Case Law Update in a Post "Suffolk" World

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Introduction

There have been over 200 judgments in planning cases in the last year. One could try to cover them all in a 45-minute presentation. But only by trying to read out the case names very quickly. That would make for an entertaining test, worthy of the speed reading record required to gain entry to the Guinness Book of Records. Whilst that might be amusing, it probably would not be very informative. This paper therefore seeks to achieve the low threshold of being mildly more instructive. The emphasis is unashamedly on the practical effect of the case law for practitioners.

This positive torrent of planning cases has been determined by the Planning Court, which is a division of the High Court. That is where most cases are successfully resolved. The losing party can pursue its case further to the Court of Appeal but it needs permission. For the non-lawyer, it is worth noting that permission is only given for a claim to proceed to the Court of Appeal if the court (most often the Court of Appeal) considers that the appeal would have a reasonable prospect of success or there is some other compelling reason for the appeal to be heard (e.g. the need for clarification due to conflicting High Court decisions or some wider public interest). The aggrieved party therefore cannot pursue its case further unless it first secures permission to do so. Thus the decisions of the Court of Appeal are both more significant and more authoritative.

In light of this, and given the sheer volume of planning cases, whilst this paper does address some key decisions of the Planning Court, the focus is on decisions of the Court of Appeal. It attempts to focus on the key themes which have emerged.

Above the Court of Appeal sits the Supreme Court of United Kingdom. Planning cases which reach this far are rare. There are only a few each year. The judgments of the Supreme Court are, of course, especially important. Not just for the particular issue which is resolved by the court. But for the wider observations which the Justices of the Supreme Court make about the planning system in general.

What is a post-Suffolk world?

In this decade there have been two seminal planning cases of the Supreme Court. The first was *Tesco Stores Ltd v Dundee CC*.[1] Lord Reed made clear that the interpretation of planning policy was a matter for the court, which as every lawyer now knows "should be interpreted objectively in accordance with the language used, read as always in the proper context" (at [18]). This removed the previously held view that the meaning of a policy was a matter which "each planning authority was entitled to determine from time to time as it pleases, within the limits of rationality" (also at [18]). The case was concerned with planning policy in a development plan. But it was soon applied with equal force to national policy statements: *Hunston Properties Ltd v Secretary of State for Communities and Local Government*[2] as per David Keene (at [4]): Sir David Keene referring to *Tesco v Dundee* and holding "That case was concerned with policy in a statutory development plan, but it would seem difficult to distinguish between such a policy statement and one contained in non-statutory national policy guidance". And in large measure, it is this case which has given rise to the positive torrent of cases, as lawyers have seen an obvious opportunity to challenge the interpretation of a policy by decision makers if their client's planning proposal is refused or dismissed. The NPPF 2012 has proved a fruitful hunting ground.

[1] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13; [2012] J.P.L. 1078.
[2] *Hunston Properties Ltd v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1610; [2014] J.P.L. 599.

The second much more recent case is *Suffolk Coastal DC v Hopkins Homes: Richborough Estates Partnership v Cheshire East BC*.[3] Conveniently (although disappointingly for a very small group of us), this case has become widely known as "Suffolk". As everyone will know it determined the meaning of the phrase "relevant policies for the supply of housing" contained in the NPPF 2012 para.49. If an LPA cannot demonstrate the required five-year supply of housing land, such policies were judged to be not up-to-date. The Government (who was the "another" in both cases) aligned itself with the developers and argued that the phrase should be interpreted widely to cover not just housing policies, but those which also work to constrain the supply of housing (such as settlement boundary policies and green gap policies). The Supreme Court disagreed. One year on, it is noteworthy that the Government has since changed national policy, and the second version of the NPPF, issued two months ago, now uses different language to ensure an even wider group of policies are now judged out-of-date if an LPA cannot demonstrate a five-year supply of housing land.[4] If there is no five-year supply of housing, "the policies most important for determining the application are out-of-date". Which presumably means all the policies referred to in in the reasons for refusal. That can include, for example, all highways and transport policies and is far wider than just "policies for the supply of housing", even in the wide interpretation adopted by the Court of Appeal.

Whilst the wording of para.49 proved transient, the wider issues determined by the Supreme Court in *Suffolk* are altogether more significant. It seeks to row back a little from the high-water mark of *Tesco v Dundee*. Partly in an attempt to stem the torrent of court cases, which are undoubtedly putting an unwelcome strain on the Planning Court. Ten key observations from the Supreme Court included in the important contents of [23]–[26] and 60 are as follows:

- the particularly unfortunate over-legalisation of the planning process ([23]);
- the role of courts in interpreting planning policy should not be overstated ([24]);
- statements of policy are not statutory texts and must be read in that light ([25]);
- disputes over interpretation may well not be determinative of the outcome ([25]);
- the courts should respect the expertise of the specialist planning inspectors ([25]); and
- start at least from the presumption that they will have understood the NPPF correctly ([25]);
- issues of genuine interpretation need to be distinguished from issues of application ([26]);
- recourse to the courts may be sometimes needed to resolve distinct issue of law ([26]);
- or to ensure consistency of interpretation in relation to specific policies ([26]); but
- policy should be interpreted in accordance with the natural language used ([60]).

Judgment in *Suffolk* case was handed down on 10 May last year. And that is why this paper refers to the post *Suffolk* World: all of the judgments handed down over the last year seek to reflect these important observations from the Supreme Court. As a consequence, one should anticipate fewer claims being successful and the firm rejection of over-legalistic interpretation, together with greater respect for, and less criticism of, inspectors. Even if there is a legal error, the courts will pay particular attention to whether the outcome of the case would have been the same.

That is ultimately why *Richborough Estates* succeeded in the Supreme Court. The Inspector, guided by the somewhat artificial language[5] used by Ouseley J to interpret NPPF 2012 para.49 in *South Northamptonshire Council v Secretary of State for Communities and Local Government*,[6] had treated the settlement boundary as a policy for the supply of housing and reduced the weight he gave that policy.

[3] *Suffolk Coastal DC v Hopkins Homes: Richborough Estates Partnership v Cheshire East BC* [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] J.P.L. 1084.

[4] NPPF 2018 para.11d and fn.7.

[5] Ouseley J adopted the concept of settlement boundary policies being "counterpart policies" to housing policies and therefore, as settlement boundaries impact on supply they were "policies for the supply of housing".

[6] *South Northamptonshire Council v Secretary of State for Communities and Local Government* [2014] EWHC 573.

Whilst that was held by the Supreme Court to be wrong, the court upheld the Inspectors decision because "he was clearly perfectly entitled to conclude that the weight to be given to the restrictive policies was reduced to the extent that they were derived from "settlement boundaries that in turn reflect out-of-date housing requirements" (at [63]). As Cheshire East discovered to their cost, lawyers should be wary of issuing claims where the outcome would have been the same. This is what Lord Carnwath meant when he referred to disputes over interpretation "may well not be determinative of the outcome" (*Suffolk*, principle iv)

Topic 1: Consistency in decision making

DLA Delivery v Baroness Cumberlege

Perhaps the clearest statement the Supreme Court made about a legitimate basis for bringing a legal challenge was in ensuring consistency of interpretation. This was the problem which had bedevilled the High Court in respect of para.49, with multiple different interpretations. It was not long after *Suffolk* that the Court of Appeal had an opportunity to consider the issue: in *DLA Delivery Ltd v Baroness Cumberlege of Newick*,[7] the court was asked to consider a situation in which the Secretary of State came to diametrically opposing views about the same policy in the same District within a matter of a few months. He found the settlement boundary policy in the old Local Plan up-to-date, and then out-of-date.

DLA brought forward a proposal for 50 houses on the edge of Newick in Lewes District, East Sussex. The Secretary of State allowed the appeal following the recommendation of his Inspector. There was a brand-new Core Strategy and neighbourhood plan and the Inspector also found there was a five-year supply of housing land. But he judged the settlement boundary policy CT1 for the village of Newick out-of-date because it had been drawn at the time of the old Local Plan, which only related to development needs up to 2011.

Nine weeks earlier the Secretary of State had found the same policy (CT1) up-to-date in respect of the village of Ringmer in the same District. A different Inspector in that case had concluded the settlement boundary around Ringmer was up-to-date. The context being both settlements were due to accommodate a minimum of 100 new homes over the Core Strategy plan period. And Ringmer had already received over 300 units by way of completions, commitments and allocations.

The Secretary of State made no mention of the *Ringmer* appeal in his decision on the *Newick* appeal. This, despite the fact it was the same person in the DCLG who had written both decision letters. No one awaiting the decision in the *Newick* appeal brought the *Ringmer* decision to the attention of the Secretary of State, including the LPA and subsequent claimant, Baroness Cumberlege of Newick.

John Hobson QC sitting as a High Court Judge quashed DLA's permission due to this inconsistency. The Secretary of State initially sought to defend his decision. But then withdrew his support relying on *Dear v Secretary of State for Communities and Local Government* at [32].[8] The judge granted permission to allow an appeal to the Court of Appeal from his own decision.

As every planning lawyer knows, the need for consistency in planning appeal decisions is a well-established principle: *North Wiltshire DC v Secretary of State for the Environment* (see Lord Mann at 145).[9] Application of the principle has, however, varied depending on whether the decision maker is the local planning authority, an Inspector or the Secretary of State. Recent previous case law has emphasised the need for the parties to place other decisions before the decision maker if they wish them to be taken into account: *Cotswold DC v Secretary of State for Communities and Local Government*.[10] The Council

[7] *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] EWCA Civ 1305; [2018] J.P.L. 1268.
[8] *Dear v Secretary of State for Communities and Local Government* [2015] EWHC 29 (Admin) at [32].
[9] *North Wiltshire DC v Secretary of State for the Environment* [1993] 65 P. & C.R. 137; [1992] J.P.L. 955.
[10] *Cotswold DC v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin).

in that case alleged the Secretary of State had been inconsistent in failing to refer to an Inspector's decision in the same District issued a few weeks earlier. The High Court rejected that challenge, placing the onus on the parties to put before the Secretary of State any decision they considered relevant.

In *R. v Secretary of State for the Environment Ex p. Baber*,[11] Glidewell LJ (at 1040) had posed this question for the decision-maker:

> "[A] previous decision having been drawn to my attention, do I take the view that it may well be sufficiently closely related to the matters in issue in my appeal that I ought to have regard to it and either follow it or distinguish it?"

But in the *DLA*, Lindblom LJ rejected the submission that the Secretary of State is only ever obliged to have regard to other decisions which are specifically brought to his attention (at [32]):

> "There can be no 'absolute rule' to that effect … having regard to a decision maker's general obligation to take reasonable steps to acquaint himself with the relevant information to enable him to decide relevant questions correctly, an obligation emphasized by Lord Diplock in *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014."

