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

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Introduction

In the last year there have been 121 High Court judgments dealing with planning, 32 in the Court of Appeal and one in the Supreme Court.[1] This paper does not attempt to deal with all the issues that have arisen in those cases. Rather, it focuses on some key trends and topic areas. It deals first with cases on the knotty issue of the National Planning Policy Framework ("NPPF") paras 14 and 49 and the presumption in favour of sustainable development. It then reports on some other discrete matters of NPPF interpretation before moving on to cases relating to heritage, Green Belt, duty to give reasons, decision taking, neighbourhood planning and, finally, decisions on the Habitats Directive.[2] In the concluding remarks, it also touches on the recent ClientEarth litigation and the increasing importance of air quality in planning cases.

Since originally writing the paper and presenting it at the JPLC, an important decision was handed down on the Aarhus costs regime in the Civil Procedure Rules Pt 45. Changes to the cost-capping regime brought in earlier this year were challenged by RSPB, Friends of the Earth and ClientEarth on the basis that they breached the Aarhus Convention and related European legislation that incorporates aspects of Aarhus into domestic law. Under CPR Pt 45, individual claimants in environmental judicial and statutory review cases (a definition which includes many, if not most, planning cases), benefit from a cap on their costs liability of £5,000 (£10,000 for organisations), with a reciprocal cap on their ability to claim costs from the other parties of £35,000. The recent changes introduced in February allow defendants to examine claimants' finances and to seek variations to the cap, apparently at any stage in the proceedings.

The decision of Dove J handed down on 15 September,[3] has made clear that, to be Aarhus compatible and to allow sufficient certainty at an early stage, any challenge to the cap must be made in the acknowledgement of service and, ordinarily, be determined on the papers at the permission stage. The only exceptions to this being where the claimant's financial information is shown to be untrue or misleading or where there is a significant material change in the claimant's finances affecting whether or not the proceedings would be "prohibitively expensive". Any hearing into the claimant's finances must be in private and the question of whether a claim is "prohibitively expensive" for a claimant has to be considered taking into account the claimant's own costs liability in addition to any adverse costs liability. It is not yet entirely clear exactly how all this is to be implemented in the context of the current rules as, at the time of writing, the court is awaiting submissions on remedy.[4] This is one to watch.

Before finally getting to the main topics of the paper, it is also perhaps worth noting one of the more colourful cases of the last year, known colloquially as the "stripy house case". This was a case which captured the public imagination and attracted the attention of the national press.[5] It concerned a building in a Kensington and Chelsea conservation area. Ms Zipporah Lisle-Mainwaring painted her building, which was used for storage, in red and white stripes, reportedly in a fit of pique against her neighbours who had challenged her planning permission to convert the building to a house.

[1] Source: Westlaw search from 1 August 2016 to 31 July 2017.

[2] Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

[3] *R. (on the application of the Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

[4] Having said this, the court was satisfied that Pt 45, properly read alongside other provisions in the CPR does currently have the effect of requiring any application to vary the cap to be made at the earliest stage.

[5] *R. (on the application of Lisle-Mainwaring) v Kensington and Chelsea RLBC* [2017] EWHC 904 (Admin).

Kensington and Chelsea DC served a s.215 notice[6] requiring that the building be repainted white on the basis that its "condition" adversely affected the amenity of the conservation area in which it was situated. Ms Lisle-Mainwaring appealed against the notice, first to the Magistrates Court and then the Crown Court. The Crown Court upheld the notice and Ms Lisle-Mainwaring challenged that decision by a successful judicial review claim. In the judicial review, Gilbart J quashed the notice on the basis that s.215 could not be used to alter a lawful painting scheme, in circumstances where there is no suggestion that there was any want of maintenance or repair of the land. It was an abuse of the statutory scheme to use a s.215 notice on a matter of aesthetic choice which was not in breach of planning control. On that basis, the red and white stripes were allowed to stay.

Policy and the courts

And now onto the main topics of the paper: This year, the interpretation of Government policy has, once again, dominated planning disputes in the courts. It is fast becoming a cliché to point out that the Government's admirable aim of simplifying planning by replacing over a thousand pages of policy with "around fifty"' in the NPPF[7] has been compromised by the need to read many more pages of High Court, Court of Appeal and, now, Supreme Court judgments to work out what those 50 pages mean. In many instances, concision has perhaps been shown to be at the expense of clarity.

Perhaps the most eagerly awaited court decision this year was the Supreme Court judgment in *Richborough Estates v Cheshire East, Suffolk Coastal v Hopkins Homes*,[8] a case which was set to opine on what has previously been termed as the "algorithm"[9] that arises from the NPPF paras 14 and 49. The operation of those two paragraphs (and the related fn.9) has proved a very fertile ground for litigation in recent years but this was the first time the issues were to be considered by the Supreme Court.

"Policies for the supply of housing"

The specific issue for consideration in *Richborough Estates* was the meaning of the term "policies for the supply of housing" within NPPF para.49. The relevance of this to the para.14 algorithm is of course that, in the absence of a demonstrable five-year supply of deliverable housing land, para.49 deems "relevant policies for the supply of housing" as "out-of-date" with the result that the last bullet of para.14 is triggered.[10] That last bullet states that, where relevant policies are out-of-date, planning permission should be granted unless "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". The Supreme Court has adopted the term "tilted balance" as shorthand for describing this test.

The Court of Appeal in *Richborough Estates* had determined that "policies for the supply of housing", should be construed to mean any policies "affecting" the supply of housing, thereby widening the scope of the term to include all and any policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed. These include, for example, policies for the Green Belt, for general protection of the countryside, for conserving the landscape of Areas of Outstanding Natural Beauty ("AONB") and National Parks, and policies for the conservation of wildlife or cultural heritage. If such a policy is a "relevant" policy then, according to the Court of Appeal, in the

[6] Under the Town and Country Planning Act 1990 s.215.

[7] As proclaimed by Greg Clark MP in the Ministerial Foreword to the NPPF.

[8] *Richborough Estates v Cheshire East, Suffolk Coastal v Hopkins Homes* [2017] UKSC 37 .

[9] per Jay J in *Cheshire East BC v Secretary of State for Communities and Local Government* [2016] EWHC 571; [2016] P.T.S.R. 1052 (at [25]); [2016] J.P.L. 909 and the "algorithm" concept subsequently considered by Green J in *East Staffordshire BC v Secretary of State for Communities and Local Government* [2016] EWHC 2973 (Admin); [2017] P.T.S.R. 386.

[10] For ease of reference, the relevant text of paras 14 and 49 are appended at Annex 1 to this paper.

absence of a five-year housing land supply, it is to be deemed out of date by the operation of para.49. A "relevant" policy here was interpreted to mean:

> "a policy relevant to the application for planning permission before the decision maker – relevant either because it is a policy relating specifically to the provision of new housing in the local planning authority's area or because it bears upon the principle of the site in question being developed for housing."[11]

In its May judgment, the Supreme Court declined to adopt the Court of Appeal's interpretation of the term "policies for the supply of housing". In place of the Court of Appeal's "wider interpretation", the Supreme Court decided that what had been termed as the "narrow interpretation" was properly applicable. It thus determined that the phrase "policies for the supply of housing" is limited to policies dealing only with the numbers and distribution of new housing, and excludes any other policies of the development plan dealing generally with the disposition or restriction of new development in the authority's area.

