Legal Update: the Key Issues Emerging from the Cases in the Last Year

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Introduction

Since last year there have been 132 High Court cases dealing with planning, 37 Court of Appeal and 1 Supreme Court case.[1] The most significant cases this year for practice have been those on the meaning of the NPPF and the refusal to quash the Government's policy in *West Berkshire*. The NPPF cases of most note are *Suffolk Coastal*[2] and two High Court cases on the working of paragraph 14, *Forest of Dean* and *Cheshire East*.[3] There has also been an increasing tendency to refuse to quash decisions by the Court of Appeal even when errors of law have been found. This paper will concentrate on the following areas of Court activity:

- Conditions interpretation and implication.
- Policy making.
- NPPF housing decisions.
- NPPF paragraph 14 decisions.
- Discretion.
- Neighbourhood planning.

Conditions Interpretation and Implication

There is only one case in the last year that has been decided by the Supreme Court and that is *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 W.L.R. 85.

The facts of the case were that the Scottish Ministers granted a consent to operate a windfarm under s.36 of the Electricity Act 1989. The Petitioner [Scottish term for Claimant] owned and operated a golf club within sight of the proposed turbines and challenged the grant of permission.

There were 2 conditions that were most relevant in that case. Condition 14, which was under challenge, and provided:

> "Prior to the commencement of the development, a detailed design statement must be submitted by the company to the Scottish Ministers for their written approval, after consultation by the Scottish Ministers with SNH, Marine and Coastguard Agency, Northern Lighthouse Board, National Air Traffic Services and any such other advisors as may be required at the discretion of the Scottish Ministers. The design statement must provide guiding principles for the deployment of the wind turbines. This plan must detail: (a) layout location for each phase and each turbine; and (b) turbine height, finishes, blade diameter and rotation speed across each phase, rows and individual turbine locations; and (c) lighting requirements (navigation and aviation) for each turbine/row or, as the case may be, phase including any anemometer mast; and (d) further detailed assessment of visual impacts to inform the detailed layout and design of each location and phase of the deployment centre from selected viewpoints to be agreed with the Scottish Ministers and any such other advisors as may be required at their discretion.

* I am grateful for the assistance of Estelle Dehon, Ruchi Parekh and Dr Ashley Bowes. Any errors of course are mine.

[1] Source Westlaw under planning sub heading between 20 Sept and 21 July 2016.

[2] *Suffolk Coastal DC v Hopkins Homes Ltd*.

[3] *Forest of Dean v Secretary of State* [2016] EWHC 421 (admin) and *Cheshire East v Secretary of State* [2016] EWHC 571.

Reason: to set out design principles to mitigate, as far as possible, the visual impact of the turbines."

The eagle eyed will notice that there is no enforcement clause that the development will then be carried out in accordance with the detailed design statement. That was the problem that was sought to be exploited by Trump.

However Condition 13 provided a slight duplication and also required a design statement and did have an enforcement clause. It provided:

"condition 13 provides (so far as relevant):

Prior to the commencement of development a construction method statement ('CMS') must be submitted by the company to the Scottish Ministers and approved, in writing by the Scottish Ministers, following consultation [with specified advisors including SNH]. Unless otherwise agreed in writing by the Scottish Ministers, construction of the development must proceed in accordance with the approved CMS. The CMS must include, but not be limited to, information on the following matters: (a) commencement dates; (b) working methods … and (g) design statement. The CMS must be cross-referenced with the project environmental management plan, the vessel management plan and the navigational safety plan.

Reason: To ensure the appropriate construction management of the development, taking into account mitigation measures to protect the environment and other users of the marine area."

The importance of this is what the Supreme Court said about interpretation and implied conditions. It was not part of the reasoning [ratio] of the decision because the Supreme Court found that condition 14 could be enforced by condition 13.

As to interpretation of conditions, the Supreme Court made it plain that there was a modern tendency to break down the divisions in the rules on how to interpret documents and look instead to general rules on how to ascertain the meaning of words. The unanimous test that all the Justices approved was the following:

"34 When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

One of the matters that often needs to be answered is the extent that extrinsic material to the permission can be looked at. The answer from the Supreme Court is that "there is only limited scope for the use of extrinsic material in the interpretation of a public document".[4] There are only two circumstances when extrinsic material can be looked at:

- where the document is incorporated into the permission [for example by express reference]; or
- where there is ambiguity in the consent.

Lord Hodge put it in this way:

"Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are

[4] Para.33 per Lord Hodge.

> incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent".[5]

In terms of implication into a condition the Supreme Court made it plain that had it been necessary they would have implied a condition into the consent that the building of the windfarm needed to comply with the approved design statement under condition 14.[6] This was a relaxation of the strict rule in earlier cases[7] that there could never be an implied condition in a planning permission.

