Legal Update

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Year on year the individual charged with delivering this paper opens by saying that there has been an increase in the number of cases reported; 2015 is no different. Westlaw reports a total of 194 planning cases in the Administrative Court, Court of Appeal and Supreme Court since this time last year.[1] This paper does not seek to produce a comprehensive analysis of all those cases. My aim is to distil the essentials, highlight trends and focus on the standout decisions of the year.

To do so I have broken the paper down into topics. I first consider cases which have planning policy as their focus. This continues to be the major fuel-source feeding the engine room in the planning law sphere. In particular this year, the courts have heard a significant number of important cases relating to housing land supply and the green belt.

There follows a discussion of cases which might broadly be termed "environmental" planning cases, including those raising issues in respect of Environmental Impact Assessment ("EIA") and Strategic Environmental Assessments ("SEA").

I then turn my attention to cases that relate to viability and the related field of developer contributions, and after that, cover planning enforcement. I follow with what might broadly be termed procedural developments; not only has the year seen the introduction of the Criminal Justice and Courts Act 2015, but also a spate of decisions concerning the often overlooked, but vitally important, issue of time limits, as well as costs under the Aarhus Convention. Finally, I look at developments in the law relating to Compulsory Purchase Orders ("CPOs") and travellers.

Policy

The aftermath of the Supreme Court's decision in *Tesco Stores Ltd v Dundee CC*[2] and the introduction of the National Planning Policy Framework ("NPPF") that same year continues to be felt in 2015. Arguments regarding the meaning of policy provided particularly fertile ground for challenge.

Housing land supply

Readers will be well aware that the number of challenges regarding retail planning policy has dwindled recently and been replaced by a surge in cases concerning housing supply. Over the past year there has thus been a particular focus on the NPPF paras 47–55.

In *Gallagher Homes Ltd v Solihull MBC* ("*Gallagher*")[3] the Court of Appeal upheld the decision of Hickenbottom J, discussed in last year's Legal Update paper. The local authority appealed the High Court's decision that their allocation of sites belonging to Gallagher Homes as green belt land (upon which Gallagher proposed to develop housing) had been unlawful. However, the Court of Appeal affirmed, in the context of development plan making, the construction of NPPF para.47 set out by Sir David Keene in *Hunston Properties Ltd v Secretary of State for Communities and Local Government*.[4] Laws LJ made clear that the NPPF has "effected a radical change" in the correct approach to housing supply policy. Paragraph 47 now requires a two-stage approach. First, the entire Objectively Assessed Need ("OAN")

[1] As at August 1, 2015.
[2] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13; [2012] J.P.L. 1078.
[3] *Gallagher Homes Ltd v Solihull MBC* [2014] EWCA Civ 1610; [2015] J.P.L. 713.
[4] *Hunston Properties Ltd v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1610; [2014] J.P.L. 599.

for an area must be assessed. Only once this has been done should the effect of meeting that need be considered in the light of any inconsistency with other policies in the NPPF. That inconsistency may then justify constraining housing provision. The two steps, however, must remain distinct; the greater the OAN, the more will be required by way of inconsistency with other policies in the NPPF to constrain the level of provision. *Gallagher* has established that this is the only proper approach.

Part and parcel of the radical change in approach to housing supply, and intimately entwined with the issue of meeting housing need, is the duty to co-operate under the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") s.33A, which was introduced by the Localism Act 2011. This is an area in which there remains a remarkable paucity of useful information regarding what exactly a local authority is expected to do to meet that duty. Inevitably, litigation has ensued. In *Samuel Smith Old Brewery (Tadcaster) v Selby DC*,[5] a major local landowner (Sam Smith's Brewery) challenged the adoption of Selby DC's Core Strategy on the basis that, during a six-week suspension in the local plan examination, s.33A requiring cooperation had come into force and, therefore, had to be complied with. Ouseley J dismissed the challenge and held that once a local development plan had been submitted for examination under the 2004 Act s.20, the duty to co-operate ceased to take effect in relation to that plan and, therefore, did not apply to any work carried out in devising or promoting modifications to make the plan sound. This has two effects; on the one hand it means that local authorities who have been found to comply with the duty to co-operate cannot be required to further co-operate in order to make the plan sound. However, it also means that a local authority cannot rely upon evidence of co-operation after the plan was submitted for examination to demonstrate compliance with the duty.

The requirement to demonstrate a five-year supply of housing in order to avoid local plan policies being branded as "out of date" in relation to of the NPPF's presumption in favour of sustainable development has generated significant litigation in the Planning Court. In *Eastleigh BC v Secretary of State for Communities and Local Government*,[6] a local authority was unsuccessful in its challenge to an Inspector's finding, at an appeal against a decision to refuse planning permission for 150 homes, that it was not able to demonstrate a five-year supply of housing. Dove J reiterated that the question of whether there was a deliverable five-year supply of housing was a matter of judgment for the Inspector, regardless of whether another Inspector might have reached a different view.

In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government*,[7] a developer succeeded in challenging an Inspector's decision refusing planning permission for a residential development. The local plan defined the physical limits of settlements and only permitted it outside those limits if it was necessary. Supperstone J held that, properly construed, those policies fell within the definition under para.49 and the Inspector's decision, which had refused permission on the basis that they were not policies concerning the supply of housing, was therefore overturned. Conversely in *Cheshire East BC v Secretary of State for Communities and Local Government*,[8] a green wedge policy intended to preserve open space was not a policy for the supply of housing under the NPPF and therefore was not rendered out of date by the inability to demonstrate a five-year supply. That there are appeals to the Court of Appeal pending in both of these cases is indicative of the fact that this is an area very likely to generate further litigation.