Lindblom LJ (at [36]) was keen to make clear this obligation had its limits for obvious reasons:

> "Like the judge, I would not accept that, as a matter of law, the Secretary of State ought to be aware of every previous decision taken in his name, whether by himself or a ministerial predecessor or by one of the inspectors to whom his decision-making function is largely delegated. In my view that concept is unrealistic and unworkable, given the number of decisions on planning appeals that have been made, year upon year, since the modern statutory code came into existence …"

But the Court of Appeal ([36]) fashioned out a particular category of case where Secretary of State decisions would be quashed if inconsistent conclusions were reached in sufficiently similar cases made at broadly the same time:

> "There will, however, be circumstances in which, having regard to the interests of consistency in decision-making, the court is prepared to hold that the Secretary of State has acted unreasonably in not taking into account a previous decision of his own. Whether this is so in a particular case will always depend on the facts and circumstances. A possible example would be a case in which, within a short span of time, the Secretary of State has called in applications for his own determination, or recovered jurisdiction in appeals, in cases of a sufficiently similar kind, to which the same policies or the development plan apply."

This largely follows the approach of Gilbart J and the Court of Appeal in *Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government*[12] which involved two decisions issued by the Secretary of State on the same day for almost identical housing proposals of the same size located just 500m apart. In that case, an inspector recommended approval of a proposal by Richborough Estates. But another inspector who conducted a separate inquiry for an appeal made by Fox Land (now Gladman) recommended refusal. In refusing the *Fox* appeal, the Secretary of State made no mention of the *Richborough* appeal. HH Judge Andrew Gilbart QC (as he then was) sitting in the High Court was highly critical of the Secretary of State's approach. It seems in the *DLA Delivery* case, the DCLG had not learned its lesson.

One might think the *DLA Delivery* case leaves the decision of Lewis J in *Cotswold* (which was not disapproved of by the Court of Appeal) as something of an outlier. But it is easily reconciled. It is not the

[11] *R. v Secretary of State for the Environment Ex p. Baber* [1996] J.P.L. 1034.
[12] *Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198; [2013] 1 P. & C.R. 6.

close physical proximity of the sites which matters. Instead, it is the identity of the decision maker. Whilst the Secretary of State cannot be expected to be aware of all the decisions made by his Inspectors in the same District (unless they are brought to his attention) as was the case in *Cotswold*, he should be cognisant of his own decisions in the same District (as in *DLA Delivery*). As Lindblom LJ explained (at [46]):

> "[i]t would not have been difficult for those whose task it is to prepare decision letters on behalf of the Secretary of State to find out whether another decision had recently been made by him in which effectively the same issues had been dealt with."

Hallam Land v Secretary of State for Communities and Local Government

The Secretary of State afforded the Court of Appeal a further opportunity to quash a decision for inconsistency in July. In *Hallam Land Management Ltd v Secretary of State for Communities and Local Government*,[13] the Court of Appeal had again to consider two Secretary of State appeal decisions issued for housing developments in the same District, this time just three weeks apart. The Secretary of State allowed an appeal for 660 dwellings on greenfield land at Boorley Green in Eastleigh some three weeks after he had refused Hallam's appeal for 225 dwellings. Both were located in a local gap policy known as Policy 3.CO.

Significantly of course, the reports here were the other way round. Hallam were seeking to complain about a decision issued by the Secretary of State which granted planning permission, three weeks after its own appeal had been refused. Lindblom LJ had no difficulty rejecting this, concluded that the principle of consistency in decision making:

> "… does not apply, in the case of decisions on planning appeals made by the Secretary of State, to inspectors' reports that have been submitted to the Secretary of State but on which his decision is still to be made at the time of the decision subject to challenge in the case before the court." ([74])

Lindblom LJ made important observations about the status of an inspectors report in a recovered or call-in inquiry:

> "The purpose and status of such a report is, essentially, that of advice given to the Secretary of State by his appointed inspector, which will inform the decision itself, but which the Secretary of State is not bound to follow and is free to reject, so long as he gives adequate reasons for doing so. It is an intermediate stage in the process of decision-making. The assessment and conclusions contained in the report do not constitute the Secretary of State's decision, nor do they form any part of that decision unless and until they are incorporated into it, whether in whole or in part. ([74])
>
> It would be a radical and unjustified extension to the principle of consistency to embrace within it unpublished inspectors' reports, whose conclusions and recommendations the Secretary of State may in due course choose to accept or reject. Indeed, this would not be an extension of the principle of consistency but a distortion of it, because the basis for it would not be consistency between one decision and another, but consistency between a decision and a non-decision, a decision yet to be made. That is not a principle the court has ever recognized, nor even, in truth, a meaningful principle at all." ([75])

Hallam were successful though, for another reason. There were two other appeal decisions, issued by Inspectors for sites in Eastleigh, to which the Secretary of State had made no mention. Decisions at Bubb Lane and Botley Road both involved Inspectors reaching conclusions that the Council could only demonstrate a housing land supply of around four years. This was seen as a substantial shortfall and the weight given to the gap policy was limited. In the *Hallam* appeal, the Secretary of State's conclusion on

[13] *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808.

the extent of the shortfall in the five-year supply was not clear. He relied upon the Council's late evidence that the supply was 4.86 years and then gave policy 3.CO "significant weight". Critically, he did so on the assumption that the shortfall in the housing land supply was "limited". As Lindblom LJ concluded ([65]) "One is left with genuine—not merely forensic—confusion on this important point, and the uncomfortable impression that the Secretary of State did not come to grips with the inspector's conclusions on housing land supply in those two very recent appeal decisions". The court concluded the Secretary of State's reasons were deficient.

It is interesting to note Lindblom LJ reasserting his view that the size of the shortfall in the five-year supply of housing land matters. It is a theme he has consistently espoused in *Crane v Secretary of State for Communities and Local Government* at [71];[14] *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government*[15] at [61] and *Suffolk/Richborough* in the Court of Appeal at [47]. The Secretary of State's handling of the issue in the *Hallam* case illustrates precisely why it is important. As Lindblom LJ made clear at [66] "This was an important issue in itself, and potentially decisive in the planning".

Tate v Northumberland

The need for consistency in decision making is obviously not confined to the Secretary of State. The Court of Appeal has ventured into this theme for a third time in the last 12 months in *R. (on the application of Tate) v Northumberland CC*.[16] Here a planning officer had failed to address a previous Inspector's report, which was pertinent to the issue of whether a development proposal represented "limited infilling" within the context of Green Belt policy. The term "limited infilling" is not defined in policy. The Inspector had expressed his understanding of the phrase. Which made it even more surprising that the officer failed to address the Inspector's decision in his report to the committee on the same site.

Topic 2: Interpretation of policy

The Supreme Court in *Suffolk* made clear that the courts "may sometimes be needed to resolve distinct issues of law" ([36]). Interpretation of policy remains a matter of law. *Suffolk* did not reverse *Tesco v Dundee*, even though the Supreme Court is empowered to do so. And as Lord Carnwath made clear "[in] that exercise the specialist judges of the Planning Court have an important role". Cases concerning the interpretation of policy will continue. What Lord Carnwath sanctioned against was challenges to the application of policy dressed up as the misinterpretation of policy. Such a distinction is not always easy to make. And key phrases of the NPPF and statutory instruments will continue to be the subject of proper scrutiny by the courts. Indeed, the Court of Appeal has continued to allow appeals to be heard on such grounds, especially where the subject matter has widespread implications.

A supply of specific deliverable sites

Whether a local authority can demonstrate the minimum five-year supply of housing land has remained at the forefront of the case law again in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government*.[17] The pivotal para.47 of the NPPF has been the subject of much litigation,[18] but not the phrase "a supply of specific deliverable sites". This is a requirement for all local authorities who

[14] *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin).
[15] *Phides Estates (Overseas) Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin).
[16] *R. (on the application of Tate) v Northumberland CC* [2018] EWCA Civ 1519.
[17] *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2018] J.P.L. 398.
[18] *R. (on the application of St Albans CC and DC) v Secretary of State for Communities and Local Government* [2017] EWHC 1751 (Admin); *Solihull Homes Ltd v Gallagher MBC* [2014] EWCA Civ 1610; [2015] J.P.L. 713.

need to show this to ensure they "provide five years worth of housing against their housing requirements". The word "deliverable" was defined in NPPF 2012 in fn.1 in these terms:

> "To be deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on site within five years and in particular that the site is viable. Sites with planning permission should be considered deliverable until permission expires …"

St Modwen appealed against the refusal of schemes for 500 and 390 dwellings on employment land next to the Humber Estuary. The appeals were recovered by the Secretary of State who dismissed both on the advice of his Inspector. The challenge was brought in the High Court to the Inspector's reasoning. The Inspector had accepted the Council's evidence of a supply of 15,000 dwellings (against a requirement of 14,000), based mostly on draft allocations in an emerging plan none of which had even outline planning permission. St Modwen challenged that at the inquiry as being unrealistic and suggesting the supply was closer to 5,000 dwellings based largely on sites with planning permission or a resolution to grant plus a windfall allowance. The Council's own trajectory, submitted concurrently for the purpose of the emerging local plan, showed "an anticipated rate of delivery" of just 7,000 dwellings for the relevant five-year period.

The Inspector rejected St Modwen's case. In so doing, she said of the 15,000 "Clearly, given the number of sites involved, it may well turn out that not all allocations currently identified as deliverable will in fact be delivered". In addition, she suggested that "the assessment of supply is distinct from that for delivery". St Modwen's main points were that the Inspector had misinterpreted the phrase "a supply of specific deliverable sites", and had misunderstood the purpose of a trajectory: how could a council claim to have a supply of deliverable sites amounting to 15,000 dwellings to meet the five-year requirement of 14,000, yet simultaneously produce a trajectory showing it only thought 7,000 were likely to come forward over that time period.

The Court of Appeal, upholding the decision of Ouseley J below, rejected the developer's case. It concluded that the difference:

> "misses the essential distinction between the concept of deliverability, in the sense in which it is used in the policy, and the concept of 'an expected rate of delivery'. These two concepts are not synonymous, or incompatible. Deliverability is not the same thing as delivery. The fact that a particular site is capable of being deliverable within five years does not mean that it necessary will be." ([35]).

Referring to the definition in fn.11, the court made clear that the reference in the definition to sites with planning permission "clearly implies that to be considered deliverable and included within the five-year supply, a site does not necessarily have to have planning permission already granted for housing development on it". ([38])

The court rejected the submission that a supply which is "achievable with a realistic prospect that housing will be delivered on the site within five years" required an assessment of whether delivery from the site within the five years was probable. The court held that no part of fn.11 supported that interpretation. Lindblom LJ held that:

> "[s]ites may be included in the five-year supply if the likelihood of housing being delivered on them within the five-year period is no greater than a '*realistic*' prospect … This does not mean that for a site properly to be regarded as 'deliverable' it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years." ([38])

In the judgment, the Court of Appeal cited text from the Planning Practice Guidance ("PPG") relevant at the time, including s.03-029. This made clear that allocated sites and sites with planning permission

(both outline and detailed) should be included in the supply unless there is clear evidence that the schemes will not be implemented. But went further also to suggest the supply could include sites with neither an allocation nor a permission ([11] and [33]).

