

Shining a light on the BRE

Annabel Graham Paul*

Introduction

Our cities are growing rapidly.¹ Meeting future housing needs is a paramount driver of Government policy. While cities grow, in 2018 the High Court quashed two planning permissions—one for scheme of 62 affordable flats and commercial uses in Tower Hamlets; the other for a hotel in Shepherds Bush—on the basis of deficiencies with the approach to assessing the effects of the new development on daylight in existing adjoining residential properties. This paper examines the implications of the judgments in those cases, *R. (on the application of Rainbird) v Tower Hamlets LBC* [2018] EWHC 657 (Admin) and *R. (on the application of Guerry) v Hammersmith and Fulham LBC* [2018] EWHC 2899 (Admin). It sets out how challenges to assessing daylight and sunlight can be avoided and suggests ways in which practitioners can approach assessments more flexibly without leading decision-makers into legal error.

“Site Layout Planning for Daylight and Sunlight: a guide to Good Practice”, written by Dr Paul Littlefair of the Building Research Establishment and published in 2011, commonly known as the ‘BRE Guide’, is the most widely used practitioner guidance. Its express purpose is to: “provide advice on site layout planning to achieve good sunlight and daylight within both new and existing buildings and in open spaces between them. Although the Guide recognises that it may be used by planning authorities, its aim is to help, rather than to constrain, the designer”.² The Guide covers rights to light methodologies (which are not material to planning³) and methodologies for assessing the impact of new development on existing lighting conditions, on prospective future adjoining development, and within a new development itself. This paper concerns only those parts of the BRE Guide that relate to assessing daylight on existing properties. There is, of course, scope for challenging the application of other parts of the BRE Guide.⁴

Despite the BRE Guide’s widespread adoption by practitioners and planning decision makers, it has been afforded no special status in Government policy or guidance,⁵ in contrast to other independently produced technical guidance, such as ETSU-R-97 on “Noise from Wind Turbines”, the use of which is expressly advocated in the National Policy Statement for Renewable Energy Infrastructure (EN-3).⁶ Some local planning authorities have, however, incorporated reference to the BRE Guide in their development plan policies or in an SPD, for example by directing developments to assessing daylight and sunlight using the BRE Guide.⁷ I am not aware of any planning policy which stipulates the mandatory use of the BRE Guide.

* Barrister, Francis Taylor Building. Acted for the Claimant in *R. (on the application of Guerry) v Hammersmith and Fulham LBC* [2018] EWHC 2899 (Admin).

¹ London alone is expected to grow by 37% to 11 million by 2050: see the GLA’s London Infrastructure Plan 2050.

² Guide [1.6].

³ Guide [2.2.18] and see NPPG Paragraph: 006 Reference ID: 66-006-20190722.

⁴ For example, permission to bring judicial review was granted on 26 July 2019 in respect of a claim challenging the application of the part of the BRE Guide relating to assessing daylight effects on potential development land (see *R. (on the application of Maxine Investments) v Guildford BC*, CO/2314/2019). At the time of writing, the substantive hearing has not yet taken place.

⁵ The BRE Guide is mentioned in neither the NPPF nor NPPG although there is general guidance about daylight and sunlight. The NPPG states: “Where a planning application is submitted, local planning authorities will need to consider whether the proposed development would have an unreasonable impact on the daylight and sunlight levels enjoyed by neighbouring occupiers, as well as assessing whether daylight and sunlight within the development itself will provide satisfactory living conditions for future occupants.” (Paragraph: 006 Reference ID: 66-006-20190722.) The NPPG also distinguishes between rights to light, which are not part of the planning system, but which may affect the scope for development on neighbouring sites.

⁶ At [2.7.56].

⁷ An example is Policy DM25 of the “Managing Development Document” in LB Tower Hamlets which featured in the *Rainbird* case, where the explanatory text stated: “The Council will expect the impact of the development to be assessed following the methodology set out in the most recent version of Building Research Establishment’s (BRE) ‘Site layout planning for daylight and sunlight: A guide to good practice’” (at 25.5).