The Supreme Court also ruled on a submission made that a tailpiece that said "unless otherwise agreed in writing" invalidated the condition and permission. This was based on the cases of *R. (on the application of Midcounties Co-operative Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin) and *Hubert v Carmarthenshire CC* [2015] EWHC 2327 (Admin).

The Supreme Court distinguished those cases on the basis that the flexibility from these tailpiece words does not allow alteration to the nature of the approved development which was set out in Annex 1 of the consent. The position on tailpieces is that they should not be used where they purport to allow a material variation to a planning permission. That is the effect of *Midcounties* where a tailpiece was acceptable that allowed minor variations to a plans condition but not one that allowed floorspace to be varied.

Patterson J in the High Court in *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 534 (Admin) distilled the principles that were set out in *Trump* as follows.

(i) Planning conditions need to be construed in the context of the planning permission as a whole;
(ii) Planning conditions should be construed in a common sense way so that the court should give a condition a sensible meaning if at all possible;
(iii) Consistent with that approach a condition should not be construed narrowly or strictly;
(iv) There is no reason to exclude an implied condition but, in considering the principle of implication, it has to be remembered that a planning permission (and its conditions) is "a public document which may be relied upon by parties unrelated to those originally involved";
(v) The fact that breach of a planning conditions may be used to support criminal proceedings means that "a relatively cautious approach" should be taken;
(vi) A planning condition is to be construed objectively and not by what parties may or may not have intended at the time but by what a reasonable reader construing the condition in the context of the planning permission as a whole would understand;
(vii) A condition should be clearly and expressly imposed;
(viii) A planning condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood;
(ix) The process of interpreting a planning condition, as for a planning permission, does not differ materially from that appropriate to other legal documents.

On the facts of that case there was a condition that required:

> "use of this building shall be for purposes falling within Class B1 (Business) as defined in the Town and Country Planning (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained."

[5] Para.34.
[6] Para.37.
[7] *Trustees of the Walton-on-Thames Charities v Walton and Weybridge Urban DC* (1970) 21 P. & C.R. 411, Salmon LJ, at p.418 and Widgery LJ, at p.420 and *Sevenoaks DC* case [2005] 1 P. & C.R. 186, Sullivan J at [45].

This was clear that it meant only B1 uses. This Patterson J said was a common sense interpretation of the words used. The second half of the condition required express permission for things that would otherwise be permitted under the GPDO.

Whilst these cases are of wider significance because of the authoritative treatment of interpretation of planning permissions and conditions they are also an example of the Supreme Court being reluctant to quash permissions. The effect of this approach to conditions is that fewer permissions will have to be quashed if the Courts are willing to imply a condition or part of a condition and conditions are given a sensible meaning if at all possible.

West Berkshire and Political Decision Making

Secretary of State for Communities and Local Government v West Berkshire DC, Reading BC was the challenge to the Government's policy excluding small sites from having to contribute to affordable housing. This was a policy promulgated by a written ministerial statement dated 28 November 2014. Holgate J in the High Court found it unlawful on a number of grounds.

The key parts of the policy were as follows:

> "Due to the disproportionate burden of developer contributions on small scale developers, for sites of 10 units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions.
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> For designated rural areas under Section 157 of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty, authorities may choose to implement a lower threshold of 5 units or less, beneath which affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions. Within these designated areas, if the 5 unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between 6 to 10 units should also be sought as a cash payment only and be commuted until after completion of units within the development"

The Court of Appeal overturned the High Court's decision and found the policy to be lawful. The main ground of challenge was that it was inconsistent with the statutory scheme because it was a policy that overrode the development plan.

The Court of Appeal relied on two principles.[8]

i) First the rule against fettering discretion which is that a decision maker cannot just blindly follow policy without considering other matters.

ii) Secondly the liberty (generally) to express policy without acknowledging exceptions. It is not required in policy to spell out the legal fact that the application of policy must allow for the possibility of exceptions.

The result of those two principles was that the effect of the policy was not to undermine the statutory scheme because the policy would not as a matter of law have to be followed. They agreed with the way the Secretary of State through Counsel put the effect of the policy. The Court of Appeal said the statement:

> "… amounts to no more than a conventional description of the law's treatment of the Secretary of State's policy in the decision-making process"[9]

[8] See Laws LJ and Treacy LJ at para..16–18.
[9] At [29] per Treacy LJ and Laws LJ.

The relevant part of the statement that dealt with the role of the national policy in decision making is as follows:

> "(i) As a matter of law the new national policy is only one of the matters which has to be considered under section 70(2) of TCPA 1990 and section 38(6) of PCPA 2004 when determining planning applications or formulating local plan policies (section 19(2) of PCPA 2004), albeit it is a matter to which the Secretary of State considers 'very considerable weight should be attached';
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> …
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> (iii) In the determination of planning applications the effect of the new national policy is that although it would normally be inappropriate to require any affordable housing or social infrastructure contributions on sites below the thresholds stated, local circumstances may justify lower (or no) thresholds as an exception to the national policy. It would then be a matter for the decision-maker to decide how much weight to give to lower thresholds justified by local circumstances as compared with the new national policy;
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> (iv) Likewise if in future an LPA submits for examination local plan policies with thresholds below those in the national policy, the Inspector will consider whether the LPA's evidence base and local circumstances justify the LPA's proposed thresholds. If he concludes that they do and the local plan policy is adopted, then more weight will be given to it than to the new national policy in subsequent decisions on planning applications."

