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> "We demand rigidly defined areas of doubt and uncertainty! "Douglas Adams, *The Hitchhiker's Guide to the Galaxy*

Introduction

It is my sincere hope that this legal update is a one-off and that by the time this paper sees the light of day, the trials and tribulations of Spring and Summer 2020 will be receding into the past and life will have returned to some semblance of normality.

I am writing in the midst of a global pandemic that has affected every aspect of modern life. The Joint Planning Law Conference was to be held at one of Oxford University's finest colleges but now I shall be offering my imperfect legal insights to the planning world from my home office via a webcam that has become my constant, loyal and often unflattering companion over recent months.

Many of us have had to become teachers and IT experts overnight. Some of us, and our loved ones, have suffered from the benighted disease that is Covid-19. Court rooms and inquiry venues have become virtual and the planning sector is awash with ideas about how to bounce back from the unprecedented socio-economic impacts of the coronavirus. It is a time of anxiety and sadness but also of reflection, re-evaluation and opportunity. As we emerge slowly and cautiously into a "new normal" the planning profession has a vital part to play in assisting our country to learn lessons and to re-assess the role of the planning system in wider society.

It is perhaps too early to predict the courts' response to decisions made during the lockdown.[1] One thing is certain though: there will be legal challenges to planning decisions made during this period particularly as many public authorities have followed Voltaire's advice to avoid letting perfection become the enemy of the good. Of necessity, this paper looks backwards to assess whether any jurisprudential trends have emerged over the last 12 months or so. One such pattern may provide local authorities and Government with some degree of comfort for the future. Judicial deference to bodies charged with making planning decisions is a thread that runs through many of the judgments that we shall examine. It is not meant to be a fit of professional pique to suggest that the bar is slowly and surely being raised for successful legal challenges (statutory or judicial review) in the planning sphere. The higher courts frequently chastise claimants for "overly legalistic" arguments, "unduly forensic" analysis and "nit picking" at the same time as placing considerable importance on the judgments of expert tribunals such as the Planning Inspectorate or Neighbourhood Plan Examiners.[2] Perhaps this is as it should be and we are simply going through a period of adjustment so that a workable and realistic relationship between the courts and the wider planning

* I am extremely grateful to Martin Carter (Kings Chambers) and Mary Cook (JPLC Committee Member, Town Legal) for their review of this paper and their helpful suggestions. All errors, however, are mine.

[1] Which started on 23 March 2020.

[2] See, e.g. *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin).

system is settled upon. Whatever the position and to coin a phrase that recently achieved some prominence, "reasonable people might disagree" on this issue. Indeed, different people may have a different *instinctive* response to the observations and trends identified in this paper.

I do not expect everyone will agree with all the observations made in this paper. Indeed, it would be surprising and a little disappointing if you did readers. In making these points, I am reminded of a recent letter to the *Times*:[3]

> "Sir, There are several articles in Saturday's comment section (Jun 20) with which I profoundly disagree. Keep up the good work."

If this period of lockdown has taught us anything, it is to view statistical comparisons with a degree of care and—in some cases—scepticism. However, that is not going to prevent me attempting to make such a comparison, especially as it now seems de rigueur in JPLC Legal Updates. In the period 1 September 2019–21 June 2020 there have been 133 planning judgments in the higher courts.[4] This represents a slight dip from previous years but not enough to give one the impression that would-be claimants are being dissuaded in large numbers from challenging planning decisions.

In last year's Legal Update, Estelle Dehon predicted that "the forthcoming 12 months will be a bumper year for planning in the Supreme Court". That was a fair prediction; statistically speaking a 33% increase. There have been three Supreme Court judgments,[5] each of which are highly significant in their own way:

- *R. (on the application of Wright) v Resilient Energy Severndale Ltd*.[6]
- *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC*.[7]
- *Dill v Secretary of State for Housing Communities and Local Government*.[8]

There might have been one more Supreme Court planning case this year but the Welsh Ministers' application for permission to appeal in the case of *Finney v Welsh Ministers*[9] has been refused.[10] It is therefore now established that the Town and Country Planning Act 1990 ("TCPA") s.73 may not be used to amend the operative part of a planning permission or to impose a condition which would be inconsistent with the operative part of the original planning permission.

This paper will start with an attempt to identify a number of judicial trends that have emerged—or continued—over the last "year"[11] before examining in a little detail the Supreme Court planning judgments. There then follows an analysis of different topic areas with, I hope, some practical advice as well as legal analysis.

The paper closes with a few tentative suggestions as to the areas of the planning system where legal skirmishes are likely to emerge in the coming year.

Judicial "trending"

It might be a fool's errand to search for jurisprudential themes or trends and I appreciate that such an exercise is necessarily subjective. Nonetheless, it is possible to identify some patterns in judicial decision taking over the last year:

[3] *Times* letters section, 21 June 2020.
[4] Based on a Westlaw search using the term "planning", confined to the date range above and restricted to England and Wales.
[5] On 11 February 2020, the Supreme Court granted permission to appeal in *R. (on the application of Oyston Estates Ltd) v Fylde BC* [2019] EWCA Civ 1152; [2020] J.P.L. 47 with a hearing expected early in 2021.
[6] *R. (on the application of Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53; [2020] J.P.L. 646.
[7] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3; [2020] J.P.L. 903.
[8] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20; [2020] 1 W.L.R. 2206.
[9] *Finney v Welsh Ministers* [2019] EWCA Civ 1868; [2020] P.T.S.R. 455; [2020] J.P.L. 524.
[10] On 19 May 2020.
[11] This paper covers the period 1 September 2019–1 July 2020. For consistency I shall describe this as the "JPLC Year".

- A number of decisions this year have examined and, in some cases, shifted orthodox legal concepts whose roots have been embedded in the planning system for some time.
- I have already touched on another trend, that of judicial deference to expert decision takers. This trend runs hand in hand with the resistance to the over legalisation of the planning system and "nit picking".
- It is a trite observation that planning decisions are not readily amenable to judicial scrutiny given that a subjective (but informed) assessment lies at the heart of most of them. It is therefore not surprising that whilst resisting "planning judgment" challenges the courts appear more open to technical legal arguments where there is a 'right' answer to an often binary question. Cases concerning the Community Infrastructure Levy Regulations 2010 and traditional statutory interpretation are a particularly fertile ground for this type of black letter legal analysis.

The Supreme Court

The first Supreme Court judgment of the JPLC year was *R. (on the application of Wright) v Resilient Energy Severndale Ltd*[12] and provides a clear, cogent and helpful recitation of the law relating to material considerations. Resilient applied for and obtained permission for a 500kW wind turbine to be erected and operated by a Community Benefit Society. 4% of the turbine's turnover would be put into a local community fund. In granting permission, the local planning authority expressly took into account the community fund donation and went as far as imposing a condition requiring the scheme to be operated by a Community Benefit Society.[13]

Mr Wright applied for judicial review, arguing that the community benefit fund donation was not a material consideration for planning purposes. He argued that it did not serve a planning purpose, was not related to land use, and it had no real connection to the proposed development.

An important contextual point to recall at this stage is the existence of guidance issued by the Department for Energy and Climate Change in October 2014[14] which specifically encouraged community benefits to be offered alongside onshore wind schemes. Although securing such benefits was voluntary, the strong inference from the guidance was that it may help to reduce local opposition to onshore wind schemes.

This case might have been less remarkable were it not for the intervention of the Secretary of State for Housing Communities and Local Government, who invited the court to "update *Newbury*[15] to a modern and expanded understanding of planning purposes".[16] Lord Sales delivered the judgment dismissing the developer's and the council's appeal. In doing so, the Justice saw no need to "update *Newbury*" as invited by the Secretary of State. On the contrary, the court plotted a conventional course through the well-known authorities,[17] approving the *Newbury* doctrine that:

> "the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them …"[18]

The court also reaffirmed one of the foundations of the planning system; namely that planning permission cannot be bought or sold. It was stressed that this principle was an important protection for landowners

[12] *R. (on the application of Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53.
[13] See *R. (on the application of Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53 at [26] for a full recitation of the condition.
[14] See *https://www.gov.uk/government/publications/community-benefits-and-engagement-guidance-for-onshore-wind* [accessed 15 July 2020].
[15] *Newbury DC v Secretary of State for the Environment* [1981] A.C. 578; [1980] J.P.L. 325.
[16] *R. (on the application of Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53 at [30].
[17] *Westminster CC v Great Portland Estates Plc* [1985] A.C. 661; [1985] J.P.L. 108. *R. v Plymouth CC Ex p. Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P. & C.R. 78; [1993] 2 P.L.R. 75; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636 and *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20; [2011] 1 A.C. 437; [2010] J.P.L. 1259.
[18] *Newbury DC v Secretary of State for the Environment* [1981] A.C. 578 at 599H per Viscount Dilhorne.

against local authorities seeking money or other benefits in return for a planning permission and a bulwark against developers seeking to buy permission.[19]

It is notable that the court expressly applied the *Newbury* test for the imposition of planning conditions to the question of whether a consideration is "material" for planning purposes, a subtle but important step away from decisions such as *Stringer*[20] and *Great Portland Estates*.[21] These older cases focused largely on whether a matter of relevant to the character or use of land.

The Supreme Court rejected any notion that Government policy or guidance (such as the DECC best practice guidance) could inform or alter the scope of a material consideration, the latter being a statutory concept only amenable to judicial interpretation.[22]

Ultimately, the claimant was "Wright" all along.

In early February 2020, the most significant of the three Supreme Court judgments was handed down. *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC*.[23]

Older planners may harbour a degree of nostalgia for simpler days when the concept of Green Belt openness was uncomplicated: "openness" meant the absence of development, with no need to bother with more elusive and subjective concepts like visual amenity. In *Timmins v Gedling BC*,[24] held that "there is a clear conceptual distinction between openness and visual impact" and "it is wrong in principle to arrive at a specific conclusion as to openness by reference to its visual impact". This judgment merely confirmed what most planners knew to be an immutable Green Belt truth.

The cracks in the old orthodoxy started to show in *Turner v Secretary of State for Communities and Local Government*[25] when Sales LJ interpreted the concept of openness as one which was "not narrowly limited to [a]volumetric approach" but "is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case".[26] Openness, concluded the Court of Appeal, was *capable* of having a visual dimension,[27] suggesting that it was a matter for the decision-maker in any given case.

Sam Smith's concerned a challenge to the grant of planning permission for an extension to Jackdaw Quarry, a limestone quarry some 1.5km from Samuel Smith's brewery in Tadcaster. The site lies in the Green Belt. In an extremely long and detailed report, North Yorkshire CC considered the likely visual impact on the landscape but did not *expressly* address the visual dimension of openness when considering Green Belt harm, relying instead on the traditional view that openness is a spatial concept per *Timmins*. The Council's approach was not surprising given that *Turner* had not been handed down at the time of the Officer's Report, although it had been when the planning permission was issued some months later.

In the Court of Appeal, Lindblom LJ quashed the planning permission, holding that the following ought to have been taken into account:

> "under government planning policy for mineral extraction in the Green Belt in para 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor in their approach to the effect of the development on the 'openness of the Green Belt'."[28]

Thus, indicated the Court of Appeal, visual impact must always be considered when assessing the effect of development on openness.

[19] See *R. (on the application of Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53 esp. at [39] of Lord Sales' judgment.
[20] *Stringer v Minister for Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] J.P.L. 114.
[21] *Westminster CC v Great Portland Estates Ltd* [1985] A.C. 661.
[22] See *R. (on the application of Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53 at [46]–[57].
[23] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3.
[24] *Timmins v Gedling BC* [2014] EWHC 654 (Admin).
[25] *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466; [2016] J.P.L. 1092.
[26] *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466 at [14].
[27] *Turner v Secretary of State for Communities and Local Government* at [27].
[28] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [49].

The planners with rose-tinted spectacles could breathe a hesitant sigh of relief upon reading the Supreme Court's judgment, for it re-established the old orthodoxy to some extent. First, "openness" is a broad policy concept that is not necessarily linked to visual amenity. Some forms of development such as mineral extraction may not—in principle—be incompatible with openness.[29] To illustrate this point Lord Carnwath commented that "as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land".[30] Secondly, NPPF para.90[31] does not expressly (or by implication) refer to visual "openness". Those matters which are relevant to the assessment are a matter of planning judgment.[32]

The orthodox view that "openness = absence of development" was not resurrected entirely but the Supreme Court did observe that that approach was more consistent with the NPPF, which draws a distinction between urban sprawl and openness.[33]

Nonetheless, it is now tolerably clear that the scope for challenging decisions on Green Belt openness is considerably narrower, that broad policy question being within the ambit of planning judgment. In this regard, *Sam Smith*'s continues the theme of recent cases in which a sharp distinction is drawn between the interpretation and application of policy, the latter being subject only to irrationality.[34] Such a distinction is of a piece with the broader objective to prevent the "over legalisation" of the planning process.[35]

The import of the *Sam Smith*'s judgment is much wider than settling the Green Belt "openness" debate. The brewery's argument was, in essence, that the Council had failed to take account of a material consideration; that being the visual effect of the scheme on Green Belt openness.[36] In this context, Lord Carnwath endorsed the reasoning in *Derbyshire Dales DC v Secretary of State for Communities and Local Government*[37] and the antipodean case of *CreedNZ Inc v Governor General*[38] at 182.[39] The legal question, said the court, was whether visual impacts were expressly or impliedly identified in the Act or the policy as matters that must be taken into account "as a legal obligation" or, on the facts of the case, they were "so obviously material" as to require direct consideration.[40]

This shift in emphasis was taken up more recently in *R. (on the application of Clientearth) v Secretary of State for Business, Energy and Industrial Strategy*,[41] a challenge to the Development Consent Order approving two gas-fired generating units. There are two paragraphs in the *Clientearth* judgment,[42] following the analysis of the Supreme Court in *Sam Smith*'s, which should now be pasted into every planning lawyer's notebook.