If a developer chooses to apply the BRE methodology, it must be applied correctly in accordance with how the Guide is written and operates, whether or not the use of the Guide is preferred by a particular authority.⁸ Tied to this, however, is the caveat within the Guide, that the methodology is intended to be applied “sensibly and flexibly”.⁹ If a developer feels that there is a better—or more appropriate—alternative methodology to use then they are free to adopt it, subject to considerations of what weight is likely to be accorded to its reliability by a decision-maker. However, at the current time, there is no other methodology which has the same track-record of long use in the field and so it may not be wise to diverge from BRE methods without compelling evidence supporting an alternative method of assessment.¹⁰

The relevant parts of the BRE Guide to Rainbird and Guerry

Both the *Rainbird* and *Guerry* cases concerned the impact of proposed new development on daylight within existing neighbouring buildings.

Section 2 of the BRE Guide contains numerical target values which indicate when daylight enjoyed by an existing building is likely to be significantly affected by a development.

The target values are intended for application only to rooms in dwellings where the BRE Guide considers that daylight is required, including living rooms, kitchens and bedrooms.

There are two guidelines:

- Vertical Sky Component (“VSC”).
- Daylight Distribution (or No Sky Line) (“NSL”).

VSC measures how much light reaches a dot on a window in an overcast day. It is the ratio of the direct sky illuminance falling on the centre of each main window to the simultaneous horizontal illuminance under an obstructed overcast sky. The Guide states:

“If the VSC is greater than 27% then enough skylight should still be reaching the window of the existing building. Any reduction below this level should be kept to a minimum. If the VSC, with the new development in place, is both less than 27% and less than 0.8 times its former value, occupants of the existing building will notice the reduction in the amount of skylight.”¹¹

Where room layouts are known,¹² the impact on the daylighting distribution in the existing building can be found by plotting the NSL in each of the main rooms. The Guide states:

“The NSL divides points on the working plane which can and cannot see the sky ... Areas beyond the NSL, since they receive no direct daylight, usually look dark and gloomy compared with the rest of the room, however bright it is outside ... If, following construction of a new development, the no sky line moves so that the area of the existing room, which does receive direct skylight, is reduced to less than 0.8 times its former value this will be noticeable to the occupants, and more of the room will appear poorly lit.”¹³

⁸ As was set out in *Guerry* at [51]: “If the Council chooses to apply the BRE Guide it must do so properly.”

⁹ See BRE Guide at [2.2.10], for example. As Thornton J said in *Guerry*, “If the Council chooses to apply the BRE Guide it must do so properly. Whether or not an officer’s report is seriously misleading requires a fact sensitive analysis” (at [51]).

¹⁰ One example of a recently developed alternative standard which may inform what is an acceptable level of daylight within a building is the BSI Group’s European standard for the provision of daylight in buildings which uses median daylight illuminance, amongst other methodologies, and was published in May of this year: BS EN 17037:2018, *Daylight in Buildings* (May 2019). I am not aware of this though, or any other method of daylight assessment, being used in the context of assessing planning applications. A development corporation, or similar, may be inclined to fund the development of an entirely new methodology for daylight and sunlight assessment but there is no evidence that this is happening yet.

¹¹ [2.2.7].

¹² It is notable that NSL is only applicable “where room layouts are known”. Thus, a developer could, depending on the characteristics of the particular development, be in a better position by not making any assumptions on room layouts and carrying out a less stringent analysis relying solely on VSC than analysing both VSC and NSL. Such an approach would not be contrary to a strict reading of the Guide.

¹³ Guide [2.2.8] and [2.2.9].

