authority, the appellant or those with formal "Rule 6" status;[229] and

b. finding that any procedural unfairness that might have occurred at the inquiry cannot be corrected by simply giving the objectors an opportunity to make further submissions at a later stage when conditions imposed on the grant of permission fall to be discharged.[230]

Furthermore, Andrews J's assessment in [58] gives valuable guidance on what amounts to "a reasonable opportunity to adduce evidence and make submissions in relation to [the opposing case]":[231] The Judge held that the following factors are relevant to that assessment:

> "• the nature, volume and complexity of the evidence in question;
> • its importance to the issues to be determined on the planning application or appeal, as the case may be;
> • how much time that person in fact had to assimilate and understand the evidence and to prepare a response to it (irrespective of whether he actually availed himself of that time);
> • the resources available to the party concerned and whether they had access to relevant expertise. A lay person is likely to need longer to digest and assimilate information of a technical nature and respond to it than someone who has access to expert assistance, but how much longer will naturally depend on the nature of the information and its impact on the applicant's proposals;
> • what responses the party concerned was able to put forward in the time that they were given; and
> • what else they might have said or done if they had been given a longer time to prepare their response."

The Judge held that last of these factors is also relevant to the issue of whether there has been material prejudice.

The Use of Parliamentary Material

The second Heathrow case, *R. (on the application of Heathrow Hub Ltd) v SST* [2019] EWHC 1069, prompted an intervention from the Speaker of the House of Common and thus shone a fascinating light on the use of Parliamentary Material in judicial review and similar proceedings. The challenge to the ANPS in this case was brought by Claimants who supported the expansion of Heathrow but who opposed the decision to expand to the north west of the current runways in favour of extending the current northern runway. The Speaker "took exception" to certain statements of the Secretary of State being admitted in evidence on the basis that they were subject to Parliamentary Privilege. In a delightful twist for a case based on 21st century infrastructure and business, the Speaker relied on an alleged breach of art.9 of the 1689 Bill of Rights,[232] which provides:

> "That the freedom of speech and debate or proceedings in Parlyament ought not to be impeached or questioned in any court …"

[229] At [11].
[230] At [63].
[231] This is the second limb of Jackson LJ's test in *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470 at [62].
[232] The UK Parliament website describes the Bill of Rights thus: "The Bill of Rights 1689 is an iron gall ink manuscript on parchment. It is an original Act of the English Parliament and has been in the custody of Parliament since its creation. The Bill firmly established the principles of frequent parliaments, free elections and freedom of speech within Parliament – known today as Parliamentary Privilege."

The first statement said to be subject to Parliamentary Privilege was a response from the Secretary of State during the course of questions after the Government announced to Parliament its preferred option for Heathrow expansion.[233] The second statement was in evidence given by the Secretary of State before the House of Commons Transport Committee.[234] It must immediately be noted that the Speaker's objection was not to the admissibility of all Parliamentary material in the judicial review proceedings.[235] The Speaker's concern arose because of the way in which the claimant was relying on the statements: using them to evidence that the Secretary of State in fact had a motivation for preferring a specific option which the Secretary of State denied was the case.[236]

Ultimately the Court concluded that it did not need to determine the issue as the disputed statements were to the same effect of statements made outside Parliament, which were admissible. However, the Court made "limited observations" on the issue, including casting doubt on the submission made on behalf of the Speaker that it was not open to the court to determine a dispute as to the meaning and effect of statements made in Parliament. The issue thus remains at large, so practitioners are warned that, if in future their scouring of Hansard throws up seemingly helpful statements in Parliament, the meaning of which is then disputed by the defendant, another perusal of the 1689 Bill of Rights might be required because of an intervention from the Speaker.

The Standard of Review

The first issue before the Court in *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) was the applicable standard of review. Practitioners will no doubt find the detailed analysis at [182]–[184] particularly illuminating. The Court noted that the "scrutiny of review is dependent upon the circumstances of the particular case"[237] and had regard to the fact that the policy decisions brought together in the ANPS covered a wide spectrum. The Court concluded that the intensity of review varied depending on the particular subject matter in issue. While "considerable caution" was to be applied to challenges in relation to matters of policy judgement, other grounds may involve hard edge questions, not affected by the high-level political nature of the ANPS. In addition, the Court observed that the degree to which the grounds involved challenges to policy judgements and where those judgements sat on the "policy spectrum" may also be relevant to whether an error of law was material and, if so, what relief (if any) should be ordered.[238]