It will no longer be possible for a claimant simply to assert that the decision-maker has failed to take account of a material consideration (part of the *Bolton*[43] doctrine). Rather it will be necessary to show that the decision-maker was:

[29] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [22].
[30] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [22].
[31] NB—this is a reference to the NPPF 2012. The updated reference in NPPF 2019 is para.146.
[32] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [39].
[33] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [40].
[34] Lord Carnwath cited and expressly relied upon this distinction, previously articulated in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] J.P.L. 1084.
[35] See *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [22].
[36] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [29].
[37] *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P. & C.R. 19; [2010] J.P.L. 341.
[38] *CreedNZ Inc v Governor General* [1981] 1 N.Z.L.R. 172.
[39] Adopted by Lord Scarman in the House of Lords in *In re Findlay* [1985] A.C. 318 at 333–334; [1984] 3 W.L.R. 1159.
[40] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2018] EWCA Civ 48 at [32].
[41] *R. (on the application of Clientearth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin).
[42] *R. (on the application of Clientearth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) at [99] and [100].
[43] *Bolton MBC v Secretary of State for the Environment* [2017] P.T.S.R. 1063; (1991) 61 P. & C.R. 343; [1991] J.P.L. 241.

> "expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so 'obviously material', that it was irrational not to have taken it into account."[44]

In *Clientearth*, Holgate J read *Sam Smith*'s as holding that "principles (2) and (6) in the judgment of Glidewell LJ in *Bolton* at 1072 (which were relied upon in the Claimant's skeleton under grounds 3 and 4) are no longer good law". To recap, Principle 2 in *Bolton* required a decision taker to consider a matter that might cause him to reach a different conclusion than if he left it out of account.[45] Principle 6 entitled the court to quash a decision where it is clear that there is a "real possibility" that consideration of the matter would have made a difference to the decision.[46]

It is noteworthy that "obvious materiality" here is couched in terms of rationality. There appears now to be two categories of material considerations challenge. First, where the decision-maker is expressly or impliedly required to take a matter into account but fails to do so. The second category is necessarily fact specific and requires claimants to show that no reasonable public authority would have left a particular consideration out of account. This is high bar indeed and must be seen in light of the judgment of Sullivan J in *Newsmith*.[47]

Dill v Secretary of State for Housing Communities and Local Government[48]

This judgment has certainly "urned" its place in the 2020 Legal Update. In the *Dill* case, the Supreme Court has provided a definitive ruling on the meaning of "listed building" under the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990.

The case centred on two lead urns attributed to the Dutch sculptor John van Nost and dating from c.1700. The urns sat atop limestone piers. The artefacts were originally at Wrest Park in Bedfordshire but were transported by the *Dill* family from there to a number of different locations before ending up at Idlicote House, a Grade II listed building in 1973. Unbeknownst to the family, the items were listed in their own right in 1986. The appellant, Mr Dill, sold the urns at auction in 2009[49] and they were exported abroad.

The local authority became aware of the removal of the urns and the appellant sought retrospective listed building consent for their removal, which was refused and a listed building enforcement notice issue. The appellant appealed both the refusal of consent and the enforcement notice on various grounds including that the items were not "buildings" so that listed building consent was not required. The appeal was dismissed, including on the basis that it was not open for an Inspector to go behind the listing and that the established criteria for whether something comprised a building in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2)*[50] were irrelevant in this context.[51]

Mr Dill challenged the Inspector's decision and was unsuccessful in both the High Court and Court of Appeal.

On the question of whether an Inspector could go behind the original listing, Lord Carnwath held that it was possible, consistent with the well-known House of Lords judgment in *Boddington v British Transport Police*:[52]

[44] *R. (on the application of Clientearth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) at [99].
[45] *Bolton MBC v Secretary of State for the Environment* [2017] P.T.S.R. 1063 at 352.
[46] *Bolton MBC v Secretary of State for the Environment* [2017] P.T.S.R. 1063 at 352.
[47] See *R. (on the application of Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin).
[48] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20.
[49] For £55,000.
[50] *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2)* [2000] 2 P.L.R. 102; [2000] J.P.L. 1025.
[51] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [5].
[52] *Boddington v British Transport Police* [1999] 2 A.C. 143; [1998] 2 W.L.R. 639.

> "The issue of statutory construction is subject to the rule of law that individuals affected by legal measures should have a fair opportunity to challenge these measures and to vindicate their right in court proceedings, and there is a strong presumption that Parliament will not legislate to prevent individuals from doing so."

This principle must be read in the context of the particularly statutory scheme in question. Planners will be aware of the planning enforcement case of *R. v Wicks*,[53] which established that the scope for raising residual grounds of challenge to the issue of an enforcement notice under the Town and Country Planning Act 1990 s.172 are extremely narrow indeed.[54] Lord Carnwath drew particular attention to the fact that "every aspect of the merits" of the enforcement action in planning cases can be examined by an Inspector, a factor which plainly influenced the House of Lords in *Wicks*.[55] Had the existential question of whether an item was a "building" within the meaning of the Planning (Listed Buildings & Conservation Areas) Act 1990 ("the Listed Buildings Act") fallen within the scope of a listed building enforcement notice appeal, the Supreme Court may have agreed with *Wicks*. However, for the following reasons the court concluded that the parallels were not entirely comparable:

- there are two essential elements to a listed building. It must both be a "building" and one included within the statutory list.[56] In other words, if an item is not a "building" its inclusion on the list will not make it so;
- there is nothing in the Listed Buildings Act 1990 which states that a listing is conclusive as to an item's status as a building;[57]
- the preclusive provisions contained within the Listed Buildings Act 1990 s.64[58] in relation to a listed building enforcement notice do not bite in relation to raising a "building's" status in defence to a prosecution under the Listed Buildings Act 1990 s.9(1);[59]
- That being the case, an appellant must be able to raise the status of an item on an appeal against a listed building enforcement notice since s.39(1)(c) permits him to argue that "the matters alleged to constitute a contravention of section 9(1) … do not constitute such a contravention".[60] If the item is not a building, there can be no contravention of s.9(1) and this ground of appeal should succeed;
- Any residual confusion about an item's status can be addressed by the Secretary of State de-listing it.[61] Thus, the Supreme Court sent a clear message to the Secretary of State that he should de-list any item held by a planning Inspector not to constitute a "building". This leaves open the question of whether the Secretary of State could disagree with his Inspector as to the status of the item and decline to de-list it, although this is plainly a matter that could subsequently be challenged by judicial review.

For these reasons the Supreme Court upheld Mr Dill's first ground.

The second issue considered by the Supreme Court is of wider interest to all planners and concerned the vexed question: what is a building? Lord Carnwath took a lengthy a detailed look at the legislation

[53] *R. v Wicks* [1998] A.C. 92; [1997] J.P.L. 1049.

[54] *R. v Wicks* [1998] A.C. 92 at 122D and see the preclusive provisions in Town and Country Planning Act 1990 s.285(1), which prevents challenges to enforcement notices other than within the confines of the Planning Code.

[55] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [22].

[56] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [24].

[57] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [24].

[58] "The validity of a listed building enforcement notice shall not, except by way of an appeal under section 39, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."

[59] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [24].

[60] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [25].

[61] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [25] and see Listed Buildings Act 1990 s.39(1)(a), which establishes a ground of appeal that the building in question is not of "special architectural or historic merit".

and jurisprudence which have attempted to clarify this question.[62] In doing so, the court expressly approved of the three-fold *Skerritts* test of size, permanence and degree of physical attachment, in spite of its imprecision.[63] Lord Carnwath also rejected the notion that concepts of real property should be deployed when answering this question.[64]

Ultimately, the court was unwilling directly to rule on whether the urns were in fact "buildings" and remitted the matter back to the Planning Inspectorate albeit with the strongest possible hint that it might not be expedient or in the public interest to continue with enforcement action.[65] The local planning authority heeded this message and the enforcement notice has since been withdrawn.

One of the other important lessons to emerge from the *Dill* case is the difference between "judgment" and "judgment"; the former being within the purview of a decision-maker, the latter being the exclusive province of the court.

We shall now turn to the other cases of note decided over the last year by reference (by and large) to recognisable topics.

Statutory interpretation

Some jurists resist the notion that judges make the law, arguing that the courts simply apply and interpret it. *Finney v Welsh Ministers*[66] is a fine example of the latter doctrine at work. *Finney* concerned the grant of permission for two wind turbines described as being of a height up to 100m. One of the conditions required the development to be carried out in accordance with various approved plans, one of which showed turbines with a tip height of 100m. The development sought permission under the Town and Country Planning Act 1990 s.73 to substitute the approved plan for one showing a tip height of 125m, requiring a "varied" condition. This application was refused by the local planning authority but an appeal to the Welsh Ministers was allowed.

Lewison LJ's treatment of the issue was an elegant and concise exercise in statutory interpretation,[67] contained largely within a single paragraph.[68]Section 73(1) is limited to permission for the development of land "without complying with conditions". Its purpose, held the judge, was to avoid a breach of planning control. Section 73(2) permits the local planning authority to "consider only the question of conditions" and therefore not the description of development which precedes the conditions. In so holding, the Court of Appeal found that *R. (on the application of Wet Finishing Works) Ltd v Taunton Deane BC*[69] was wrongly decided but that the "fundamental alteration" principle in *R. v Coventry CC Ex p. Arrowcroft Group Plc*[70] remains good law.[71] In other words, decision-makers should still be astute to avoid granting a s.73 permission the effect of which would be to authorise development fundamentally different from the original permission.

The longer-term implications of the judgment are perhaps not as serious as one might first believe. If a change is not material, an application under TCPA s.96A could be made.[72] Readers should note, however, that there is no right of appeal against the refusal of a s.96A application. Judicial review is the only route of challenge with its attendant risk and costs. In any event, the development industry is fleet of foot and in response to *Finney* some developers, especially where outline planning permission is being sought,

[62] See *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [34]–[51].
[63] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [52].
[64] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [52].
[65] *Dill v Secretary of State for Housing Communities and Local Government* [2020] UKSC 20 at [60].
[66] *Finney v Welsh Ministers* [2019] EWCA Civ 1868; [2020] J.P.L. 524.
[67] The judgment is a mere 49 paragraphs in length.
[68] *Finney v Welsh Ministers* [2019] EWCA Civ 1868 at [42].
[69] *R. (on the application of Wet Finishing Works) Ltd v Taunton Deane BC* [2017] EWHC 1837 (Admin); [2018] J.P.L. 23.
[70] *R. v Coventry CC Ex p. Arrowcroft Group Plc* [2001] P.L.C.R. 7.
[71] And Collins J's consideration of *R. v Coventry CC Ex p. Arrowcroft Group Plc* [2001] P.L.C.R. 7 in *R. (on the application of Vue Entertainment Ltd) v York CC* [2017] EWHC 588 (Admin) was correct.
[72] per Lewison LJ in *Finney v Welsh Ministers* [2019] EWCA Civ 1868 at [45].

have been rather less precise in their applications using expressions such as "residential development" or "retail food store" without prescribing the parameters of the proposed schemes in terms of numbers or size.

Finney might have been added to the bumper crop of this year's Supreme Court planning cases but the Welsh Ministers' application for permission to appeal has been refused.[73]

Interpretation of policy

Although the main focus of policy interpretation this year has been on the NPPF 2019, there are two introductory points to make. First, the number of decisions examining the wording of the NPPF seems to have dropped from a torrent to a steady trickle. The national policy document which provoked so much litigation following its first incarnation has developed something of an immunity to legal challenge. Secondly, the approach to the interpretation of development plan policies has enjoyed something of a limited renaissance this year.

NPPF

It is now well settled that the interpretation of policy is a matter of law[74] but the courts have been keen to emphasise[75] the difference between the interpretation and application of policy. In fact, *Tesco* had already highlighted this distinction, noting that some policies may be expressed "in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis",[76] even if that message was not always observed in the flurry of litigation which followed the Supreme Court's judgment in that case.

As in previous years, the tilted planning balance has been a target for claimants. The first judgment this year was *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government*.[77] The developer applied to quash a decision dismissing their appeal against the refusal of permission for 50 dwellings in the countryside. The Inspector found that the local planning authority, Aylesbury Vale DC, could demonstrate a deliverable supply of housing land. She also identified only two local plan policies of direct relevance to the scheme: one relating to affordable housing, the other being a generic policy concerning character and appearance. In the circumstances, the Inspector held that none of the circumstances which might "tilt" the planning balance under NPPF 2018 para.11(d) applied:[78] i.e. there was a five-year housing land supply, there were relevant policies in the development plan and the most important policies for determining the application were not "out of date".[79] The developer's challenge related to the approach to be taken to the second trigger for the tilted balance ("where there are no relevant development plan policies") and relied on persuading the court that the phrase "no relevant development plan policies" meant no basket of policies sufficient for the determination of the application.