The Supreme Court therefore flatly rejected the Court of Appeal's ruling on the main point of dispute in the case, but the practical significance of this both for the outcome of the cases and for decision making is much less than one might at first think. This is clear not least from the fact that the decisions of the Court of Appeal in both *Richborough Estates* and *Hopkins Homes* were not overturned by the Supreme Court. Both appeals in fact failed in the Supreme Court.

The reasons for this are twofold. First, as has now been made clear repeatedly by the courts,[12] whether or not a policy is deemed "out-of-date" does not determine the weight to be accorded to the policy, either generally or within the tilted balance. Contrary to some submissions on the point in earlier cases, a policy that is deemed "out-of-date" is not to be "set aside".[13] Weight is a matter for the consideration of the decision maker and may be affected by such matters as the degree of consistency of a policy with the NPPF, the particular purpose of the policy and the degree of any shortfall in five-year housing land supply. Indeed, the Court of Appeal has recently upheld the decision of Lang J in *Daventry DC*[14] which made clear that the fact that a policy is time-expired does not necessarily make it "out-of-date" or of less weight. The Supreme Court has also made clear, as a corollary of this, that policies not for the supply of housing should not be given added weight just because they cannot be deemed out- of-date by NPPF para.49.[15]

Secondly, as already mentioned, by deeming policies "out-of-date" where a five-year housing land supply cannot be demonstrated, the effect of para.49 is to trigger the application of the "tilted balance" in NPPF para.14. However, in the view of Lord Carnwath, if there is a shortfall in five-year housing land supply, that shortfall is "of itself" enough to trigger the operation of the tilted balance in the second part of para.14. The need for a "legalistic exercise" to decide whether individual policies do or do not come within the expression 'policies for the supply of housing' has been rejected by the Supreme Court.[16] This is presumably because, in a housing case where there is a shortfall in five-year supply the effect of para.49 will, in the Supreme Court's view, be to inevitably deem some relevant policies as "out-of-date" and that in itself will have the effect of triggering the tilted balance in para.14, without needing to ascertain precisely which policies are deemed out-of-date. This must be on the basis that there will always inevitably be a policy setting the housing numbers for the plan period and such a policy is considered to be a "relevant" policy in a housing case, notwithstanding that such a policy may not in itself affect the determination of a particular planning application.

[11] The Court of Appeal judgment in *Richborough Estates* [2016] EWCA Civ 168 at [32].
[12] See, e.g. *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) at [70]–[75], *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 827(Admin) at [71] and [74] and *Edward Ware Homes Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 103 (Admin) at [7] and [26].
[13] *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) at [70]–[75].
[14] *Telford and Wrekin BC v Secretary of State for Communities and Local Government* [2016] EWHC 3073 (Admin).
[15] The Supreme Court judgment in *Richborough Estates* [2017] 1 W.L.R. 1865 at [66].
[16] The Supreme Court judgment in *Richborough Estates* [2017] 1 W.L.R. 1865 at [59].

So, in summary, irrespective of which policies can properly be described as "policies for the supply of housing", in a housing case where a local planning authority cannot demonstrate a five-year supply of deliverable housing sites, the "tilted balance" in the first limb of the second bullet of the last part of para.14 will potentially be triggered. It is also worth noting in passing that the fact that the Supreme Court has adopted the term "tilted" to describe the balancing exercise in the last part of para.14 confirms, if there were any remaining doubt, that decision makers are right to apply that balance as weighted in favour of granting permission.[17] Other than where a proposal is in accordance with an up-to-date local plan, the application of the tilted balance is the mechanism for application of the "presumption in favour of sustainable development" under para.14.

Operation of fn.9

I say above that the "tilted balance" will only be *potentially* triggered by a shortfall in housing land supply. This is because the second limb of the second bullet of para.14 can apply to exclude the application of the "tilted balance" where "specific policies in this Framework indicate development should be restricted". This second limb,[18] together with the related fn.9 has been another fertile area of litigation. For ease of reference, fn.9 states:

> "For example, those policies relating to sites protected under the Birds and Habitats Directive (see paragraph 119) and/or designated as Sites of Special Scientific Interest, land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."

This part of para.14 was not central to the Supreme Court decision in *Richborough* but the court did make some comment on it, stating that the list of examples in fn.9 is "not exhaustive" and that "although the footnote refers in terms only to policies in the Framework itself, it is clear in my view that the list is to be read as including the related development plan policies".[19]

What the Supreme Court did not do (because it was not asked to) is resolve the issue of how the second limb and fn.9 operate as part of the presumption in favour of sustainable development and in what circumstances the combined effect of the second limb and fn.9 together operate to exclude the application of the "tilted balance" in favour of development.

A key question is whether the very fact that a specific "restrictive" policy is in play operates to shut out the tilted balance or whether the tilted balance can still apply alongside the restrictive policy in circumstances where the specific restrictive policy is applied first and does not militate against the grant of permission. In a recent decision of the Court of Appeal in *Watermead PC v Aylesbury Vale DC*,[20] this question has been described as "an issue of some significance for the operation of the planning system in England". But, in that case, the court declined to determine it because it was not necessary to do so to resolve the issues in that case. Also, the court considered that it would be better dealt with in a future case, where the court may have the benefit of submissions on behalf of the Secretary of State who authored the policy and who has responsibility for its operation. The issue has since been determined in the Court of Appeal decision in *East Staffordshire*[21] in which Lindblom LJ said this:

[17] The decision of Jay J in *Cheshire East BC v Secretary of State for Communities and Local Government* [2016] EWHC 571 (Admin) is an example of an earlier decision where the expression "tilted balance" has been used, meaning that there is a (rebuttable) presumption in favour of development or that the scales are weighted or loaded in favour of the development.

[18] See the Annex to this paper for the full text.

[19] *Richborough Estates* [2017] 1 W.L.R. 1865 at [14] per Lord Carnwath.

[20] *R. (on the application of Watermead PC) v Aylesbury Vale DC* [2017] EWCA Civ 152.

[21] *East Staffordshire v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893 at [22(3)].

> "The operation of the 'tilted balance' involves the two specific exceptions relevant to a case in which 'the development plan is absent, silent or relevant policies are out-of-date'. As the Secretary of State has expressly acknowledged and emphasized in this appeal, the second of those two exceptions does not 'shut out' the 'presumption in favour of sustainable development' simply because any of the 'specific policies'—of which examples are given in footnote 9—is in play (see [45] of my judgment in *Watermead Parish Council v Crematoria Management Ltd* [2017] EWCA Civ 152). Once identified, the specific policy in question has to be applied—and, where that specific policy requires it, planning judgment exercised—before the decision-maker can ascertain whether the 'presumption in favour of sustainable development' is available to the proposal in hand (see [14], [55], [56] and [59] of Lord Carnwath's judgment, and [79] and [85] of Lord Gill's; and [26] to [30], [35], [45] and [46] of the Court of Appeal's)."

This accords with the approach of Coulson J in *Forest of Dean DC v Secretary of State for Communities and Local Government*,[22] which was that if, after the application of a "restrictive" policy, the outcome was in favour of development then the weighted or tilted balance in favour of development under the first limb "resurfaces and could be applied". That approach was also followed by Holgate J in *R. (on the application of Leckhampton Green Land Action Group Ltd) v Tewkesbury BC*[23] and was supported by Lang J in *Telford and Wrekin v Secretary of State for Communities and Local Government*,[24] although in that latter case the point was largely academic as the Court decided that the policy in dispute in that case, namely the NPPF para.112 relating to best and most versatile agricultural land, was not to be construed as a restrictive policy to which the second limb applied.

Is there a presumption in favour of sustainable development beyond NPPF para.14?