To many, the interpretation adopted by the court will seem to be at odds with what occurs in most planning appeals. The parties are often engaged in examining whether a site is likely to come forward in the five-year period and how many houses are likely to be delivered in that period. Since most outline permissions allow five years for commencement, the existence of at least an outline permission is often seen as an essential pre-requisite for any such delivery. This approach might be thought appropriate if one is trying to ensure annual housing requirements are met over the whole of the plan period. But the Court of Appeal reminds us that one needs to look very carefully at the words used in policy. In so doing, the court here, as in many other planning judgments had in mind what definitions and guidance are offered by the Government. In the context of the PPG not requiring sites to have planning permission or even an allocation, the court decided that a "realistic prospect" was a low threshold, which does not require planning permission.

One might legitimately ask what is the point of a five-year supply of housing land when there is no requirement for delivery from a site to be even probable in the five-year period. Such a low threshold might be seen to only encourage under-delivery against annual targets which is endemic in this country, and surely a key cause of the national housing crisis. And as a matter of fact East Riding Council have delivered less houses than even St Modwen anticipated in the five year since the inquiry. As the judgment reminds us, however the problem here lies not in misinterpretation of the policy or even misapplication. The problem lies in the wording of policy itself. That is plainly beyond the remit of the courts save for irrationality. Although in this case, one might venture to suggest, part of the problem lay in the wording of the Government's guidance in the PPG.

This may be why the Government has moved quickly to change the definition of "deliverable" in both the NPPF 2018 and PPG. The new definition focusses on the need for sites to have a detailed planning permission or reserved matters approval to be included in the five-year supply. Everything else, including sites with outline permission and allocations are excluded unless the LPA has "clear evidence" there will be completions on the site in the five-year period. Clearly, the burden of proof has now shifted onto the LPA for all but a narrow band of sites with detailed permission. It is the exact opposite of the previous position, which required the appellant to provide clear evidence that schemes will not be implemented within five years. Such evidence proved hard to find. Now the boot is firmly on the other foot. Indeed, some LPAs responded to the consultation on the draft NPPF (2018), by suggesting it would be impossible for them to find "clear evidence" of delivery from sites without detailed planning permission. The proposed changes to the PPG mirror the new definition of "deliverable", removing all reference to automatically including in the five-year supply sites which have only outline permission, an allocation or neither.

Added to which the Government has introduced into NPPF 2018 the "Housing Delivery Test", which will also trigger the tilted balance. So LPAs attempting to rely on their five-year supply on sites where delivery is not even probable will ultimately have such claims re-visited upon them.

Finally, it would be wrong to pass over the court's re-emphasis of the concern expressed by the Supreme Court about the over-legalisation of the planning process. Lindblom LJ emphasised the need to respect the role of Inspectors:

> "[t]here is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected—whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee."

Such reports "should not be laboriously dissected in an effort to find fault …" ([7]). That observation was made in the context of a plea to read inspectors reports as a whole, rather than focus on select sentences.

General Permitted Development Order—Class Q

The extent of permitted development rights has been expanded greatly in recent years. The conversion of commercial and agricultural buildings to dwellings is an important source of new homes in some areas of the country. *Mansell v Tonbridge and Malling BC and Croudace*[19] concerned an issue of interpretation over the wording of Class Q. The Court of Appeal favoured a literal interpretation, in line with Lord Carnwath's plea in *Suffolk* (at [60]) that policy should be interpreted in accordance with the natural language used.

Class Q of the Town and Country Planning (General Permitted Development) (England) Order 2015[20]Sch.2 Pt 3 allows for the conversion of agricultural buildings. The restriction in Q.1(b) limits such conversions to a floor space of 450m^2. Utilising this provision, a developer applied to demolish a large barn and bungalow to facilitate the construction of four dwellings.

The proposal conflicted with the local development plan. But the planning officer recommended the granting of planning permission on the basis of other material considerations. He referred to the emphasis contained within the NPPF 2012 on supporting sustainable development, the provision of new homes, the benefits of removing existing structures and the permitted development "fallback" position. The fallback position was said to arise through the ability to convert 450m^2 of the barn into housing under Class Q. He was careful to say that only a proportion of the barn, up to 450m^2, could be converted, with the remainder being left unconverted. The claimant argued that such a fallback could not be applied when the agricultural building exceeded the 450m^2 limit. It relied upon the restriction in Q.1(h) which prevents the development under Class Q if it would result in "a building or buildings having more than 450m^2 of floor space having a use falling within Class C3 (dwellinghouses)".

Lindblom LJ held the officer had not misrepresented the permitted development rights under Class Q. The provisions relating to the scope of permitted development rights should be given their literal meaning. The restriction to 450m^2 in Q.1(b) applied to the floor space actually changing use, not to the floor space of the agricultural building or buildings in question. That might have the consequence that the permitted development rights, when fully used, would result in a building partly in use as a dwelling house and partly still in agricultural use. Such an interpretation did not leave Q.1(h) redundant. That sub-paragraph achieved a different purpose. It prevented, for example, a change of use as permitted development in an agricultural building of which part was already in Class C3 use, or an aggregation of successive changes of use through separate acts of development that would result in more than 450m^2 of floor space in a building or buildings being in Class C3 use.

The claimant had also questioned whether the fall-back the officer took into account was probable or likely. The court re-iterated that for a fall-back to be relevant the prospect of it happening did not have to be probable or likely: a possibility would suffice, *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* applied.[21] And in respect of the presumption in favour of sustainable development, the court was keen to emphasise that case law predating *East Staffordshire BC v Secretary of State for Communities and Local Government*[22] should be avoided.

Not for the first time, the Court of Appeal stressed that the reports of planning officers were not to be read with undue rigour. It should be borne in mind they were written for councillors with local knowledge. It was only if the advice in the report misdirected members in a material way so that, but for the flawed advice, that committee's decision might have been different, that the decision was rendered unlawful. In the instant case, the officer's advice was not so flawed. The officer had not counted the presumption as a material consideration weighing in favour of planning permission being granted. The exercise which he

[19] *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314; [2018] J.P.L. 176.
[20] Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596).
[21] *Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 333; [2009] J.P.L. 1326.
[22] *East Staffordshire BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893; [2017] J.P.L. 1378.

conducted was an entirely conventional and lawful balance of material considerations against the identified conflict with the development plan. He took account of the sustainability of the proposed development in the light of the NPPF policy, but without giving it the added impetus of the presumption in favour of sustainable development. The judgment speaks against the unfortunate over-legalisation of the planning process, to which Lord Carnwath referred (at [23]) in *Suffolk*.

Valued landscapes

For a long time now, another vexed issue of interpretation has been whether a valued landscape is a specific policy of the NPPF indicating development should be restricted (NPPF 2012 para.14). This argument is much favoured by LPAs and local objection groups, deployed not least because if the answer is "yes", then the tilted balance does not apply. But clarification was obtained in *CEG Land Promotions II Ltd v Secretary of State for Communities and Local Government*,[23] when the Secretary of State confirmed to the High Court that [109] in relation to valued landscapes was not such a specific policy. As Ouseley J observed (at [20]), this is contrary to what the Secretary of State appeared previously to have thought the position to be. The Secretary of State's concession in the *CEG Land* case followed a consent order addressing the same issue in the same District where an Inspector had erroneously considered paragraph 109 to be a specific policy indicating development should be restricted: *Gladman Developments Ltd v Secretary of State for Communities and Local Government*.[24] This matter has been overtaken by events, as the list of specific policies identified (now in the NPPF 2018 fn.6 is exhaustive. It does not include valued landscapes.

The claim in *CEG Land* focussed on a novel argument about whether the Inspector had "double-counted" the landscape harm of the proposal by treating the harm done to "valued landscape" as additional to harm done to the landscape through breaches of development plan policy and was also irrational. Ouseley J (at [39]) rejected the claim emphasising that:

> "[t]here is a danger of over-analysing decision letters, with the risk that in doing so, error is found where none exists. When I first read this Decision Letter, I could see nothing wrong with it; it was internally logical; it dealt with the issues within the correct structure; the Inspector had dealt correctly with two more difficult issues—the effect of my decision in Stroud and the disapplication of the tilted balance; she balanced harm to the landscape against the absence of a five year housing land supply, expressing clear planning judgment, and applying the 'tilted balance'. This is far from a promising basis for a legal challenge, let alone an irrationality challenge."

Valued landscapes however, remain very much part of the Framework and Ouseley J's judgment (at [55]–[60]) provides some useful clarification on the context in which he was focused on "demonstrable physical attributes" in determining whether a site is a valued landscape in *Stroud DC v Secretary of State for Communities and Local Government*[25] and the way in which it had been followed by Hickinbottom J (as he then was) in *Forest of Dean DC v Secretary of State for Communities and Local Government*.[26] The key point being that there is no need to examine a development site in terms of such demonstrable physical attributes. That was simply the phrase adopted by the Inspector in the *Stroud* case and which the court felt was a convenient way to look at the issues in that case. Ouseley J also observed it would be a bizarre and artificial approach to landscape evaluation to examine whether a site is a valued landscape by assessing only the red line area of a site. A landscape, properly understood, is clearly a large area, and will very rarely be fully encompassed by the red line site boundary.

[23] *CEG Land Promotions II Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 1799 (Admin).
[24] *Gladman Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWHC 2768 (Admin); [2018] J.P.L. 448.
[25] *Stroud DC v Secretary of State for Communities and Local Government* [2015] EWHC 488 (Admin).
[26] *Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 2429 (Admin).

Topic 3: Directly challenging the content of policy

Written Ministerial Statement on Neighbourhood Development Plans (2016)

Neighbourhood Development Plans have been introduced with the stated objective of allowing local people to shape the future development of their own communities. They are also designed to allow local people to participate more directly in the planning system. That is the intention. But as all professionals in the planning system know, all too often the NDP is devised by a small number of people, seeking to thwart and constrain development. In *Richborough Estates Ltd v Secretary of State for Communities and Local Government*,[27] the High Court heard a challenge brought by housebuilders and other developers against the Written Ministerial Statement ("WMS") on Neighbourhood Development Plans ("NDP") issued on 12 December 2016. The key attribute of the WMS is that it removes the requirement for a five-year supply of housing land in all areas where the NDP allocates sites for housing. Instead, in these areas with a made (i.e. adopted) NDP, there is only be a requirement for the LPA to show a three-year supply of housing land.

The main concerns of the house builders as regards the WMS were: (i) it was issued without any consultation; (ii) the three-year protection applied regardless of whether an NDP meets its local housing requirement; (iii) the Ministerial claim that NDP deliver 10% more housing than proposed by local authorities was based on wholly misleading and inaccurate evidence and irrational; and (iv) the policy was irrational as it plainly reduces the supply of new homes in areas already failing to supply enough new homes, by reducing the housing requirement to just a three-year supply, contradicting Ministerial claims of a commitment to housing delivery.