Finally, the decision in *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government*[9] is of particular interest. The case concerned an Inspector's decision to uphold a refusal of planning permission for a housing development consisting of 250 homes including a local centre and outdoor facilities. The local authority had refused permission on the basis that the development was outside the settlement boundary. The developer argued that the local authority could not demonstrate a five-year

[5] *Samuel Smith Old Brewery (Tadcaster) v Selby DC* [2014] EWHC 3441 (Admin); [2015] J.P.L. 427.
[6] *Eastleigh BC v Secretary of State for Communities and Local Government* [2014] EWHC 4225.
[7] *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 132 (Admin).
[8] *Cheshire East BC v Secretary of State for Communities and Local Government* [2015] EWHC 410 (Admin).
[9] *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin).

housing land supply and that the policy restricting development outside the settlement boundary was therefore out of date. Whilst this was accepted, Lindblom J held that a broad approach should be taken when examining the degree to which a given policy affected housing numbers. Provided an Inspector properly understood the scope of para.49, whether a policy fell within that paragraph was properly a matter of planning judgment.

In *Crane v Secretary of State for Communities and Local Government*,[10] Lindblom J made clear that it is for the decision-maker to judge, in the particular circumstances of the case before him, how much weight should be given to conflict with a plan whose policies for the supply of housing are out of date. This is not a matter of law but a matter of planning judgment. The NPPF does not say that a development plan whose policies for the supply of housing are out of date should be given no weight, or minimal weight, or, indeed, any specific amount of weight.

Even where a policy falling within the scope of the NPPF para.49 was out of date, it might still be compliant with the NPPF and could therefore be given material weight. Subject to the decisions in the outstanding appeals mentioned above, this gives a clear indication regarding how the court will approach the issue of out of date development plan policies in future cases

The green belt

The green belt is amongst the most politically sensitive areas of planning law and policy. Over the past year, discussion regarding the assailability of the green belt has found its way as far as the Court of Appeal on more than one occasion.

In *Gallagher*, Laws LJ upheld the decision of Hickinbottom J at first instance that a single composite test for "exceptional circumstances" permitting altering the green belt boundary should be applied under the NPPF para.83. The correct test is whether there are exceptional circumstances necessitating a revision of the green belt boundary. This was glossed by Jay J in *Calverton Parish Council v Nottingham CC*[11] where he held that "necessary may be seen as broadly synonymous with the existence of exceptional circumstances".

Two other Court of Appeal cases concerning the interpretation of green belt policy are worthy of note. The first is *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government*.[12] This concerned the meaning of "any other harm" to be weighed within the NPPF para.88 when determining whether very special circumstances exist. The proposal was for a hard runway to replace an existing grass runway at an aerodrome in the green belt. The case turned, in particular, on what harm caused by the proposal was included in the term "any other harm", that is, was it only other harm to the green belt or harm to other interests, for example the harm caused in this case by noise disturbance resulting from the development. The words "any other harm" predated the NPPF and were in Planning Policy Guidance ("PPG") 2. In the context of PPG2, Frances Patterson QC (as she then was) had held in *R. (on the application of River Club v Secretary of State for Communities and Local Government*[13] that "any other harm" included any harm to the green belt or otherwise. However, as a High Court Judge in this case, she construed the words differently in the context of the NPPF, finding that non green belt harm should be excluded from "any other harm". The Court of Appeal disagreed, holding that this would have been a significant change to green belt policy as it would make it less difficult for applicants to obtain planning permission for inappropriate development in the Green Belt. Sullivan LJ held that if it had been the Government's intention to make such a significant change to green belt policy then it was likely that there would have been a clear statement to that effect. Not only had no such statement been made, all indications

[10] *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin).
[11] *Calverton Parish Council v Nottingham CC* [2015] EWHC 1708 (Admin).
[12] *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] J.P.L. 416.
[13] *R. (on the application of River Club) v Secretary of State for Communities and Local Government* [2009] EWHC 2674; [2010] J.P.L. 584.

were to the contrary. Having regard to the actual balancing exercise in the NPPF para.88, he held that it was clear that all of the "other considerations" in favour of granting planning permission, which would by definition be non-green belt factors, had to go into the weighing exercise. Therefore, there was no sensible reason why "any other harm", whether it was green belt or non-green belt harm, should not also go into the weighing exercise. This judgment therefore introduced a return to the status quo and a position that had been found to be correct by Frances Patterson QC (as she was) herself some years earlier.

In *R. (on the application of Luton BC) v Central Bedfordshire Council*,[14] Luton appealed against the dismissal of a judicial review of *Central Bedfordshire*'s decision to grant planning permission for a substantial urban extension consisting of more than 5,000 homes, as well as offices, leisure facilities, a hotel and other commercial development at Houghton Regis North on 262ha of green belt land. Sales LJ held that there was no policy injunction requiring that green belt boundaries be altered through the development plan process before planning development could take place in the relevant area. The NPPF paras 87 and 88 plainly contemplated that development might be permitted on green belt land before the boundaries had been changed in the local plan provided that "very special circumstances" existed. Of particular future relevance may be that, in reaching its decision the Court of Appeal held that the test for "very special circumstances" for development within the green belt was stricter than the test of "exceptional circumstances" for altering its boundary under the NPPF para.83.[15]

Neighbourhood plans

Focusing on the level of neighbourhood planning, I wish to home in upon several significant decisions taken this year. The first is *R. (on the application of Gladman Developments Ltd) v Aylesbury Vale DC*[16] in which a developer applied for judicial review of the local authority's decision to make a neighbourhood plan restricting development by establishing a settlement boundary outside which planning permission for development would only be granted in exceptional circumstances. Lewis J held that the Planning 2004 Act s.38 was sufficiently widely worded to enable a neighbourhood development plan ("NDP") to include policies dealing with the use of development land for housing. This, he held, extended so far as to include policies which dealt with the location of proposed new dwellings, even in the absence of a development plan document setting out strategic housing policies. Thus in *Crane v Secretary of State for Communities and Local Government*,[17] Lindblom J held that the fact that development would conflict with a neighbourhood plan allocating other sites for development was a lawful basis for an Inspector's decision to uphold the local planning authority's refusal of planning permission for a development of 111 dwellings as well as a sports hall and other neighbourhood facilities.