The short answer to this question is now "no". This is yet another example of something the courts have had to grapple with this year which goes to the heart of the application of the NPPF and its interpretation. As the number of planning authorities with a five-year housing land supply has been steadily increasing, developers of sites that do not comply with the local plan (even if it is time-expired) have sought to look outside of NPPF para.14 to find a Government policy presumption in support of their developments.

One of the reasons for this is that the courts had made it clear that the fact that a plan is time-expired does not mean its policies are "out-of-date" and automatically of less weight.[25] Where a five-year housing land supply exists, a development plan policy is only to be considered "out-of-date" and/or accorded less than full weight by assessing it for consistency, or inconsistency, with the NPPF (see *Gladman v Secretary of State for Communities and Local Government*[26]).

This means that, with a five-year supply in place, a time-expired plan will not necessarily of itself trigger the presumption in favour of development under the second bullet of the decision taking part of para.14. As a result (and also in relation to cases where a proposal is in conflict with a non-time-expired plan), developers have sought to argue that "the presumption in favour of sustainable development" is not confined to applying to cases that fall within para.14. They have argued that the presumption in favour of sustainable development applies more widely to other proposals which are considered to constitute "sustainable development" within the wider terms of the NPPF.

[22] *Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 421 (Admin); [2016] P.T.S.R. 1031; [2016] J.P.L. 918.

[23] *R. (on the application of Leckhampton Green Land Action Group Ltd) v Tewkesbury BC* [2017] EWHC 198 (Admin).

[24] *Telford and Wrekin v Secretary of State for Communities and Local Government* [2016] EWHC 3073 (Admin).

[25] Although see *Richborough Estates* [2017] 1 W.L.R. 1865 at [63] per Lord Carnwarth, who considered that: "on any view, quite apart from paragraph 49, the current statutory development plan was out of date, in that its period extended only to 2011."

[26] *Daventry DC and Secretary of State for Communities and Local Government* [2016] EWCA Civ 1146.

This argument originally succeeded in the High Court decision of Coulson J in *Wychavon DC v Secretary of State for Communities and Local Government*[27] but this was in direct conflict with a decision of Jay J in a different case given on the very same day.[28] Subsequently, other High Court decisions[29] expressly doubted the decision in *Wychavon* and the issue was finally settled by the Court of Appeal in June this year in *East Staffordshire BC v Secretary of State for Communities and Local Government*,[30] one of the first planning cases[31] in the Court of Appeal following the Supreme Court decision in *Richborough Estates*.

The Court of Appeal has now made it absolutely clear that neither the "golden thread" nor the policy presumption in favour of sustainable development has application outside the confines of para.14. In other words, para.14 alone defines the circumstances in which the presumption in favour of sustainable development applies. Development that appears to be "sustainable" by reference to other parts of the NPPF will only benefit from the presumption in favour if para.14 is triggered. A development's sustainability credentials, in terms of its compatibility with the three dimensions in NPPF para.7, will always be material considerations in favour of the proposal. But, they will only be given the added impetus of a *presumption* in favour within the context of applying para.14.

Furthermore, and as a corollary to this, for a development to benefit from the policy presumption, it *only* has to meet the relevant tests in para.14 (albeit that those tests bring into consideration judgements about other policies, including those which describe and define how sustainable development is to be achieved and delivered). Recent court decisions[32] have made clear that there is no additional requirement that a development proposal must be found to be sustainable first, nor that it must meet all three roles of "sustainable development" *simultaneously* (as per NPPF para.8 and as set out in NPPF para.7) in order to benefit from the presumption under para.14.

Finally, on the presumption in favour of sustainable development, as emphasised in the very recent Court of Appeal decision in *Mansell v Tonbridge and Malling*,[33] it is important to remember that it is only a *policy* presumption and it is a presumption that is rebuttable. Accordingly, the application of the presumption or the tilted balance will not necessarily be determinative of whether or not planning permission should be granted. A development that does not earn the presumption in favour can still be granted planning permission.

Other areas of interpretation of the NPPF

Before leaving the issue of policy in the NPPF, it is worth summarising a few other discrete areas of interpretation clarified by the courts over the past year and which are not dealt with elsewhere in this paper under particular topic areas. As already mentioned, the decision of Lang J in *Telford and Wrekin v Secretary of State for Communities and Local Government*[34] determined that the NPPF para.112, relating to best and most versatile agricultural land, is *not* a restrictive policy falling within the fn.9 category.

In *Watermead Parish Council v Aylesbury Vale DC*,[35] the NPPF policy relating to flood risk and, particularly the interrelationship between the sequential test and the exception test, was clarified.[36] Decision

[27] *Wychavon DC v Secretary of State for Communities and Local Government* [2016] EWHC 592 (Admin).
[28] *Cheshire East BC v Secretary of State for Communities and Local Government* [2016] EWHC 571 (Admin).
[29] *Barker Mill Estates Trustees v Test Valley BC* [2016] EWHC 3028 (Admin), *East Staffordshire BC v Secretary of State for Communities and Local Government* [2016] EWHC 2973 (Admin) and *Thorpe-Smith v Secretary of State for Communities and Local Government* [2017] EWHC 356 (Admin).
[30] *East Staffordshire BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893.
[31] The other being *R. (on the application of Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787.
[32] *Muller Property Group v Secretary of State for Communities and Local Government* [2016] EWHC 3323 (Admin) at [35]–[40] and *Cheshire East BC v Secretary of State for Communities and Local Government* [2016] EWHC 571 (Admin) at [19ff], approved in *East Staffordshire v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893.
[33] *Mansell v Tonbridge and Malling* [2017] EWCA Civ 1314.
[34] *Telford and Wrekin v Secretary of State for Communities and Local Government* [2016] EWHC 3073 (Admin).
[35] *Watermead Parish Council v Aylesbury Vale DC* [2016] EWCA Civ 152.
[36] NPPF paras 100–103.

makers are to be careful not to conflate the two tests and to ensure that the sequential test is applied first, even in relation to applications for development on brownfield sites where there is to be an overall improvement in relation to flood risk on the site. If such betterment represents a good reason for departing from the sequential test then that should be expressly explained by the decision maker who should make clear the reasons that the sequential test is not being followed. The sequential test, which is intended to steer new development to areas with the lowest probability of flooding, is in clear terms and cannot be fudged or ignored in order to achieve a betterment result.

In a case concerning fracking, *Preston New Road Action Group v Secretary of State for Communities and Local Government*,[37] Dove J considered a number of arguments relating to the interpretation of both development plan policy and the NPPF. The judge emphasised the importance of context to interpretation and decided that NPPF para.109 (which states, inter alia, that "the planning system should contribute to and enhance the natural and local environment by protecting and enhancing valued landscapes") required an overall and broad judgment as to the effect on the landscape. The argument that *any* material harm to a valued landscape, even if temporary, would cause a conflict with that paragraph was rejected. An overall assessment rather than a binary judgement was what was required.[38] It is also worth remembering that, for the purposes of para.109, a landscape can be "valued" if it has positive physical attributes taking it out of the ordinary, and an absence of designation does not necessarily mean an absence of landscape value.[39]

Finally, in *Dartford BC v Secretary of State for Communities and Local Government*,[40] a case concerning the definition of "previously developed land", the Court of Appeal has made clear that whilst previous iterations of policy can sometimes be relevant to interpretation of current policy,[41] the public should be entitled to rely on the NPPF as it stands without having to investigate previous policy. Ministerial statements about the meaning of previous policy could not detract from the clear words of the definition of "previously developed land" in the glossary.[42] That definition excludes "land in built-up areas such as private residential gardens" from being "previously developed land". The court determined that that wording clearly indicates that private residential gardens would only be excluded if located in built-up areas. Private residential gardens that are not located *in* built-up areas may be considered "previously developed land", and a previous ministerial statement that might imply otherwise could not change that.