This interpretation of NPPF 2018 para.11 was roundly rejected. First, it is entirely possible for the existence of a single development plan policy to prevent the policy trigger to para.11 from operating.[80] The use of the plural "policies" in the NPPF naturally encompassed the singular "policy" and avoided

[73] On 19 May 2020.

[74] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13; [2012] J.P.L. 1078.

[75] As in *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 analysed above. See also *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865; [2017] J.P.L. 1084 and *Dignity Funerals Ltd v Breckland DC v Thornalley Funeral Services Ltd* [2017] EWHC 1492 (Admin) at [53].

[76] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13 at [19].

[77] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin); [2020] P.T.S.R. 434.

[78] NB—there were no changes to para.11 between the 2018 version of the NPPF and its 2019 update.

[79] See Inspector's decision letter cited at [26] of *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin).

[80] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [32].

"linguistic awkwardness".[81] Secondly, the question of whether a policy was "relevant" meant relevant to the determination of the application, not that a policy was "decisive" or "of high importance".[82] The judge recognised that a policy of wholly "tangential significance" or with a "fanciful connection" to the application would be irrelevant[83] but that was not the case with the "mundane"[84] development management policy at play.

The judge also took the opportunity expressly to approve the judgment of Dove J in *Wavendon Properties v Secretary of State for Communities and Local Government*[85] (otherwise known as the "basket case"). In particular, he underlined the fact that saved but time-expired local policies should not automatically be held to be "out of date" under NPPF para.11. Had the Government intended that to be the case, it would have referred to "time expired policies" or a "time expired plan".[86]

In developing their case, the claimant relied heavily on the body of case law that examined NPPF 2012 para.14. However, that did not assist the developer. Ouseley J held that the NPPF 2018 (and by extension NPPF 2019) should be construed in general without reference to previous policies or versions.[87] Any difference in language between different versions of the NPPF must be intentional. In taking this approach, the judge relied upon Lewison LJ's judgment in *Dartford BC v Secretary of State for Communities and Local Government*[88] in which he held that it would be wrong to expect the public or developers to have to "undertake the investigation of previous iterations of government policy in order to understand the NPPF, let alone ministerial statements introducing previous iterations".

Thus, another potential loophole or legal uncertainty created by a high-level policy document has been closed, at least for now.[89] Prior to *Paul Newman New Homes*, some little time was spent at public inquiries discussing whether the existence of a single development plan policy was sufficient to "pull the trigger"[90] on the tilted planning balance.

Barely a month later, Ouseley J was called upon again to consider NPPF para.11. *Satnam Millenium Ltd v Secretary of State for Housing, Communities and Local Government*[91] was a claim under the Town and Country Planning Act 1990 s.288 by which Satnam applied to quash the Secretary of State's refusal of planning permission for 1,200 dwellings in Warrington. The grounds were wide ranging.

The first ground was that the Secretary of State had misinterpreted and misapplied the "tilted balance" in NPPF para.11(d). It was common ground that the "tilted balance" applied to the scheme since the Council could not demonstrate a five-year supply of deliverable housing sites. However, as well as finding that the proposal would have adverse highways and air quality impacts, the Secretary of State concluded that the scheme was not deliverable. The claimant's main contention was that treating the absence of deliverability as a significant adverse impact of greater weight than the effect on highways and air quality was irrational and ignored the benefits that would flow from the development if implemented. It is important to note that the Inspector did assess the benefits of the proposal on the assumption that it was deliverable.

[81] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [32] and [36].
[82] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [32].
[83] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [32].
[84] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [32].
[85] *Wavendon Properties v Secretary of State for Communities and Local Government* [2019] EWHC 1524 (Admin); [2019] J.P.L. 1486.
[86] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [34].
[87] See *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [20] and [37], relying upon Holgate J's similar approach in *Monkhill v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1993 (Admin) at [41]; [2020] J.P.L. 175.
[88] *Dartford BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 141; [2017] P.T.S.R. 737.
[89] An appeal against Ouseley J's judgment is awaiting determination by the Court of Appeal: see *https://casetracker.justice.gov.uk/getDetail.do?case_id=20192413* [accessed 15 July 2020].
[90] *Paul Newman New Homes Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 2367 (Admin) at [39], in which Ouseley J's frequent references to trigger pulling would not be out of place in Cool Hand Luke.
[91] *Satnam Millenium Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2631 (Admin).

The court held that the Secretary of State's approach to applying the "tilted balance" was irrational for: (i) not identifying the proposed development's benefits and adverse impacts; before (ii) weighing up the benefits and adverse impacts.

Satnam's second ground was that the Secretary of State had unlawfully taken into account in his decision-making whether the development was likely to be delivered. At issue was how a decision-maker should properly consider deliverability of a site where the applicant for planning permission does not own all the site. The Secretary of State had taken the view that Satnam's housing proposals faced serious deliverability difficulties resulting from the absence of an agreement with Homes England, which owned part of the site, and with the proposed operator of additional bus services and treated those difficulties as a material consideration to be weighed in the balance against the grant of planning permission. However, the court held that this approach was irrational: the judge held that: "I cannot discern here what material planning consideration could warrant a refusal of permission on the grounds that the proposal could not be implemented."[92] Ouseley J relied in particular on the judgment in *British Railways Board v Secretary of State for the Environment* at [38][93] that the likelihood of implementation of a planning permission that was otherwise in the public interest was not a basis on which to refuse planning permission.

Practitioners would do well to remember this judgment since it is sometimes argued that planning permission ought to be refused, especially for residential development, where there is a question-mark over its deliverability. Such an argument would be wrong.

Perhaps the most significant decision on the tilted balance this year arose from the linked cases in *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government*.[94] In both cases, the tilted planning balance was triggered by a lack of housing land supply.[95] Gladman argued that the Inspectors had misconstrued NPPF para.11(d)(ii) by considering development plan policies as part of the tilted balance. The strategic land company argued for a two-stage test: first carrying out the tilted planning balance under the NPPF followed by the statutory balance under the Planning and Compulsory Purchase Act 2004 s.38(6).

The claim was dismissed. The court held that there is nothing in NPPF para.11(d)(ii) which requires development plan policies to be excluded from consideration in the tilted balance nor any established policy or principle that obliges decision-makers to adopt a two-stage approach.[96] In particular, NPPF para.11(d) is to be interpreted within the context of the plan led system.[97] Holgate J observed that a proposal may *accord* with a development plan the most important policies of which are assessed as being out of date, or the "footnote 7" trigger may apply because of a shortfall of housing land, but the development plan (including its most important policies) may be assessed as being up-to-date and attracting substantial or full weight.[98] In either of those scenarios, taking account of development plan policies would not be inconsistent with the presumption in favour of sustainable development.[99]

Holgate J also gave some important guidance of wider application. First, the interpretation of policy is an objective exercise reading the policies in their proper context. That context requires consideration of the full range of circumstances in which the policy can be applied and not through the lens of the disappointed party.[100] This will require a greater degree of legal objectivity than has hitherto been a feature of many planning challenges. Secondly, the parties (and advocates) were warned again to bear in mind the courts' previous pronouncements to avoid wrapping up challenges to policy application in the cloak

[92] *Satnam Millenium Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2631 (Admin) at [92].
[93] *British Railways Board v Secretary of State for the Environment* [1993] 3 P.L.R. 125; [1994] J.P.L. 32.
[94] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin).
[95] See NPPF para.11 fn.7.
[96] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [64].
[97] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [86].
[98] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [97].
[99] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [97].
[100] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [99].

of an excessive legalistic interpretation point.[101] Thirdly, claimants have been told in no uncertain terms to cease filing witness statements that seek to show a pattern amongst decision-makers (in this case the Planning Inspectorate).[102] Judicial review and statutory challenges must be determined on the basis of material that was before the decision-maker.[103]

The *Gladman* case does highlight one aspect of this corner of the planning world; namely the logical and linguistic gymnastics in which parties sometimes engage in order to seek clarity in the understanding of high-level planning policy.

R. (on the application of Asda Stores Ltd) v Leeds CC[104] touched on the tilted planning balance albeit in considering a different aspect of the planning sector. In this claim, Asda sought to quash the grant of planning permission for a mixed-use retail-led scheme on a 5.9ha site in Leeds. The principal line of attack concerned NPPF para.90 which states that proposals which fail the sequential test for retail development or will have a significant adverse impact should be refused. The clear wording of NPPF para.90, argued the supermarket operator, raises a policy presumption against the grant of planning permission where there is a breach. In making this submission, reliance was placed on *Zurich Assurance Ltd v North Lincolnshire Council*[105] in which Hickinbottom J (as he then was) examined the effect of policy EC.17 of PPS 4.[106] The predecessor to the NPPF contained a similar formulation to para.90 indicating that permission should be refused if the "proposal is likely to lead to significant adverse impacts …". In *Zurich*, the judge held that a failure to satisfy the sequential test gave rise to a "national policy presumption of refusal", which could be rebutted by other material considerations.[107]

Lieven J held that para.90 does not establish a policy presumption against such schemes akin to the tilted balance in NPPF para.11.[108] The judge considered that the NPPF should be read as a whole and noted that the specific term "presumption" is to be found in paras 11–14 in the context of sustainable development and sets out the particular circumstances in which it should be applied.[109] Those circumstances did not include those cases which fell within NPPF para.90. The clear inference from Lieven J's approach is that the expression "presumption" (when used in the NPPF) is a term of art and is only to be used within the four corners of NPPF paras 11–14. ASDA's formulation of NPPF para.90 as including a policy presumption could lead to different presumptions pulling in different directions[110] and result in the "excessive legalism" deprecated by Lindblom LJ in *Mansell v Tonbridge DC*.[111] Lieven J used the example of other policies in the NPPF such as "permission should be refused for development of poor design" (NPPF para.130) to show that in some cases there could be multiple "presumptions" at play with the attendant confusion.

In obiter comments the judge observed that:

> "it is not entirely clear whether the Secretary of state could lawfully mandate a decision maker to accord a particular factor particular weight, given the words of s.38(6) and the judgement of Lord Hoffmann in *Tesco Stores*, that weight is always a matter for the decision maker."[112]

She declined to hold that expressions such as "should be refused" suggest that any particular weight should be attributed to policy breach: see judgment at [43]–[45].

[101] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [113]–[115].
[102] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [67].
[103] *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) at [68].
[104] *R. (on the application of Asda Stores Ltd) v Leeds CC* [2019] EWHC 3578 (Admin); [2020] P.T.S.R. 874. Note that Lieven J's judgment has been appealed: see *https://casetracker.justice.gov.uk/getDetail.do?case_id=20200059* [accessed 15 July 2020].
[105] *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 (Admin).
[106] PPS 4 was the Planning Policy Statement on town centres, which was replaced by the NPPF in 2012.
[107] *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [45(iii)].
[108] *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [43].
[109] *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [43].
[110] *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [45].
[111] *Mansell v Tonbridge DC* [2017] EWCA Civ 1314 at [41]; [2018] J.P.L. 176.
[112] *Zurich Assurance Ltd v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [44].

ASDA raises two additional and interesting points. First, unless there is some form of policy presumption or weighting at play, it is difficult to see the why the NPPF should indicate that "permission should be refused" for poor design (para.130), for development that results in the loss of ancient woodland (para.175(c)), for major development in National Parks, the Broads and in the AONB (para.172) or where there is an unacceptable impact on highway safety (para.109). If, in each of these cases, the question of weight is a matter entirely for the decision-maker without the ability of the Secretary of State to prescribe a particular approach in certain circumstances, one wonders how effective the NPPF can be in guiding decisions. The second point relates to the broader question of the Planning Inspectorate when applying national policy. There has been some discussion over this last year of the Inspectorate's role. Are Inspectors entirely independent of the Secretary of State and free to apply his policies as they see fit or, as they are standing in the Secretary of State's shoes, should they seek to apply his policies as set out in the NPPF?

Chichester DC v Secretary of State for Housing, Communities and Local Government[113] addressed a different part of the NPPF, that relating to Neighbourhood Development Plans ("NDPs"). NPPF 2012 para.198 stated that where an application for planning permission "conflicts" with a neighbourhood plan "… permission should not normally be granted".[114] At appeal, the Inspector concluded that the residential development conflicted with two policies of the Chichester Local Plan and did not comply with the aims of the NDP[115] as to the location of development. Nonetheless, he found that the scheme did not conflict with any of the policies in the NDP. In the Court of Appeal, the Council argued that the Inspector's finding of no conflict with the NDP was obviously wrong and irrational. The planning balance was tilted due an insufficient housing supply.[116] Having applied the tilted balance, the Inspector allowed the appeal.