This now has the support of the Court of Appeal. In *R. (on the application of Larkfleet Homes Ltd) v Rutland CC*,[18] Larkfleet challenged a local authority's decision to proceed to a referendum on a neighbourhood development plan allocating three sites for development (not including theirs, which had previously been identified as a potential site in the Core Strategy). The challenge turned not on the wording of the 2004 Act ss.38A and 38B, which it was accepted were wide enough to allow for the preparation of an allocations policy, but on whether the Town and Country Planning (Local Planning) (England) Regulations 2012[19]s.17 meant that a site allocations document must be prepared as a local development document. The court held that s.38(3) drew a clear distinction between development plan documents and

[14] *R. (on the application of Luton BC) v Central Bedfordshire Council* [2015] EWCA Civ 537; [2015] J.P.L. 1132.

[15] The court most recently considered the latter test in *IM Properties Development Ltd v Lichfield DC* [2015] EWHC 2077 (Admin). Cranston J reiterated that whether or not circumstances were exceptional was a matter of planning judgment. The claimant's attempt to rely upon *Copas v Windsor and Maidenhead RBC* [2001] EWCA Civ 180 for the proposition that in order to revise the green belt boundary, the assumptions upon which that boundary had been drawn had to be found to have been falsified had already been rejected by the Court of Appeal.

[16] *R. (on the application of Gladman Developments Ltd) v Aylesbury Vale DC* [2014] EWHC 4323 (Admin); [2015] J.P.L. 656.

[17] *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin).

[18] *R. (on the application of Larkfleet Homes Ltd) v Rutland CC* [2015] EWCA Civ 597.

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

NDPs. NDPs were therefore governed by a separate statutory regime and there was nothing within the wording of s.38B (which considered what could be provided for in a neighbourhood plan) to suggest that it could not include a site allocations plan.

Most recently in *R. (on the application of DLA Delivery Ltd) v Lewes DC*,[20] where again a developer challenged a local authority's decision to put a neighbourhood development plan out to a referendum, Foskett J has made clear that even in the absence of an up-to-date development plan setting out strategic housing policies, with which a neighbourhood plan can be regarded as being in conformity, a neighbourhood plan can nevertheless be "made" and include policies regarding the use and development of land for housing.

These cases indicate the court's clear acceptance of the significance of neighbourhood planning. Whilst the scope of such plans may be very local, they are far from impotent. On the contrary, they can have a real effect on the allocation of sites for development and therefore upon the commercial interests of developers. They are in this respect a successful manifestation of the localism agenda. Despite the respect the courts plainly afford that agenda and neighbourhood plans, given the potential commercial sensitivity of this area for developers, it would be surprising if some further litigation in this area did not come forward over the coming years.

Environmental cases

The number of "environmental" planning cases being heard is fewer than in recent years. However, there are still important points of law being decided in this field.

The first significant case of the year was the National Trust for Ireland's challenge to the Secretary of State's order granting development consent for the Hinkley Point C Power Station in *R. (on the application of An Taisce (National Trust For Ireland)) v Secretary of State for Energy and Climate Change*.[21] It concerned whether consultation regarding the proposed power station was required outside the UK. The UK Government had not carried out such a consultation on the basis that the scientific evidence was that an extreme or severe accident would not be expected to occur more than once in every 10 million years of reactor operation and therefore the development was not "likely to have significant effects on another state" under Environment Impact Assessment Directive ("the EIA Directive") art.7.[22] The Court of Appeal agreed, holding that An Taisce's argument did not need to be referred to the Court of Justice of the European Union. The suggestion that in order to fall outside the EIA Directive it needed to be demonstrated that the adverse impact of a severe nuclear accident was zero had no realistic prospect of success. Rather the definition of "likely" under the Habitats Directive[23] as set out in *Waddenzee*[24] could be read across. The result is that what was required was that it could be shown, on the basis of current scientific knowledge, that there was no realistic prospect of significant transboundary effects. This is an unsurprising decision of the law and the interest in the case derives at least as much from its subject matter as the legal principles it established.

Similarly, *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport*[25] attracted substantial coverage by virtue of the project at stake. In that case, the Court of Appeal held that safeguarding directions made in relation to the High Speed 2 ("HS2") rail link, which aim to ensure that new developments along HS2's proposed route do not impact on the ability to build or operate the line or lead to any additional costs, would not set the framework for future development consent under the Directive

[20] *R. (on the application of DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311 (Admin).
[21] *R. (on the application of An Taisce (National Trust For Ireland)) v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 1111.
[22] Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1.
[23] Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.
[24] *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2004] E.C.R. I-7405.
[25] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] EWCA Civ 1578; [2015] J.P.L. 555.

on Strategic Environmental Assessment ("the SEA Directive") art.3(2).[26] In fact, a very similar result could have been achieved by issuing directions under the Town and Country Planning Act 1990 ("TCPA 1990") ss.74 and 77. The Court of Appeal held that safeguarding directions were not comparable to a development plan. Whilst they constrained local planning authorities in determining planning applications they did not constrain the Secretary of State on an appeal under s.78. They were not, therefore, a plan or programme setting the framework for future development consent and did not require assessment under the SEA Directive.