Excessive legalism?

Finally, on the topic of policy and the courts, one very strong theme running through the Supreme Court and Court of Appeal judgments in the past year is the plea to all to avoid the over-legalisation of planning decisions and to respect the wide discretion of planning decision makers. In the words of Lord Carnwath in *Richborough Estates,* it is important "to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy, and not to elide the two". Further, in the very recent Court of Appeal decision in *East Staffordshire*,[43] Lindblom LJ made related points:

> "Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts

[37] *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2017] EWHC 808 (Admin), but note, appeal decision pending.

[38] This is to be contrasted with the decision in *R. (on the application of Boot) v Elmbridge BC* [2017] EWHC 12 (Admin) (discussed below) which took an absolute approach to the binary issue of whether or not development is inappropriate in the Green Belt.

[39] Per Hickinbottom J (as he then was) in *Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 2429 (Admin), applying the approach of Ouseley J in *Stroud DC v Secretary of State for Communities and Local Government* [2015] EWHC 488 (Admin).

[40] *Dartford BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 141.

[41] Such as in *R. (on the application of Timmins) v Gedling BC* [2016] EWHC 220 (Admin).

[42] But, see also the heritage case, *R. (on the application of Hayes) v York CC* [2017] EWHC 1374 (Admin) (discussed below) in relation to the relevance of previous iterations of policy to policy interpretation.

[43] *East Staffordshire BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893.

> that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law."

Of course, it is understandable that the courts are seeking to limit planning litigation, not least given the proliferation of judicial decisions on the NPPF and the resulting difficulty for local planning authorities and planning inspectors to keep abreast of judicial guidance. However, the high number of legal disputes (and conflicting judicial decisions) over the meaning of the NPPF, and particularly over the construction and application of the presumption in favour of sustainable development, is perhaps more reflective of the way in which policy makers approached the NPPF (in terms of its quasi-legal use of presumptions and deeming provisions), rather than of any "excessive legalism" on the part of lawyers and judges.

It may be that seeking to exert control by using a multi-limbed "algorithm" to direct decision making, but doing so in a policy document which inevitably lacks the discipline and precision of statute has led, perhaps not surprisingly, to the need for much collective judicial brainpower to clarify exactly how those policy provisions are to be construed. Where the application of the "algorithm" potentially gives rise to a presumption in favour of the grant of permission (albeit only a policy, and not statutory, presumption), it was perhaps inevitable that its meaning and application was going to be hotly contested through the courts.

Heritage

There have been four cases of note concerning heritage issues in the last year. The first, *R. (on the application of Hayes) v York CC* ,[44] was about a proposal to construct new features at the historic site of Clifford's Tower. It was supported by English Heritage and included the construction of a visitor centre at the base of the tower motte, installation of a new staircase and tower floor, a roof deck with café, and other restoration works. The construction would also involve archaeological works and disturbance to buried artefacts.

It is the first case raising directly the meaning and effect of the NPPF para.141. That paragraph states that where heritage assets are lost or partly lost, local planning authorities and developers should make archaeological records publicly available, but "the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted".

The issue in the case was whether or not para.141 meant that the commitment to record evidence of disturbed artefacts could be taken into account *at all* in the decision to grant planning permission. Kerr J considered that the literal interpretation of para.141 was that the recording of evidence could not be a material factor in the decision. But, after considering the purpose and context of the policy, as illuminated by its previous iterations, the judge rejected that literal interpretation and effectively implied the word "decisive" before "factor" in para.141:

> "It follows that, on the literal reading advocated by Mr Crean, the officer's report would have taken account of a legally irrelevant consideration and the decision consequently flawed. But rejecting, as I do, the literal interpretation in favour of a sensible and liberal construction of the paragraph in its proper historical context, the officer's report and the committee's decision were not taken inconsistently

[44] *R. (on the application of Hayes) v York CC* [2017] EWHC 1374 (Admin).

with the concluding words of NPPF paragraph 141. The recording of evidence of the past was not the sole justification for the development. It was treated as part of the public benefit flowing from the project, but that was not unlawful."

The decision of the Court of Appeal in *R. (on the application of Williams) v Powys CC*[45] was to quash planning permission for an already constructed wind turbine approximately 1.5km away from a Grade II* listed church. The council had failed to consider the harm to the setting of the church that would potentially be caused by the inter-visibility between the turbine and the church (the ability to see one from the other) and by the "co-visibility" of the two (that is, the fact that the turbine and the church could be seen together from some viewpoints). Lindblom LJ considered that for there to be an impact on setting there must be a distinct visual relationship of some kind between the heritage asset and the development, a relationship "that is more than remote or ephemeral and which in some way bears on one's experience of the listed building in its surrounding landscape or townscape". However, he considered that physical proximity was not always essential for such an effect and harm could be caused by the inter-visibility and co-visibility of the two.

In the case before the court, the developer's assessment had identified some harm to the setting caused by the inter-visibility and co-visibility, albeit that the harm was described as "slight". The officer's report had failed to advise the committee about that harm and about the duty under s.66(1)[46] in relation to it. That failure was a legal flaw sufficient to justify the quashing of the decision. The fact that the issue of the impact on the church had not been raised by consultees or the public at the time of the grant of permission did not relieve the planning authority of its duty in this respect.

A few weeks after the Court of Appeal decision in *Williams*, Lang J delivered an extensive judgment on the ambit of the term "setting" in *Steer v Secretary of State for Communities and Local Government*.[47] The claimant in that case successfully argued that the inspector had erroneously determined that a physical or visual connection was necessary for the appeal site to form part of the setting of Kedleston Hall. The court decided that the inspector had erred by failing to consider that the existence of a historical, social and economic connection between the Hall and its agricultural estate lands could be sufficient to bring those lands within the setting of the Hall.

On the face of it, this decision would appear contrary to the above comments of Lindblom LJ in *Williams* where he said that there must be a distinct visual relationship for there to be an impact on setting. In contrast, Lang J expressly decided that an inspector had erred in law by treating a visual or physical relationship as an essential criterion for setting. The Court of Appeal decision in *Williams* was not available at the time of the hearing before Lang J and she did not refer to it in her judgment. However, when the context of the two decisions is properly considered, the apparent contradiction between the two is perhaps more apparent than real. In *Steer,* Lang J was expressly considering whether or not connections and relationships other than visual ones could establish an asset's setting and her decision was informed by an extensive review of policy and guidance. By contrast, Lindblom LJ was only looking at the visual connection (and the extent of such a connection). He was not considering, and was not asked to consider, whether non-visual relationships could influence the extent of a heritage asset's setting. It is understood that an application for permission to appeal has been made in *Steer*, so an express judgment on the non-visual issue by the Court of Appeal may soon be forthcoming.

Finally, on the issue of heritage, the Court of Appeal decision in *R. (on the application of Khodari) v Kensington and Chelsea RLBC*[48] made clear that whether or not a non-listed building is a "heritage asset" within the terms of the NPPF is a matter of planning judgement for the decision maker. Whilst "heritage

[45] *R. (on the application of Williams) v Powys CC* [2017] EWCA Civ 427.
[46] Planning (Listed Buildings and Conservation Areas) Act 1990 s.66(1).
[47] *Steer v Secretary of State for Communities and Local Government* [2017] EWHC 1456 (Admin).
[48] *R. (on the application of Khodari) v Kensington and Chelsea RLBC* [2017] EWCA Civ 333.

assets" includes designated heritage assets and assets identified by the local planning authority (including by local listing), the term can include other assets of heritage interest.