The Court of Appeal held that although the wording of the policy would, looked at by itself, suggest that it would override the development plan, the decision maker can still decide take into account the development plan policy. Its place as a material consideration means that it did not countermand or frustrate the effective provisions of the Planning Acts.

The Court of Appeal held[10] that the Secretary of State had very wide discretion to make policy choices. Issuing planning policy is a common law power and not laid down in statute. The Court said that provided the policy did not countermand or frustrate the effective operation of ss.38(6) and 70(2) and contained proper planning considerations then subject to that, policy choices are for him, the Secretary of State. He did not need to have regard to all relevant considerations. They said:

> "36 We would certainly accept that the statutory planning context to some extent constrains the Secretary of State. It prohibits him from making policy which, as we have put it in dealing with the principal issue in the case, would countermand or frustrate the effective operation of s.38(6) or s.70(2) . It would also prevent him from introducing into planning policy matters which were not proper planning considerations at all. Subject to that, his policy choices are for him. He may decide to cover a small, or a larger, part of the territory potentially in question. He may address few or many issues. The planning legislation establishes a framework for the making of planning decisions; it does not lay down merits criteria for planning policy, or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making.
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> 37 In those circumstances the Secretary of State was not in our judgment obliged to go further than he did into the specifics described by the learned judge, and in consequence is not to be faulted for a failure to have regard to relevant considerations in formulating the policy set out in the WMS."

The Court also dismissed the challenge based on consultation and the PSED. The Court interpreted the consultation document widely and so was sufficient to enable an intelligent response. The Court found

[10] As part of the second ground of challenge alleging that many material considerations were not taken into account.

that the Secretary of State's response did take the product of consultation conscientiously into account. The response said that it would support new build small scale and brown field development: "without adversely impacting on local contributions to affordable homes and infrastructure." The Court interpreted this to be an overall balance rather than an entirely un-evidenced statement as Holgate J had found below. The PSED challenge was dismissed on the basis that the potential adverse impacts on protected groups was considered.

This represents a very non-interventionist approach to regulating policy making by the Courts. The test for policy making and what it could cover and what the Secretary of State needed to consider is extremely widely drawn being only proper planning considerations and not countermanding or frustrating the Act. This is especially so when even an emphatically worded policy that on its face says contribution will not be sought, does not frustrate the Act.

In practice now the Secretary of State reintroduced the policy in the PPG[11] that there should not be contributions on development of 10 units or less and which have a maximum gross floorspace of no more than 1,000m^2. In rural areas local planning authorities can apply a lower threshold of five units or less. What remains to be seen is whether authorities will be able to persuade Inspectors that they should follow local policies which take a different approach justified by local circumstances. The judgment gives some scope for this especially for policies adopted post the PPG changes.

Lobbying.

In *Broadview Energy v Secretary of State* [2016] EWCA 562 the Court of Appeal had to rule on whether Mrs Leadsom MP's lobbying of Kris Hopkins MP Parliamentary Under Secretary of State was a reason to quash a Secretary of State decision to refuse a windfarm. The Court of Appeal was clear that a minister should politely say that he could not listen to lobbying in the tea room or elsewhere.[12] The decision was not quashed because the tea room conversation was held so long before the decision. The Court found it would have played no part in the decision making. The tea room conversation was on 2 December 2013 which was 11 months before Mr Hopkins MP was sent the memo from DCLG making him the decision maker.

NPPF Cases on Supply of Housing Policies

Earlier this year, in *Suffolk Coastal DC v Hopkins Homes Ltd*,[13] the Court of Appeal sought to clarify the scope of para.49 of the NPPF. The conjoined appeals considered, in particular, the meaning of "[r]elevant policies for the supply of housing". As per para.49, such policies cannot be considered up-to-date if local planning authorities are unable to demonstrate a five-year housing supply, thereby triggering the specific application of the presumption in favour of sustainable development as set out in para.14 of the NPPF.

Prior to the Court of Appeal judgment, the question had been considered at first instance by numerous judges of the Planning Court, with varying results. The interpretations ranged from the so-called "narrow"

[11] Planning Obligations para.031:
- contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm
- in designated rural areas, local planning authorities may choose to apply a lower threshold of 5-units or less. No affordable housing or tariff-style contributions should then be sought from these developments. In addition, in a rural area where the lower 5-unit or less threshold is applied, affordable housing and tariff style contributions should be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after completion of units within the development. This applies to rural areas described under section 157(1) of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty
- affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home.