The Council's main allegation was that the Inspector had erred in his interpretation and application of NPPF 2012 para.198. National policy, said the court, was:

> "not difficult to understand. It is simply stated, and clear. The concept that when an application 'conflicts with a neighbourhood plan' planning permission 'should not normally be granted' is straightforward. It carries a policy presumption consistent both with the statutory presumption in favour of the development plan as a whole in section 38(6) of the 2004 Act, which includes a neighbourhood plan."[117]

In particular, echoing previous decisions on the status of NDPs,[118] the court reminded us that the NPPF does not elevate the status of a NDP within the development plan as a whole. Indeed, this is one of reasons why the court indicated that it would have refused relief even if the Inspector ought to have found conflict with the NDP.[119] The Inspector applied the statutory presumption in the Planning and Compulsory Purchase Act 2004 s.38(6) against the development. In this way, he was giving effect to NPPF para.198 which did no more than reflect the statutory presumption in favour of the development plan.

The Court of Appeal also issued a timely reminder that the application of well-known principles relating to national and local policies will vary widely according to their context:

> "reading the analysis in one case across into another can be mistaken. No two plans are the same. The policies of each are unique, crafted for the area or neighbourhood to which they relate, not to fit some wider pattern or prescription."[120]

[113] *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640; [2020] J.P.L. 487.

[114] NPPF 2019 para.12 is expressed in slightly different terms: "[where] a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part of the development plan), permission should not usually be granted."

[115] Set out in the objectives and vision of the NDP: see *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640 at [28].

[116] NPPF 2012 para.14 was in force at the material time.

[117] *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640 at [34].

[118] See *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) at [24]; [2015] J.P.L. 1151; and *R. (on the application of DLA Delivery Ltd) v Lewes DC* [2017] EWCA Civ 58 at [11]; [2017] J.P.L. 721.

[119] *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640 at [54].

[120] *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640 at [32] per Lindblom LJ.

Practitioners should therefore be very cautious before attempting fit the policy context examined in one judgment to the facts of a different case, which is sometimes attempted and is rarely successful.

R. (on the application of Wiltshire Council) v Secretary of State for Housing, Communities and Local Government[121] involved a question asked by many planners (but perhaps not many other people) over the years: what is a "dwelling"?

NPPF 2019 para.79 states that isolated homes should be avoided save in five exceptional circumstances. One such exception is where the development would comprise "the subdivision of an existing residential dwelling" (para.79(d)). An application was made to change the use of annexed accommodation from ancillary use to independent residential accommodation. The red line on the application plan was around the annex building and a small surrounding area but excluded the principal dwelling. On appeal, the Inspector identified the principal dwelling and the annex as a single planning unit, thereby bringing the proposal within the scope of the para.79(d) exception. The Council brought a statutory challenge.

The interpretation of the word "dwelling", held Lieven J, must be carried out by looking at the word itself, the context in which it appears and the overarching policy objective.[122] Considering each of these considerations, the judge concluded that:

- the words "sub-division of an existing residential dwelling" tend to suggest the presence of a single physical building rather than part of a wider unit that may include several buildings;[123]
- although the Secretary of State's intended meaning of the policy was irrelevant to its objective meaning, the change from the word "property" in the Draft NPPF 2018 to "dwelling" in the publication version of the NPPF was an interpretative aid.[124] This approach is something for practitioners to bear in mind where there is doubt about the meaning of a policy, but only if there has been a change from the consultation version to the published policy; and
- most importantly, the broader policy context supported the narrower interpretation. The judge referred, in particular, to the consequences of Inspector's interpretation; it could result in the proliferation of self-contained dwellings in isolated rural locations which often have numerous outbuilding and have poor accessibility to public transport.[125] That state of affairs plainly went further than the exceptions in NPPF para.79 contemplated.

Development plan

Wokingham BC v Secretary of State for Housing, Communities and Local Government[126] reviewed an Inspector's decision to allow development of 55 houses and an area of SANG.[127] The scheme conflicted with policies in the development plan, which restricted development outside settlement limits. The Inspector concluded that the settlement limits were out-of-date because they were based on an outdated housing requirement but declined to hold that the settlement boundary policies were sufficiently out-of-date to tilt the planning balance per NPPF para.11.[128] Part of this reasoning relied on the purpose of the policies, which included the protection of the identities of separate settlements, maintenance of the quality of the environment and the location of development where there is good accessibility to services and facilities.

[121] *R. (on the application of Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin).
[122] *R. (on the application of Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin) at [27].
[123] *R. (on the application of Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin) at [27].
[124] *R. (on the application of Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin) at [28].
[125] *R. (on the application of Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin) at [29], [31] and [32].
[126] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin).
[127] Suitable Alternative Natural Greenspace to act as mitigation of effect on the Europe-wide network of Special Protection Areas.
[128] See the substantial recitation of the Inspector's conclusions in *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [9].

The Inspector ascribed "significant" rather than "full" weight to the conflict with development plan policies. This is the conclusion which provoked the Council's challenge.

Three points emerge from the court's judgment.[129] First, the fact that the development limits in the policies were derived from out-of-date housing requirements was clearly a relevant factor and "an issue of real substance" informing the Inspector as to the weight to be given to settlement boundaries which derived from that requirement.[130] This was not a case analogous to "time expired" policies, a point considered in *Daventry DC v Secretary of State for Communities and Local Government*[131] and therefore, the Inspector was perfectly entitled to consider the matter in the context of giving weight to policy conflict. Secondly, the Council asserted that the Inspector should have taken account—as a material consideration—the extent to which development limits were preventing it from complying with the national policy requirement to demonstrate a deliverable supply.[132] This is an area of debate which rears its head regularly at appeals, its most likely genesis being the comments of Lord Gill in the *Suffolk Coastal* judgment when he concluded that "the rigid enforcement of [environmental and amenity] … policies may prevent a planning authority from meeting its requirement to provide a five-years supply".[133] These observations have encouraged local authorities and developers alike to consider the extent to which protective policies, the counterpart of settlement boundary policies, are frustrating the delivery of housing. The logic of the point is that if local authorities are permitting residential development outside settlement limits, that is a clear recognition that the strict application of protective policies would prevent the achievement of deliverable housing supply. The *Wokingham* judgment is unlikely to stop that debate, for Lang J held that there is no binding principle that development outside settlement limits can only be given weight insofar as it can be shown that the strict application of those limits will frustrate the delivery of housing.[134] It will be a matter for each decision-maker whether, and to what extent, the "frustrating" role of settlement boundaries is relevant.[135]

Thirdly, and hardly a surprise, the judge held that provided that the decision taker has properly understood the policy and legal context, a claimant is highly unlikely indeed to overturn his findings on weight.[136]

In *R. (on the application of Corbett) v Cornwall Council*,[137] the Court of Appeal dealt with the sometimes tricky question of how to assess whether a proposal is in accordance with the development plan "as a whole". It is often the case that policies pull in different directions; there may be conflict with some and compliance with others. Does that prevent development complying with the development plan and therefore enjoying the statutory presumption under the Planning and Compulsory Purchase Act 2004 s.38(6)?[138]

Policy 14 of the Restormel Local Plan stated that "Developments will not be permitted that would cause harm to the landscape, features and characteristics of Areas of Great Landscape Value".[139] It did not admit any exceptions and the proposed holiday park extension obviously conflicted with that policy. However, there were other policies in the development plan with which the scheme did not conflict and some which positively supported this type of development. The Court of Appeal did not expostulate any new principles but their key findings (with Lindblom LJ giving the leading judgment) lay out a clear framework for discharge the statutory duty under the Planning and Compulsory Purchase Act 2004 s.38(6):

[129] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) per Lang J.
[130] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [60].
[131] *Daventry DC v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1146; [2017] J.P.L. 402 at [40(i)].
[132] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [62].
[133] *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37 at [79]; [2017] J.P.L. 1084.
[134] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [63].
[135] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [63].
[136] *Wokingham BC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3158 (Admin) at [60].
[137] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508.
[138] And the policy presumption in NPPF 2019 para.11.
[139] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [11].

- development plan policies often pull in different directions. In such cases, it is a matter for the local authority (or Inspector) to determine which policies should be given greater weight in the "day-to-day application of development plan policy";[140]
- even if a policy is unqualified (e.g. "will not be permitted …"), it cannot automatically operate so as to trump or override supportive policies;[141]
- a development plan must always be read as a whole and unless one policy is expressly written so as to be given primacy over other policies, the decision-maker must come to an overall planning judgment.[142] One observes in passing that it is exceptionally unlikely for any local plan to include a policy the breach of which overrides compliance with other policies. Indeed, it would be difficult to see how such a policy would meet the "soundness" tests under the NPPF;
- nonetheless, it remains possible for conflict with a single policy in a development plan to result in conflict with the plan "as a whole".[143]

In this case, the officer concluded that the proposal's compliance with supportive policies prevailed over its conflict with protective landscape policies. On this basis, she found that there was compliance with the development plan "as a whole". The approach adopted by the officer was not irrational or vulnerable to challenge on any public law ground.[144]

Although many of these principles are well familiar to planners, it is a useful re-statement of the approach to the statutory planning balance. Over recent years, parties at appeals especially have often sought to identify a single "key" policy and assert that failure to accord with it automatically creates a conflict with the development plan as a whole; usually a policy restricting development outside settlement boundaries. Although such a scenario may theoretically exist, *Corbett* reminds us that the assessment under the Planning and Compulsory Purchase Act 2004 s.38(6) is both holistic and nuanced.

Green Belt

This last year has produced a crop of Green Belt decisions from the higher courts. We have already examined *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC*, both in terms of its fresh look at Green Belt policy and its wider impact on planning challenges.

Compton Parish Council v Guildford BC[145] certainly created a lot of chatter in the planning sector when it was handed down. The case was a challenge under the Planning and Compulsory Purchase Act 2004 s.113 to the Guildford Local Plan: Strategy and Sites. The local plan proposed the release of Green Belt land in order to meet Guildford's housing needs.

NPPF 2012 para.83[146] allows the alteration of Green Belt boundaries through local plans and only in "exceptional circumstances". The claimant's first point was a reasons challenge albeit that Ouseley J used the opportunity to explore the scope of "exceptional circumstances" under the NPPF. For practitioners involved in the plan-making process and for local planning authorities embarking on the plan-making journey the judge's findings make for obligatory reading:

[140] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [43].
[141] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [40].
[142] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [41] and see *R. v Rochdale MBC Ex p. Milne* [2000] EWHC 650 (Admin) at [48]; and *R. (on the application of TW Logistics Ltd) v Tendring DC* [2013] EWCA Civ 9; [2013] 2 P. & C.R. 9 at [1]; [2013] J.P.L. 832.
[143] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [42], although Lindblom LJ's comments were expressly obiter.
[144] *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [46]–[47].
[145] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin); [2020] J.P.L. 661.
[146] NPPF 2019 para.136.

- "exceptional circumstances" is a broad policy concept not susceptible to dictionary definition. That, held Ouseley J, was a deliberate policy decision;[147]
- the existence (or not) of exceptional circumstances requires the application of planning judgment;[148]
- although whether a particular factor is capable of being an exceptional circumstance is a question of law, such a question is likely to require "some caution and judicial restraint".[149] Cutting off all but the most egregious errors the judge held that: "All that is required is that the circumstances relied on, taken together, rationally fit within the scope of 'exceptional circumstances' in this context".[150] This focus on rationality as the touchstone suggests very strongly that the breadth of discretion for plan-makers is wide indeed;
- the "exceptional circumstances" test is less demanding and rigorous than the "very special circumstances" test under NPPF 2019 para.144.[151] Aside from the plain difference between the two expressions, the judge followed the judgment of Patterson J in *IM Properties Development Ltd v Lichfield DC* at [90]–[91] and [95]–[96],[152] in which she held that there is no requirement that Green Belt land be released as a last resort, nor was it necessary to show that assumptions upon which the Green Belt boundary had been drawn, had been falsified by subsequent events;
- whether "exceptional circumstances" exist is a cumulative question: i.e. each factor relied upon does not need to be, of itself, exceptional. Rather it is the totality of the considerations taken together.[153] In this context, it is not necessary to explain why each factor is itself, or in combination, exceptional;[154]
- importantly, Ouseley J held that "general planning needs, such as ordinary housing" are not excluded from the scope of "exceptional circumstances" and unmet need may "weigh heavily or decisively"[155] in the exercise.

The significance of this judgment, set against the Government's drive to have up-to-date local plans in place by 2023[156] and the inevitable focus on building the country out of the pandemic induced recession, cannot be overstated. Although Green Belt release is almost always controversial, the *Guildford* case provides local authorities with significantly greater leeway to meet their needs in the Green Belt without experiencing a paralysing sense of legal jeopardy.

NPPF para.136 provides that:

> "Where a need for changes to Green Belt boundaries has been established through strategic policies, detailed amendments to those boundaries may be made through non-strategic policies, including neighbourhood plans."