Material to the errors that were found in *Rainbird* and *Guerry*, the Guide sets out that both the amount of daylight and its distribution in a room are important and the diffuse daylighting of the existing building may be adversely affected. This will be the case if *either*: VSC is less than 27% and less than 0.8 times its former value, or the area of the working plane in a room which can receive direct skylight is reduced to less than 0.8 times its former value.

The errors in *Rainbird* and *Guerry*

Prior to the judgments in *Rainbird* and *Guerry*, it was not uncommon for practitioners to use the BRE methodologies as a tool for assessment rather than following the Guide slavishly. Indeed, this practice is reflected in the new NPPF published in February 2019 which states that, when considering applications for housing: “authorities should take a flexible approach in applying policies or guidance relating to daylight and sunlight, where they would otherwise inhibit making efficient use of a site (as long as the resulting scheme would provide acceptable living standards).”¹⁴

Commentators have expressed the view that many popular places to live and work in dense urban locations do not meet BRE standards and yet that does not mean that the quality of accommodation in those places is inadequate or the daylight levels are poor. As London First, in partnership with GIA, set out in “Guiding Light: Unlocking London’s Residential Density”:

“Some of the densest parts of London such as Covent Garden, Marylebone, Mayfair, Shad Thames and Chelsea, are also some of the most sought after areas to live and work as well as being predominantly low to mid-rise with good access to public transport and a range of amenities and facilities. Many of these places, and indeed much of London’s central areas, do not comply with current national standards or the daylight and sunlight levels expected by the BRE guidance.”¹⁵

In *Rainbird*, the developer’s daylight and sunlight report had treated compliance with either VSC or NSL as indicating BRE compliance. In relation to one room, it had stated: “W8 would experience a 38% reduction in VSC but importantly the room it serves, R2, will experience no change in its daylight distribution, indicating this room will remain as well daylit in the proposed situation as it currently is in existing situation, [and] meets the BRE Guideline in terms of VSC.”¹⁶ In respect of other properties, meeting NSL (or nearly meeting NSL) was argued to justify transgressions with VSC. This is contrary to a strict application of the numerical tests in the BRE Guide which states that both VSC and NSL must be met for daylight not to be adversely affected.

In *Guerry*, a number of room layouts were known and some were assumed, so both NSL and VSC were calculated. All results were set out in an annex but the main report focussed only on VSC. This led to the following analysis in the officer’s report:

“When reviewing the daylight results for each property, the methods would normally be considered sequentially, VSC and NSL. In the first instance, therefore the VSC results should be considered. If all the windows in a building meet the VSC criteria, it can be concluded that there will be adequate daylight. If the windows in a building do not meet the VSC criteria, the NSL analysis for the room served by that window needs to be considered. If neither the VSC nor NSL criteria are met, then average daylight factor (ADF) results should be considered.”¹⁷

¹⁴ NPPF [123](c).

¹⁵ <https://www.londonfirst.co.uk/sites/default/files/documents/2018-05/Guiding-Light-Unlocking-Londons-Residential-Density.pdf> (p.6).

¹⁶ As quoted from the Officer’s Report at [57].

¹⁷ As quoted at [10].

Ms Guerry argued that this methodological approach was wrong. It cannot be concluded that if windows meet the VSC criteria there will be adequate daylight because properties which meet VSC should not be treated as having adequate daylight if the NSL guideline is not also met.

In addition, for those properties that were acknowledged in the report to have inadequate daylight because they failed the VSC guideline, the officer's report ignored that some of these properties also failed the NSL guideline. Ms Guerry argued that this substantially understated the overall failure to meet BRE standards and thus the seriousness of the harm caused.