It was not until February 2015 that there was a "successful" environmental challenge to a planning decision. *R. (on the application of Davies) v Carmarthenshire CC*[27] concerned a proposed wind turbine within a Special Landscape Area directly opposite the former writing shed belonging to Dylan Thomas. Gilbart J held that the planning officer had confused the concepts of significant impact and local impact in writing his scoping opinion. The Inspector had concluded that the turbine would have a negative impact on the character and appearance of the countryside that would outweigh the economic benefits of the development. However, he went on to hold that it would not have significant effects for the purposes of EIA, on the basis that the environmental impact would be felt only locally. Gilbart J made clear that significant effects and local effects are not, as the Inspector seemed to think, mutually exclusive. A local impact can itself be significant.

The most important "environmental" planning case of the year is also the most recent. In *R. (on the application of Champion) v North Norfolk DC* ("*Champion*"),[28] the Supreme Court addressed the issue of when the local authority were entitled to conclude that EIA was not required in relation to proposed development. The case concerned an application for planning permission to erect two silos and to construct a lorry park and wash bay at a site close to a river protected under the Habitats Directive as a site of special scientific interest. It turned, in particular, on the relevance of mitigation measures. The developer's proposed scheme raised concerns about the potential pollution of the river. It was accepted that pollution could be avoided by mitigation measures. However, the claimant argued that those measures could not be taken into account at the screening stage. In his leading judgment, Carnwath LJ made clear that the "likely to have significant effects" threshold under the Habitats Directive art.6(3) should not be confused with a formal screening opinion in the EIA sense. In this regard where, by virtue of mitigation measures, the local authority holds that the project is not likely to have significant effects upon the environment, there is no requirement to carry out an "appropriate assessment". However, in instances of doubt the precautionary principle means that issue should be resolved in favour of carrying out an assessment. This in and of itself is an interesting and noteworthy point regarding the interrelationship between EU and domestic law.

Discretion

Of even greater interest in *Champion* is the latter half of the judgment. It was accepted by both parties that the environmental statement was defective. The screening exercise had not properly set out the mitigation measures. However, building upon *Walton v Scottish Ministers*,[29] Carnwath LJ held that where the claimant's interests had not been substantially prejudiced and they were, in practice, still able to enjoy the substance of their EU law rights, the court could exercise its discretion not to quash the decision. Indeed, he went so far as to add obiter that there was no reason in principle why delay should not be taken into account in deciding whether to exercise this discretion. He appears therefore to have made the most

[26] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.
[27] *R. (on the application of Davies) v Carmarthenshire CC* [2015] EWHC 230 (Admin); [2015] J.P.L. 908.
[28] *R. (on the application of Champion) v North Norfolk DC* [2015] UKSC 52.
[29] *Walton v Scottish Ministers* [2012] UKSC 44; [2013] J.P.L. 323.

of the opportunity to row back on the House of Lords' decision in *Berkeley v Secretary of State for the Environment*[30] which limited the court's discretion not to quash in EU law cases.

Champion is very likely to have a significant impact on the practical outcome of future challenges to planning cases that turn on points of EU law. The Planning Court will be emboldened by this decision to exercise its discretion not to quash even in EU law cases. The decision in *Champion* and its knock-on effect therefore have the potential to create a chilling effect in relation to challenging perceived breaches of EU law. For developers this can only be good news. However, as with the changes under the Courts and Criminal Justice Act 2015 s.84 discussed below, it may have a collateral detrimental impact on the quality of administrative decision-making and, in particular, adherence to European regulatory requirements.

In the field of discretion, *Wiltshire CC v Secretary of State for Communities and Local Government*[31] is also of interest. Following an inquiry at which five-year housing supply had been a central issue, a report published recommending a figure for housing need in line with the local authority's projected provision and lower than that suggested at the inquiry. The report was sent to the Planning Inspectorate but not passed on to the Inspector, who issued his decision without having regard to it. The report was a material consideration which Patterson J held the Inspector had failed to take into account. However, this had been through no fault of the developer or the local planning authority. Patterson J considered that this was an exceptional circumstance such that quashing the decision would severely prejudice the developer and so she made a declaration that the decision was unlawful instead. She could do this because whether or not the court should issue a declaration instead of quashing the decision was a question not of whether the court should exercise its discretion about whether relief should be granted but rather what form (declaration or quashing order) that relief should take. Although the judgment refers to the exceptional circumstances in that case, generally where there is a challenge to a decision of the Secretary of State, the error of law is likely to be that of the Planning Inspector or the Secretary of State and not specifically that of the appellant or local planning authority. Ultimately it is the Secretary of State's decision which is under challenge. Therefore, it will be interesting to see the extent to which the approach in *Wiltshire* is followed in other cases. It may that the courts will consider that the exceptionality in *Wiltshire* arose due to the lack of a proper procedure in the Planning Inspectorate to deal with late changes of circumstances rather than the broader concept of fault for the error of law which in reality is likely to be placed at the door of the decision-maker in most cases.

Viability/developer contributions

On April 6, 2015, the Community Infrastructure Regulation 123 took effect. This prevented the use of s.106 agreements to fund an infrastructure project where five or more separate planning obligations funding the provision of that project or type of project have been entered into on or after April 6, 2010. Developer contributions in these cases must now be obtained through the Community Infrastructure Levy ("CIL"). Whilst reg.123 aimed to force local authorities to transition from an uncodified tariff approach to developer contributions under s.106 to the adoption of CIL charging schedules, reg.123(2) stated that a planning obligation may not constitute a reason for granting planning permission where it provides for infrastructure covered by a charging schedule. Regulation 123(2)'s purpose was to prevent so called "double dipping", where developers are charged both through CIL and a s.106 agreement. The problem created by the above is that a number of local authorities did not have a CIL charging schedule in place by April 6. This could potentially result in a position where even a developer willing to contribute to infrastructure in order to make their proposed development acceptable in planning terms is barred from doing so, which has caused local authorities, developers and lawyers to seek imaginative solutions to the issue.

[30] *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603; [2001] J.P.L. 58.
[31] *Wiltshire CC v Secretary of State for Communities and Local Government* [2015] EWHC 1459 (Admin).