R. (on the application of Bond) v Vale of White Horse DC[157] was a highly technical challenge, the facts of which require something of a run up. Mr Bond owned land which was identified in the text of the Vale of White Horse Local Plan as being within the Oxford Green Belt. This followed a Green Belt review,

[147] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [68].
[148] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [68], following *Calverton Parish Council v Nottingham CC* [2015] EWHC 1078 at [20] per Jay J.
[149] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [69].
[150] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [69].
[151] NB—the same test applied in NPPF 2012.
[152] *IM Properties Development Ltd v Lichfield DC* [2014] EWHC 2440 (Admin); [2014] P.T.S.R. 1484.
[153] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [71].
[154] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [74].
[155] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin) at [72].
[156] See the Government's "Planning for the Future" proposal at para.11: *https://www.gov.uk/government/publications/planning-for-the-future* [accessed 15 July 2020].
[157] *R. (on the application of Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin); [2020] J.P.L. 597.

which included an assessment of whether Mr Bond's land should be removed from the Green Belt. The review and the Examining Inspector determined that it should not be removed. However, due an administrative error in drawing up the Local Plan Policies Plan, Mr Bond's land was shown as falling outside the Green Belt.

Having recognised this error, the Council's Cabinet resolved to alter the Policies Plan to reflect the text of the Local Plan. Unsurprisingly, Mr Bond was disappointed in this outcome and challenged the alteration of the Policies Plan on the basis that it could only be amended if the procedures in the Planning and Compulsory Purchase Act 2004 and Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 Regulations")[158] were followed.[159] Lang J reviewed the complex statutory and regulatory framework governing the production, examination and adoption of local plans. In doing so, she drew attention to reg.6 of the 2012 Regulations which provides a definition of "local plan" and concluded that an adopted policies map[160] does not form part of a local plan. This conclusion is consistent with *Fox Land & Property v Secretary of State for Communities and Local Government*,[161] *Jopling v Richmond upon Thames LBC*[162] and is reflected in the "Planning Inspectorate Procedural Practice in the Examination of Local Plans",[163] which all make clear that policies maps illustrate geographically the application of policies in the relevant plan. In this regard, it is for the local planning authority to rectify any inconsistencies between the policies and the policies map since an Examining Inspector has no power to recommendation alterations to the map. Consequently, held the judge, there is no requirement to follow the elaborate procedural requirements for amending a local plan laid out in the 2012 Regulations if the exercise is to amend a policies map which does not properly reflect policies in the plan itself.[164]

What then is the local authority's power to alter a policies map? In *Bond*, the court held that the powers in the Planning and Compulsory Purchase Act 2004 ss.23(1), 23(5) and 26(1) were sufficiently wide to allow alterations to the map.[165]Section 23(1) provides that:

> "(1) The local planning authority may *adopt a local development document* (other than a development plan document) either as originally prepared *or as modified* to take account of—
>
> (a) any representations made in relation to the document;
>
> (b) any other matter they think is relevant." (emphasis added)

Here it is necessary to untangle some of the terminology surrounding plan-making. A local plan is a "development plan document"[166]*as well as* a "local development document".[167] Put another way, a DPD is a type of LDD. However, even though a policies map is a "local development document"[168] it is *not* a development plan document[169] or a local plan.[170] As such, it is possible to modify a policies map under the Planning and Compulsory Purchase Act 2004 s.23(1) to reflect changes to the policies in the local plan

[158] Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767).

[159] *R. (on the application of Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin) at [29].

[160] Identified in Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767) reg.5(1)(b).

[161] See *Fox Land & Property v Secretary of State for Communities and Local Government* [2015] EWCA Civ 298 at [28].

[162] See *Jopling v Richmond upon Thames LBC* [2019] EWHC 190 (Admin) at [14], [15], and [20]; [2019] J.P.L. 830.

[163] "Planning Inspectorate Procedural Practice in the Examination of Local Plans" para.5.24 at *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/813316/Procedure_Guide_for_Local_Plan_Examinations_June_2019_-_Final.pdf* [accessed 15 July 2020].

[164] *R. (on the application of Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin) at [58].

[165] *R. (on the application of Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin) at [57].

[166] Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767) reg.2(1) and reg.6.

[167] Planning and Compulsory Purchase Act 2004 s.17(8); Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767) reg.5(1) and (2).

[168] Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767) reg.(1)(b).

[169] *R. (on the application of Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin) at [50].

[170] Planning and Compulsory Purchase Act 2004 s.17(8); Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012/767) reg.6.

(which is a development plan document, remember) and may do so "by resolution of the authority".[171] The outcome in this case reflects common sense but it does shine a light on the labyrinthine procedures which parties have to navigate in order to reach the promised land of an adopted local plan.

Interestingly, the claimant relied upon the presumption of regularity of the policies map: i.e. if it was a document produced by the local authority following the conclusion of the examination process, it must be deemed to be accurate. However, Lang J held that the obvious inconsistency between the Local Plan's policies and the clear evidence that the Inspector did not recommend removing Mr Bond's land from the Green Belt was sufficient to displace any such presumption.[172]

R. (on the application of Haden) v Shropshire Council[173] concerned a proposed sand and gravel quarry covering some 44-odd hectares of land in the Shropshire Green Belt. The principal challenge to the local authority's grant of planning permission centred on the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations")[174] but included an allegation that the council had misinterpreted NPPF para.146,[175] which includes minerals extraction in the category of appropriate development, provided that it preserves openness and does not conflict with the purposes of including land within the Green Belt. The Officer's Report was criticised especially for concluding that although there would be "specific localised impacts" on openness, the proposal would nonetheless "preserve openness".[176] Although the Supreme Court's judgment in *Sam Smith*'s had not yet been handed down, Stuart-Smith J agreed with Sir Ross Cranston (who refused permission on the papers) that the planning authority was "entitled to conclude that the impact of the proposal on the openness of the Green Belt would not be harmful when not widespread".[177] It would, therefore, appear that notwithstanding some level of harm to Green Belt openness can still be preserved. Whether that is so depends on the circumstances of the case and on planning judgment.

Our penultimate Green Belt case is one for the "planoraks", not least because it was handed down by the Court of Appeal remotely in accordance with the Covid-19 protocol.

The central question in *Hook v Secretary of State for Housing, Communities and Local Government*[178] was as follows:

> "In an appeal against the refusal of planning permission for the retention of a 'dwelling', did the inspector err in law in concluding that the 'dwelling' was not a '[building] for agriculture' and was thus 'inappropriate development' in the Green Belt—despite it being suggested by the appellant that a condition could be imposed to restrict its occupancy to a person working in agriculture on the land?"[179]

This case raised two main issues. First, whether a building formally erected and used as a dwelling could be treated as a building "for agriculture" under the NPPF.[180] The second issue was the extent to which the Inspector was obliged to consider an agricultural occupancy condition suggested by the appellant, which she said would ensure that the building would be a "building for agriculture" and thereby appropriate in the Green Belt.

[171] Planning and Compulsory Purchase Act 2004 s.23(5).
[172] *R. (on the application of Bond) v Vale of White Horse DC* [2019] EWHC 3080 (Admin) at [49].
[173] *R. (on the application of Haden) v Shropshire Council* [2020] EWHC 33 (Admin).
[174] Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824).
[175] This is the same provision considered in *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3, which post-dated *R. (on the application of Haden) v Shropshire Council* [2020] EWHC 33 (Admin).
[176] See *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 at [50] for the claimant's submissions.
[177] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 at [59].
[178] *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486.
[179] *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486 at [1] per Lindblom LJ.
[180] See NPPF 2012 para.89.

On the first issue, the Inspector concluded that the building was not agricultural, nor was it ancillary to an agricultural use.[181] As such, it constituted the erection of a new building in the Green Belt and was therefore inappropriate. The appellant did not challenge this conclusion.[182]

It was on the second issue that the Court of Appeal concentrated. The court concluded that once the Inspector found that the dwelling was not a "building for agriculture" or ancillary to an agricultural use, he was under no obligation to consider the imposition of an agricultural occupancy condition. In fact:

> "The suggested agricultural occupancy condition related to a different development, which—as he found on the evidence before him—did not exist, and was not going to exist. It depended on the building being a '[building] for agriculture', in the sense of the policy in paragraph 89 of the NPPF."[183]

In simple terms, held the court, once the Inspector concluded that the development was not and would not become a "building for agriculture", he was right to discount the imposition of a condition. Recalling the principle that a condition must fairly and reasonably relate to the development permitted, Lindblom LJ concluded that such an occupancy condition could only be imposed *if* the Inspector had concluded the building was agricultural: i.e. its status (or not) as a "building for agriculture" was determinative.[184]

We shall finish this section with *Wedgewood v York CC*[185] or the "doughnut case". York's Green Belt is a philosophical conundrum. What is it? Where does it come from? How do we know it's really there? The judge met these issues head on.

The claim concerned a challenge to the grant of permission for an extension to an existing neurological rehabilitation centre. The Council, in a delegated decision, concluded that the application site did not lie within the "general extent" of the York Green Belt. The claimant asserted that the Council had erred in concluding that the site was not located within the Green Belt. Ordinarily, given that the precise boundaries of Green Belts are fixed through local plans,[186] this would not be a challenge open to a claimant. However, the history of the York Green Belt is complex[187] so that at present, the only policies in York's development plan are two saved policies in the Yorkshire and Humber Regional Spatial Strategy. These policies established the "general extent" of the Green Belt, whose detailed inner boundaries were to be established in a later development plan document.[188]

Reassuringly for the local planning authority, the judge held that the RSS established the "principle" of a Green Belt around York[189] but that it was a matter of planning judgment whether a particular parcel of land fell within or outside the Green Belt in any given case.[190]

There are 14 references in the judgment equating the York Green Belt to a doughnut ring.[191]

Development Plan Challenges

With the exception *Compton Parish Council v Guildford BC*,[192] which concerned a challenge to the Guildford Local Plan, the attention of the High Court has mainly been on NDPs this year. Indeed, since

[181] See *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486 at [8]–[13] of the Inspector's decision letter, cited at [23].
[182] *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486 at [42].
[183] *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486 at [41] and see [51].
[184] *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486 at [51].
[185] *Wedgewood v City of York Council* [2020] EWHC 780 (Admin).
[186] See, e.g. NPPF para.136.
[187] See *Wedgewood v York CC* [2020] EWHC 780 (Admin) at [12]–[16] for a summary of the history of attempts to identify a Green Belt around York.
[188] See *Wedgewood v York CC* [2020] EWHC 780 (Admin) at [16], which set out policies YH9C and Y1C of the RSS.
[189] *Wedgewood v York CC* [2020] EWHC 780 (Admin) at [21].
[190] The Upper Tribunal (Land Chamber) has had to grapple this year with a similar Green Belt conundrum is *Leech Homes Ltd v Northumberland CC* [2020] UKUT 150 (LC), a case relating to the Green Belt around Morpeth.
[191] The author acted for the City of York in this case and offered "Polo mint" as a more apposite description of the Green Belt, suggesting a greater degree of permanence than the deep-fried confection.
[192] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin); [2020] J.P.L. 661.

their introduction through the Localism Act 2012, challenges to NDPs have provided a consistent source of jurisprudence (and work for planning lawyers).

*R. (on the application of Wilbur Developments Ltd) v Hart DC*Wilbur[193] was a judicial review claim in which a developer challenged the acceptance of a NDP Examiner's report and the local authority's decision to put the Hook NDP to a referendum. The developer was unhappy with the NDP's "green gap" and "identified views" policies, each of which reduced the prospects of obtaining planning permission on a development site.

The *Wilbur* decision is worthy of consideration for a number of reasons. The claimant relied heavily on NPPF 2019 para.31, which advises that:

> "the preparation and review of all policies should be underpinned by relevant and up-to-date evidence. This should be adequate and proportionate, focused tightly on supporting and justifying the policies concerned …"

The claimant asserted that the Council had failed to pay regard to the fact that there was insufficient evidence to justify the green gap and identified views policies in the NDP, especially given the comments by the Inspector examining the Hook Local Plan to a similar effect in relation to green gap proposed in the Local Plan. This, they said, was a breach of NPPF para.31. Lang J presaged her assessment with the following sentence: "The Court must be alert to the risk that a legal challenge is being used as a covert way of impermissibly reviewing the planning merits, which I consider to be the case here".[194] The judge then held that the approach to reading Examiner's reports into a NDP should mirror that applied to Inspectors' reports: they should be "read fairly and in good faith, and as a whole, and in a straightforward down-to-earth manner, without excessive legalism or criticism".[195] Next the court held that the principle in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* at [24]–[26][196] that the courts should recognise the expertise of the specialist planning inspectors and work from the presumption that they will have understood the policy framework correctly applies equally to Examiners of NDPs.[197]

Having set out these principles, it was tolerably clear that it would require a glaring legal error for the court to intervene. It did not, finding that the Examiner (on whose report the Council relied) must be presumed to be aware of the relevant policies at play[198] and was entitled as a matter of planning judgment to reach the conclusions he did. It is worth noting that the "basic conditions" test in TCPA 1990 Sch.4B para.8(2) requires Examiners and, by extension, local planning authorities to "have regard" to national policy, which suggests a relatively low bar for a lawful decision.[199]

A further ground was that the Examiner had not considered any "reasonable alternatives"[200] to the green gap. Although the claimant had raised this matter in their representations, the Examiner had not addressed it in his report. Lang J noted that where NDPs do not propose to allocate land for development they may not require SEA[201] and that even if SEA was carried out the Examiner enjoyed a discretion to consider whether or not something was a reasonable alternative.[202]

R. (on the application of Lochailort Investments Ltd) v Mendip DC[203] followed a similar narrative arc to the *Wilbur* judgment and was also delivered by Lang J. It was a judicial review brought by a local

[193] *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin).
[194] *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin) at [63].
[195] *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin) at [65].
[196] *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865.
[197] *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin) at [67].
[198] *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin) at [68].
[199] On this point see *R. (on the application of Crownhall Estates Ltd) v Chichester DC* [2016] EWHC 73 (Admin) at [29(iii)].
[200] As required by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations").
[201] See *R. (on the application of Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin) at [115] and PPG para.27 ID: 11-027-20190722.
[202] On this issue see also *R. (on the application of DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311 (Admin) at [105]–[107].
[203] *R. (on the application of Lochailort Investments Ltd) v Mendip DC* [2020] EWHC 1146 (Admin). The decision has been appealed, see *https://casetracker.justice.gov.uk/getDetail.do?case_id=20200812* [accessed 15 July 2020], albeit with a hearing date of January 2022.

developer against the decision of Mendip DC to accept the recommendations of the Examiner for the draft Norton St Philip NDP to proceed to a referendum.