[12] See at [29] per Longmore LJ.

[13] [2016] EWCA Civ 168.

view,[14] which included only those policies dealing with the amount or distribution of new housing, to the "wider" approach,[15] which also caught policies that had the effect of restricting the supply of housing development. There was a further "intermediate" or "compromise" position,[16] in which certain restrictive policies were held to be caught by para.49, while others were not (for example, a specific landscape designation).

In *Hopkins Homes*, the Court of Appeal favoured the wide interpretation of "relevant policies for the supply of housing". The Court concluded that the concept is not limited to those policies that provide positively for the delivery of new housing. Rather, it also extends to those policies whose effect is to influence the supply of housing by constraining the location or amount of new housing development. This approach, Lindblom LJ held: "reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it — that policies of both kinds make the supply what it is."[17]

Notably, when considering how para.49 is to be applied in practice, the Court of Appeal confirmed that it is a question for the decision maker in an individual case to judge whether a particular policy is relevant for the supply of housing. The question is a matter of planning judgment, not a question for the courts, and the courts will only intervene on public law grounds. The Court was quick to stress that the decision maker had to proceed on a correct understanding of para.49 (and the policy in question), these remaining matters of law for the courts.

The Court of Appeal further clarified that out-of-date policies for the supply of housing did not become irrelevant in determining the planning application or appeal.[18] Rather, the weight to be given to such policies remained a matter for decision makers. As Lindblom LJ clarified:

> "46. … Neither of those paragraphs [14 and 49] of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied …
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> 47. One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy — such as the protection of a "green wedge" or of a gap between settlements."

The effect of these paragraphs is that, in practical terms, both parties in a case are left with considerable scope to argue over the weight that should be given to out-of-date policies.

When granting permission to hear this appeal, Sullivan LJ acknowledged the importance of the issues to the application of national planning policy. The Supreme Court appears to take the same view, as it has granted the Councils permission to appeal on all grounds. This will be the first opportunity for that Court to consider the NPPF and leaves all the issues open for reconsideration.

[14] See for e.g., Lang J in *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin).
[15] See for e.g., Lewis J in *Cotswold DC v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin).
[16] See for e.g. Ouseley J in *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land* [2014] EWHC 573 (Admin).
[17] §33.
[18] §§46–48.

Paragraph 14 and Presumption in Favour of Sustainable Development

The NPPF says that "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development which should be seen as golden thread running through both plan-making and decision taking". Even after four years the Courts have not definitively ruled on the meaning of the presumption. Does it mean something more than what is said in para.14? Is there a presumption outside of para.14?

In *Wychavon DC v Secretary of State for Communities and Local Government*,[19] Coulson J considered the scope of the presumption in favour of sustainable development. His answer is yes it does mean something more than what is said in para.14.

The Inspector in the appeal had granted permission for the development of dwellings that was in conflict with the location policy in the local plan. All parties had agreed that there was a development plan in place and that relevant policies were not out of date. As a result, the decision-taking route set out in para.14 (which applies when a development plan is absent, silent or relevant policies are out-of-date) was not engaged. However, when carrying out a balancing exercise, the Inspector took into account the overarching presumption in favour of sustainable development advocated in the NPPF, concluding that those benefits outweighed the conflict with the local plan policy.

In the High Court, Coulson J rejected the claimant's argument that a presumption in favour of sustainable development did not exist outside of para.14. He referred to the number of NPPF paragraphs which made reference to the presumption (6; 7; 47; 49; 197; Ministerial Foreword). The judge explained further:

> "42 … Para 14 does not offer a true definition [of the presumption] at all; it is instead an explanation of the effect of the presumption. And there are many other places in the NPPF where "mean" or "means" is used in the context of this presumption, such as the foreword and para 6.
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> 43 Fourthly, and perhaps most important of all … if the claimant was right, the presumption in favour of sustainable development would only apply if the development plan was silent or absent, or if the relevant policies were out of date (the requirements that trigger the last part of para 14). That cannot possibly be right; that would be such an important limitation on the "golden thread" that, if such was the intention of the NPPF, it would say so in the clearest terms."

This is a decision that is potentially hard to reconcile with para.14. Paragraph 14 is central to the NPPF and says that there is presumption in favour of sustainable development and then sets out that "for decision taking this means …". That is clearly a definition of what the presumption means for decision taking. The fear that Coulson J had that if you restricted the presumption to just para.14 that would make it rather limited is rather pessimistic. Even if the presumption was limited to para.14 it would after all cover when the development is in accordance with the development plan and when the development plan is absent, silent or relevant policies are out of date. It would thus still have wide effect. There is a further case that has been given permission and will be considering this *Wychavon* point which is *East Staffs BC v SSCLG* and *Barwood*. It is my understanding that the Secretary of State is suggesting *Wychavon* should not be followed.