In *Rainbird*, counsel for the local authority had argued that the BRE Guide fell to be interpreted by experts on the basis of common practice. An interpretation of the Guide (unlike that of policies in development plans) would only be flawed if it was not within the range of reasonable interpretations that such an expert might adopt. A development could be in accordance with the guidelines even if the target values in them were not met. What was reasonable to expect in the (urban) area where this new development was proposed was relevant.¹⁸

John Howell QC, sitting as Deputy High Court Judge, applied the classic approach to allegations of misleading officers' reports,¹⁹ concluding: "I do not accept that, in considering what the impact of a proposed development assessed in accordance with the BRE Guide is, the Council were free to adopt any interpretation of that Guide that might be adopted within the limits of rationality."²⁰

He applied *Tesco Stores v Dundee*,²¹ ruled that the Guide should be construed objectively by the Court,²² and rejected that any different approach should apply in an urban location.²³ In light of this objective construction of the Guide, he held that Members were significantly misled because the daylight and sunlight report was written on the assumption that the daylight enjoyed by a room which did not meet the VSC guideline was likely to be significantly adversely affected by a proposed development only if the NSL was also not met or was not met sufficiently closely.²⁴ Members were not told that 23 rooms in 12 properties failed to meet the BRE guidelines. They were not told that 15 rooms in 11 properties would, in fact, suffer a significant adverse effect on the daylight they enjoyed, as properly assessed in accordance with the Guide.

These errors were held to be sufficiently significant or serious as to be material when the report was read as a whole:

"The overall conclusion that all the rooms would remain well lit and enjoy good daylight was materially flawed by that omission and these errors and it did not follow in any event from the analysis that preceded it. In my judgment it cannot be said that the same conclusions on daylight would have been reached regardless of that omission and those errors."²⁵

Thornton J in *Guerry* confirmed that the officer's report was flawed by the similar misapplication of the BRE methodology:

"By virtue of the error Councillors were given scant information on NSL compliance ... Councillors would probably not have understood that failing to meet the guideline for the distribution of daylight

¹⁸ [71].

¹⁹ As summarised in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314.

²⁰ [81].

²¹ [2012] UKSC 13.

²² *Tesco Stores* applies to documents other than planning policy and John Howell QC pointed out that it is irrelevant whether or not the statement emanates from the decision-maker or (as in the *Rainbird* case) is incorporated by reference into the development plan (see *Hopkins Homes*). He noted it is important to bear in mind the Guide is aimed at designers and contains scientific or technical terms. He had been assisted by expert evidence from the author of the Daylight and Sunlight Report and the author of the BRE Guide, Dr Paul Littlefair.

²³ Adding that there is nothing in the BRE Guide that states that the VSC guideline values are derived from a suburban development or that indicates that its guidelines are only applicable to developments outside an inner city urban environment ([112]).

²⁴ [93].

²⁵ [121](2).

within a building is a separate distinct reason why daylight might be adversely affected and the need to form a judgment on the implications of any noncompliance with the Guide.”²⁶

The question which then arose was whether the errors were material.²⁷ Thornton J concluded that they were, and the decision should be quashed because:

- (1) Members were not told that a reduction in the distribution of daylight is a separate and distinct reason why daylight in the properties may be adversely affected.
- (2) Members were not informed that the NSL results indicated losses in daylight distribution in properties, some of which appeared significant, although much might depend on the use of the rooms in question.
- (3) In contrast, where it existed, NSL compliance was drawn to their attention as a reason for them to take comfort that the overall reduction in amount of daylight at the relevant properties was not unacceptable.
- (4) Members were not therefore in a position to form a judgment on the impacts of daylight distribution at neighbouring properties or aware that they needed to do so.

Discussion

Interestingly, the planning officer in *Guerry* simply imported—almost verbatim—what was said in the consultant’s daylight and sunlight report into his own report. Thornton J mitigated any blame on the officer’s part: “None of this appears to be the fault of the planning officer who simply repeated the analysis put before him.”²⁸

Likewise in *Rainbird*, John Howell QC noted that the BRE Guide is a technical document and: “Unlike planning policies, national and local, with which members of the planning committees will in practice be familiar, the Guide may well not be.”²⁹

This stresses the importance of consultants getting it right first time. With a technical subject such as daylight and sunlight, planning officers may in some cases be inclined simply to take information presented to them on trust. Consultants and experts must therefore be extremely careful in the language adopted in the main body of a report, even if all the results are available in an annex,³⁰ in order to present an entirely objective assessment that leaves no room for any doubt about what the impacts are.