Limitations on Judicial Review

A party who succeeds in a planning appeal cannot be "aggrieved" by the decision on appeal. That rules out a s.288 challenge. But can they bring a judicial review of a decision on an issue with which they disagree, having lost that particular battle but having nonetheless won the war in relation to the outcome of the appeal? The High Court in *Tewkesbury BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1775 (Admin) said "no". Here the issue was the inspector's interpretation of para.73 of the NPPF. Dove J held that the claimant's disagreement with the inspector could be "perfectly properly ventilated and re-examined in a subsequent appeal if there is good reason to do so". After all, appeal decisions do not amount to binding precedents.[239]

[233] At [70]–[71].
[234] At [74].
[235] The Speaker therefore did not seek to unpick the familiar decision in *Pepper v Hart* [1993] A.C. 593 that that the court may under certain conditions have regard to a statement made in Parliament by a promoter of legislation as an aid to the construction of an ambiguous provision in that legislation, provided that (amongst other things) that statement is clear in dealing with the point in issue.
[236] At [143].
[237] At [147].
[238] At [182]–[184].
[239] *North Wiltshire DC v SSE* (1993) P. & C.R. 137.

For those claimants tempted to bring judicial review proceedings challenging a grant of planning permission based on new expert evidence, not before the local planning authority, there is a warning in *R. (on the application of Lakenheath Parish Council) v Suffolk CC* [2019] EWHC 987 (Admin) at [7]–[16]: it is unlikely that the Court will be assisted by a "ping pong" of supplementary expert witness statements.

Settlement

Great Hadham Country Club Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1203 (Admin) is a salutary reminder that offers of settlement need to be clearly worded. In this case, the Secretary of State made an "unambiguous" offer to settle the claim on ground 1 but later sought to argue that the inspector's decision should be quashed on just one aspect of that ground. That was disputed by the claimant. The result was the contested hearing that the Secretary of State had been trying to avoid and, moreover, in that hearing the burden was on the Secretary of State to show why the decision should *not* be quashed on the entirety of ground 1. That attempt was rejected by the court.

Costs

Where permission is refused—in either a judicial review or a statutory review—who is entitled to their costs? *CPRE—Kent Branch v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1230 reviewed the authorities and held that: (1) in principle a claimant is liable to pay the costs of filing an acknowledgment of service by any defendant and/or interested party; (2) it is not necessary for a defendant/IP seeking their costs to show "exceptional" or "special circumstances" in order to recover those costs; (3) however, to be recoverable, those costs must be reasonable and proportionate. An example where costs would not be reasonable and proportionate is where there is an "obvious lead defendant" and an additional defendant's or interested party's AOS or summary grounds did not assist the court. The court declined to specify any hard and fast rules for identifying the lead defendant. The court rejected a further submission that, in an Aarhus claim where permission is refused, the £10,000 cap on the claimant's liability for costs should be reduced to reflect that fact that the claim did not proceed to trial.

In Northern Ireland, the Queen's Bench Division rejected an applicant's attempt to exploit the Aarhus costs protection rules by establishing a network of related companies for the purpose of litigating 33 separate judicial review claims in *Rural Integrity (Lisburn 01) Ltd v Planning Appeals Commission* [2019] NIQB 40. The court balanced the public interest in environmental protection secured by the Aarhus Convention against the public interest in ensuring that the limited resources of public authority defendants are not exploited. Accordingly, the applicant was granted a protective costs order limited to £10,000 but was also ordered to pay security for costs in the same amount.

Conclusion

Of the many wonderfully enlightening programmes on Radio 4, I particularly enjoy "More or Less", which "places a statistical tape measure against anything that will stay still for long enough".[240] So it is hopefully illuminating to finish with a brief statistical analysis. Anecdotally, there has been an impression that, recently, a higher proportion of High Court cases are going up to the Court of Appeal. Not so. In fact, over the past three years, there has been remarkable consistency:

[240] 30 August 2019 "Amazon fires, State pension, American burgers".

Westlaw search for cases for which the subject/keyword is "planning", limited by date range and court.

Dates	High Court	Court of Appeal	Supreme Court
1/8/2018 – 31/7/2019	128	32	1
1/8/2017 – 31/7/2018	127	30	2
1/8/2016 – 31/7/2017	121	32	1

There will, however, be less statistical consistency by the time of next year's conference. The forthcoming 12 months will be a bumper year for planning in the Supreme Court, with decisions already anticipated in three cases[241] and others knocking on the door.[242] There will also be interest in the work of other Supreme Courts, with the *Urgenda* climate decision awaited in the Netherlands. There is, indeed, much illumination on the horizon.

[241] *R. (on the application of Wright) v Forest of Dean DC*; *Dill v Secretary of State for Communities and Local Government* and *Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC*.

[242] For example, an application for permission to appeal in *R. (on the application of Oyston Estates Ltd) v Fylde BC* is currently with the Supreme Court.