Does The Presumption only apply if prior ruling that sustainable development?

Cheshire East[20] is a very significant case where Jay J gave a very clear ruling that it is not necessary to reach a conclusion that the development is sustainable before applying para.14. He held that:

[19] [2016] EWHC 592 (Admin); [2016] P.T.S.R. 675.
[20] *Cheshire East v Secretary of State* [2016] EWHC 571.

> "23. In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within paragraph 14. This is not what paragraph 14 says, and in my view would be unworkable. Rather, paragraph 14 teaches decision makers how to decide whether the proposal, if approved, would constitute sustainable development."

He expressly disagreed with Lang J in *William Davis*[21] and *Wenman*.[22]

Weighted balance or specific policies indicate development should be restricted.

The case of *Forest of Dean*[23] deals with when it is correct to apply the weighted balance in para.14. The NPPF provides that:

> "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
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> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
> - specific policies in this Framework indicate development should be restricted."

The issue that arose was whether heritage policies in the NPPF when there was less that substantial harm amounted to policy restriction. The Court held that they did amount to a specific policy saying that development should be restricted and the correct way to proceed was to do the balance in para.134. If the para.134 balance was concluded successfully such that it did not restrict development on the basis of the harm to the heritage asset a wider balance using the weighted first dagger of para.14 should then be done.[24]

This is potentially of wide effect because para.20 sets out that that the list in the footnote which includes Green Belt, AONB and Heritage is not exhaustive of all the restrictive policies. It also uses the example of coastal policy which is in the list but is very generally restrictive in para.114 of the Framework to suggest that even general policies can be specific policies restricting development. Thus there are numerous other examples which may be considered to fall within this category such as existing open space in para.74 of the NPPF.

Green Belt

In another ruling from this year, the Court of Appeal considered the meaning of Green Belt policies in the NPPF. In *R. (on the application of Lee Valley Regional Park Authority) v Epping Forest DC*,[25] the context was the construction of an agricultural building.

Buildings "for agriculture and forestry" are specifically listed at paragraph 89 of the NPPF as one of the exceptions to the general policy that the construction of new buildings in the Green Belt should be regarded as inappropriate. Unlike other exceptions included in para.89 (or for that matter, the further exceptions at para.90), the category of agricultural buildings is unqualified. By contrast, two of the categories in para.89 and all of the para.90 categories are qualified by reference to "openness of the Green Belt" and the "purposes of including land within it".

The Appellant sought to argue, among other things, that even where there was no "definitional harm" to the Green Belt, because agricultural development was in principle not inappropriate as per the NPPF, there could still be "actual harm" to either the openness of the Green Belt or to the purposes of including

[21] *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin).
[22] *Wenman v Secretary of State for Communities and Local Government* [2015] EWHC 1663 (Admin).
[23] *Forest of Dean v Secretary of State* [2016] EWHC 421 (admin).
[24] See para.37.
[25] [2016] EWCA Civ 404.

land in it. The Court rejected that approach. It took the view that the first sentence of paragraph 88 of the NPPF, "… local planning authorities should ensure that substantial weight is given to any harm to the Green Belt", could not be read in isolation. The Green Belt policies (paras 79–92) had to necessarily be read as a whole.

As Lindblom LJ set out:

> "24. The true position surely is this. Development that is not, in principle, 'inappropriate' in the Green Belt is … development 'appropriate to the Green Belt'. On a sensible contextual reading of the policies in paragraphs 79 to 92 of the NPPF, development appropriate in — and to — the Green Belt is regarded by the Government as not inimical to the 'fundamental aim' of Green Belt policy 'to prevent urban sprawl by keeping land permanently open', or to 'the essential characteristics of Green Belts', namely 'their openness and their permanence' (paragraph 79 of the NPPF), or to the 'five purposes' served by the Green Belt (paragraph 80). This is the real significance of a development being appropriate in the Green Belt, and the reason why it does not have to be justified by 'very special circumstances'."

The Court confirmed that this does not mean that buildings for agriculture in the Green Belt escape scrutiny under other policies in the NPPF or the development plan. Thus, policies related to visual impact or countryside protection or landscape character will be relevant even where a development is, in principle, appropriate in the Green Belt.

It is worth noting that, in effect, the decision continues the approach taken under previous Green Belt policy, Planning Policy Guidance 2. In fact, this was a persuasive factor in deciding the appeal the way the Court did. As was recorded in the judgment, "[i]f the Government had meant to abandon that distinction between 'inappropriate' and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced".[26]

The meaning of "openness of the Green Belt" has also been recently clarified by the Court of Appeal. In *Turner v Secretary of State for Communities and Local Government*,[27] the appellant was seeking to redevelop a site in the Green Belt and sought to rely on the sixth exception in para.89 of the NPPF (which would have made it, in principle, appropriate development). That category is only engaged where the redevelopment "would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development".