In a reflection of her judgment in *Wilbur*, Lang J repeated the broad messages as to the discretion given to Examiners and local authorities in considering NDPs, to the *Hopkins Homes* principle of deference to expert planners, the approach to reading Examiners' report and a strong note of caution that judicial review should not be used as a cloak to re-examine the planning merits.[204]

It was contended that the Examiner had failed to have adequate regard to the NPPF policy concerning Local Green Space ("LGS").[205] NPPF para.99 requires the designation of a LGS is "consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services" and NPPF para.100 requires that "demonstrably special to a local community and holds a particular local significance". It was asserted that the Examiner did not pay adequate regard to those policy requirements, especially as the Local Plan required the delivery of 505 houses in area of the district within which Norton St Philip was located. It is not entirely necessary to recite in detail the reasons why the judge rejected the claimant's arguments. In essence, she concluded that the Examiner had properly understood her role and the LGS policy tests in the NPPF. Indeed, the Examiner had expressly referred to NPPF paras 99 and 100 as well as the substance of their requirements in her report.[206]

Lochailort is separately remarkable for apparently being the first judgment of the Planning Court both heard remotely and for which the judgment was handed down during the period of national lockdown, which started the day before the hearing.

As a postscript, each of the preceding claims related to decisions of local planning authorities to accept recommendations of NDP Inspectors. Neither claimant waited until the referendum was held or the NDP "made". In each case, interim relief was granted to prevent any further steps being taken in the plan-making process. The approach adopted was plainly influenced by *R. (on the application of Oyston Estates Ltd) v Fylde BC*,[207] which held that a challenge which is in substance an attack on "Stage 1" of the plan-making process[208] must be brought within six weeks of that decision; it cannot await the making of the NDP itself. The Town and Country Planning Act 1990 s.61N does not empower the court to extend time.

Heritage assets

With the exception of *Dill*, the most notable decision concerning heritage assets was Safe *Rottingdean Ltd v Brighton and Hove CC*.[209]*Safe Rottingdean* is a useful illustration of the intellectual contortions sometimes required to gain a proper understanding of the Listed Buildings Act 1990 ss.66 and 72 and NPPF 2019 paras 193–196.[210] It was a challenge to the grant of planning permission for 93 houses on a site where designated heritage assets would be affected. The Officer's Report concluded that there would be some harm to the setting of a listed building and conservation area through re-development of playing fields but the scheme would involve the conversion and re-use of a Grade II listed building (and associated curtilage listed buildings) that had lain empty and were derelict.[211] The redevelopment of the listed building was determined to have a positive effect on the building, its setting and the setting of the conservation area. Although the report did not find expressly that there was no conflict with local plan policies HE3

[204] *R. (on the application of Lochailort Investments Ltd) v Mendip DC* [2020] EWHC 1146 (Admin) at [88]–[94].
[205] *R. (on the application of Lochailort Investments Ltd) v Mendip DC* [2020] EWHC 1146 (Admin) at [86].
[206] *R. (on the application of Lochailort Investments Ltd) v Mendip DC* [2020] EWHC 1146 (Admin) at [141].
[207] *R. (on the application of Oyston Estates Ltd) v Fylde BC* [2019] EWCA Civ 1152; [2020] J.P.L. 47.
[208] Stage 1 involves consideration by the local planning authority of the Examiner's report.
[209] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin).
[210] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [196] reads: "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."
[211] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [42].

and HE6 relating to heritage assets, Ouseley J held by inference that that was the obvious conclusion.[212] In other words, the Council had weighed the positive and negative effects on the relevant heritage assets and concluded that *overall* there was no harm. It was the framework for the Council's decision which the claimant challenged.

Given the context, the judgment is necessarily complex but it is possible to distil a number of important points to guide practitioners. First and perhaps most importantly for practitioners, Ouseley J clarified the approach to be taken to the "heritage balance". His focus was on the statutory duties in the Listed Buildings Act 1990 ss.66 and 72 but the analysis should apply equally to the NPPF's heritage policies. The essence of the judge's reasoning is as follows.

First, the Listed Buildings Act 1990 requires "considerable importance and weight" to be given to achieving the relevant statutory duty: e.g. to preserve the listing building, its features and setting. It is the achievement of the statutory duty to which the importance is attached, not simply the avoidance of harm which may be caused by development.[213] With this in mind, it would be irrational to assess the heritage benefits, then the heritage harms but to set aside the beneficial aspects where there is *some* harm.[214] In simple terms, a "stage 1" assessment is required, which weighs the heritage harms and the heritage benefits before coming to an overall conclusion on whether there is net heritage harm or a net heritage benefit. If, as Brighton's officer concluded, there is a net heritage benefit which achieves the statutory duty, in such circumstances "considerable weight has to be given to the overall benefits".[215]

Secondly and in the NPPF context, Ouseley J took a similarly robust approach in response to the assertion that NPPF para.193 (requiring "great weight" to be given an asset's conservation) was ignored:

> "Great weight, under the Framework, had to be given to the conservation and enhancement of the listed building, and its setting; and the preservation and enhancement of the Conservation Area, and its setting. It was; the benefits to each were very significant. They were far more significant than the harm. The fallacy permeating all of [the Claimant's] submissions is that the policies are only concerned with harm, and ignored benefits."[216]

Finally, the judge examined the well-known case law in relation to the Listed Buildings Act 1990 ss.66 and 72[217] the effect of which is as follows: the degree of harm is a matter of judgment for the decision-maker, but if there is harm, he cannot give it such weight as he deems fit, but instead had to give it considerable weight. But that weight is not uniform and may vary with the degree of harm to the value of the asset.[218] It was also held that there is no requirement expressly to refer to the statutory duties under the Listed Buildings Act 1990 since it was the discharge of the duty in substance that mattered.[219] In this respect, the jurisprudence has advanced somewhat since *R. (on the application of Hughes) v South Lakeland DC*[220] in which this author attempted (unsuccessfully) to argue that the recitation and application of the Framework's heritage policies would be sufficient to discharge the duty under the Listed Buildings Act 1990 s.72(1) even where there was no express reference to the statutory provisions.

Safe Rottingdean is an extremely useful reckoner for the approach to be adopted to schemes which may have both positive and negative effects on heritage assets. It is sometimes the case that *any* harm to a designated heritage asset is assumed to trigger both the statutory and policy presumptions against planning permission with any heritage benefits only being weighed in the balance to overcome the presumption.

[212] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [58] and [61].
[213] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [86].
[214] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [86].
[215] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [87].
[216] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [99]. The claimant's argument also seemed contradict how "conservation" is defined in the NPPF glossary. "Conservation" involves managing change, not preventing it.
[217] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [73]–[77].
[218] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [76].
[219] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [85].
[220] *R. (on the application of Hughes) v South Lakeland DC* [2014] EWHC 3979 (Admin).

This judgment reminds practitioners to weigh the heritage impacts, positive and negative, *before* concluding whether there is a net positive or a net negative effect on the heritage asset(s) overall.

Environmental Impact Assessment

There was a time not so long ago that challenges relying upon alleged breaches of the EIA Regulations were commonplace. They have not dried up but there are substantially fewer of them.

Kenyon v Secretary of State for Housing Communities & Local Government[221] involved the judicial review of a screening direction given by the Secretary of State that a residential development proposal of 150 houses was not "EIA development".[222] It was, noted the court, "a routine development of residential houses. There was nothing unusual about the proposed development".[223]

The judgment is necessarily fact specific but does tell a cautionary tale about attempts to couch challenges on the merits in the language of familiar public law concepts. The expression "unduly forensic and nit-picking" appeared in the Court of Appeal's judgment,[224] continuing a line of similar observations by the High Court disappointed with the over legalisation of planning challenges.

A number of grounds alleged that the Secretary of State reached a conclusion for which there was no evidential basis. By way of introduction, the court remarked that the proponent of such an argument "faces an uphill task", made more difficult by the fact that an EIA screening direction is a "preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise".[225] In so finding, the court relied upon the Court of Appeal in *R. (on the application of Bateman) v South Cambridgeshire DC*[226] and *R. (on the application of Loader) v Secretary of State for Communities and Local Government*,[227] the latter judgment confirming that a decision as to whether a proposed development will have a significant effect on the environment is only amenable to challenge on *Wednesbury* grounds.[228] On the facts of this case, the appellant was wholly unsuccessful in surmounting this high hurdle.

The other aspect of the judgment which merits some examination is the approach to the "precautionary principle" the source of which is Directive 2011/92.[229] The appellant argued that due to an "inevitable uncertainty" about the level of air pollution created by the development, in "screening out" the proposal, the Secretary of State failed to have regard to the precautionary principle. This contention was given short shrift for "The precautionary principle will only apply if there is 'a reasonable doubt in the mind of the primary decision-maker' (see Beatson LJ in *Evans*)".[230] As such, "where there was no doubt in the mind of the relevant decision-maker, there is no room for the precautionary principle to operate".[231]

Kenyon is a clear indication, if one were required, that the scope for challenging high level environmental judgments under the EIA Regulations (whether a screening opinion or a screening direction) is very narrow indeed and the practitioner embarking on such a challenge should be mindful of the "uphill task" that will lie in front of them.

In *R. (on the application of XSWFX) v Ealing LBC*,[232] the London Borough proposed to lease land to QPR football club to operate a training facility. Planning permission was granted for its redevelopment, albeit subject to a condition requiring the submission of an Ecological Construction Method Statement

[221] *Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302.
[222] The Regulations in place at the material time were the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824).
[223] *Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302 at [48].
[224] *Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302 at [45].
[225] *Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302 at [43].
[226] See *R. (on the application of Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 at [20] and [40]; [2011] N.P.C. 22.
[227] *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869; [2012] J.P.L. 1509.
[228] See *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [31].
[229] Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [1992] OJ L26/1.
[230] *Evans v Secretary of State* [2013] EWCA Civ 114; [2013] J.P.L. 1027.
[231] *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [66].
[232] *R. (on the application of XSWFX) v Ealing LBC* [2020] EWHC 1485 (Admin).

("ECMS") and an Ecological Management Plan ("EMP") prior to the commencement of development. The planning application was not accompanied by an Environmental Statement. It was accepted that the local planning authority did not carry out any screening under the EIA Regulations prior to discharging the ECMS and EMP conditions.[233]

Lang J dealt with the point of principle briefly. Screening for EIA covers not simply "development consents" but also "subsequent applications" as defined in the EIA Regulations reg.2, which include applications for approval required by or under a condition.[234] Furthermore, screening opinions should be kept under review: *R. (on the application of Champion) v North Norfolk DC*.[235] The Council failed to discharge this duty and conceded as much.[236]

The focus then shifted to the ambit of the Senior Courts Act 1981 subss.31(3C), (3D) and (3E) in the context of EIA challenges: i.e. was it highly likely that the conditions would have been discharged even if the Council had provided screening opinions. Ultimately, the judge held that the test in the Senior Courts Act 1981 was not satisfied and granted the claimant relief. In doing so, the court noted that in "EU law the bar is higher in that the burden of proof is on the defendant which is required to show that the decision would not have been different without the procedural defect invoked by the claimant".[237] Without making a formal finding, Lang J did raise the question as to whether in the case of a breach of EU law, the Senior Courts Act 1981 s.31 prevails over the court's residual discretion to refuse relief.[238]

This case did have one extraordinary aspect. An anonymity order protecting the claimant's identity was continued where there was evidence of threats made to residents who opposed the development. The judge emphasised that the claimant's identity made no difference to the claim, citing *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust*.[239]

Such orders are not regularly made albeit that they are not unheard of in the planning sphere.[240] Amongst the limited examples perhaps most amusing is the judgment *Hillman v London CC*,[241] a compulsory purchase case, which refers to the site as "X" to maintain its anonymity.

R. (on the application of Swire) v Secretary of State for Housing, Communities and Local Government[242] concerned the proposed redevelopment of a site (within an AONB) used during the 1990s for the disposal of cattle infected with bovine spongiform encephalopathy or "Mad Cow Disease". It was common ground that the site was contaminated but the developer proposed a comprehensive remediation strategy. The Secretary of State subsequently gave a screening direction pursuant to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017[243]reg.5(3) and concluded, having regard to the proposed mitigation, that EIA was not required.