The litigation was highly sensitive with Ministers requesting and being given three adjournments of the case: (i) to await the judgment of the Supreme Court in Richborough's other case; (ii) and because Ministers said they could not focus on the litigation because of the General Election; and (iii) the Grenfell Tower disaster. The delay led to a further ground being added questioning how the WMS could operate alongside the NPPF para.49 in light of the Supreme Court's judgment in *Suffolk*/*Richborough*, when the WMS was so obviously predicated on the different interpretation of para.49 adopted by the Court of Appeal. Other grounds were raised focusing on the failure of ministers to take into account relevant considerations.

Dove J gave permission on five grounds, albeit refusing permission for a claim of a breach of the Public Sector Equality Duty ("PSED"). The case was eventually heard nearly a year after it was issued. The Secretary of State's defence of the case relied heavily on both modifying its position on the effect of para.49 via amendments to the PPG, and the Judgment of Laws and Treacy LLJ in *R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government*.[28] That case involved a challenge to the WMS removing the need for affordable housing on all housing schemes of 10 or less dwellings. The High Court had allowed the claim on all four grounds, only to have all four firmly reversed[29] by the Court of Appeal as being an illegitimate interference in the ability of Ministers to make policy. Was the High Court going to venture there again?

The answer was no. Relying on *West Berkshire*, Dove J observed from the outset (at [33]) that:

> "the legislative framework does not lay down criteria for assessing the merits of planning policy which has been made, nor does it lay down those matters which the defendant should or should not

[27] *Richborough Estates Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 33 (Admin); [2018] J.P.L. 762.

[28] *R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 W.L.R. 3923; [2016] J.P.L. 1034.

[29] Although it would be right to observe that the assertion of Laws LJ in *R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 that the ability of Government Ministers to promulgate planning policy is derived from the Royal Prerogative that was itself firmly rejected by the Supreme Court in *Suffolk Coastal DC v Hopkins Homes: Richborough Estates Partnership v Cheshire East BC* [2017] UKSC 37 (see Lord Carnwath at [19]–[20]).

> have regards to when making national policy. Provided, therefore, that the policy produced does not frustrate the operation of planning legislation, or introduce matters which are not properly planning considerations at all, and is not irrational, the matters which the defendant regards as material or immaterial to the determination of the policy being issued is entirely for the defendant."

The significance of that observation being that if a Government Minister introduces a policy which seeks to restrict further housing delivery in an area where there is already a shortfall in housing delivery, then that is very much a matter for the Minister, not the courts.

The concern about the lack of consultation with the housebuilding industry over introducing a three-year supply requirement in NDP areas was articulated as a breach of a legitimate expectation of consultation based on past practice, adopting the principle laid down in the GCHQ case: *Council of Civil Service Unions v Minister for Civil Service*.[30] The claimants relied on 40 years of consultation with the development industry over changes to housing policy. But the court found (at 72/73) there were two occasions on which the Government had issued a WMS related to housing where there was no consultation. The claimant contested this as a matter of fact as one had involved a degree of consultation with LPAs, and the other was not primarily concerned with housing. More significantly, the claimants relied on Sedley LJ in *R. (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department*[31] where he made clear (at [39]) that to establish a legitimate expectation "whilst a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional voluntary act". Dove J (at [66]) expressly acknowledged Sedley LJ's words, but went on to find against the claimant based on the two occasions in 40 years where there was no direct consultation. The claimants sought permission to appeal to the Court of Appeal on this specific point. But the appeal was overtaken by events, when the Government decided to consult on the three-year policy for neighbourhood plan areas as part of the consultation on the NPPF in March 2018. It would be right to observe that Dove J (at [69]) also expressed concerns about limiting the claim to a legitimate expectation for consultation over housing policy alone.

The concern that the WMS was inconsistent with the Supreme Court's decision in *Suffolk* and therefore incoherent and irrational was rejected on the basis that the Government was entitled to subsequently clarify the content of WMS even though it had not withdrawn or changed its wording. The Government relied on text in the Planning Practice Guidance, issued after the Supreme Court judgment was handed down, which Dove J (at [41]) accepted as amending the text of the WMS. Critically, the Secretary of State adopted the position that para.49 still applied if there was no five-year supply of housing land, such that the tilted balance was engaged, even when the WMS applied a requirement for a three-year housing land supply. All rather confusing.

The wording of the WMS sees Ministers make the claim that NDPs which plan for an average of 10% more housing in the NDP area than proposed by local planning authorities. This was said to be based on "recent analysis". The claimants tracked this down in DCLG research documents. These relied upon data from local plans which were found unsound, untested draft plans and even SHMAs, which as everyone (certainly outside the DCLG) knows have nothing to do with the level of housing LPAs are planning to accommodate. This was articulated in the challenge as a mistake of fact. But Dove J dismissed the concern holding (at 54]) "[t]he text of the WMS is not in my judgment a mistake of fact, but rather an incomplete summary of the 'recent analysis' contained in the 2015 and 2016 research to which it alludes". The court relied (at [52]) upon the fact the "recent analysis was in the public domain", albeit as the claimants had pointed out it could not be found on any Government website.

[30] *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 A.C. 374; [1984] 3 W.L.R. 1174 (Lord Fraser at 401A–F).
[31] *R. (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] A.C.D. 7.

Mayor of London Affordable Housing Policy (2017)

The requirement to provide affordable housing can have profound implications on the viability of a proposal. This is a particular concern for the retirement living sector where the provision of affordable housing in what are often apartment schemes presents both financial and operational difficulties. In *R. (on the application of McCarthy and Stone Retirement Lifestyles Ltd) v Greater London Authority*,[32] four retirement-living developers challenged Supplementary Planning Guidance ("SPG") issued by the Mayor of London, after consultation. The SPG (Homes for Londoners: Affordable Housing and Viability Supplementary Guidance 2017) is related to policies in the London Plan. It concerns how affordable housing developments (or contributions in lieu) should be negotiated on the grant of planning permission for housing developments. The claimants argued the new SPG has a very damaging impact on their ability to acquire and develop sites. They claimed the SPG was unlawful because: (1) it constitutes policy which should only be in the London Plan, which is currently being revised; and the SPG was also inconsistent with that Plan; (2) the SPG is a "plan or programme" which required a Strategic Environmental Assessment ("SEA") which was not undertaken; and (3) it was produced without due regard being had to the constituent parts of the PSED, in Equality Act 2010 s.149.

The debate over ground 1 focussed on whether the SPG was policy or guidance, and if the former whether it was inconsistent with Draft London Plan. Ouseley J held (at [30]) the SPG was policy, not least because it replicated what was clearly a policy in the draft London Plan:

> "There is now no distinction in that respect between the status of the "guidance" in this SPG and the "policy" in the draft London Plan. Both H6 and its SPG equivalent are now, and for the time being, policies. Such similar 'approaches' cannot have different statuses."

But the court also held it would have found the SPG to be policy in any event, given its content and detailed advice.

Conscious this might open up more challenges to policy adopted via SPG/SPD, the court went out of its way (at [33]) to discourage such litigation:

> "That brings me to the qualifications I need to express about the proper role of the judge in deciding whether a document must or must not be in a development plan. That after all is the basis upon which Mr Warren argued this point, though only addressing the 'policy' or 'not policy' aspect. First, the line between guidance and policy is not a bright line, particularly when it comes to an assessment of the level of detail appropriate for a plan. I see nothing wrong with one planning authority taking the view that, for it, an issue requires the force of s.38(6) of the 2004 Act to be applied, and so its policy is promulgated as a development plan policy, while another authority or its successor, could decide that precisely the same point was best left for guidance."

This reflects entirely Lord Carnwath's concern in Suffolk over "the over-legalisation of the planning process".

The claimants argued that it was not appropriate for such policy to appear in an SPG. They relied upon the Greater London Authority Act 1999 s.334(1) which requires the Mayor to produce a "spatial development strategy" (i.e. the London Plan). And that by subs.(3), it "includes his general policies in respect of development and use of land in Greater London". This is however limited by subs.(5) in that the strategy "must deal only with matters which are of strategic importance to Greater London".

Ouseley J accepted he had to decide whether the SPG constituted a policy which had to be in the spatial strategy, and decided that s.334 left considerable room for the plan-maker's judgement. And that even if

[32] *R. (on the application of McCarthy and Stone Retirement Lifestyles Ltd) v Greater London Authority* [2018] EWHC 1202 (Admin); [2018] J.P.L. 1106.

the SPG was policy when issued, that would not have made it unlawful. He observed that in planning it was not uncommon to give some weight to draft policy which was inconsistent with development plans.

Where the claimants were successful however, was in showing that the SPG was inconsistent with the London Plan in respect of viability proposals. The SPG introduced what it termed "a late stage review" of single phase development. But in this regard, the SPG was inconsistent with the London Plan where such a review was only required for phased development (at [47]–[49]). That inconsistency made the "late stage review" part of the policy unlawful. This follows the approach set out by Pill LJ in *R. (on the application of JA Pye (Oxford) Ltd) v Oxford CC*,[33] which had been determined at first instance 16 years earlier by Ouseley J himself.

The court rejected grounds 2 and 3. SEA is often cited in challenges to plans or policy. But in rejecting this ground Ouseley J emphasised that such a requirement only arises where the plan was likely to have significant environmental effects, not simply because a policy forms a "plan or programme", if indeed it was either. He accepted there had been no such determination or direction in the instant case. But on the evidence, even if the SPG was a "plan or programme", there was no doubt the Mayor would have concluded that no significant environmental effects were likely ([68] and [69]).

Ouseley J took an equally hard line on public sector equality duty. The Mayor had not done an equality impact assessment for the SPG. But the court decided (at [88]) that did not mean the s.149 duty had not been considered. The Mayor relied upon the integrated impact assessment for the draft London Plan which had considered equality impacts, including the objective of reducing health inequalities in Greater London and included a policy specifically addressed to specialist older people's housing with the purpose of promoting the needs of older residents for affordable and accessible housing across a range of housing types.

Topic 4: Heritage impact

The impact on heritage assets can be one of the most difficult issues for a developer to overcome. Recent case law has reasserted the importance of proper consideration of heritage, not least because of the statutory requirements in the Planning (Listed Buildings and Conservation Area) Act 1990 s.66.

In *Catesby Estates Ltd v Steer*,[34] the vexed issue of setting was centre stage. An Inspector allowed an appeal for 400 houses on farmland which had once formed part of the estate of Kedleston Hall, a Grade I listed building. This was quashed by the High Court with Lang J concluding the Inspector had taken too narrow a view of "setting" by requiring there to be some degree of physical or visual impact on the listed building. But in reversing the decision, the Court of Appeal adopt the approach favoured by Lord Carnwath in *Suffolk:* namely, to recognise that the courts should respect the expertise of the specialist planning inspectors.