The lesson of *Rainbird* and *Guerry* is that glossing over adverse results can do more harm than good to a development, as it may expose the resulting planning permission to unnecessary challenge resulting in expense, delay and potential jeopardy to the whole scheme.

Following the quashing of the planning permissions in *Rainbird* and *Guerry*, revised daylight and sunlight reports have been submitted for both schemes. I understand that both local authorities required the developer to pay for external assessment of the reports and the new reports were subject to public consultation. This belt-and-braces method of peer review and consultation ought to reassure any concerned local authority that they have done everything reasonable to protect their position.

Larger schemes subject to Environmental Impact Assessment are likely to have been given more attention by lawyers but it is mid-range schemes like *Rainbird* and *Guerry* which carry greater risk of errors being overlooked. Few local planning authorities employ officers with specialist expertise in daylight and sunlight. Training planning officers and local authority Members in the BRE Guide—and daylight and sunlight assessment generally—might assist with wider technical understanding amongst decision makers.

²⁶ [41].

²⁷ The Council argued that the errors were immaterial because there were only four rooms in two properties which were described as “BRE compliant” when they failed NSL. It was said that the errors were far less widespread and serious than in *Rainbird*.

²⁸ [53].

²⁹ [86].

³⁰ As was in fact the case in *Guerry*.

Looking to the future

Rainbird and *Guerry* will probably be stand-alone cases on this issue. Practitioners are now aware of the errors identified, and are keen to avoid their repetition. However, developers should not be too afraid of the dark, or excessively spooked about the risk of errors in daylight assessments. First, even if there are minor errors in any assessment, such errors must have actually been capable of making a difference to the overall decision and daylight is just one consideration in the planning balance to be given reasonable weight (which may be very little in an appropriate case).

Second, as already stated, use of the BRE Guide is not mandatory (even if an authority expresses a desire for developers to use it in the explanatory text to a policy) so there may be a case for using an entirely different methodology if developers and practitioners see fit.

And third, there is now—post *Rainbird* and *Guerry*—a recognition in practice—and indeed in the new publications of the NPPF and additions to the NPPG—that what is important is assessing whether there is unacceptable planning harm. Whilst the strict approach the Courts have adopted to application of the BRE Guide means that it is essential that developers are candid where exceedances occur, the position must be realistically examined in heavily built up urban areas. In many cases, it is the cause of the breach³¹ and the nature of the location which is relevant to the weight that should be attached to it. Consideration of these factors allows the strict application of the BRE Guide to be set in the full planning context.

The relevance of location to daylight levels is now expressly endorsed, since 22 July 2019, in the NPPG:

“What this means in practice, in relation to assessing appropriate levels of sunlight and daylight, will depend to some extent on the context for the development as well as its detailed design. For example in areas of high-density historic buildings, or city centre locations where tall modern buildings predominate, lower daylight and sunlight levels at some windows may be unavoidable if new developments are to be in keeping with the general form of their surroundings.”³²

It is notable that both the new NPPF and the revisions to the NPPG emphasize greater flexibility in assessing daylight and sunlight. They recognise that, in some locations, it is inevitable that standards will not always be met. These changes to policy and guidance will support applicants for planning permission in urging decision makers to adopt a less rigid approach.

³¹ When dealing with adjoining land, sometimes breaches are not due to the proposed development being unacceptable, but due to what has gone on nearby historically. For example, one property may have extended their building to near the boundary, resulting in any adjoining development having an adverse impact on daylight in their extension. This in itself may have been contrary to the part of the BRE Guide relating to adjoining development land, but overlooked when planning permission was granted (if it, in fact, needed expressly to be).

³² Paragraph: 007 Reference ID: 66-007-20190722.