In concluding that the scheme was unlikely to have significant effects on the environment simply because all such effects were, in his view, likely to be eliminated by mitigation measures that would be secured by planning conditions, the claimant contended that the Secretary of State had acted unlawfully. The starting point for the court was the established position that that proposals for remediation or mitigation

[233] *R. (on the application of XSWFX) v Ealing LBC* [2020] EWHC 1485 (Admin) at [14].
[234] See Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) regs 5–9.
[235] *R. (on the application of Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 W.L.R. 3710 at [32] and [43] to [47].
[236] *R. (on the application of XSWFX) v Ealing LBC* [2020] EWHC 1485 (Admin) at [15].
[237] *R. (on the application of XSWFX) v Ealing LBC* [2020] EWHC 1485 (Admin) at [17].
[238] *R. (on the application of XSWFX) v Ealing LBC* [2020] EWHC 1485 (Admin) at [17].
[239] *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB); [2019] Med. L.R. 250.
[240] See *AZ v Secretary of State for Communities and Local Government* [2012] EWHC 3660 (Admin); [2013] J.P.L. 713, where personal data of the anonymous Claimant (including psychiatric evidence) was relevant to the planning decision and anonymity was granted with reference to the best interests of the children; and *South Gloucestershire Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 74; [2016] J.P.L. 798, where the anonymity order was made again because of the individual's personal data being relevant (serious mental illness) and in the interests of the individual's son.
[241] *Hillman v London CC* (1952–53) 3 P. & C.R. 257.
[242] *R. (on the application of Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin).
[243] Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571).

measures can be taken into account in the determination of whether EIA was required.[244] However, this does not entitle a decision-maker to simply assume that effective mitigation will take place. Measures "whose nature, availability and effectiveness are already plainly established and plainly uncontroversial" may be taken into account but if "prospective remedial measures are not plainly established and not plainly uncontroversial" then the case is likely to require EIA.[245]

In this case, even though there was evidence before the Secretary of State as to the likely BSE contamination and some measures to remediate any contamination, it was also accepted that this issue required further investigation and assessment.[246] In particular, there was no expert evidence or risk assessment on the nature of BSE contamination, nor had the specific remediation measures been identified. In taking this approach, the Secretary of State committed the same errors that infected the decision in the *Gillespie* case.

Swire provides an interesting counterpoint to the *Kenyon* judgment considered earlier in this section. Whilst the characterisation of EIA challenges as an "uphill task" holds good, *Swire* is a gentle warning to those decision takers who pay less than full attention to the rigours of the screening exercise.

Habitats

In *R. (on the application of Hudson) v Legoland Windsor Park Ltd*,[247] Mr Hudson, in his role as Chair of Berkshire CPRE, challenged the grant of permission for the construction of a holiday village and other works at Legoland Windsor.

It was common ground between the parties that an Appropriate Assessment ("AA") should have been undertaken under the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations 2017")[248] given the potential adverse effects on a Special Area of Conservation ("SAC").[249] Nonetheless, the Council submitted that an AA had in substance, been undertaken by the process of engagement between its planning officers, Natural England, and Legoland's consultants, which culminated in the assessment set out in the officer's report.[250] In the alternative, it was contended that relief should be refused because it was highly likely that the outcome would have been the same.[251] Lang J rejected the first argument but declined to order relief because the Senior Courts Act test was satisfied. The factors taken into account by the judge included the extensive assessments carried out, assessment of the effectiveness of mitigation measures, the lack of objection from Natural England, the extensive public consultation and the consistency of the Council's assessment with the requirements of the Habitats Directive.[252] *Hudson* shows that the failure to carry out an AA when required will not automatically lead to the quashing of a planning permission but the steps taken by the local planning authority will have to be as close as humanly possible to a "full" AA to successfully fend off an application for relief.

Hudson is noteworthy for a reason unrelated to the Habitats Regulations. The decision to grant planning permission was contrary to the officers' recommendation and the claimant asserted that inadequate reasons were given for the Members' decision. The relevant Committee Meeting was recorded and a transcript

[244] See *Champion v North Norfolk DC* [2015] UKSC 52; [2015] 1 W.L.R. 3710 and Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) Sch.3 para.3(h), which allows decision-makers to take into account "the possibility of effectively reducing the impact".

[245] See *Gillespie v First Secretary of State* [2003] EWCA Civ 400; [2003] Env. L.R. 663 at [46] per Laws LJ, cited in *R. (on the application of Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin) at [76]. See also *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env. L.R. 21 at [38]–[39] and *R. (on the application of Catt) v Brighton and Hove CC* [2009] EWHC 1639 (Admin); [2007] Env. L.R. 6 at [33]–[35].

[246] *R. (on the application of Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin) at [105].

[247] *R. (on the application of Hudson) v Legoland Windsor Park Ltd* [2019] EWHC 3505 (Admin); [2020] J.P.L. 779.

[248] Conservation of Habitats and Species Regulations 2017 (SI 2017/1012).

[249] *R. (on the application of Hudson) v Legoland Windsor Park Ltd* [2019] EWHC 3505 (Admin) at [84].

[250] *R. (on the application of Hudson) v Legoland Windsor Park Ltd* [2019] EWHC 3505 (Admin) at [85].

[251] Relying on Senior Courts Act 1981 s.31(2A).

[252] Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7. See *R. (on the application of Hudson) v Legoland Windsor Park Ltd* [2019] EWHC 3505 (Admin) at [91].

provided. Lang J held that the Council's formal resolution could be supplemented by a transcript of the meeting in order to discharge the common law duty[253] to given reasons.[254] This raises a couple of points. First, during the current pandemic many (if not most) committee meetings are being held remotely by video conference.[255] They are generally recorded. As such, there should be a clear and accurate record of local authority decision making during this period. Secondly, during a Committee Meeting the discussion often ranges far and wide with some Members occasionally changing their views. One wonders whether in all circumstances it will be possible to discern a consensus amongst Councillors on a particular issue. That is not a matter which was examined in *Hudson*. One is reminded here of century the old judgment in *R. v London CC Ex p. London and Provincial Electric Theatres Ltd*[256] where the court said this:

> "With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision of a body like the London County Council dealing with these matters could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably few debates in which some one does not suggest as a ground for decision something which is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being founded on that particular ground is wrong."[257]

In another judgment this year, Ouseley J declined to grant relief despite the Inspector having erred in certain minor respects as to the effect of residential development on the Hamford Special Protection Area and Hamford Water SAC. In *Thorpe Hall Leisure Ltd v Secretary of State for Housing, Communities and Local Government*,[258] in dismissing the claimant's planning appeal the Inspector had misconstrued some Natural England interim advice. Despite finding that the Inspector had erred in her finding that harm to the European designated sites could not be excluded, the judge was satisfied that the Inspector's decision would ultimately have been the same had she not erred in her interpretation of Natural England's interim advice because the proposed development conflicted with important policies in the development plan so the tilted balance in favour of the development would still have been disapplied.[259] It is interesting to note that in the exercise of his discretion on relief the judge made some comments which might be construed as relating to the planning merits of the scheme, observing that even without the legal error identified "the proposal would still have faced major objections".[260] It may be said that this is unavoidable where the court has to decide whether the outcome inevitably would have been the same, i.e. without having some notion of the planning merits, one cannot conclude what impact the legally erroneous part of the decision would have had on the outcome.

Local authority decision making

During the Covid-19 related restrictions on "in person" meetings, local planning authorities have had to be agile and adaptable. They are now empowered to meet remotely and vote virtually.[261] At the time of writing, there are no judgments of the Planning or other Courts based on procedural challenges to lockdown

[253] *R. (on the application of CPRE Kent) v Dover DC* [2017] UKSC 79; [2018] 1 W.L.R. 108 at [59]–[60]; [2018] J.P.L. 653.
[254] *R. (on the application of Hudson) v Legoland Windsor Park Ltd* [2019] EWHC 3505 (Admin) at [59] and [61].
[255] See the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (SI 2020/392).
[256] *R. v London CC Ex p. London and Provincial Electric Theatres Ltd* [1915] 2 K.B. 466.
[257] See also *R. (on the application of Oadby Hilltop and Meadow Conservation Area Assoc) v Oadby and Wigston BC* [2011] EWHC 60 (Admin) at [38] to [40].
[258] *Thorpe Hall Leisure Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 44 (Admin).
[259] *Thorpe Hall Leisure Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 44 (Admin) at [131].
[260] *Thorpe Hall Leisure Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 44 (Admin) at [131].
[261] Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (SI 2020/392).

decision making but they are perhaps inevitable. As such, this collection of cases relates to decisions "BC", or "Before Covid".

In *R. (on the application of Campaign to Protect Rural England) v Herefordshire Council*,[262] there was a challenge to the grant of planning permission for 37 hectares of polytunnels and caravan accommodation for 350 seasonal workers was dismissed. The grounds of challenge concerned legitimate expectation, flaws in the Officer's Report and procedural unfairness.

The first ground was that the Officer had wrongly advised the Committee that no weight could be given to the Council's Polytunnels Planning Guide ("POPG") because it was not a SPD. However, it was clear in the context of the report that the officer's meaning was that although the POPG's purpose was to give guidance, it did not have a special status as would a formal SPD. This meaning was rational and justified and precluded argument that failure to comply with something in the POPG of itself would be a breach of policy of procedure. The reading of the Officer's Report may be said to be particularly benevolent in this case given that the Report expressly advised that the POPG "cannot be attributed weight in the decision-making process".[263] However, the judgment presents an object lesson in reading an Officer's Report as a whole in a non-legalistic way. Stuart-Smith J held that to ignore the surrounding words and context of the Report was "to adopt a legalistic literalism which is quite out of place".[264]

A second argument was that contents of the POPG gave rise to a legitimate expectation which had been breached by the Council in terms of evidence that would be required when considering an application for polytunnels. Stuart-Smith J held that the relevant statements did not give rise to an enforceable legitimate expectation. They were not framed as prescriptive policy requirements that had to be satisfied in all cases.[265] In any event, the substance of the concerns had been met by the information provided. A reminder that the bar for showing that a policy document establishes a substantive legitimate expectation is a high one.

Risby v East Hertfordshire DC[266] was a judicial review of a decision by East Hertfordshire DC to grant planning permission to itself for a multi-storey car park and other development on land in a conservation area in Bishop's Stortford. The case was a sensitive one, not only because the Council owned the site but also a previous planning permission had been quashed by the Planning Court by consent. The previous decision was quashed because the Council accepted that it did expressly address "appearance" of the conservation area which is one of the matters that must be addressed under the Listed Buildings Act 1990 s.72(1). It is important to note that in the quashed decision, the Council accepted that there would be some harm to the character and appearance of the conservation area. The officer reporting on the second scheme concluded that there would be no harm.[267]

This was another case where a transcript of the relevant committee meeting was submitted in evidence and referred to in the judgment of the court.[268]

One of the claimant's points was that the Council's finding of heritage harm in relation to the first scheme was a material consideration in determining the second application. Whilst the Deputy Judge held that the Council's previous consideration of the issue was material,[269] it had done enough to demonstrate that it had taken the formerly held view into account. Interestingly, the Deputy Judge suggested that the previous advice was so confused that it was difficult to say whether there was actually a clear finding on heritage harm at all.[270] For practitioners, especially those in local government, this judgment underlines: (i) the importance of clear and reasoned reports, especially in relation to heritage matters; and (ii) the need

[262] *R. (on the application of Campaign to Protect Rural England) v Herefordshire Council* [2019] EWHC 3458 (Admin).
[263] *R. (on the application of Campaign to Protect Rural England) v Herefordshire Council* [2019] EWHC 3458 (Admin) at [27].
[264] *R. (on the application of Campaign to Protect Rural England) v Herefordshire Council* [2019] EWHC 3458 (Admin) at [31].
[265] *R. (on the application of Campaign to Protect Rural England) v Herefordshire Council* [2019] EWHC 3458 (Admin) at [35]–[36].
[266] *Risby v East Hertfordshire DC* [2019] EWHC 3474 (Admin).
[267] Officer's Report para.9.5, cited in *Risby v East Hertfordshire DC* [2019] EWHC 3474 (Admin) at [21].
[268] *Risby v East Hertfordshire DC* [2019] EWHC 3474 (Admin) at [22].
[269] *Risby v East Hertfordshire DC* [2019] EWHC 3474 (Admin) at [44].
[270] *Risby v East Hertfordshire DC* [2019] EWHC 3474 (Admin) at [45].

to take into account officer advice on previous similar schemes and, if that advice has changed, a clear explanation as to why.

Finally on this topic, we turn to the Holborn Studios litigation, which is a saga—*R. (on the application of Holborn Studios Ltd) v Hackney LBC*.[271] Holborn Studios are a leaseholder of buildings on Eagle Wharf Road and have fought a campaign to prevent the freeholder redeveloping the site. A previous planning permission was quashed on the grounds of a failure to consult.[272] Although there are a number of interesting points for planning lawyers in this latest judgment by Dove J, it is the implications for local authority decision making that makes the case fit neatly into this section.