The magnificent Kedleston Hall and its surrounding gardens and parkland are located close to the edge of Derby. They are acknowledged to be of exceptional historic and architectural interest. The whole site was also close to two conservation areas. Section 66 requires that, when considering development proposals affecting listed buildings and heritage assets, decision-makers should have special regard to the desirability of preserving the asset or its "setting". And NPPG 2012 para.132 indicated that the significance of an asset could be harmed by development within its setting, which it defined as the surroundings in which the asset was experienced. The Planning Practice Guidance explains that setting might be more extensive than curtilage, and that although the views of or from an asset were important, the way in which it was experienced was influenced by a range of environmental factors.

[33] *R. (on the application of JA Pye (Oxford) Ltd) v Oxford CC* [2002] EWCA Civ 1116; [2003] J.P.L. 45.
[34] *Catesby Estates Ltd v Steer* [2018] EWCA Civ 1697.

The LPA refused permission for the development on the basis that it would harm the setting and significance of the hall and parkland. Objectors argued that even though the development site would not intrude upon views to and from the hall and parkland, it lay within the setting of both. They relied on the fact that the site had originally formed part of the estate, remained in its historic agricultural use, and was important in preserving a sense of a parkland landscape at the centre of a managed rural estate.

The Inspector rejected this and concluded that the development site lay within the setting of the parkland but that, with appropriate landscaping, it would not lie within the setting of the hall. He found that the development would not harm the significance of the hall, and would cause "less than substantial" harm to the parkland.

Lindblom LJ began by making clear that what is meant by "the setting" of a heritage asset is not statutorily defined and does not lend itself to precise definition. But that it is implicit in s.66 that setting could be affected by development, whether within or outside it. Thus, the decision-maker was required to understand what the asset's setting was, and whether the development site either lay within it or was in some way related to it. But in so doing, the identification of the extent of an asset's setting and whether the development would affect it were matters of planning judgement. And unless there was clear error of law in the decision-maker's approach, the court should not intervene. The decision-maker had to have regard to relevant policy and guidance, and to the principle that considerable importance and weight had to be given to the desirability of preserving that setting, *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC* followed.[35] For a proposed development to affect the setting, there had to be a distinct visual relationship between the two. That relationship had to be more than remote or ephemeral, and it had to bear on how the asset was experienced in its surrounding landscape, *R. (on the application of Williams) v Powys CC* followed.[36]

The court held that in this case the Inspector did not concentrate on the visual and physical effect of the development to the exclusion of all else. He was aware of the need also to take account of its effect on the historic value of the hall and parkland. He was entitled to look for visual or physical effects to ascertain the extent of the setting, and his indication that there needed to be something more physical or visual was a legitimate planning judgment.

Topic 5: Ecology

Ecology plays an ever-increasing role in planning decisions. The extent of ecological work necessary for any major new development proposal is now vast. The issues involved are often complex. A recent decision at the Court of Justice of the European Union ("CJEU") in the matter of *People Over Wind v Teoranta*[37] has made it even more complicated. It has immediately altered the UK's position on appropriate assessments under the Habitats Directive 92/43 ("the Directive").[38]

The case concerned the decision to allow cables to be laid across two European Special Areas of Conservation ("SAC") in the Republic of Ireland. The cables are intended to connect an off-shore wind farm to the electricity grid. But they pass through an area rich in freshwater pearl mussels.

Under the Habitats Directive art.6, planning permission can only be granted if: (a) There is no impact to the protected area (SAC), either by reason of the nature of the plan or where specific preventative or mitigation techniques are employed to protect them; or (b) Where there is a risk to the special area (SAC) and no mitigation can make it acceptable in terms of the Directive, permission can only be granted where there are reasons of overriding public interest (including social or economic matters) and Member States shall take all compensatory measures necessary to ensure the coherence of Natura 2000 is protected.

[35] *R. (on the application of Friends of Hethel Ltd) v South Norfolk DC* [2010] EWCA Civ 894; [2011] 1 W.L.R. 1216; [2011] J.P.L. 192.
[36] *R. (on the application of Williams) v Powys CC* [2017] EWCA Civ 427; [2018] 1 W.L.R. 439; [2017] J.P.L. 1236.
[37] *People Over Wind v Teoranta* (C-323/17) EU:C:2018:244; [2018] P.T.S.R. 1668.
[38] Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

The developer sought planning permission which was subsequently granted. The dispute related to the laying of cables where Coillte, a company owned by the Irish State, instructed consultants to complete a screening report to identify whether there were any risks to the river and or freshwater pearl mussels. The report concluded: (a) in the absence of protective measures, there is potential for the release of suspended solids into waterbodies along the proposed route, including direction drilling; (b) with regards to the pearl mussel, if the construction of the proposed cable works was to result in the release of silt or pollutants such as concrete into the pearl mussels population area of river … there would be a negative impact on the pearl mussels population. Sedimentation of gravels can prevent sufficient water flow through the gravels, starving the juveniles of oxygen.

The Irish Court heard that the species is nearing extinction with as few as 300 individuals left, having not reproduced itself since 1970 due to the vulnerability of juveniles to sedimentation.

Nonetheless, it was concluded by the screening report that appropriate assessment under the Directive was not required because of the protective measures that had been built into the design of the project. The protective measures consisted of a construction methodology to control surface run off into watercourses.

The CECJ highlighted that the Directive does not refer to "mitigation" only conservation, prevention and compensation. The CECJ (at [26]) therefore interpreted "mitigation" to mean "… measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned".

In considering the requirements for appropriate assessment under the Directive, the CECJ concluded that the only requirements were that: the plan or project is not necessary for the management of the special protection area; and it must be likely to have a significant effect on the site.

The CECJ concluded that the very fact mitigation was required evidenced that the plan or project would significantly affect the special protection area. In such a scenario, an assessment should be undertaken so that the adequacy of mitigation measures could be considered with the benefit of a full appropriate assessment (which would provide significantly more information to the decision maker). The court's main concern was the evasion of the appropriate assessment procedure. This was succinctly expressed (at [37]):

> "… taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purposes and there would be a risk of circumvention … which constitutes … an essential safeguard provided for by the directive."

The impact in the UK has been swift and profound. The case contradicts the approach adopted by Sullivan J (as he then was) in his pragmatic and logical judgment in *R. (on the Application of Hart DC) v Secretary of State for Communities and Local Government*[39] in which concluded (at [61]):

> "… if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects, and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary … as a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged."

Some have tried to distinguish between different types of mitigation. But until such time as someone is brave enough to take another case to the CECJ or the UK elects to relinquish the supervisory role of the CECJ (post Brexit), then the safest course for most developers is to carry out an appropriate assessment, where of course mitigation measures can still be taken into account.

[39] *R. (on the Application of Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2009] J.P.L. 365.

The CECJ has considered a further case concerning ecological protection in Ireland. In *Grace v An Bord Pleanala*,[40] the court had to consider whether the mitigation and compensatory measures relating to habitat for which a Special Area of Conservation ("SAC") was designated, apply equally to the habitat of the species for which the SAC was designated or classified (the qualifying species features) for example the area used for feeding, even if the habitat itself is not a qualifying feature. The court held that it did. The areas concerned in this case were blanket bogs and forestry area, used by Hen harrier, which were subject to forestry rotations. The provision of areas of foraging habitat designed to offset the impact of the windfarm could not be regarded as mitigation for the loss and damage of the Hen harriers feeding habitat. The court held (at [58]) that:

> "the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact the project includes measures to ensure that … throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered under Article 6(4) of the directive."

The court also reiterated the strictness of the integrity test holding that:

> "It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such measures may be taken into consideration when the appropriate assessment is carried out."

Topic 6: Planning obligations

As every planning lawyer knows, to be material to a planning decision, planning obligations must meet the test laid down in the Community Infrastructure Levy Regulations.[41] Windfarm promoters routinely make payments to local communities who are willing to accept a windfarm in their area. But some of these payments go into community funds and are used for various purposes unrelated to planning including providing financial assistance for local children attending university. There has always been a degree of discomfort about such payments. And it is perhaps surprising there has not been a challenge before now.

The issue came before the Court of Appeal in *Forest of Dean DC v Wright*.[42] The local authority had granted the developer permission to erect a wind turbine on agricultural land. The turbine was intended to meet the local community's energy needs and was to be run by a community benefit society. The application had included a promise that an annual donation of 4% of the turbine's turnover would be made to a local community fund. The local authority took the promised donation into account as a material planning consideration. In court it argued that although it was an "off-site" benefit, the contribution had a planning purpose and a real connection with the turbine. The developer sought to place reliance on the content of Government policy and guidance.

The Court of Appeal emphasised that for a consideration to be material, it had to have a planning purpose and had to relate fairly and reasonably to the proposed development, *Newbury DC v Secretary of State for the Environment* followed.[43] For a benefit to be material, it did not have to be one that was necessary to make the development acceptable in planning terms. Financial considerations could be relevant, and

[40] *Grace v An Bord Pleanala* (C-164/17) EU:C:2018:593.
[41] Community Infrastructure Levy Regulations 2010 (SI 2010/948).
[42] *Forest of Dean DC v Wright* [2017] EWCA Civ 2102; [2018] J.P.L. 672.
[43] *Newbury DC v Secretary of State for the Environment* [1981] A.C. 578; [1980] J.P.L. 325.

an "off-site" benefit such as a donation to a community benefit fund could be material if it satisfied the *Newbury* criteria.

In upholding the judgment of Dove J below, Hickinbottom LJ held the donation did not satisfy those criteria. He found the promised donation was clearly a community benefit fund donation distinct from the other socio-economic benefits of the development and was therefore not a material planning consideration. It did not have a planning purpose and did not relate to the use of the turbine. It was envisaged that the money might be used to fund community causes that had no planning purpose or connection to the turbine.

The court (at 48) addressed the content of the NPPF and PPG. It acknowledged that these encouraged the use of renewable energy:

> "… whilst it is true that both paragraph 97 of the NPPF and the PPG encourage the use of renewable energy, and particularly community-led initiatives in that regard, neither encourage unrestricted gifts of money to the community; and, as Dove J said at [54] of his judgment, neither suggests that, where a proposed development is community-led, it is unnecessary to examine contributions associated with it to assess whether they satisfy the legal requirements of being a material consideration in the planning decision, i.e. the Newbury criteria."

The Court of Appeal held that Dove J had been entitled to conclude that the promised donation was an untargeted contribution of off-site community benefits that was not designed to address a planning purpose and had no real connection with the turbine. The donation was not a material consideration and the local authority had not been entitled to take it into account.