The Court held that the concept of openness has both a spatial and a visual dimension. It is not restricted to a volumetric approach, but can include consideration of a number of other factors, including visual impact.[28] That visual aspect falls to be considered as part of "openness of the Green Belt" is implicit on a natural reading of the language at para.89. That interpretation is further supported by the guidance in the introductory paragraphs (79–81) on the Green Belt policies. Sales LJ explained the position in the following terms:

> "16. The visual dimension of the openness of the Green Belt does not exhaust all relevant planning factors relating to visual impact when a proposal for development in the Green Belt comes up for consideration. For example, there may be harm to visual amenity for neighbouring properties arising from the proposed development which needs to be taken into account as well. But it does not follow from the fact that there may be other harms with a visual dimension apart from harm to the openness of the Green Belt that the concept of openness of the Green Belt has no visual dimension itself."

[26] §22.
[27] [2016] EWCA Civ 466.
[28] §§25 and 14–15.

Listed Buildings

In the last few years one of the areas of challenge that was most fertile was on heritage assets and listed buildings. *Barnwell Manor*[29] followed by *Forge Field* had set out a stringent test for decision makers. If there was any harm to a listed building that harm had to be given considerable importance and weight.

In *Mordue v Secretary of State for Communities and Local Government*,[30] the Court of Appeal set out the correct approach in assessing the impact of development on listed buildings and their setting. The issue in question was the grant of planning permission for the erection of a wind turbine that would have some effect on the views of listed buildings, including a church. The Inspector had assessed the harm but concluded that it was outweighed by the environmental benefits. However, he had not expressly referred to the statutory duty in s.66(1) of the of the Planning (Listed Buildings and Conservation Areas) Act 1990, namely, to have special regard to the desirability of preserving listed buildings or their setting or any special features.

The Court held that government policy on listed buildings in the NPPF (paras 131–134) "lay[s] down an approach which corresponds with the" duty in section 66(1).[31] Thus, according to Sales LJ:

> "28. … Generally, a decision maker who works through those [NPPF] paragraphs in accordance with their terms will have complied with the section 66(1) duty. When an expert planning Inspector refers to a paragraph within that grouping of provisions [131–134] … then—absent some positive contrary indication in other parts of the text of his reasons—the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned."

Sales LJ also laid to rest any confusion resulting from the previous ruling in *Barnwell Manor Wind Energy*.[32] That decision, properly interpreted, does not require a standard of reasons in s.66(1) cases which is different from or more demanding than the general approach to the adequacy of reasons as set out in *South Bucks DC v Porter (No.2)*.[33]

Clearly the *Forest of Dean* case covered above under para.14 is highly relevant to heritage assets. It sets out that the weighted balance in para.14 can only be applied after the 134 policy normal balance is applied.

The case of *Loader v Rother DC*[34] is important because the Court of Appeal held that the failure to consult the Victorian Society and an error in the committee report that said "no comments received" was seriously misleading. The Court disagreed with Patterson J below on this point. The result was that the decision was quashed. There was no information as to what their views would have been.

Cases on Discretion

Discretion not to quash

There appears to be an increasing reluctance on the part of the courts to exercise their discretion to quash planning decisions, even where there has been an error of law. This is certainly the trend among judicial decisions in the last twelve months, including a series of Court of Appeal judgments from earlier in the year.

[29] *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137; [2015] 1 W.L.R. 45.
[30] [2015] EWCA Civ 1243; [2016] 1 W.L.R. 2682.
[31] §28.
[32] *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137; [2015] 1 W.L.R. 45.
[33] [2004] 1 W.L.R. 1953 (HL); see *Mordue* at §26.
[34] [2016] EWCA 795.

In *R. (on the application of Smech Properties Ltd) v Runnymede BC*,[35] the Court of Appeal upheld Patterson J's decision to refuse to quash planning permission for a mixed use development in the Green Belt. The judge accepted that the authority had acted upon misleading advice contained in an officer's report on its five-year housing land supply position. Nonetheless, applying *Simplex*[36] and *Hunston*,[37] she concluded that the authority would have reached the same decision in any event, especially as the housing supply situation was more dire than anticipated, and thus did not quash the permission.

The Court of Appeal upheld that decision, noting that Patterson J had directed herself to the relevant legal tests and correctly assessed the position on housing need. Moreover, as per Sales LJ, "on reading the judgment as a whole it was abundantly clear that the judge had very well in mind the stringent test in para.87 of the NPPF" requiring "very special circumstances".[38] Neither could it be said that the judge had overlooked the disapplication of para.14 in relation to the Green Belt. In light of national planning policy, the pressing nature of the objectively assessed housing need and the contribution of the development to that need, the Court agreed with Patterson J that the authority, properly advised, would still have decided to grant planning permission.