Green Belt

In *R. (on the application of Boot) v Elmbridge BC*,[49] the court determined that the NPPF para.89 was clear in providing that new buildings comprising facilities for outdoor sport, outdoor recreation and cemeteries would *only* be appropriate development in the Green Belt so long as they preserved the openness of the Green Belt and did not conflict with the purposes of including land within it. *Any* harm to openness or to those purposes would mean that the development could *not* be appropriate development in the Green Belt. This absolute approach to the interpretation of para.89 is to be contrasted with Dove J's approach[50] to the interpretation of protection of valued landscapes under NPPF para.109. Dove J recognised the apparent contrast and explained the difference by reference to the different policy context and the binary nature of the definition of appropriate or inappropriate development in the Green Belt.

The final decision on Green Belt is the decision of the High Court in *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC*[51] which explains the earlier Court of Appeal decision in *Turner*[52] which had made clear that visual impact can be an aspect of impact on openness. In *Samuel Smith* (which is under appeal), the court clarified that whether visual impact is relevant will depend on the circumstances of the case and there is no requirement in every case to take into account visual impact when assessing openness.

Reasons

There have been a number of cases this year which have provided some guidance and clarity on the duty to give reasons in planning cases.

Between 2003 and June 2013,[53] there was a statutory duty on local planning authorities to give summary reasons for a decision to grant planning permission. Whilst there is no longer any statutory duty to provide reasons for grant (except in EIA cases), two recent Court of Appeal decisions can now be relied on by claimants as authority for a fairly wide common law duty to provide reasons. Whilst the Court of Appeal has not yet conclusively overruled its own decision in *Chaplin*[54] (which determined that there was no general common law duty to give reasons for planning decisions), the Court of Appeal decisions in *CPRE*[55] and in *Oakley*[56] come close to imposing a general common law duty, at least in cases where the grant of planning permission is contrary to the development plan, contrary to important national policy (such as the AONB or Green Belt) and represents a departure from the planning officer's report.

Whilst both those cases were decided on their own particular facts, obiter comments by Elias J in *Oakley* in particular set out a strong rationale for imposing a general duty to give reasons in all cases other than where the planning committee's reasons are clear from the officer's report.[57]

[49] *R. (on the application of Boot) v Elmbridge BC* [2017] EWHC 12 (Admin).

[50] In *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2017] EWHC 808 (Admin) referred to above.

[51] *R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2017] EWHC 442 (Admin).

[52] *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466; [2016] J.P.L. 1092, followed in *Goodman Logistics Developments v Secretary of State for Communities and Local Government* [2017] EWHC 947 (Admin) in which the court held that an inspector had erred in law by treating visual impact as irrelevant to the issue of openness.

[53] This was when the duty to provide summary reasons for the grant of permission (under the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) art.31(1)(a) was repealed.

[54] *R. v Aylesbury Vale DC Ex p. Chaplin* (1998) 76 P. & C.R. 207; [1998] J.P.L. 49.

[55] *R. (on the application of Campaign to Protect Rural England) v Dover DC* [2016] EWCA Civ 936; [2017] J.P.L. 180, and now subject to an appeal in the Supreme Court.

[56] *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71; [2017] J.P.L. 703.

[57] See judgment of Elias LJ at [45]–[55] in *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71 but note that the judgment of Sales LJ at [70]–[76] does not fully support this rationale.

Such reasons will usually be clear where the committee follows its officer's recommendation and it can then be assumed that it adopts the reasoning in that report. However, even where the committee's decision is contrary to the officer's recommendation, its reasoning may still be clear from the officer's report in circumstances where the officer has set out a contrary view on the issue in his or her report.[58]

As for planning applications not determined by committee but decided by a planning officer under delegated powers, the recent decision of the High Court in *Sasha*[59] confirms that there is a statutory duty[60] on the delegated officer to produce a written record of the decision along with reasons for the decision. Of course, usually there is an officer's report in such cases and the reasons can be inferred from that.

In cases where the Secretary of State makes a decision contrary to his appeal inspector, two decisions of Lang J[61] have rejected submissions that the Secretary of State is required to provide a detailed reasoned rebuttal of the inspector's report. The standard required is merely that the reasons should be "proper, intelligible and adequate".[62]

Lang J has also recently given judgment on the standard of reasons required of an examiner examining whether a neighbourhood plan meets statutory requirements. In *R. (on the application of Bewley Homes Plc) v Waverley BC*,[63] reflecting the comments of Holgate J in *Crownhall Estates*,[64] Lang J considered that there were obvious differences between the role and function of an inspector deciding a contested appeal, which was an adversarial process, and an examiner examining whether a neighbourhood plan met the statutory requirements, which was an inquisitorial process. The adversarial process gave rise to a particular obligation to inform the parties of the reasons why their main arguments succeeded or failed, and the extent to which their evidence was accepted. An examiner conducting an inquisitorial process into a neighbourhood plan was not subject to the same obligation as he or she was undertaking a function which was narrowly prescribed by statute and therefore subject to a limited statutory duty to give reasons. Accordingly, Lang J determined that the principles in *South Bucks*[65] had to be modified to reflect those differences.

Decision taking

I deal here with a couple of miscellaneous cases this year: First, in *R. (on the application of Leckhampton Green Land Action Group Ltd) v Tewkesbury BC*,[66] Holgate J rejected a challenge based on the *Kides* principle.[67] The committee had resolved to grant planning permission for housing on a site forming part of an allocation in the emerging core strategy. After the resolution to grant but before the planning permission was issued, the inspector examining the emerging core strategy issued "preliminary findings" in which she said that she was "not minded" to regard the allocation as "sound". The claimant argued that the planning application should have been referred back to committee to consider this new factor. This argument was rejected by the court on the basis that it was "wholly unrealistic" to consider that the

[58] See [95]–[96] in the very recent decision of Singh J in *R. (on the application of The Mid-counties Co-operative Ltd) v Forest of Dean DC and Aldi* [2017] EWHC 2056 (Admin). Also see that judgment generally for a review of the law on reasons including the recent CA decisions in *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71 and *R. (on the application of Campaign to Protect Rural England) v Dover DC* [2016] EWCA Civ 936.

[59] *R. (on the application of Sasha) v Westminster CC* [2016] EWHC 3283 (Admin); [2017] J.P.L. 539.

[60] Under the Openness Government Bodies Regulations 2014 (SI 2014/2095) reg.7 .

[61] *Keith Langmead v Secretary of State for Communities and Local Government* [2017] EWHC 788 (Admin) and *Wind Prospect Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 4041 (Admin).

[62] See the decision of Gilbart J in *Moulton Parish Council v Secretary of State for Communities and Local Government* [2017] EWHC 1047 (Admin) for a recent example of where the Secretary of State's reasons were held very definitely not to meet that standard, in circumstances where the decision overruled the inspector's report and departed from the reasoning in a previous decision.

[63] *R. (on the application of Bewley Homes Plc) v Waverley BC* [2017] EWHC 1776 (Admin).

[64] *R (on the application of Crownhall Estates Ltd) v Chichester DC* [2016] EWHC 73 (Admin).

[65] *South Buckinghamshire DC v Porter (No.2)* [2004] UKHL 33; [2004] 1 W.L.R. 1953.

[66] *R. (on the application of Leckhampton Green Land Action Group Ltd) v Tewkesbury BC* [2017] EWHC 198 (Admin).