Topic 7: Planning conditions

Imposing conditions by implication

Multiple planning conditions are applied to countless planning permissions every day. The content often follows standard wording and is, in the main, uncontroversial. But problems still occur especially when there is a failure to impose conditions, which has happened frequently with the variation of permissions for retail development, pursuant to the Town and Country Planning Act 1990 s.73. With regard to planning conditions more generally, the courts have in more recent times been willing to imply additional wording to help ensure conditions are effective. In *Lambeth LBC v Secretary of State for Communities and Local Government and Aberdeen Asset Management*,[44] the Court of Appeal was invited to consider extending that benevolence to retail permissions devoid of key conditions restricting the use to which a retail unit may be put.

The story begins in 1985, when Aberdeen was granted conditional planning permission to construct and operate a DIY retail unit. In 2010, the permission was varied to allow the sale of a wider range of goods, excluding food. In 2013, the local authority refused an application to vary the condition which would inferentially have permitted the retail sale of food on the basis of its impact on traffic flow. By a 2014 decision notice, the local authority purported to restrict the range of goods permitted to be sold. However, its grant of planning permission under s.73 failed to repeat any of the conditions imposed on the previous planning permissions. So Aberdeen applied under s.192 of the 1990 Act for a certificate of lawfulness to allow the retail unit for unrestricted A1 use, as defined by Town and Country Planning (Use Classes) Order 1987 Sch.1 Pt 1 para.1.[45] The local authority refused that application. The inspector allowed Aberdeen's appeal having found that the 2014 permission contained no condition restricting the sale of food.

[44] *Lambeth LBC v Secretary of State for Communities and Local Government and Aberdeen Asset Management* [2018] EWCA Civ 844; [2018] J.P.L. 1160.

[45] Town and Country Planning (Use Classes) Order 1987 (SI 1987/764).

The local authority sought to quash that decision on the basis that the 2014 permission should be interpreted as restricting the permission for retail use to the sale of non-food goods, or that a condition to that effect should be implied into it, since that had clearly been its intention.

The Court of Appeal (at [23]–[26]) recorded that the current approach to the interpretation of planning permissions and similar public documents had been considered by the Supreme Court in *Trump International Golf Club Scotland Ltd v Scottish Ministers*.[46] The process of interpreting a public document was not materially different from that appropriate to other legal documents although, because they affected third parties in a way that many legal contracts did not, there was only limited scope for the use of extrinsic material in their interpretation. Lewison LJ cited the words of Lord Carnwath in *Trump*:

> "Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved … It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission (helpfully summarised in the judgment of Keene J in the *Shepway* case [1999] P.L.C.R. 12 at 19–20). But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation."

Lewison LJ re-emphasised that having regard to the more limited range of material that could be taken into account in ascertaining the meaning of words in a planning decision, the ultimate question was still the same, namely what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. Whilst *Trump* did not concern a planning permission, so that the court's observations were obiter, they have since been applied in the Court of Appeal and could therefore be taken as representing the law: *R. (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC*[47] and *Dunnett Investments Ltd v Secretary of State for Communities and Local Government*[48] followed.

Lewison LJ held that within that context, it was not possible to apply a corrective interpretation of the 2014 permission to derive the existence of such a condition. A corrective interpretation could not be used to supply a whole clause which the parties had mistakenly forgotten to include, *Cherry Tree Investments Ltd v Landmain Ltd*[49] applied. Moreover, planning conditions should only be imposed where they were necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Whether a condition met those tests was a question of planning judgment for the local authority, and could not be exercised by the court in seeking to interpret a planning permission where there was no evidence that the local planning authority had carried out that exercise.

On the issue of implying a condition, Lewison LJ accepted that it was possible to imply words into a public document such as a planning permission. But in applying *Trump*, the court had to exercise great restraint in doing so, given the possibility of criminal sanctions. What Lambeth were arguing for the instant case was a wholly new condition. Lewison LJ (at [72] and [73]) saw this as an important point:

> "In addition, Mr Lockhart-Mummery submitted that the only point potentially at issue in *Trump* was whether an implication could be made into an extant condition that was incomplete. That was the position in *Trump* itself; and was also the position in Crisp from the Fens. *Trump* did not contemplate the implication of a wholly new condition. To the extent that this court suggested otherwise (obiter)

[46] *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] J.P.L. 555.
[47] *R. (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC* [2016] EWCA Civ 1260.
[48] *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192; [2017] J.P.L. 848.
[49] *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch. 305.

> in *Government of the Republic of France* at [118] it was wrong or distinguishable. Neither Lord Hodge nor Lord Carnwath expressed themselves in the limited way suggested. Nevertheless, to my mind there is considerable force in this submission."

Lewison LJ also considered the limited range of available extrinsic evidence was a critical factor. Drawing on his extensive knowledge of contract law, he acknowledged that in private contract recourse to the background facts might be the reason for implying a term. But he held that that was not possible in a public document. There were, in essence, two routes to the implication of a term in private contracts: either the term had to be necessary to give business efficacy to the contract, or it had to be so obvious that it went without saying, *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers At Work Ltd)*[50] considered. Given the public and permanent nature of a planning permission, those tests required some modification in the planning context. Whilst the 2014 permission had not achieved the local authority's intention, it had not, as a document, lacked practical or commercial coherence. Although the reasonable reader might wonder whether the local authority had made a mistake in not restating the conditions attached to the previous permissions, that was not so obvious that it went without saying.

Decision maker ignoring proposed conditions

Conditions were at the centre of a legal challenge to a Secretary of State's decision in *Verdin (t/a Darnhall Estate) v Secretary of State for Communities and Local Government and Cheshire West and Chester BC*.[51] The Secretary of State failed to take into account conditions seeking to ensure a housing proposal on the edge of Winsford supported the local economy and local people. The Secretary of State deliberately chose to ignore those conditions, when refusing permission for the proposal, located within a neighbourhood plan area.

The claimant, a local Estates owner whose family were intimately connected with the New Town of Winsford, applied for permission to build up to 184 dwellings on the edge of the town. The local authority refused his application. The application proposed conditions that not less than 50% of the construction workforce should come from within the county and not less than 20% from the local area, and that 20% of the gross construction costs should be secured by local procurement. Following an inquiry, a planning inspector recommended the grant of permission. The Secretary of State rejected that recommendation and refused permission, having found that the proposed conditions should be given no weight because the "employment" condition was insufficiently precise and would be difficult to enforce, partly because it would be difficult to detect a breach and that the "local procurement" condition was not strictly related to planning, would similarly be difficult to enforce because of the difficulty in detecting a breach, and that the position in relation to the availability of businesses within the specified area to meet the criteria was unclear.

Robin Purchas QC, sitting as a High Court Judge, held there was no evidence as to any specific difficulty in enforcing the employment condition such as to affect its overall aim of helping the local area's deprivation and joblessness. The Secretary of State had, accordingly, been under a duty to provide more by way of reasons as to why he had concluded that there was insufficient precision or difficulty in enforcement and detection of that condition. That inadequacy of reasons had substantially prejudiced the claimant, and the decision had to be quashed on that basis.

Similarly, the local procurement condition satisfied the relevance test since it related to the local policies for the economic and other support of the local, deprived area. In respect of enforceability, the Secretary of State had given no sufficient reasons as to why it would prove difficult to detect a breach of the condition.

[50] *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers At Work Ltd)* [2016] UKSC 57; [2017] A.C. 73.

[51] *Verdin (t/a Darnhall Estate) v Secretary of State for Communities and Local Government and Cheshire West and Chester BC* [2017] EWHC 2079 (Admin); [2018] J.P.L. 78.

There was no evidence that it would in practice be impossible to produce a strategy that put in place arrangements to ensure that the information was regularly provided to the local authority to demonstrate the performance and effectiveness of the initiatives in terms of the percentage of the gross construction costs supplied by local firms. Similarly, there was no evidence on which it might be inferred that there would be an insufficiency of businesses in the area to support the supply of materials and services to the required level. Again, the Secretary of State's reasons could not rationally support his conclusion that the relevant tests were not met by the local procurement condition or his conclusion that no weight should be placed on it. That was, accordingly, a further basis for quashing the decision.

It was a similar problem which led to the quashing by Lang J in *Amstel Group Corp v Secretary of State for Communities and Local Government and North Norfolk DC*,[52] but in the context of an obligation in a s.106 agreement. In this case the Inspector failed to have regard to a main public benefit of the proposal, namely the provision of a new primary school.

Topic 8: Reasons

Committee Reports

Cases in which council members reject the advice of their professional planning officers are a staple ingredient in the diet of any planning lawyer. Usually the councillors reject the officer's recommendation to approval a scheme. But from time to time it is the other way around: the officers recommend a scheme should be refused and the councillors, often for economic reasons, grant permission contrary to that advice. Statutory provisions meant there was a duty to give reasons for the grant of planning permission between 2003 and 2014. But these were abolished under the Town and Country (Development Management Procedure) (England) (Amendment) Order 2013 art.7.[53] There is now no general requirement to give reasons for the grant of permission, save for EIA development. What then is required by way of reasoning when permission is granted contrary to officer advice, given that the officers report will not provide the answer?

The Supreme Court considered this issue in *Dover DC v Campaign to Protect Rural England (Kent)*.[54] The application site is located in an Area of Outstanding Natural Beauty ("AONB") and proposed a major employment development. The councillors approved the application but gave no reasons for doing so. It was EIA development. The Council accepted it should have given reasons pursuant to the 2011 EIA Regulations. But it argued that the breach could be remedied by a declaration.

In his judgment, Lord Carnwath provided many insightful and important observations on the need for, and adequacy of, reasons provided in the context of planning decisions. He observed that where the Secretary of State or a planning inspector made a decision following an inquiry or hearing, the decision-maker had to notify their decision and their reasons for it in writing. The decision-maker had to notify all persons entitled to appear who had appeared and any other attendee who had asked to be notified. In contrast, there was no corresponding statutory rule applying to decisions following a written representations appeal. However, the court (at [26]) applied the ratio of Lindblom J (as he then was) in *Martin v Secretary of State for Communities and Local Government* (at [51])[55] holding that there remained an enforceable duty to give a full reasoned decision:

> "There is no corresponding statutory rule applying to decisions following a written representations appeal. However, it is the practice for a fully reasoned decision to be given. It has been accepted (on

[52] *Amstel Group Corp v Secretary of State for Communities and Local Government and North Norfolk DC* [2018] EWHC 633 (Admin); [2018] J.P.L. 1013.
[53] Town and Country (Development Management Procedure) (England) (Amendment) Order 2013 (SI 2013/1238).
[54] *Dover DC v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] J.P.L. 653.
[55] *Martin v Secretary of State for Communities and Local Government* [2015] EWHC 3435 (Admin).

behalf of the Secretary of State, and by the Administrative Court) that there is an enforceable duty, said to arise … either from the principles of procedural fairness … or from the legitimate expectation generated by the Secretary of State's long-established practice …"

Lord Carnwath (at [27]–[31]) also observed that whilst there was no duty to give reasons, since 2014 local authority officers making any decision involving the grant of a permission or licence had been required to produce a written record of the decision and reasons for it, under the Openness of Local Government Bodies Regulations 2004 art.7.[56] Special duties arose where an application involved EIA development. Under the 2011 EIA Regulations reg.3(4), decision-makers were to state in their decision that they had taken environmental information into consideration. Under reg.24(1)(c) where a local authority determined an EIA application, it had to inform the public of the decision and make available a statement containing the main reasons on which the decision was based.

