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Latest cases on what is a material consideration

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Topics/case law covered in this talk

- **What is material consideration (such that it must be taken into account)?**
  - DLA Delivery Ltd v Baroness Cumberlege of Newick [2018] EWCA Civ 1305 (8th June 2018)

- **When is something not a material planning consideration (such that it cannot be taken into account)?**
  - Good Energy Generation Limited v (1) SSCLG and (2) Cornwall CC [2018] EWHC 1270 (Admin) (25th May 2018)

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Topics/case law NOT covered here (due to lack of time):

The slightly different principle which governs when a matter is a material consideration for the purposes of considering whether a resolution to grant must be referred back to Committee before decision notice is issued:

i.e *Kides* line of authority (*Dry* [2010] EWCA Civ 1143, *Hinds* [2012] EWCA Civ 466, *Wakil* [2013] EWHC 2833 (Admin)

See recent decision of Holgate J in *R (Leckhampton Green Land Action Group Ltd) v. Tewkesbury BC* [2017] EWHC 198 (Admin)

Part 1. What is a material consideration? Two Stage Test (1) express or implied by statute

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- **Creed NZ v Governor General** [1981] 1 N.Z.L.R. 172 at 182 (approved by House of Lords in *Re Findlay* [1985] AC 318):

  – "If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters…. What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision"

Two Stage Test
(2) “so obviously material”

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- **Re Findlay [1985] AC 318** at [334]:
  - “in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act”

Where does irrationality come into play in the test for materiality?

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- **Derbyshire Dales DC v SSCLG** [2010] per Carnwath LJ at :

  – “it is not enough that, in the judge’s view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because “obviously material”) requires to be taken into account “as a matter of legal obligation” (at [28])

A distinction between material considerations implied by statute and Wednesbury irrationality?

- **R(DSD) v Parole Board [2018] EWHC 694 (Admin) at [141]**

  – The distinction between relevant considerations, properly so called, and matters which may be so obviously material in any particular case that they cannot be ignored, is not merely one of legal classification; it has important consequences. If a consideration arises as a matter of necessary implication because it is compelled by the wording of the statute itself, the decision-maker must take it into account, and any failure to do so is, without more, justiciable in judicial review proceedings. If, on the other hand, the logic of the statute does not compel that conclusion or, in the language of Laws LJ, there is no implied lexicon of the matters to be treated as relevant, then it is for the decision-maker and not for the court to make the primary judgment as to what should be considered in the circumstances of any given case. The court exercises a secondary judgment, framed in broad *Wednesbury* terms, if a matter is so obviously material that it would be irrational to ignore it.

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DLA Delivery v Baroness Cumberlege [2018] EWCA Civ 1305

- **Issue**: did the SoS err in law in failing to take into account a recent decision of his own regarding the interpretation of the same local plan policy?
- S.78 appeal against Lewes DC refusal of application for 50 houses in Newick
- Inquiry heard in Feb 2016, appeal recovered by SoS, Inspector report 5 August 2016, decision by SoS holding that LP policy out of date 23 November 2016
- Another SoS decision on 19 Sep 2016 holding that LP policy was not out of date (Inspector's report was 15 June 2016).
- SoS not referred to earlier report or decision
- **HELD**: SoS *Wednesbury* unreasonable not to have regard to earlier decision

DLA Delivery: the composite test re-defined?

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- The two tests (*Wednesbury* unreasonable or implied by statute) are essentially "one and the same" because they both involve the test of what is "so obviously material":

  – "on analysis it seems ... the matter is "so obviously material" in such circumstances when no reasonable person would have failed to take it into account"

  – "simpler and less likely to mislead or produce an incorrect result to ask ... only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances".

Relevance of previous decisions: the 3 general principles in *DLA Delivery*

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- **Principle 1**: No absolute rule that previous decision does not have to be taken into account if not referred to by parties. Consistency in planning decision-making is an important (if not decisive) consideration.