In *Secretary of State for Communities and Local Government v South Gloucestershire Council*,[39] the Court of Appeal overturned a first instance ruling quashing a planning decision to allow a mobile home on a Green Belt site. The Court accepted that the Inspector had made errors in his approach to the issue of five-year supply of housing, which the first instance judge had classified as "serious".[40] The Court acknowledged that the errors concerned "an important theme of national planning policy in England" and that the Inspector had further failed to understand and apply the relevant Planning Practice Guidance.[41]

However, in the "extremely unusual circumstances of this case", Lindblom LJ held that the judge had erred in exercising his discretion to quash.[42] The factors in favour of granting permission, including the individual's personal circumstances, had carried substantial weight and there was no real possibility that a correct approach to housing supply could have affected the outcome. Lindblom LJ further clarified that the fact that the erroneous decision would be relied upon as a precedent if it were allowed to stand should not have influenced the first instance judge when considering his discretion to quash.[43]

In *R. (on the application of Gerber) v Wiltshire CC*,[44] Dove J in the High Court had quashed planning permission for a solar farm that had since been installed. The challenge to the Court of Appeal focused on Dove J's extension of time under CPR Part 54.4 (allowing the claim to be brought a year after permission had been granted) and the exercise of his discretion to quash the permission (under s.31(6) of the Senior Courts Act 1981).

The Court of Appeal held that the judge had erred in extending time, particularly as the claimant had no legitimate expectation of being notified of the planning application being made and thus had no proper grounds or explanation for the delay. While it was not necessary to consider the subsequent exercise of discretion, Sales LJ held that the Court would have set aside the judge's decision on the issue if necessary.[45] Instead, the Court would have exercised its discretion not to quash the decision taking into account, among other factors, the inexcusable delay and the major financial detriment that would be suffered by the relevant companies.

[35] [2016] EWCA Civ 42; [2016] J.P.L. 677.
[36] *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1989) 57 P. & C.R. 306 (CA).
[37] *St Albans CC and DC v Hunston Properties Ltd* [2013] EWCA Civ 1610.
[38] §38.
[39] [2016] EWCA Civ 74; [2016] J.P.L. 798.
[40] §28.
[41] §28.
[42] §31.
[43] §§28–29.
[44] [2016] EWCA Civ 84; [2016] 1 W.L.R. 2593.
[45] §§65–66.

This approach is also reflected in recent High Court decisions. Coulson J's decision in *Wychavon DC* (considered above) is a good example. He dismissed the claimant's challenge to the Inspector's decision in that case. However, Coulson J went on to state that while this was not strictly necessary to consider, he would have exercised his discretion in favour of not quashing the Inspector's decision in any event:

> "51. The relevant legal test is set out in the recent case of *Europa Oil and Gas Ltd v SSCLG* [2014] EWCA Civ 825 …
>
> 52. As noted above, the most that can be said against the Inspector in the present case is that he did not say in terms that the balancing exercise that he undertook was pursuant to s. 38(6) of the 2004 Act, or say that the presumption in favour of sustainable development was simply a material consideration. The criticisms are ones of form; they are not criticisms of substance. In those circumstances, even if the Inspector had worded his decision letter in a clearer way, that would have made no difference to the outcome. I reject the invitation to quash the Inspector's decision on that ground as well."

Meanwhile, in *R. (on the application of Nicholson) v Allerdale BC*,[46] Holgate J adopted an approach that did not require him to quash planning permission for a motorsport business to expand its premises, including a car testing track. He found that the noise condition did not impose sufficient protection, but noted the public interest in allowing the parties to remedy the defect rather than quashing the permission.[47] Holgate J circulated a draft judgment and adjourned handing down final judgment, allowing the developer formally to amend the noise condition. In the end, it was not necessary to make a quashing order, but a declaration was made to record the claimant's success on the noise ground.[48]

This reluctance to quash planning permissions and decisions suggests that, moving forward, applicants will need to be even more alive to this ground of defence to challenges.

Neighbourhood Planning

Last year of course neighbourhood planning was considered on several occasions in the High Court notably in *Crane* and *Woodcock Holdings v Secretary of State for Communities and Local Government*.[49]

In terms of what is to come shortly, the case of *DLA Delivery*[50] has been granted permission on all of the grounds and is going to be heard by the Court of Appeal in November 2016. One of the most fundamental points that is to be argued is whether a neighbourhood plan can come forward ahead of the strategic policies of a local plan. One of the basic conditions for a Neighbourhood plan is that it should be "in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area)". The question is how can that be achieved if there is as yet no strategic development plan that has been adopted.

The High Court found that a neighbourhood plan could come forward in advance of a strategic plan and followed Lewis J in *Gladman*.[51]

One of the other grounds is whether the whole process of examination is unfair because NP examiners are selected by the Council. The others related to Habitat Regulations and whether there was sufficient information available to the Local Authority as to the deliverability of the SANGS for the sites selected in the NDP.