[67] The principle established in *R. (on the application of Kides) v South Cambridgeshire DC* [2003] 1 P. & C.R. 19 that if a material consideration arises after a Committee's resolution to grant but before the issue of the planning permission, the matter should be referred back to Committee for consideration.

preliminary findings would have changed the committee's decision on the application. Those findings were not made with the benefit of the detailed information on the application which the committee had considered. Further, they were expressly "preliminary" and subject to fundamental issues that were to be resolved, such as the assessment of housing need.

Secondly, in *Lyndon-Stanford QC v Mid Suffolk DC*,[68] the court made clear that there is a reasonable inference that committee members rely on any summary of other documents in an officer's report as being accurate and sufficiently complete for them to understand their effect so far as relevant to the planning application being determined. An inaccurate and misleading officer's report will not be saved by the fact that members might have corrected any deficiency by themselves inspecting any document referred to in it in the absence of evidence either that they did so or that any deficiency was not left uncorrected.

A useful example of a committee report that has been held to be misleading is to be found in the Court of Appeal decision in *R. (on the application of Loader) v Rother DC*.[69] That case involved an application for planning permission for an apartment building opposite a Grade II listed Victorian building. An earlier planning application had been refused and dismissed on appeal, largely due to concerns about the impact of the design on the nearby listed building. Objections had been made by, among others, the Victorian Society. In the second application, which was for a re-designed apartment building, the committee report stated, under the heading "Consultations", "Victorian Society: no comments received". This was held by the Court of Appeal to be fatally misleading and led to the quashing of the resultant planning permission. Due to an administrative error, the Victorian Society had not in fact been consulted on the second application, so it was not surprising that they had offered no response. There was no statutory obligation to consult the Victorian Society in that case and the failure to consult was not, therefore, unlawful (and this was the reason given by the High Court for dismissing the challenge). However, the legal error (as found by the Court of Appeal) arose simply from the misleading impression given to the committee that the Victorian Society had been consulted when they had not. The committee may well have concluded (wrongly) that the Victorian Society were now satisfied with the design when they had in fact not had a chance to consider it. On this basis, the appeal was allowed and the planning permission was quashed.

Finally, on committee reports, the recent Court of Appeal decision in *Mansell v Tonbridge and Malling*[70] sets out a useful summary of the relevant principles and the circumstances where an officer's report will be (or perhaps, more importantly where it will not be) vulnerable to legal challenge.

Neighbourhood planning

In the Court of Appeal decision in *R. (on the application of DLA Delivery Ltd) v Lewes DC*,[71] the court upheld Foskett J's dismissal of a challenge to a neighbourhood plan. The key issue was the legal scope of the requirement[72] that a neighbourhood development plan be "in general conformity with the strategic policies contained in the development plan for the area". The claimant contended that this requirement could not properly be met unless there was an up-to-date local plan in place. This argument was dismissed on the basis that the requirement for "general conformity" was flexible and did not require absolute conformity with an out-of-date plan. Further, no conformity was needed with policies which specifically planned for a previous time period that was not covered by the neighbourhood development plan. There was no requirement for the making of a neighbourhood plan to await the adoption of an up-to-date local

[68] *Lyndon-Stanford QC v Mid Suffolk DC* [2016] EWHC 3284 (Admin).

[69] *R. (on the application of Loader) v Rother DC* [2016] EWCA Civ 795; [2017] J.P.L. 25.

[70] *Mansell v Tonbridge and Malling* [2017] EWCA Civ 1314.

[71] *R. (on the application of DLA Delivery Ltd) v Lewes DC* [2017] EWCA Civ 58; [2017] J.P.L. 721, since followed by Lang J in *R. (on the application of Bewley Homes Plc) v Waverley BC* [2017] EWHC 1776 (Admin) which held that it was not unlawful for a neighbourhood plan also to seek to be consistent with an emerging local development plan.

[72] Under Town and Country Planning Act 1990 Sch.4B para.8(2)(e).

plan. To the extent that a later local plan superseded or conflicted with the neighbourhood plan, that would be reflected in the weight to be accorded to the neighbourhood plan in decision making.

In *Kebbell* ,[73] the developer claimant argued that the local authority's decision to allow a neighbourhood development plan to proceed to a referendum was legally flawed because the local authority could not have lawfully been satisfied that the "basic conditions" (in Sch.4B paras 8(2)(a)and(e)[74]) were met. In other words, it was argued that it was not appropriate to approve the plan "having regard to national policies and advice" contained in Government guidance and the plan was not in "general conformity with the strategic policies in the development plan for the area".

It was argued that the final version of the plan conflicted with the strategic policies of the local plan, was not aligned with the strategic needs and priorities of the wider local area, failed to reflect and positively support those needs, promoted less development than set out in the local plan and undermined its strategic policies, all contrary to the NPPF para.184.

The central issue in the case was that references in the neighbourhood plan to the parish council's view of the undesirability of developing land known as "the Ridge" together with references to aspirations to return that land to the Green Belt were claimed to be contrary to the Local Plan which had allocated the Ridge to be safeguarded for possible future development and which had earmarked an area which included the Ridge for the delivery of up to 5,000 homes. Those references were also claimed to be contrary to the recommendation of the neighbourhood plan examiner.

That claim was rejected. Kerr J relied on the fact that the possibility of returning the Ridge land to agricultural use and possibly to the Green Belt:

> "was only included in the final LNP at the end, in the project section, thus clearly relegating a Green Belt return to the level of a mere aspiration. It was neither a policy nor part of the explanatory material accompanying a policy."

He concluded as follows:

> "60. In the result, while the LNP in its final form included mention of the parish council's opposition to development of the Ridge for housing, that does not mean that planning permission for future housing development of the Ridge would necessarily have to be refused. Neither section 70(2) of the 1990 Act, nor section 38(6) of the 2004 Act would compel that result. A developer such as the claimant could argue that the material plan for the purposes of section 70(2) and section 38(6) is the Leeds Local Plan; and that even if the grant of planning permission would be out of tune with the LNP, planning permission should not be refused because 'material considerations indicate otherwise'.
>
> 61. The same reasoning applies if the issue is considered from the standpoint of the NPPF. A developer applying for planning permission to build dwellings on the Ridge could argue that the references in the LNP to the parish council's opposition to that course should be disregarded or given little weight because they are not statements of policy; that the LNP should not be allowed, in the words of paragraph 184 of the NPPF, to 'promote less development than set out in the Local Plan or undermine its strategic policies'; and, for the same reason, that a planning application to build dwellings on the Ridge would not be one that 'conflicts with a neighbourhood plan' (NPPF para.198).
>
> 62. It follows that, in general, I prefer the submissions of the city council to those advanced by the claimant. It was open to the city council to make the modifications which it made, and to profess itself satisfied that the basic conditions were met. Having reached that conclusion, it was bound to accept the LNP and submit it to a referendum."

[73] *R. (on the application of Kebbell Developments Ltd) v Leeds CC* [2016] EWHC 2664 (Admin).
[74] Town and Country Planning Act 1990, as amended.