- **Principle 2**. A previous decision can be material via various different similarities: no finite list.

- **Principle 3**: fact dependent: the circumstances in which it can be unreasonable for the Secretary of State to fail to take into account a previous appeal decision will vary

DLA Delivery: the factors for determining if a previous decision should have been considered

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- Key factor is if the SoS was aware or 'ought to have been aware' of the previous decision

- No general rule that 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.

- Timing is key: decisions should be considered where "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 of the development plan apply".

Key determining factors in DLA Delivery

- Applications were for same form of development, in same district, for housing on unallocated sites.

- Appeals were recovered for the same reason in both appeals: over 10 dwellings, and in an area with adopted Neighbourhood Plan.

- Appeals before the SoS at the same time/decision-making was broadly concurrent.

Cases following DLA delivery (1)

Unpublished Inspector's Reports? **: Hallam Land Management Limited v SSCLG** [2018] EWCA Civ 1808 (31 July 2018) at [75]:

> 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

Cases following DLA Delivery (2)

Tate v Northumberland CC [2018] EWCA Civ 519

- **HELD**: Officer's report, having referred to previous Inspector decision for similar proposal on same site, should have provided reasons why a different recommendation to that of the Inspector was advanced.

- "I accept that the principle of consistency goes, in this case, to a matter of fact and planning judgment, and one on which detailed reasons will generally not be required. And the question is not whether any of the planning officer's conclusions was irrational. As the circumstances *in North Wiltshire District Council* show, the need for reasons to be given to explain such inconsistency is not removed by the fact that the planning judgment involved is relatively straightforward" (Lindblom LJ at [44])

Part 2: when is something not a material planning consideration?

(1) If fails the *Newbury* criteria:

The Newbury criteria as confirmed in **Aberdeen City & Shire Strategic Development Planning Authority v Elsick Development Co Ltd** [2017] UKSC 66 :

> *"The fact that a matter may be regarded as desirable (for example, as being of benefit to the local community or wider public) does not in itself make that matter a material consideration for planning purposes. For a consideration to be material, it must have a planning purpose (i.e. it must relate to the character or the use of land, and not be solely for some other purpose no matter how well-intentioned and desirable that purpose may be); and it must fairly and reasonably relate to the permitted development (i.e. there must be a real – as opposed to a fanciful, remote, trivial or de minimis – connection with the development)"*

When is something not a material planning obligation: the CIL tests

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(2) Potentially if in breach of reg 122:

Reg 122. Limitation on use of planning obligations

(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is —

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

What is a material planning obligation – the effect of CIL Regulation 122

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- **Working Titles Films Limited v Westminster CC** [2016] EWHC 1865 Admin at [20]:

  – The test of necessity in Regulation 122(2) (a) was originally not a test in law of the materiality of a planning obligation. Indeed that was the reason why the challenge failed in … It was a test of policy, and not a test in law…the tests in (b) and (c) in Regulation 122 also go wider than the law did before its enactment. The test of materiality in law hitherto was that to be material, the provisions in a 106 obligation (a) had to have a planning purpose, (b) be related to the permitted development and (c) not be *Wednesbury* unreasonable….It follows that there are now tests in law which to some degree were not tests of law before their enactment.

But, test of necessity is a matter of planning judgement and can be compensatory:

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- **Working Titles Films Limited v Westminster CC** [2016] EWHC 1865 Admin at [25]:

"Turning to [122(2)] (a), the question of whether it is necessary, the terms of the officer's report show that he was approaching it on the basis that the community benefit realized by provision of the Community Hall compensated for the fact that there would be an underprovision of affordable housing. In my judgement that was a planning judgement which the Council was entitled to make. [Counsel for the Claimant] sought to argue that relying on the fact of those benefits to compensate for the failure to achieve the higher percentage of affordable housing was a breach of Regulation 122. I disagree. Matters of weight and of planning judgement are for the decision maker, and the officer and his Council were perfectly entitled to think that the gain in one area made up for the loss in another. The exercise of judgement such as this is what has to happen when local planning authorities have to deal with planning applications in the real world. In the sense used in Regulation 122, this s.106 obligation was necessary, because it provided a countervailing benefit to set against the disadvantage of the underprovision of affordable housing."