As regards the standard of reasoning, Lord Carnwath explained that the words of Lord Brown (at [36]) in *South Buckinghamshire DC v Porter*[57] on the intelligibility and adequacy of reasons, applied to decisions by local authorities in the same way as they did to those of the Secretary of State or inspectors. The reference in the 2011 Regulations reg.24(1)(c) to providing the "main" reasons did not materially limit the ordinary duty in such cases: the *South Buckinghamshire* guidance was equally relevant in the EIA context. The court referred to *R. (on the application of Hawksworth Securities Plc) v Peterborough CC*[58] which had considered that, unlike in an inquiry, a local authority was not adjudicating a dispute and so was not required to give reasons for rejecting objections. However, Lord Carnwath held that the difference between the processes did not bear such significance. Where there was a legal requirement to give reasons, an adequate explanation was needed. If a local authority accepted the officers' report, no reasons further than those in the report might be needed. Even if it was not accepted, it might normally be enough for the committee's statement of reasons to be limited to the points of difference. Lord Carnwath (at [37]–[42]) applied *Clarke Homes Ltd v Secretary of State for Communities and Local Government*[59] holding that the essence of the duty was the same: whether the information provided left room for doubt about what had been decided and why. The appropriate remedy when there was a material defect of reasoning would be to quash the permission: *Save Britain's Heritage v Number 1 Poultry Ltd*.[60]

Turning to the facts of this case, the Supreme Court made clear that public authorities were under no general common law duty to give reasons, but fairness could in some circumstances require it: *R. v Secretary of State for the Home Department Ex p. Doody*.[61] Lord Carnwath (at [51]–[57]) cited with approval the decision in *Oakley v South Cambridgeshire DC*,[62] where a duty to give reasons had been found where a committee had disagreed with the officer, in light of *Doody* and notwithstanding the 2013 abrogation of the statutory duty to give reasons for granting permission. The existence of a common law duty to give reasons, supplementing the statutory rules, was consistent with the 2013 abrogation. In the instant case, the council members of Dover DC had provided no reasons as to why they were allowing the development in the AONB.

Neighbourhood plans

Neighbourhood plans have continued to cause concern for the development industry. There are now over 2000 neighbourhood plans which have been made or are in the process of being prepared, mostly in rural parishes. They are the manifestation of localism, which proponents claim are the articulation of the interests

[56] Openness of Local Government Bodies Regulations 2004 (SI 2004/2095).
[57] *South Buckinghamshire DC v Porter* [2004] UKHL 33; [2004] 1 W.L.R. 1953.
[58] *R. (on the application of Hawksworth Securities Plc) v Peterborough CC* [2016] EWHC 1870 (Admin).
[59] *Clarke Homes Ltd v Secretary of State for Communities and Local Government* [2017] P.T.S.R 1081; (1993) 66 P. & C.R. 263.
[60] *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 W.L.R. 153; [1991] 2 All E.R. 10.
[61] *R. v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531; [1993] 3 W.L.R. 154.
[62] *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71; [2017] J.P.L. 703.

of the community. Neighbourhood plans are meant to encourage local people to participate in planning. And more particularly encourage a positive view of new development, by allowing people to become involved in the planning process, rather than planning being something which is done to them. It is an exciting new chapter in the history of planning. But there is one key problem with this transatlantic concept: this is England. It is full of pretty villages, historic and elegant towns and picturesque countryside. And in these places, most communities do not want any more development in their parish. As a consequence most neighbourhood plans, plan for no development at all. They are rich in policies designed to stop and discourage new development.

That was the story in the beautiful village of Linton in Wharfedale, near Wetherby in Yorkshire, the setting for *Kebbell Homes Ltd v Leeds CC*,[63] in what was another round in the largely unsuccessful on-going litigation over the content and procedures governing neighbourhood development plans. The Linton neighbourhood plan was a frontrunner. The plan's steering group spent two years examining a host of sites around the village upon which to accommodate some new housing development. What was the conclusion of that work? The steering group concluded there were simply no suitable sites at all. The key basis for that conclusion was that most of the village was Green Belt. That is save for one single site removed from the Green Belt in 2001 and allocated as safeguarded land for the purpose of meeting development needs beyond 2011. The site is known as the Ridge. The development of the Ridge however, was not what the community wanted. They devised a policy designed to return the site to the Green Belt. The landowner objected on the basis that the return of sites to the Green Belt was a strategic matter. The neighbourhood plan examiner agreed. His report made clear that the offending policy "and all associated text" should be deleted from the plan.

Local people were not very happy about this. So they contacted their local planning authority (Leeds CC) and encouraged them to reinstate text, about why the site was not suitable for development, into a table setting out the reasons why the steering group had rejected all possible sites for housing. The City Council duly obliged and whilst deleting the offending policy, re-instated some of the associated text elsewhere in the neighbourhood plan, listing reasons why it was not suitable for housing development and including an aspiration to return the site to the Green Belt. As the body supervising neighbourhood plans, a local planning authority can accept or reject an examiner's recommendation and make modifications of its own. The ability of an LPA to modify a neighbourhood plan is subject to a limited range of circumstances as prescribed by the Town and Country Planning Act 1990 ("TCPA 1990") Sch.4B para.12. One of these is to correct errors. The Council claimed the re-inserted text was for the correction of an "error in cross-referencing".

The developer challenged the City Council's decision to re-insert the text into the plan. The challenge was dismissed by Kerr J in the High Court and proceeded to the Court of Appeal. But as Lindblom LJ observed (at [43]) the developer "succeeded in persuading Kerr J that the city council's reasons for amending the table in para.84 of the neighbourhood plan in the way it did were "less than complete and decidedly economical" ([63] of the judgment). The judge said that the changes "went well beyond merely correcting a cross-referencing error", and that "that brief reason, as given, fell short of what was required under regulation 18(2) of the 2012 [regulations]". But he concluded that this "relatively minor deficiency in the city council's decision making process is nowhere [near] enough in itself to condemn the [neighbourhood plan] and the referendum result approving it, or to impugn the decision challenged in this application" ([64]).

The Court of Appeal in contrast rejected this criticism of the City Council. Lindblom LJ concluding (at [44]) in these terms:

[63] *Kebbell Homes Ltd v Leeds CC* [2018] EWCA Civ 450; [2018] J.P.L. 983.

> "I do not accept that in the circumstances here the city council's reasons, succinct as they were, can be regarded as unclear or inadequate. It is true that the examiner did not positively recommend the amendment of the table … It is also true that in the city council's decision statement of 4 November 2015 the amendment to the table was explained simply as the correction of an 'error in cross referencing' resulting from the deletion of the words [in the policy] … The substitution for those words of the note explaining the reasons for the parish council's opposition to development on 'The Ridge' was not specifically explained. But I cannot see why that particular change should have required a specific explanation of its own … The city council might have amplified its reasons by stating as much. But it did not need to do so to comply with the statutory requirements for the giving of reasons in paragraph 12(11) and regulation 18(2). Its reasons were lawful as they stood. They did not fall below the requisite standard."

The Court of Appeal considered the city council's modification of the neighbourhood plan as being well within the scope of what is permitted, concluding that the statutory provisions afforded an LPA wide discretion to amend the content of the neighbourhood plan following an examiners report. Lindblom LJ went on to highlight and rely on the Supreme Court's discussion on the duty to give reasons in [35] to [42] of *Dover DC v Campaign to Protect Rural England (Kent)*:[64] "Read fairly as a whole, they provided "an adequate explanation of the [city council's] ultimate decision", and did not "[leave] room for genuine as opposed to forensic doubt as to what [it had] decided and why".

In the alternative, the developer also argued that if such a modification is permissible, then it should have been the subject of consultation. The TCPA 1990 Sch.4B para.13 requires such modifications to be the subject of consultation. Such consultation would seem entirely appropriate, especially with the affected landowner or developer. But para.13(1) limits such consultation to situation where the modification involves "new evidence or a new fact or a different view … as to a particular fact". The Court of Appeal rejected this second ground on the basis that the modification the LPA had made did not fall within these three criteria. Also, the regulations concerning who should be consulted on such modification had not been enacted at the time Leeds CC modified the plan. The court, Singh LJ in particular, pointed out that the absence of the regulations at the operative time meant Parliament had clearly not intended landowners and developers to be consulted at that stage. They are now in place, but that was cold comfort for the developer in this case.

This outcome might seem surprising, if not a little unfair on the landowner. The Council made changes to the neighbourhood plan after the examiner's report, partly reversing in substance what the examiner had recommended. And yet the landowner was not consulted upon these changes. The Court of Appeal however was, at its core, emphasising the fundamental sovereignty of Parliament. That is both in terms of what the legislation permits local planning authorities to do as regards neighbourhood plans (i.e. modify plans after the independent examination), and the fact that when statutory provisions have not yet been enacted, the timing of that enactment was also a clear expression of the will of Parliament. The Courts are there to uphold the will of Parliament, not seek to undermine it or put a gloss upon it.

Topic 9: Financial viability

The issues surrounding financial viability continue to feature in many planning decisions, especially in London. This is despite guidance offered by both the Government in the Planning Practice Guidance and the RICS *Guidance on Financial Viability in Planning* 2012. The issue is raised nearly always in the context of developers seeking to reduce the quantum of affordable housing which is to be provided on a site. It nearly always comes down to the value of the land. There is no prescribed formula for identifying the value of land and all guidance to date has shied away from being prescriptive. These issues were

[64] *Dover DC v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] J.P.L. 653.

explored in detail in the recent case of *Parkhurst Road Ltd v Secretary of State for Communities and Local Government*[65] which involved a legal challenge by the developer to an Inspector's decision dismissing its appeal. Islington's Local Plan requires 50% affordable housing provision for all new development. For those developments providing less than 50%, it is necessary for the developer to demonstrate it to be unviable to provide any more.

The appeal site was the former Territorial Army Centre, Parkhurst Road, Islington, London. It was just 0.58ha of land which had been vacant for several years. Parkhurst purchased the site from Ministry of Defence in May 2013 for £13.25m. The debate at the inquiry, which lasted for nine days centred on the Benchmark Land Value ("BLV") which is the term ascribed to the appropriate value of the land. For the purpose of assessment. Parkhurst argued for a BLV of £11.9m being the price it paid for the land (£13.25m) less a 10% discount for the provision of some affordable housing figure. The Council suggested the appellant had overpaid for the land and favoured an existing use value plus ("EUV plus") method to calculate land value, giving a BLV of £6.75m. The EUV the Council adopted was very generous, being about nine times the EUV no doubt in recognition of its potential for residential development. But why nine times the EUV? The Council said that it was not really arguing for the EUV+ method at all. The Council suggested it adopted a land value based on comparisons with other comparable sites in the area.