Whilst the developer claimant was therefore unsuccessful in its legal challenge, it can be seen that these judge's comments will not be unhelpful if and when he comes to make an application for planning permission! The effect of the NPPF para.198, which is not liked by developers, has been effectively neutralised by the judge's comments in relation to the Ridge site. The relevant part of para.198 is of course: "Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted." It is important to remember though that courts have held that NPPF para.198 does not give "enhanced status to neighbourhood plans as compared with other statutory development plans".[75]

There was a well-publicised claim for judicial review by RTE Built Environment Ltd against the decision of Cornwall Council to progress the St Ives Neighbourhood Plan ("SINP") to a referendum. The claim contended that Policy H2 of the SINP does not meet the requirement in para.12(4)(a) of Sch.4B of the 1990 Act that neighbourhood plans must be "compatible with Convention rights" and does not meet the requirement to comply with EU obligations under Sch.4B para.8(2)(f).

Policy H2 of the SINP requires all new dwellings to be subject to a planning condition or obligation requiring them to be occupied only as a primary residence (defined as where the resident spends the majority of his/her time). No exceptions were provided for by the policy, for example to cover a situation where someone is unexpectedly forced to spend the majority of time in another residence and can only live in their St Ives home at weekends (such as due to a change in their work or family situation). The Council's position was that in such circumstances it could exercise its discretion not to enforce the restriction, and that even if it did enforce, the individual affected could appeal against an enforcement notice.

The claimant argued that Policy H2 is in breach of the European Convention on Human Rights ("ECHR") art.8, because it would result in an unjustified interference with the right to respect for the home under ECHR art.8(1). It further argued that the plan is in breach of the SEA Regulations[76] by not properly considering alternatives to Policy H2, such as alternative means of tempering the effect of the second homes market.

The claim was rejected by Hickinbottom J (as he then was) on all grounds.[77] Under the duty to consider alternatives, the judge considered that there was no need to consider "obvious non-starters". As to the potential conflict with the Convention on Human Rights art.8, the judge considered that there was no sufficient evidence that there would be any such infringement of an art.8 right and, even if there were, he considered that such an infringement would have been justified and proportionate in the circumstances of the case.

A more successful challenge brought under the Strategic Environmental Assessment ("SEA") Regulations[78] was a challenge to the Henfield neighbourhood plan in Horsham. In *R. (on the application of Stonegate Homes) v Horsham DC* ,[79] Patterson J quashed the neighbourhood plan on the basis that both the examiner and the local authority had been wrong to conclude that the plan complied with EU obligations. In fact, she went on to say that the examiner was not only wrong but "irrational given the absence of an evidence base".

The challenge was brought by the promoter of a site on the western side of the settlement of Henfield and was a challenge to the plan's strategy of rejecting an option (Option C) of allowing for new development to the west of the settlement on the basis that such development "would place unsustainable pressure on the local road system". There was only assertion of local residents to support that finding, whereas all the

[75] per Holgate J in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) at [24], approved by Lindblom LJ in *R. (on the application of DLA Delivery Ltd v Lewes DC* [2017] EWCA Civ 58 at [11]). Effect of para.198 was also considered by Lang J in *Keith Langmead v Secretary of State for Communities and Local Government* [2017] EWHC 788 (Admin).

[76] Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633).

[77] *R. (on the application of RTE Built Environment Ltd) v Cornwall Council)* [2016] EWHC 2817 (Admin); [2017] J.P.L. 378.

[78] Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633).

[79] *R. (on the application of Stonegate Homes) v Horsham DC* [2016] EWHC 2512 (Admin); [2017] J.P.L. 271.

available evidence pointed in the other direction. That consisted of an allowed appeal for development to the west which had rejected the roads objection, together with the fact that the local authority had signed up to a statement of common ground on an appeal on the promoter's site agreeing that they had no objection on road transport grounds.

In that situation, the court held that, without further justification or reasoning, neither the examiner nor the local authority could properly conclude that EU obligations under the SEA Directive had been met. Those obligations included the requirement to properly assess and evaluate reasonable alternatives to the chosen strategy in the plan.

The judge said this:

> "The basis for the claim in the HNP that sites on the western boundary consolidating the recent consent at West End Lane would place unsustainable pressure on the local road system, is thus, in my judgment, entirely obscure."

Compliance with EU obligations is arguably a free-standing requirement, but, in any case, is an express requirement of the neighbourhood planning regime under "basic condition" para.8(2)(f) of Sch.4B. Accordingly, the fact that the authorities could not properly be satisfied that a reasonable alternative had been evaluated in accordance with the SEA Directive meant that the plan would be quashed.

In *Hoare v Vale of White Horse* ,[80] the court determined that there had been a legal error by the neighbourhood plan examiner in failing to identify a clear conflict between the neighbourhood plan and a policy in the local plan. However, the mere fact that there was a conflict between one policy in a neighbourhood plan and one strategic policy in the development plan did not necessarily mean that the policies in the neighbourhood plan collectively were not in general conformity with the strategic policies in the development plan as a whole. It was highly likely that, had the examiner and the local authority realised that the neighbourhood plan policy conflicted with the local plan policy, they would still have concluded that the draft neighbourhood plan was in general conformity with the strategic policies in the development plan (that being the legal requirement). In those circumstances, since the outcome for the claimant would not have been substantially different if the identified legal error had not occurred, the court had to refuse her relief pursuant to the Senior Courts Act 1981 s.31(2A).

Finally, on neighbourhood planning, it is worth noting that the High Court is due to hear a challenge to the legality of the recent written ministerial statement relating to neighbourhood plans. In a statement issued in December 2016 by the then planning minister, Gavin Barwell, neighbourhood plan policies in plans that allocate housing sites are not to be treated as "out of date", unless less than a three-year housing land supply can be demonstrated. This is in direct conflict with the NPPF para.49 which deems plan policies out of date unless a five-year housing land supply can be demonstrated. A group of housebuilders and land promoters have brought judicial review proceedings against the statement. Permission has been granted by Dove J for the claimants to proceed with grounds of challenge relating to the failure to consult and irrationality. The substantive hearing is listed for 7 and 8 November.

Habitats

This year, in cases concerning the Habitats Directive and Regulations, the trend has been for courts to uphold legal challenges and quash decisions based on flawed consideration of effects on protected sites. I have picked just two for the purposes of this paper.

In January this year, in *Secretary of State for Communities and Local Government v Wealden DC*,[81] the Court of Appeal upheld a decision of Lang J to quash a planning permission for housing development

[80] *Hoare v Vale of White Horse* [2017] EWHC 1711 (Admin).
[81] *Secretary of State for Communities and Local Government v Wealden DC* [2017] EWCA Civ 39.

granted on appeal by the Secretary of State. The court considered that Lang J was right to determine that the inspector had erred in failing to consider the deliverability and efficacy of mitigation measures in circumstances where the inspector had concluded that those mitigation measures were necessary to ensure that there would be no significant effects on the Special Area of Conservation ("SAC").

In a case with a similar name,[82] and concerning the same SAC, Wealden DC successfully applied to quash the Joint Core Strategy ("JCS") prepared by neighbouring Lewes DC and the South Downs National Park Authority. The decision of Jay J in this case is striking in that it is a very rare example of where the advice of a statutory consultee—Natural England ("NE")—has been found by the Court to be "obviously wrong" and "irrational". The *Wednesbury* error in NE's advice was held to create a *Wednesbury* error in the evaluative assessments that were taken into account by the examining inspector. Thus, NE's error directly infected the decision-making process and the lawfulness of the resulting JCS.

The case concerned the impact of the JCS development on traffic flows on routes within 200 metres of the SAC. NE advised that if the expected increase in annual average daily traffic ("AADT") flows is less than 1,000 cars or 200 HGVs or if there is less than a 1% increase in traffic generated compared to that predicted at the end of the JCS period, then it could be concluded that the effect on the SAC would not be significant and the effect could be "screened out" without needing to carry out an appropriate assessment under the Habitat Regulations. This aspect of NE's advice was not in itself in error. However, the difficulty that arose was that it led to a breach of the Regulations and Directive by a failure to consider the effects of the JCS *in combination with* an earlier neighbouring core strategy adopted by Wealden DC ("WCS") in 2013.