[46] [2015] EWHC 2510.
[47] §81.
[48] §103.
[49] [2015] EWHC 1173 (Admin).
[50] High Court *R (on the application of DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311
[51] *R. (on the application of Gladman Developments Ltd) v Aylesbury Vale DC* [2014] EWHC 4323 (Admin).

Looking to the Future: Retrenchment from *Tesco*?

The decision in *Tesco Stores Ltd v Dundee CC*[52] was arguably the high-water mark of the continued importance of law and legal considerations in the world of planning applications. The Supreme Court confirmed in *Tesco* that planning decisions must be taken based on a proper interpretation of planning policy, which is matter of law. It was not the case, the Court held, that the meaning of a development plan is a matter "which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality".[53]

What followed, naturally, was an influx in appeals and judicial reviews in an attempt to engage the courts on whether Inspectors had properly interpreted policies, including the NPPF (although that policy document was not before the Supreme Court in *Tesco*). But recent decisions suggest the courts may be trying to hand back control to planning authorities and Inspectors. The signs point to the courts placing increasing importance on planning judgment, indicating a desire to step back, at least partially, from the full force of the proposition in *Tesco*.

For example, in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government*,[54] Ouseley J considered, among other issues, the meaning of "available now" in fn.11 to para.47 of the NPPF. The appellant argued that, contrary to the Inspector's view, the phrase necessarily included only those sites that had planning permission. Ouseley J rejected that argument, stating that the Inspector's interpretation of the NPPF phrase would be wrong if it led to an outcome which lacked a sound planning basis (which in this case, it did not). He was thus content to link reasonable planning judgment with a proper interpretation of the NPPF,[55] before making his own assessment of the phrase.

The decision of Gilbart J in *South Oxfordshire DC v Secretary of State for Communities and Local Government* offers a further example.[56] One of the issues in this case was whether the Inspector had erred in interpreting para.14 of the NPPF, in particular, whether a development plan is "absent, silent or relevant policies are out-of-date" (which then engages the presumption in favour of sustainable development as set out in that paragraph). It was argued before the Court that a case of the development plan being "silent" (the view taken by the Inspector) should be distinguished from a case where it is "out-of-date".

Previously, in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government*,[57] Lindblom J (as he then was) had held that the three possible shortcomings in a development plan identified in para.14 were distinct concepts. Whether a plan is silent, as opposed to being absent or its relevant policies being out of date, is an issue that the court may need to decide. In that case it was said that if the authority "fails to see that the plan is silent, or thinks it is silent when it is not, it will have gone wrong in law".[58]

However, in *South Oxfordshire DC*, Gilbart J rejected the distinction between silence and out-of-date on the facts before him. He did not consider *Bloor Homes* to exclude the possibility of overlap between the second and third shortcomings in para.14. Instead, Gilbart J accepted the Inspector's planning judgment, noted that on either shortcoming the questions before the decision maker would be the same, and acknowledged that even if he were wrong about the nature of the test of "silence", it was "at worst a mistake in the label to be attached to the reason why the Development Plan polices carried little weight".[59] The focus, once again, is on planning judgment as opposed to strict judicial construction of policy.

[52] [2012] UKSC 13; [2012] P.T.S.R. 983.
[53] §18.
[54] [2016] EWHC 968 (Admin).
[55] §§19–20.
[56] [2016] EWHC 1173 (Admin).
[57] [2014] EWHC 754 (Admin).
[58] §49.
[59] §101.

The decision of the Court of Appeal in *Hopkins Homes Ltd*[60] also provides a good example of this trend. This sets out that the weight to be attached to policies whether they are out of date or not is entirely a matter for the decision maker and then offers some guidance on the factors to be taken into account. This puts the matter very much into the hands of the decision maker rather than on the meaning of the relevant policy for the supply of housing. In addition there is the suggestion that the question of what is a relevant policy for the supply of housing is one for the decision maker, subject to a correct understanding of para.49 and the particular policy. It is not easy to discern what the decision maker will do to work out whether something is a RPSH after considering the judgment in *Hopkins Homes*. This is no doubt a matter that the Supreme Court judgment will consider closely.

But for practical purposes, as far as para.49 is concerned, the ball is very much out of the courts and back with decision makers. This is particularly the case given the expansive construction of the paragraph.

Whether consciously or otherwise, there is certainly an indication that the courts are scaling back their jurisdiction over planning policy. But where does that leave the ruling in *Tesco*? As the Supreme Court gets ready to consider *Hopkins Homes*, it will have a further opportunity to consider the status of planning policy as a matter of law, and the appropriate balance to strike when considering the NPPF in particular. In light of recent decisions, it seems likely that the Court will take up the opportunity to restate or clarify the role of the courts and revisit *Tesco v Dundee CC*.

[60] [2016] EWCA Civ 168.