Another change regarding developer contributions came in the form of a Written Ministerial Statement ("WMS") by Brandon Lewis, Minister for Housing and Planning, on November 28, 2014, which was clarified further by Secretary of State Eric Pickles on March 25, 2015. These WMS are expressions of Government policy and also resulted in changes to the PPG. They led to the introduction of new permitted development rights, in particular in relation to converting agricultural outbuildings into residential dwellings. They also exempted empty buildings which were being brought back into use, as well as custom and self builders, from paying the CIL. Financial credit equivalent to the existing gross floor space is now to be deducted from the calculation of any affordable housing contribution where vacant buildings are brought back into use or demolished for redevelopment. Perhaps the most controversial of the changes introduced was the prohibition on local authorities collecting affordable housing and tariff style developer contributions on small scale development sites consisting of 10 units or fewer (with the option of a lower five-unit threshold in National Parks and Areas of Outstanding Natural Beauty). Whilst the aim of the policy was to provide an economic stimulus to small-scale house builders, serious problems were created where local plans had already adopted evidence-based policies for affordable housing with lower thresholds.

However, the policy has now been removed from the PPG. In *R. (on the application of Reading BC) v Secretary of State for Communities and Local Government* ("*Reading BC*"),[32] Holgate J ruled that the policy relating to affordable housing and social infrastructure contributions, as well as the vacant building credit policy was unlawful since it was inconsistent with the statutory scheme and premised upon insufficient evidence, flawed consultation and the failure to have proper regard to the public sector equality duty.

Another contentious issue in the field this year has been the confidentiality of viability information. When planning committees or Inspectors take decisions relating to the correct level of developer contribution, for example when granting planning permission or examining a local authority's CIL charging schedule, there is an obvious conflict between the need for developers to provide sufficient evidence to demonstrate the level of contribution that will enable viable development and the inherent commercial sensitivity of that evidence. *R. (on the application of Perry) v Hackney LBC*[33] concerned whether the fact that members, who granted planning permission without seeing either the confidential viability reports submitted by the developer or independent reviews of those reports, and relied instead on the advice of officers who had scrutinised those reports, was lawful. Patterson J made clear that viability appraisals are to be treated as confidential because they contain commercially sensitive information about costs and residential values. The decision of a planning committee who had not seen the viability appraisals for that reason was therefore upheld.

Similarly in *Turner v Secretary of State for Communities and Local Government*,[34] Collins J held that developers applying for planning permission to redevelop the Shell Centre on London's South Bank had to be able to submit confidential information in support of that application, in that case a report regarding the percentage of affordable housing that the developer believed could be achieved.[35] At the same time, decisions should not be taken on the basis of information that was not available to objectors and which they could not, therefore, challenge. In striking a balance between the two, Collins J held that a local authority's viability report should be disclosed on a call in by the Secretary of State, but that this alone was sufficient; developers were not required to disclose their own viability evidence. This decision strikes a pragmatic balance between these two competing considerations. However, given the apparently irreconcilable principles in play here it would be surprising if there was not further litigation on the subject in the near future.

[32] *R. (on the application of Reading BC) v Secretary of State for Communities and Local Government* [2015] EWHC 2222 (Admin).
[33] *R. (on the application of Perry) v Hackney LBC* [2014] EWHC 3499 (Admin); [2015] J.P.L. 454.
[34] *Turner v Secretary of State for Communities and Local Government* [2015] EWHC 375 (Admin); [2015] J.P.L. 936.
[35] It is interesting to note as an aside that *Turner v Secretary of State for Communities and Local Government* [2015] EWHC 375 (Admin) was appealed to the Court of Appeal on the basis that the Inspector's treatment of a lay objector gave rise to apparent bias. The appeal was dismissed on the basis that the fair-minded individual would understand that the Inspector's role was inquisitorial and would involve challenging objectors' positions.

Enforcement

There have been a surprisingly large number of significant decisions within the field of enforcement this year. Starting with one of the decisions with perhaps the broadest application, in *Wingrove v Stratford-on Avon DC*,[36] the High Court held that the TCPA 1990 s.70C conferred a wide discretion on local authorities to decline to determine retrospective applications for development subject to an enforcement notice. In particular s.70C was aimed at preventing the use of retrospective planning applications as a means of delaying enforcement action being taken. A claimant's motives in submitting the application were therefore clearly material to a decision to refuse to entertain such an application.

Also of wide importance are two decisions relating to appeals under ground (f) of s.174(2) of the TCPA 1990. The more recent is *Miaris v Secretary of State for Communities and Local Government* ("*Miaris*").[37] The Secretary of State had upheld an enforcement notice, which alleged that there had been a material change of use of premises from a restaurant to use as a restaurant, drinking establishment and nightclub. The enforcement notice required that the cessation of use as a drinking establishment and nightclub and also of allowing DJs to perform. Miaris appealed against the enforcement notice only under ground (f) arguing that it required steps beyond that which was necessary to remedy the breach of planning control. There was no appeal under ground (a) that planning permission should be granted. The Inspector therefore found that he was unable to take into account general planning considerations which would properly be considered under ground (a). In the High Court, John Howell QC (sitting as a Deputy High Court Judge) held that where an enforcement appeal sought to remedy not only injury to amenity but also dealt with other planning considerations, in the absence of an appeal under ground (a) that planning permission should be granted, an appeal under ground (f) could not succeed as it would not make good the entirety of the breach of planning control. However, he did accept that if the enforcement notice dealt only with injury to amenity then an application under ground (f) alone might be entertained; it depended upon the breach, which the enforcement notice sought to remedy. There is an outstanding appeal against this decision.