Financial benefits and renewable energy schemes: the Newbury criteria trump national policy

- **R (on the application of Wright) v Forest of Dean DC & Resilient Energy Severndale Limited** [2017] EWCA Civ 2102: turbine was to be erected and run by a community benefit society and 4% of turnover donated to a local community fund. However, no restriction on how funds were to be used (i.e not restricted to funds being used for a planning purpose). PPG encouraged community led renewable energy schemes, community involvement and 'positive local benefit'

- **HELD**: A matter does not become material merely because it is included in a planning policy: Hickinbottom J at [46], "*even planning policy cannot convert something immaterial into a material consideration for planning purposes*"

- **BUT**: Watch this space – case going to the Supreme Court in May 2019

Permission granted for appeal to the Supreme Court - concerns relevance of Govt's policy and potentially its lawfulness.

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- CA and Dove J wrong not to take into account *content* of Government policy when considering *Newbury* tests;
- 'Community involvement' and 'positive local benefit' = 'furthering Gov't policy objectives = 'for a planning purpose';
- Should not matter that community causes not all related to land use;
- Source of the funds not *irrelevant,* fund is derived from the development = direct connection to the development

So meets *Newbury* tests:

» 'for a planning purpose';
» Direct connection

Good Energy Generation Limited v (1) SSCLG and (2) Cornwall CC [2018] EWHC 1270 (Admin)

- Benefits offered in support of an application for an 11 wind turbine project in Holsworthy,Cornwall:
  - financial contributions to a community benefit fund;
  - a community investment scheme open to local residents; and
  - a reduced electricity tariff, open to local residents (received 20% of bills).
- Claimant argued these were material planning considerations as *inter alia* they furthered objectives of legitimate planning policy, including community involvement in renewable energy schemes.

Good Energy Generation Limited (1): reduced tariff scheme not a material planning consideration

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- Reduced tariff scheme essentially "*an inducement to make the proposal more attractive to local residents and to the local planning authority. The scheme was not necessary to make the development acceptable in planning terms under regulation 122 of the CIL Regulations 2010*" [BUT what about *Working Title Films ?* (compensatory and planning judgement)

- Entirely discretionary and too remote: "there must be a real rather than fanciful or remote connection between the benefit and the development if the benefit is to be treated as a consideration weighing in favour of the grant of planning permission. This nebulous proposal did not meet that requirement".

- As a proposal from the developer, was not a "community-led initiative for renewable energy" for the purposes of NPPF 2012 para 97(4th bullet), so did not further "local development plan initiatives"

Good Energy Generation Limited (2): Community Investment Scheme too uncertain to show a 'real connection' to development

- "The lack of any specific details, combined with uncertainty about the scheme's commencement and long-term future, meant that the connection between the benefit and the development was remote and uncertain, rather than real" [89]

- "An opportunity to invest in the Claimant (a private limited company), for those local residents with cash to spare, along with institutional investors, could not properly be described as community ownership. Nor was it a community-led initiative."[90]

Conclusions

- *Wednesbury* test applies to assessing whether something is "obviously material".

- Planning obligations as a material consideration: CIL tests are legal tests but still arguably matters of planning judgement.

- *DLA Developments* – application to inspector decision making and not just SoS recovered appeals?

- *Good Energy*: failed on its facts, and mere furtherance of planning policy objectives considered insufficient: Newbury test applies regardless of policy **But NB** watch Supreme Court case in *Resilient Energy* to be heard in May 2019

- Tension between between national and local planning policy and emphasis on community benefits v the CIL/Newbury tests?

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Thank you