Prior to the committee meeting, Holborn Studios Managing Director and their solicitors wrote to Members of the planning committee but these representations were turned away on the basis that planning members were advised to resist being lobbied by either applicant or objectors[273] and pass on such material to officers with an injunction not to read it.[274]

In what appears to be the first judgment which has directly addressed the right of the public to lobby elected councillors, Dove J concluded that the Council's policy breached the European Convention on Human Rights art.10[275] (and the common law):

> "Receiving communications from objectors to an application for planning permission is an important feature of freedom of expression in connection with democratic decision-taking and in undertaking this aspect of local authority business."

The Council's pro forma notification letters advised against interested parties writing to Members of the committee. This, held the judge, "impeded the freedom of expression of a member of the public".[276] Since this judgment was handed down on 11 June 2020, one can imagine that many local authorities are reviewing their standard correspondence and advice to Members.

The planning permission was not quashed on this ground because the judge held that Holborn Studios had made the points contained in the excluded correspondence at the Committee Meeting.

The permission was, however, quashed because the Council failed to make affordable housing viability assessments available to Holborn Studios or the public. These were background papers and given government policy and guidance on transparency, the public interest did not allow these to be exempt information. When considering the documents that were published, the judge found that:

> "the failure to provide the background material underpinning the viability assessment in the present case, in circumstances where such material as was in the public domain was opaque and incoherent, was a clear and material legal error in the decision-taking process."[277]

Community Infrastructure Levy ("CIL")

On 1 September 2019, the Community Infrastructure Levy (Amendment) (England) (No.2) Regulations 2019[278] came into force. They were the seventh set of amendments in nine years affecting revenue raising vehicle that was intended to be simple. The CIL Regulations, as anyone familiar with them will attest, are not simple. The following case is an illustration.

[271] *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin).
[272] See *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2017] EWHC 2823 (Admin); [2018] J.P.L. 567.
[273] *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin) at [74].
[274] *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin) at [79].
[275] "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information … subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society."
[276] *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin) at [81].
[277] *R. (on the application of Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin) at [81].
[278] Community Infrastructure Levy (Amendment) (England) (No.2) Regulations 2019 (SI 2019/1103).

In *R. (on the application of Giordano Ltd) v Camden LBC*,[279] the Court of Appeal allowed a developer's appeal concerning the interpretation and effect of the CIL Regulations reg.40(7)(ii).

As with most CIL cases, the facts are relatively complex:

- in 2011, planning permission was granted for the conversion of an office block to six flats. At the time, the Council had not introduced CIL and so that permission did not give rise to any liability;
- works had commenced through the extension of the building and removal of internal partitions when a second permission was granted in 2017 for three larger flats in place of the original three. By that time, Camden had introduced CIL;
- it was accepted that at the time the second planning permission was granted the lawful use of the building was still as office use because the flats had not been completed;
- the Council charged CIL in the sum of £547,419.09 notwithstanding Giordano's claim to be entitled to a deduction under reg.40(7)(ii).

This Regulation allows a CIL deduction equivalent to the Gross Internal Area of:

> "retained parts where the intended use following completion of the chargeable development is a use that *is able to be carried on lawfully and permanently* without further planning permission in that part on the day before planning permission first permits the chargeable development." (emphasis added)

The second planning permission first permitted development on 21 June 2017 so this was the key date for deciding the owner's entitlement to a deduction.

The appellant submitted and the Court of Appeal agreed that it is sufficient for the intended use of the development authorised by the second planning permission to be a use which the owner had the *ability* to bring about on 21 June 2017 without a further planning permission having first to be granted.[280] It was not necessary that the lawful use of the building on 21 June 2017 was for residential purposes. It sufficed that the office use could be converted to residential merely by completing the works started under the 2011 planning permission without needing to obtain a further planning permission. On this basis, the appellant was entitled to the deduction.

As a postscript to this judgment, it raises another potential CIL loophole. On the Court of Appeal's analysis, it is not necessary to have implemented a planning permission in order to benefit from the "retained parts" deduction. By way of illustration, a developer who wishes to provide five flats in an existing office building could apply for and obtain permission for ten flats. Before the expiry of the first permission, he could obtain planning permission for five larger flats. Provided that the first permission has not been implemented, no CIL liability arises on that permission. If the developer implements the second permission, again before the first expires, the application of reg.40(7)(ii) would mean that there was a lawful use (ten flats) which could be carried on. On this basis, a full deduction of CIL should follow, subject to arguments about the developer's intention. One wonders at this stage whether further amendments to the CIL Regulations are in the pipeline.

Enforcement

Enforcement cases are invariably fact-heavy and often contain a lot of law. The examples below will not disappoint on either count.

[279] *R. (on the application of Giordano Ltd) v Camden LBC* [2019] EWCA Civ 1544; [2020] J.P.L. 357.
[280] *R. (on the application of Giordano Ltd) v Camden LBC* [2019] EWCA Civ 1544 at [31].

In *Islington LBC v Secretary of State for Housing, Communities and Local Government*,[281] the Council served an enforcement notice alleged a material change of use from an ancillary A2 use[282] to C3 residential use, without planning permission. In early 2013, the basement was converted into a residential flat and leased to a tenant. In October 2013, the owner (Maxwell Estates) "gutted" the flat with a view to renovating it to comply with the Building Regulations. During the renovation works, the basement was uninhabitable but was ready for occupation by February 2014. The flat was re-let in May 2014.

The owner appealed the enforcement notice under TCPA s.174 ground (d), alleging that the basement had been in continuous use as a dwelling from at least 11 April 2013, including during the period of renovations from October 2013 to May 2014, and therefore a material change of use occurred more than four years before the enforcement notice was issued. The Inspector agreed, allowed the appeal and quashed the enforcement notice.

The Council's appeal under TCPA s.289 was based on two arguments. First, that the Inspector applied a "presumption of continuance" of occupation contrary to *Thurrock BC v Secretary of State for the Environment*[283] and *Swale BC v Secretary of State for the Environment*.[284] Lang J allowed the appeal on this ground, finding that *Thurrock* and *Swale* were authoritative on the issue that the Inspector had to decide. As planning lawyers know, the rationale for the immunity periods under the TCPA is as follows: although having the opportunity to take enforcement action the local authority have failed to take any action and consequently it would be unfair and/or could be regarded as unnecessary to permit enforcement.[285] On the facts of this case, the Council would not have been able to take enforcement action during the period when the basement was uninhabitable and unoccupied.

The Inspector relied on *Gravesham BC v Secretary of State for Environment*[286] to support his conclusion that there was some presumption of continuance in acquiring immunity. Quite unsurprisingly, the judge upheld the Council's challenge on this ground, finding that *Gravesham* was concerned with a different issue: definition of dwelling house under the Town and Country Planning General Development Order 1977. It had nothing to do with enforcement proceedings.[287]

For practitioners with an enforcement specialism, this judgment should come as no surprise. In assessing whether a particular use has acquired immunity from enforcement action, there is no presumption that the unauthorised use continues.

One has to wonder whether in other jurisdictions the installation of UPVC windows would garner judicial interest at the highest levels but that it what happened in *Haringey LBC v Secretary of State for Housing Communities and Local Government*.[288] An Inspector allowed an appeal against an enforcement notice on the ground that the installation of UPVC windows on the front elevation of a flat in a conservation area did not constitute development under TCPA 1990 s.55.

TCPA s.55 excludes from the definition of "development" "the carrying out for the maintenance, improvement or other alteration of any building of works which … (ii) do not materially affect the external appearance of the building". In this case, the Inspector treated the flat as part of a short terrace of houses all built at the same time and to the same design pattern. It was the terrace that the Inspector considered to be the "building" whose external appearance may (or may not) be affected materially. In reaching this conclusion, the Inspector relied on the well-known case of *Church Commissioners v Secretary of State for the Environment*.[289] The *Church Commissioners* decision considered whether the Metro Centre Gateshead

[281] *Islington LBC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2691 (Admin); [2020] J.P.L. 532.
[282] Financial and professional services.
[283] *Thurrock BC v Secretary of State for the Environment* [2002] EWCA Civ 226; [2002] J.P.L. 1278.
[284] *Swale BC v Secretary of State for the Environment* [2005] EWCA Civ 1568; [2006] J.P.L. 886.
[285] *Islington LBC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2691 (Admin) at [36] and [42].
[286] *Gravesham BC v Secretary of State for Environment* (1984) 47 P. & C.R. 142; [1983] J.P.L. 307.
[287] *Islington LBC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2691 (Admin) at [45].
[288] *Haringey LBC v Secretary of State for Housing Communities and Local Government* [2019] EWHC 3000 (Admin); [2020] 1 P. & C.R. 13.
[289] *Church Commissioners v Secretary of State for the Environment* [1995] 71 P. & C.R. 73; [1996] J.P.L. 669.

was a separate planning unit, or whether the entire shopping centre, being a single building owned and occupied by the Church Commissioners, was the appropriate planning unit. The judge found that the Secretary of State had not erred in law in finding that the individual unit, rather than the entire Metro Centre, was the planning unit.

In *Haringey*, Lieven J rejected the Inspector's analysis particularly given the fact that the *Church Commissioners* judgment stated expressly that it was not addressing TCPA s.55(2). Interestingly, although the judge observed that the Inspector's conclusion that the "building" comprised a terrace of houses was "unusual",[290] she stopped short of finding that it was legally impermissible.

Procedure

Finally, a few short words on procedure.

South Derbyshire DC v Secretary of State for Housing Communities and Local Government[291] provides the subtlest hint that the courts may be more forgiving of procedural slips given the incredible burden placed on everyone during the period of national lockdown. Although the decision challenged pre-dated the arrival of coronavirus on our shores, the judgment was handed down in accordance with the Covid-19 protocol. The facts are relatively straightforward. The claim was filed at court by the claimant's solicitor within the six-week time period prescribed by TCPA s.288(4B). However, service of the claim form was incorrectly made to the Government Legal Service's previous address and only arrived at the correct address a day after the six-week period expired. Having reviewed the previous case law, the Civil Procedure Rules and their associated Practice Directions, Andrews J distinguished the filing of a claim under s.288(4B) from the service of the Claim Form on the other parties. A failure to file the claim in court within the statutory period was fatal, whereas the time for service was prescribed the Rules of Court could be rectified by an extension of time. The judge extended time and proceeded to consider the arguability of grounds. She granted permission.

QM Developments (UK) Ltd v Warrington BC[292] was a rather odd case but one that confirms that it is not possible to judicially review an informative. The local planning authority issued a Certificate of Lawful Use or Development ("CLEUD") under TCPA s.191. The basis of the CLEUD was that two dwellings had acquired immunity from enforcement action because they were substantially completed more than four years previously and in breach of pre-commencement conditions attached to a planning permission. The CLEUD contained an informative which purported to require further details to discharge a condition attached the planning permission. The CLEUD was challenged by judicial review.

Noting that judicial review is a remedy of last resort,[293] Dove J held that the claimant had an alternative remedy in an appeal against the CLEUD under TCPA s.195(1)(a) and that there were no exceptional circumstances which entitled the claimant to bypass the right of appeal under the Planning Acts.[294]

Closing remarks

Planning jurisprudence is rich and varied, requiring the courts to consider such disparate issues as 18th century urns, extensions to theme parks, litigious brewers and, of course, doughnuts. One can have no doubt that the coming year will produce a similarly rich tapestry.

Although the courts have responded extremely nimbly and efficiently to the strictures of the lockdown, there will inevitably be something of a backlog. In that regard, it will be no surprise to see the courts being

[290] *Haringey LBC v Secretary of State for Housing Communities and Local Government* [2019] EWHC 3000 (Admin) at [26].
[291] *South Derbyshire DC v Secretary of State for Housing Communities and Local Government* [2020] EWHC 872 (Admin).
[292] *QM Developments (UK) Ltd v Warrington BC* [2020] EWHC 1511 (Admin).
[293] See *QM Developments (UK) Ltd v Warrington BC* [2020] EWHC 1511 (Admin) at [21], citing *R. (on the application of Willford) v Financial Services Authority* [2013] EWCA Civ 677 at [36].
[294] *QM Developments (UK) Ltd v Warrington BC* [2020] EWHC 1511 (Admin) at [22].

ever more vigilant against merits-based challenges cloaked in legalistic language as well as continuing their qualified deference towards the planning judgments of decision-makers.

It is highly likely that some decisions made during lockdown will be challenged, perhaps with allegations of procedural unfairness at their heart given that many decision takers have had to be more flexible in their application of the normally strict procedural rules. We await the courts' response to such arguments although it is likely to be sympathetic to decision takers.

With the Government's stated aim to have local plans in place by 2023[295] many local authorities should be turbo charging their plan-making. Simply by the law of averages, this may increase the number of statutory challenges to local plans, especially where they involve Green Belt releases. It is unlikely that *Compton Parish Council v Guildford BC*[296] is the last word on this often controversial question.

Since its publication in 2012, the NPPF in its different iterations has been a productive seam of legal argument and analysis. If, as appears likely, the Secretary of State amends this national policy document we should not be surprised to see an upturn in legal challenges to amended policies.

Whatever this next year holds, there will remain areas of doubt and uncertainty into which the Courts will have to venture. Those areas are not, and never have been, rigidly defined.

[295] See the Government's "Planning for the Future" proposal at para.11: *https://www.gov.uk/government/publications/planning-for-the-future* [accessed 15 July 2020].

[296] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin); [2020] J.P.L. 661.