However, the Court of Appeal has recently also taken a restrictive approach to the scope of an inspector's powers under ground (f) in *Ioannou v Secretary of State for Communities and Local Government* 4 ("*Ioannou*").[38] *Ioannou* concerned whether an Inspector had been right that he did not have the power under ground (f) to vary an enforcement notice served against the conversion of a house into five flats so as to grant permission for a three-flat scheme. At first instance Ouseley J had allowed the judicial review on the basis that any action remaining to be taken after the steps required for compliance with the varied notice could be treated as having been granted retrospective planning permission under s.73A by virtue of the TCPA 1990 s.173(11). The Court of Appeal overturned this decision. Only buildings which were in existence when the enforcement notice was issued fell within s.173(11) and therefore the proper course of action would have been to allow the appeal under ground (g) and extend time for compliance with the notice so that the planning merits of the alternative scheme could be properly explored. Taken together *Miaris* and *Ioannou* suggest that ground (f) should be tightly construed and that attempts to broaden its scope are unlikely to succeed.

Another area in which the law of enforcement continues to develop is in respect of "concealment" cases. In *R. (on the application of Jackson) v Secretary of State for Communities and Local Government*,[39] Jackson had obtained planning permission to install windows in the roof of his barn without disclosing that the first floor of the barn was being used as a residential dwelling. He then applied for a certificate of lawfulness but was refused on the basis that the barn's use as a residential dwelling had been concealed. Jackson filed

[36] *Wingrove v Stratford-on-Avon DC* [2015] EWHC 287 (Admin); [2015] J.P.L. 927.
[37] *Miaris v Secretary of State for Communities and Local Government* [2015] EWHC 1564 (Admin).
[38] *Ioannou v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1432.
[39] *R. (on the application of Jackson) v Secretary of State for Communities and Local Government* [2015] EWHC 20 (Admin); [2015] J.P.L. 830.

a claim for judicial review. Holgate J held that planning enforcement orders under ss.171BA, 171BB and 171BC are supplementary to, rather than a statutory codification of, the principles decided by the Supreme Court in *Secretary of State for Communities and Local Government v Welwyn Hatfield BC*.[40] Moreover, this year the first prosecution of a planning enforcement order took place. However, the District Judge dismissed the case on the basis that the statute required "deliberate" deception. This was the key word and it was for the local authority to prove that any deception they alleged have been deliberate. Holgate J therefore dismissed the appeal.

The final significant enforcement case that I wish to consider is *R. (on the application of Westminster CC) v Secretary of State for Communities and Local Government*.[41] This concerned whether an Inspector had been right to quash an enforcement notice issued on the basis that there had been a material change of use from lawful C1 use of the premises as a hotel to a *sui generis* mixed use as a hotel/hostel. At first instance, Supperstone J upheld that decision as a matter of planning judgment. The Court of Appeal disagreed. They overturned the decision on the basis that for there to be a mixed use it was not required that specific parts of the property be used exclusively as a hostel as found by the inspector. Rather a change in the character of the use such that it was no longer simply in C1 use was required. The Inspector's findings of fact clearly pointed towards such a conclusion and therefore she had misled herself regarding the correct test. Whilst the number of cases engaging this specific distinction may be few and far between, they provide an important and up to date illustration of the principle that in cases concerning a material change of use, it is the materiality of any change in the character of the use of the planning unit as a whole, including any off site impacts where relevant, that is at issue.

Procedure

Perhaps the single most important legislative change this year has been the introduction of the Courts and Criminal Justice Act 2015 ("the 2015 Act") ss.84–92. Whilst I do not propose to consider each of the provisions in detail I do wish to highlight three important areas of change. The first is the introduction of a new test under s.84 regarding the court's discretion where it appears highly likely that regardless of an error of law the outcome of a decision would not have been substantially different. This has now come into effect and applies to claims filed on or after April 13, 2015. The second are the changes to cost capping orders under ss.88–90 which have not yet come into effect. The third is the introduction of a permission stage to certain statutory challenges (also not yet in force), most notably under the TCPA 1990 ss.287 and 288.

The first of these changes seeks to reduce the court's discretion in cases where the outcome is "academic". The test under the common law is one of "inevitability".[42] Only if the same outcome is inevitable should the court exercise its discretion and refuse to grant permission or to quash the decision. Section 84 lowers this threshold by introducing a new less rigorous statutory test. The Act distinguishes between the permission and substantive stages. Section 84(1) requires that the court refuse relief at the substantive stage where it is highly likely that the outcome would not have been substantially different. The court has no discretion except where it would be wrong to refuse relief for reasons of exceptional public interest. The same test applies to the permission stage, but in that instance the court retains a discretion regarding whether or not to grant permission. Whilst this perhaps has the benefit of reducing any delay to development and the economic impact that results from that, there is a disbenefit in terms of maintaining high standards of administrative decision-making. Against this background it will be interesting to see how the courts interpret the meaning of highly likely; a term which will almost "inevitably" generate significant litigation.

[40] *Secretary of State for Communities and Local Government v Welwyn Hatfield BC* [2011] UKSC 15; [2011] J.P.L. 1183.
[41] *R. (on the application of Westminster CC) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 482.
[42] See *R. (on the application of Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [86].

As well as this statutory intervention, there has also been a substantial amount of "procedural' litigation over the course of the past year. In particular, time limits and costs have received no less than their fair share of judicial attention.