The WCS had been adopted on the basis of a prediction that it would lead to increased traffic flows on the A26 (which was within 200m of the SAC) of 950 vehicles per day. That was obviously below the relevant AADT threshold for significant effects, but with "very little headroom".[83] The JCS analysis for the same stretch of road revealed that the JCS development was predicted to result in an increase of 190 AADT, also, on its own, below the 1,000 threshold for significant effects. However, if amalgamated with the 950 figure for the WCS development, it is plain that the JCS predicted effects would tip the increased vehicle flows over the 1,000 threshold for significant effects (reaching 1,140), and thus would result in the need for an appropriate assessment under the Habitat Regulations.

Jay J determined that the failure to amalgamate those two figures was in breach of the legal requirement to consider *in combination* effects. He pointed out that the cars are the same and the nitrogen dioxide emissions are the same, regardless of their provenance. NE's advice that there would be no significant effects and that no appropriate assessment was required was considered to be "obviously wrong" and irrational. In a decision which stands in contrast to an earlier Court of Appeal decision (in *R. (on the application of Mott) v Environment Agency*[84]), the judge did not shy away from reviewing the substance of NE's advice. He said this:

> "I appreciate that this is a specialist area and that the court must avoid delving into the minutiae of expert opinion evidence which is beyond its competence. The court should be doubly slow to criticise expert opinion where there is no contrary evidence being advanced by WDC. Even so, these self-denying ordinances, although salutary, are by no means absolute."

and:

> "It is … clear that Natural England's expert advice cannot be supported on logical and empirical grounds."

[82] *Wealden DC v Secretary of State for Communities and Local Government* [2017] EWHC 351 (Admin).
[83] In the words of the examining inspector for the WCS.
[84] *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564.

In addition to the willingness of the Court to scrutinise NE's expert advice, the decision of Jay J is important for two other reasons. First, it was concerned with the interpretation of guidance in Highways England's Design Manual for Roads and Bridges ("DMRB"). After criticising potential ambiguity in the guidance, the judge directed that the Government Legal Department send a copy of his judgment to Highways England in order that the DRMB should be re-examined and clarified in light of the judgment.

Secondly, the case also concerned a potentially important procedural point, namely what is the appropriate time limit under s.113[85] for bringing a challenge to a local development document (the JCS in this case) in circumstances where it is a joint plan adopted by two different authorities on separate dates. The claim had been brought within six weeks of the adoption by the South Downs National Park Authority ("SDNPA") but more than six weeks after Lewes DC's adoption. After detailed consideration of s.28,[86] the court determined that the claimant was in time to challenge SDNPA's adoption of the JCS but out of time to challenge LDC's adoption of the JCS. This meant that the relevant policies of the JCS would be quashed to the extent that they formed part of the development plan for SDNPA's administrative area (but not, in relation to LDC's administrative area).

Concluding remarks

The last year has again shown that the law on town and country planning continues to evolve at a reasonable rate. Keeping up-to-date with court judgments on planning issues is often a weekly, if not daily, task. Many legal challenges to planning decisions have been successful, and, as always, it has been shown to be sensible to await the expiry of the legal challenge period before relying on a grant of planning permission.

Outside planning itself, there has also been the ClientEarth litigation relating to the Government's EU law duties to reduce nitrogen dioxide levels in the air. In a judgment given in November of last year, ClientEarth was successful in its challenge to the Government's air quality plan which had itself been published pursuant to the Supreme Court's mandatory order[87] requiring compliance with EU Directive 2008/50.[88] The High Court determined[89] that the plan was defective in a number of respects, not least because cost, rather than efficacy, had been the determining consideration when selecting measures to lower pollution levels. Further, basing the plan on very optimistic forecast assumptions (which failed to reflect properly the revelations about "defeat devices" being used in vehicle emissions testing) was held to breach the Directive. The Government was ordered to produce a new draft plan by 27 April 2017, and a final plan by 31 July 2017. Later attempts by the Government to substantially delay this timetable (due to "purdah" caused by the General Election) failed[90] and the final plan was published at the end of July. But this is not the end of the story: There are indications[91] that ClientEarth could mount a judicial challenge to the latest plan, based in part on the fact that the plan apparently seeks to pass much of the responsibility for meeting targets to local government. This has raised concerns about funding and about whether such delegation is the most effective route to meeting target levels in the shortest possible time, as required by the Directive.

Although not directly related to planning, the *ClientEarth* litigation demonstrates the increasing importance of air quality in environmental law, particularly because of its impact on human health. The very recent decision (at the time of writing) in *R. (on the application of Shirley) v Secretary of State for*

[85] Planning and Compulsory Purchase Act 2004 s.113.
[86] Planning and Compulsory Purchase Act 2004 s.28.
[87] *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.
[88] Directive 2008/50 on ambient air quality and cleaner air for Europe [2008] OJ L152/1 art.23 and the Air Quality Standards Regulations 2010 (SI 2010/1001) reg.26(2).
[89] See judgment of Garnham J in *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin).
[90] See judgment of Garnham J in *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 1618 (Admin).
[91] ClientEarth has apparently written to the Department seeking answers to a number of criticisms and alleged omissions in the Plan.

Communities and Local Government[92] also demonstrates that the air quality plan under the Directive is of crucial importance in holding the Government to account in meeting the emission limits. It is the air quality plan alone which is the mechanism for complying with the Directive. In *Shirley* , an attempt to argue that the Secretary of State's duties under the Directive meant that he was obliged to call in a planning application for 4,000 dwellings failed.

The *Wealden* litigation,[93] discussed above, shows the interplay between air quality and planning, as do other recent challenges to planning permissions based on air quality considerations.[94] Furthermore, the recent revelations by Cheshire East Council concerning the deliberate manipulation of air quality data demonstrate the critical importance of the issue to planning.[95] Air quality is likely to be a developing area of concern and one of a number of EU law areas to watch as and when Brexit proceeds.

Annex

Text of the NPPF para.14:

> "14. At the heart of the National Policy Framework is a *presumption in favour of sustainable development*, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> For *plan-making* this means that:
>
> - local planning authorities should positively seek opportunities to meet the development needs of their area;
> - Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>   - — 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 [fn.9].
>
> For *decision-taking* this means [fn.10]:
>
> - approving development proposals that accord with the development plan without delay; and
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>   - — 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 [fn.9]."

Footnote 9: For example, those policies relating to sites protected under the Birds and Habitats Directives (see para.119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.

Footnote 10: Unless material considerations indicate otherwise.

[92] *R. (on the application of Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Dove J).

[93] See the previous section relating to the Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

[94] See *R. (on the application of Carlyle) v Hastings BC* [2016] EWHC 1482 (Admin); *PS v Greenwich RBC* [2016] EWHC 1967 (Admin); [2017] J.P.L. 165; *R. (on the application of Birchall Gardens) v Herts CC* [2016] EWHC 2794 (Admin). Also see the challenge brought on air quality grounds to the draft Planning Policy Statement on airports (which failed due to timing): *R. (on the application of Hillingdon BC) v Secretary of State for Transport* [2017] EWHC 121 (Admin); [2017] J.P.L. 610.

[95] See press releases and reports on the Council's website. A legal challenge to the Council's recent adoption of its Local Plan has been launched based on the inaccurate and misleading air quality data.