Parkhurst's challenge to the Inspector's decision in the High Court was made on three grounds: principally, it alleged the Inspector erred in believing that the Council's case was based on the EUV plus approach, when it was plainly based on market evidence of other transactions in the area. The Inspector expressed his decision letter in these terms:

> "Having engaged with market evidence, something that it failed to do in the previous appeal, the Council consider that a value of £6.75m is the appropriate BLV, including a significant uplift above the EUV, and representing the Plus element of the EUV Plus approach."

Parkhurst's point being the Inspector seemed to have adopted an EUV+ approach. Parkhurst raised two other grounds. It alleged that the Inspector erred in law given his comments on the use of units of accommodation to compare land prices and criticising the manner in which the Inspector dealt with two of the sites used as comparables.

The court rejected all three grounds of challenge. On Ground 1, Holgate J held the approach taken by the Council was entirely consistent with para.3.4.1 of the RICS guidance. The Council's BLV figure of £6.75m was expressed as an EUV figure plus a premium, merely to judge the reasonableness of the BLV figure which was based on the value of comparable sites. On ground 2, the court held that the inspector's use of comparables was a matter for his planning judgment and not open to legal challenge. The court dismissed ground 3 as "hopelessly unarguable" as that was purely a matter of planning judgment.

The debate and the terminology will be familiar fare to all those who work in London, and elsewhere. The debate is a well-rehearsed argument. Yet, amongst lawyers the decision is most notable not for the conclusion on the inspector's handling of the viability issue, but Holgate J's additional observations. He made it abundantly clear that the High Court was not the place to litigate such matters, albeit he held that the claim was arguable, which is the threshold for bringing any challenge. The judge's main observations came in [147] of the judgment in which he stated: "The High Court is not the appropriate forum for resolving issues of the kind which the Inspectors dealing with the Parkhurst Road site had to consider." Reading the judgment reveals the complexity of the issues involved in the case. The dismissal of the claim follows the tone set by Lindblom LJ in St Modwen whereby he was seeking to discourage "hypercritcal scrutiny" the raising of only "forensic doubt" about a decision.

Holgate J also felt it necessary to express a view about the content of the RICS Guidance Note, given he was required to examine it in such detail:

[65] *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 991 (Admin).

> "It might be thought that an opportune moment has arrived for the RICS to consider revisiting the 2012 Guidance Note, perhaps in conjunction with MHCLG and the RTPI, in order to address any misunderstandings about market value concepts and techniques …"

This view of the judge, who is the senior planning judge in the Planning Court with extensive experience in both planning and compulsory purchase work (where land valuation is critical) will need to be heeded by the RICS. And the second version of the Guidance Note is in production, although that was the case long before this judgment was issued. No doubt the judgment will be considered as part of that revision process. Certainly it seems to have partly informed the final version of the revised guidance on viability in the PPG, issued in July.

Topic 10: Public Sector Equality Duty ("PSED")

The Courts are in no mood to expand the range of potential grounds of challenge permitted under administrative law. That much is evident in the very firm rejection of challenges which seek to rely on a failure by a local planning authority to issue planning decisions without having first considered the public sector equality duty. This was made abundantly clear by Laws LJ in *West Berkshire,* and was rejected in the challenges to both the Government's Written Ministerial Statement on neighbourhood development plans (*Richborough*) and the London Mayor's affordable housing SPG (*McCarthey and Stone*) considered above.

There has though been a successful claim against the grant of planning permission in light of a failure to consider the PSED. In *R. (on the application of Buckley) v Bath and North East Somerset Council*,[66] Lewis J quashed the grant of permission for the development of a residential estate, on which the claimant lived.

Curo Places, the developer, applied for outline permission to develop part of the estate by demolishing 542 homes and building 700 new homes. There were 414 affordable homes on the existing estate, which would be replaced by 210 affordable homes. The planning statement accompanying the application noted significant levels of deprivation on the estate and stated that the existing housing was of poor quality. It detailed a re-housing process: residents could choose to move to a new home on an adjacent development or on the new estate, to an affordable rented home elsewhere, to a specialised property such as a property for older people or those with specialised needs, or into low-cost home ownership. Policy H8 of the local authority's development plan made a presumption in favour of the redevelopment of social housing where the condition of the housing stock was poor and/or there was socio-economic justification for redevelopment. It made a presumption against a net loss of affordable housing, subject to viability considerations and social balance considerations. The local authority's officers advised that the development would provide additional, improved, dwellings. They advised that the loss of affordable housing complied with Policy H8 as the development would not be viable with a higher level of affordable housing. The local authority's planning committee granted outline permission.

The claimant argued that the grant of outline permission breached the local authority's PSED in that due regard had not been given to the impact on elderly or disabled persons of the loss of their existing home if permission were granted.

Lewis J held (at [30]–[31]) that the grant of outline planning permission involved the exercise of a statutory function by the local authority. Accordingly, the Equalities Act 2010 s.149 applied to the granting of outline permission. The fact that certain reserved matters would be considered at a later stage could affect the content or scope of the duty. But that did not prevent the duty applying the fact that the application for outline permission complied with Policy H8 did not automatically involve compliance with the local authority's s.149 duty. Policy H8 did not involve an assessment of the needs of particular groups or the

[66] *R. (on the application of Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin); [2018] J.P.L. 1231.

impact of the demolition of dwellings of persons with protected characteristics. The case did not, therefore, involve the application of a policy whose very purpose was designed to address the kind of equality considerations that might arise in relation to a proposed development: please see *R. (on the application of Isaacs) v Secretary of State for Communities and Local Government*.[67] The local authority had to have had regard to the impact on the elderly and the disabled of losing their existing homes. That loss could give rise to considerations of impact on those persons which was different from, and greater than, the impact on other persons. No equality impact assessment had been carried out and there had been no reference in the material before the decision-maker to the public sector equality duty or the matters that that duty required the decision-maker to consider. As Lewis J observed (at [37]–[40]), the local authority's focus had been on the impact of displacement on residents. It had not specifically had regard to the impact on groups with protected characteristics of the loss of their existing home. There had been a failure to discharge the s.149 duty.

As regards the remedy, the court held that given the nature of the proposal and the degree of surrounding controversy, it was not highly likely that the outcome for the claimant would have been substantially the same if the s.149 duty had been complied with.

This rejection of the argument that the decision would have been the same in any event was also articulated very clearly by the Court of Appeal in *R. (on the application of Harvey) v Mendip DC*.[68] This was a case concerning the interpretation of an affordable housing policy. The Council had assumed a proposal could comply with the policy if the proposal was "more or less meeting" the stated requirement. In other words, the Council applied the policy flexibly. The High Court dismissed the appeal but in the Court of Appeal Sales LJ overturned that decision. On the issue of the remedy, he held that this was not a case in which the test in the Senior Courts Act 1981 s.31(2A) was met. On the evidence, it could not be said that "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". The councillors thought they were acting in accordance with the Local Plan, whereas the proposed development clearly contravened it. They did not attempt to identify any reasons which might have been sufficient to counterbalance the weight that should be given to DP12, which on its proper interpretation indicated that planning permission should be refused. Moreover, the councillors had been given good reasons by the officers why the application should be refused.

Conclusion

The *Suffolk* case was much more than a case about the interpretation of the NPPF. It had much to say about planning law, planning policy and cases brought before the planning court. It sought, in part, to push back the tide of claims created by *Tesco v Dundee* and discourage claims. This message is now routinely enforced in both the Planning Court and the Court of Appeal. Yet claims against planning decisions still regularly succeed. The most fruitful sources of challenge are those in which: (i) decision makers, especially the Secretary of State, have been inconsistent in decision making and where previous decisions have simply been ignored (*DLA*, *Hallam*; *Tate)*; (ii) important facets of a proposal have been ignored (*Verdin*; *Amstel*); and (iii) a complete absence of reasoning (*Dover*; *Harvey*). These might be categorised as cases where there has been a failure to have regard to critical material considerations or a failure to provide any adequate reasoning. They are to be contrasted with the myriad of more general planning considerations which are sometimes overlooked or shortcomings in reasoning, both of which are often presented to the courts as unlawful but which are increasingly receiving a less than enthusiastic welcome.

[67] *R. (on the application of Isaacs) v Secretary of State for Communities and Local Government* [2009] EWHC 557 (Admin).
[68] *R. (on the application of Harvey) v Mendip DC* [2017] EWCA Civ 1784; [2018] J.P.L. 419.

The successful challenge in *Resilient Energy* has brought about a very welcome and important clarification of the law regarding planning contributions, which was leaving many confused. The law surrounding European environmental protection has become more complicated and more onerous (*People of Wind/Grace and Sweetman*). Whereas the law surrounding neighbourhood plans seems to be going the opposite way, with a very unrestrictive approach to the content and examination of plans, which is exactly what the Government intended (*Kebbell*).

Challenges to the interpretation of policy (*St Modwen*; *CEG*), the planning judgments of Inspectors and LPAs (*Catesby*; *Lambeth*; *Parkhurst*; *Mansell*), direct challenges to the content and making of policy (*Richborough*; *McCarthy and Stone*) and breaches of the public sector equality duty (*Richborough*; *McCarthy and Stone*) have, on the whole, fared less well. There are though exceptions such as *McCarthy and Stone* securing the quashing of that part of the Mayor's affordable housing policy with which they were most concerned; the plainly incorrect interpretation of a development plan policy by members (*Harvey*); and the quashing of permission where there was no evidence of the public sector equality duty having been addressed at all (*Foxhill*).

The courts are actively discouraging "hypercritical scrutiny" and raising only "forensic doubt" of decisions to ensure they are not "laboriously dissected" and subject to "the danger of over-analysing" them. That is clearly evident from the observations of Lindblom LJ in *St Modwen* in the Court of Appeal and from both Holgate J in *Parkhurst* and Ouseley in *CEG* in the High Court. Yet in defence of lawyers, the important changes brought into the NPPF 2018 are largely a product of such litigation. There is no mistaking the fact that there have been significant changes to the wording of the presumption, the policy on neighbourhood plans, the definition of "a supply of deliverable sites" and the status of valued landscape, all of which were the subject matter of the cases listed above: (i) The NPPF now contains a very wide definition of policies judged out-of-date by virtue of an LPA being unable to demonstrate a five-year supply (see *Suffolk*); (ii) the policy on neighbourhood plans now confines the protection afforded by a three-year supply requirement to only those NDPs which plan to meet their housing requirement (see *Richborough*); (iii) the new definition of "deliverable" seeks to exclude from the supply most sites without detailed planning permission, unless there is clear evidence to the contrary (see *St Modwen v Secretary of State for Communities and Local Government*); and (iv) valued landscapes are now expressly excluded from the list of restrictive policies which disengage the tilted balance (see *CEG*). Litigation it seems has never been more important, especially in terms of defining the content of government policy and guidance.