With regards to time limits, both of the statutory provisions that had given rise to the litigation mentioned below have now been clarified under the 2015 Act and therefore the cases can be dealt with relatively swiftly. However, their very existence is a salutary lesson in the fact that cases can be won and lost on procedure alone. The first statutory provision that gave rise to litigation was the Planning Act 2008 s.118 which specified the time limit for challenging a development consent order ("DCO"). The statute specified the time limit as "a period of six weeks beginning with the day on which the order is published". In *R. (on the application of Blue Green London Plan) v Secretary of State for the Environment* and *R. (on the application of Southward LBC) v Secretary of State for Communities and Local Government*,[43] the court held that this six-week period began to run on the day on which the order was made. The claimant was therefore one day out of time in challenging the DCO granting consent for the Thames Tideway Tunnel and, as the time limit was statutory, the court had no jurisdiction to extend it.[44]

On the other hand, *Nottingham CC v Calverton Parish Council*[45] concerned the six-week time limit under the 2004 Act s.113(4). In that case, Lewis J held that where that period expired on a day when the court was closed, the time limit would be treated as expiring on the next working day. Whilst this might be regarded as a "lucky escape" for the Parish Council, the costs thrown away on this application again bear witness to the benefits of ensuring that, where a statutory time limit applies, documents are filed with as much breathing space as possible before the deadline.

Turning then to costs, there have been two important decisions in this regard, both relating the scope of the application of the costs limits that apply under CPR 45.43 to "environmental" judicial reviews. In *Venn v Secretary of State for Communities and Local Government*,[46] the Court of Appeal affirmed the Secretary of State's concession that "most if not all planning cases" would fall within the definition of environmental under the Aarhus Convention. The subject of the claim was the grant of planning permission for a single-storey house in the side garden area of a neighbouring property. The Secretary of State conceded, and the court agreed, that this fell within the meaning of "environmental". Whilst the Aarhus Convention itself does not define the term "environmental" it does define "environmental information". Sullivan LJ made clear in his judgment that this was also to be used as a guide to the more general meaning of "environmental". Sullivan LJ also agreed with the High Court judge that CPR 45.41 deliberately limited the availability of protective costs orders for environmental cases to claims for judicial review and excluded statutory challenges. Where he disagreed, however, was with the High Court Judge's decision to relax the Corner House principles in environmental cases so as to give effect to the Aarhus Convention by grant costs protection outwith the wording of the CPR. The Court of Appeal held that to do so frustrated a limitation deliberately imposed by the CPR. This was wrong in principle and only legislative action could remedy this non-compliance with the Aarhus Convention. This was plainly intended to be a shot across the legislative bows. Sections 88–90 of the 2015 Act mentioned above will, when they come into force, therefore effect a change in this field likely to attract further litigation.

The second decision concerning the scope of the CPR was *R. (on the application of HS2 Action Alliance) v Secretary of State for Transport*[47] in which Hillingdon LBC and the HS2 Action Alliance sought to challenge the safeguarding directions for the HS2 rail link as discussed above. Sullivan LJ held that the wording of the CPR entitled a local authority to Aarhus costs protection. Whether or not the Aarhus Convention itself might apply a narrower definition was not decided. Even if the Convention's definition

[43] *R. (on the application of Blue Green London Plan) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 495 (Admin).
[44] The wording of s.118 has now been amended by the Courts and Criminal Justice Act 2015 so that when time begins to run is clear.
[45] *Nottingham CC v Calverton Parish Council* [2015] EWHC 503.
[46] *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539; [2015] J.P.L. 573.
[47] *R. (on the application of HS2 Action Alliance) v Secretary of State for Transport* [2015] EWCA Civ 203.

was narrower, that would not prevent the domestic legislation from granting wider powers. This, of course, leaves the door open for future litigation on the subject when the new legislation comes into effect and the CPRs are revised.

Compulsory Purchase Orders ("CPOs")

The case law regarding CPOs shows little in the way of a unifying theme. With the 2004 Act long bedded in, appellate interference in the area is relatively rare. However, in *Grafton Group (UK) v Secretary of State for Transport*,[48] Ouseley J quashed a CPO for a safeguarded Thames river wharf. The claimant owned the derelict wharf and intended to retain it until it could be used for residential development, which would only be permitted if use for waterborne freight handling was no longer viable. The third defendant applied to use the site as a cement batching plant, which would receive aggregates by water, and the local authority made a CPO for the wharf's acquisition with the intention of leasing it to the third defendant. An inspector refused the planning application on design grounds but indicated that an improved scheme was likely to be granted permission and therefore recommended confirmation of the CPO. Ouseley J found that in principle the rejection of the planning application did not prevent confirmation of the CPO. However, he held that on the facts of this case the CPO had been confirmed on the broad basis that there would be a forthcoming application to reactivate the wharf so as to create a public benefit. This was not the same as the case put forward by the second and third defendants and was not a sufficiently compelling justification in the public interest. There needed to be a reasonable prospect that the land would be used for the purpose for which it had been acquired with sufficient evidence to demonstrate this. There was not sufficient evidence in this case to meet that test and if the CPO was allowed to stand that would undermine the demands of the threshold set by the test. Ouseley J's decision therefore demonstrates that the test for the compulsory acquisition of land should not be underestimated. Acquiring land by compulsion is a draconian step and requires solid justification. This decision makes clear that the courts are prepared to quash decisions to ensure that that holds true in practice. It is however, interesting to note that whilst permission to appeal the ratio of the decision in this case was refused, the Court of Appeal has granted permission to appeal the relief granted. The issue is whether, as Ouseley J held, the CPO has been quashed and therefore the third defendant will need to promote an entirely new CPO or whether the matter need only be referred back to the Secretary of State for redetermination.

On the compensation side, the leading case this year has been *JS Bloor (Wilmslow) Ltd v Homes and Communities Agency*.[49] This concerned the correct hope value to be attributed to agricultural land being compulsorily acquired as part of a business park development under the *Pointe Gourde* principle. The 27 acres of agricultural grazing land had an existing use value estimated at £2,000 per acre. However, Bloor sought compensation of over £2.5million on the basis that it had significant hope value because of the prospect of planning permission for residential development. This hope value relied upon a coordinated development coming forward, including spine roads linking it to the motorway. The Upper Tribunal estimated the probability of planning permission at 50 per cent and had therefore granted compensation of £746,000. However, the Court of Appeal reiterated that, in determining the level of compensation to award, s.6 was designed to discount the effect of the scheme upon the value of the land. In the present case that required more than simply demoting the emphasis on the development plan. Rather, the Upper Tribunal should have sought to consider what development plan policies would apply in the absence of the scheme and the policies underlying it. The potential for a grant of planning permission for residential development should then be assessed in the context of those policies and a valuation arrived at on that

[48] *Grafton Group (UK) Plc v Secretary of State for Transport* [2015] EWHC 1083 (Admin).
[49] *JS Bloor (Wilmslow) Ltd v Homes and Communities Agency* [2015] EWCA Civ 540.

basis. This was not the approach the Upper Tribunal had taken and the case was therefore remitted for redetermination.

Both of the above cases in effect refine established principles under the law of compulsory purchase. More exceptional is *R. (on the application of Gottlieb) v Winchester CC*[50] which concerned alterations to a contract between Winchester and a local developer to build a mixed-use retail, residential and transport development. The site had been the subject of a CPO which was confirmed following a public inquiry. A key justification for the CPO was the need to deliver a comprehensive scheme. The permitted scheme included several key components which were to be delivered by a development partner and pursuant to a development agreement. However, when it appeared that the terms of the contract had become unviable for the developer, the local authority renegotiated the contract to remove the affordable housing and civic amenity requirements it imposed without undertaking a fresh procurement process. Lang J held that under Directive 2004/18[51] and the Public Contracts Regulations 2006,[52] the test was whether the variations resulted in a material difference and thereby resulted in what was in effect a new contract, regardless of whether the original contract had contemplated such variations. She found that the variations went to a decisive factor in the award of the contract and that in order to ensure transparency and equality of opportunity a fresh procurement exercise was therefore required. This case demonstrated the breadth of issues engaged in compulsory purchase cases. Whilst cases still raise issues about the justification required for the grant of a CPO and the correct level of compensation, they increasingly engage other complex economic and legal considerations; a trend that is only set to continue.

Travellers

The law relating to travellers raises a myriad of issues. I intend to dwell on a single key case in this field. *R. (on the application of Moore) v Secretary of State for Communities and Local Government*[53] concerned the Secretary of State's decision to recover planning appeals relating to proposed pitches for one or more caravans within the green belt. The only reason he gave for recovering those decisions was that they were appeals involving traveller sites. This led to significant delays in the determination of the appeals as compared to if they had been decided by an Inspector. Gilbart J held that Romany gypsies formed a racial group for the purposes of the Equalities Act s.9 and that there was a considerable disparity between the number of traveller cases recovered compared tp non-traveller cases. This put gypsies and travellers at a disadvantage and therefore amounted to indirect discrimination under the Equality Act 2010 s.19. In particular, Gilbart J found that the Secretary of State could not justify the recovery of these appeals as a proportionate means of achieving a legitimate objective. Indeed, since the Secretary of State could not show that the delay in access to an appeal was necessary and justified the decision to recover was a breach of the European Convention of Human Rights art.6. Finally, the court held that the Secretary of State had had no regard to the public sector equality duty under the Equality Act 2010 s.149. The decisions to recover were therefore quashed. Issues relating to travellers are often highly contentious, perhaps all the more so when they arise in the context of green belt policy. The myriad of issues raised by the Secretary of State's policy, including indirect discrimination, the right to a fair trial and the public sector equalities duty, demonstrates the importance of recognising that such cases will often involve equalities and human rights considerations by virtue of the fact that they engage a protected characteristic. When making decisions in this field public authorities should therefore be vigilant in considering the proportionality of a measure and complying with the public sector equalities duty.

[50] *R. (on the application of Gottlieb) v Winchester CC* [2015] EWHC 231 (Admin).
[51] Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L314/114.
[52] The Public Contracts Regulations 2006 (SI 2006/5).
[53] *Moore v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin); [2015] J.P.L. 762.

Broadview

I have chosen to end this talk with the case of *Broadview Energy Developments v Secretary of State for Communities and Local Government* ("*Broadview*")[54]; a case which perhaps reminds us of the political significance of the principles that may be at stake in planning cases.[55] *Broadview* concerned the Secretary of State's decision to refuse a called-in application for permission to build a wind farm, contrary to the advice of his Inspector. The claimant suggested that the fact that they had not been told that the local MP had lobbied the Minister, both in correspondence and informally in the House of Commons tea-room and lobby, meant the decision should be quashed. However, the court held that such lobbying was a normal part of the democratic process, provided it was not carried out improperly, and did not result in unfairness or the perception of bias and dismissed the application. The case placed the political reality of the planning landscape in focus. As those who work in the field are acutely aware, planning matters can be bitterly political and may engage fundamental constitutional principles; *Broadview* and the issue of separation of powers is a pertinent example.

Conclusions

This canter through the relevant developments of the past year gives a flavour of the direction of legal travel within the planning arena. The above cases demonstrate the sheer breadth of issues raised. Perhaps two key features stand out. The first is the increasing acceptance that, where an administrative decision has been improperly taken, the court should not grant relief if the practical effect will simply be that the same decision is remade following the correct procedure. Section 84 of the 2015 Act enshrines this principle in statute and *Champion* extends the remit of the court's discretion further in EU law cases. The second is the increasing contentiousness regarding promoting viable residential development. As the decisions regarding the green belt and *Reading BC* demonstrate, striking the balance between encouraging development, protecting resources and ensuring a fair deal for the tax payer is difficult, and cases involving these issues will no doubt continue to exercise the courts in the year to come.

[54] *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1743 (Admin).

[55] This case follows a series of cases last year such as *R. (on the application of Bishop's Stortford Civic Federation) v East Hertfordshire DC* [2014] EWHC 348 (Admin); [2014] J.P.L. 852, where the role of councillors in the democratic process was discussed.