2018 CASE LAW UPDATE

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Introduction

1. The perennial difficulty with presenting case law updates is reconciling the cascade of judgments, the disparate issues they cover and the limited time that is available to explain them.

2. Despite its length, this paper is not comprehensive; rather it tries to corral the main developments of the past year or so by discussing them on a topic-by-topic basis, dealing with cases in a vague order of importance or interest under each topic. It covers a period of roughly a year up to 27 November 2018. Separate slides will focus on a selection of the cases which are covered in more detail below.

3. If it is possible to discern any underlying theme in recent cases, it is the resolve of the Courts to discourage claims which seek to stray beyond the permissible boundaries of legal challenges in the planning field. The decision of the Supreme Court in Tesco Stores, which confirmed that the interpretation of planning policy was a matter of law for the Courts, has been seen by many as encouraging a far greater degree of litigation, particularly at a time when the decision to government to streamline policy in the NPPF inevitably gave rise to questions of how that new policy should be construed.

4. But in Suffolk Coastal [2017] UKSC 37 the Supreme Court was at pains to highlight (at [23]) the "particularly unfortunate" "over-legalisation of the planning process." It emphasised how the role of courts in interpreting planning policy should not be overstated; how statements of policy are not statutory texts and must be read in that light, in accordance with the natural language used; how the Courts should respect the expertise of the specialist planning inspectors, starting at least from the presumption that they will have understood the NPPF correctly; and how issues of genuine interpretation need to be distinguished from issues of application (see [23]-[26]).

5. That clear message has resounded from the Courts in the past year, through the active discouragement of challenges which involve the "excessive legalism infecting the planning system" (Mansell v. Tonbridge and Malling BC [2018] EWCA at [41]), or "hypercritical scrutiny" of decisions which are "laboriously dissected in an effort to find fault" (St Modwen Developments v. SSCLG [2017] EWCA Civ 1643 at [7]). The dangers of excessively forensic analysis of decision letters and overwrought linguistic analysis, when "planning policies do not normally require intricate discussion of their meaning," (Mansell, ibid) are plain.

6. That said, litigation on the interpretation of NPP1 has prompted government to amend policy by producing NPPF2; and it seems likely that those writing legal updates next year may be faced with a similar spate of authorities to discuss.

7. The topics covered below are as follows:

Interpretation of policy

8. This general topic covers cases which could be included under more specific headings, but it is included here to illustrate that despite the warnings of the Courts about challenges confusing the application of policy (which is essentially a judgment for the decision-maker) with its interpretation (which is for the Courts), issues of construction do arise. In Suffolk Coastal the Supreme Court recognised that the courts "may sometimes be needed to resolve distinct issues of law" ([36]) and this has genuinely been the case with some aspects of NPPF1. Several topics which encompass more than one case are considered below. There have been a few other cases which show the potential for this type of challenge to continue.

9. Preston New Road Action Group v. SSCLG [2018] EWCA Civ 9 concerned an challenge over the interpretation of policies in a minerals local plan (policies CS5 and DM2) which respectively stated (in part) (i) that criteria would be developed for considering proposals to ensure that important landscapes would be "protected from harm" and (ii) that development would be supported where all material impacts that would cause demonstrable harm "can be eliminated or reduced to acceptable levels and where proposals will, where appropriate, make a positive contribution" to social, economic or environmental interests. It was alleged that an Inspector on appeal had erred in finding that policy CS5 would be complied with because the harm to the landscape would only be temporary, when any harm would be enough to cause a breach.

10. The Court of Appeal upheld that judgment below that Policy CS5 could not be read to prohibit any harm to the landscape, including temporary harm ([18-[19]). It was a policy specifically concerned, in part, with the working of minerals, which will likely alter the landscape during the extraction phase, but where effects will often be reversed or repaired in the course of the site's restoration. The policy was a strategic policy and looked to a further policy to translate its objectives and requirements into criteria for considering proposals. It should be read with DM2, which anticipated that harm might arise. And even if policy DM2 were ignored expressions such as "protected from harm", "protect" and "protected" in the policy were not to be read as foreclosing the exercise of planning judgment but require judgment to be exercised, having regard to the particular facts and circumstances of the case in hand, bearing in mind that the broad concept of "harm" is not defined in Policy CS5. The policy allowed a planning judgment, in a particular case, that temporary effects on the landscape - even if likely to last for several years before their remediation - would not offend its objectives and would not constitute a conflict with it.

11. In response to the claim that the Inspector had ignored the part of policy DM2 which refers to whether the proposed development would make a "positive contribution" of any relevant kind, it was held that the policy did not require the refusal of planning permission for proposals that do not hold in prospect such a contribution. The policy was deliberately qualified by the important words "where appropriate" so if, for whatever reason, it was not "appropriate" for a particular proposal to make a "positive contribution" of some kind, the policy did not rule out, or presume against, the grant of planning permission for it ([24-8]).

12. Two other cases underscore the importance of looking at the particular policies in question. In Chichester District Council v Secretary of State for Housing, Communities and Local Government & Anor [2018] EWHC 2386 (Admin) the claimant unsuccessfully challenged an Inspector's decision letter on the ground that it was irrational to rely upon a distinction between the "policies" of the Neighbourhood Plan and its "aims".

13. There the relevant policies identified settlement boundaries and allocated sites for development, but did not "presume against development outside of the settlement boundaries" and referred to boundaries being addressed in the Local Plan. The Inspector thought the proposal was "at odds with the aims" of the Neighbourhood Plan with regard to the location of new housing ie not to be located north of an identified railway crossing to avoid traffic congestion. But this aim was not expressed in the wording of the policies. The Inspector could rationally draw a distinction between the policies and their aims and conclude that the proposals did not conflict with the policies in the Neighbourhood Plan.

14. This can be compared with Canterbury City Council v. SSCLG [2018] EWHC 1611 (Admin), where it was alleged that an Inspector failed to properly interpret a housing policy. The claimant argued that whereas the policy identified particular types of location for housing development, it followed that areas inconsistent with those which have been identified were not supported by and conflicted with the implicit "negative corollary" within the policy. The policy in question stated that "the City Council will permit residential development on sites allocated for housing or mixed use as shown on the Proposals Map...On other non-identified sites on previously developed land within the urban areas, planning permission will also be granted (unless other identified criteria applied). It was held ([33]) that: "Taking the language of the policy itself, and without reference to any of the explanatory text, it is clear that the purpose of the policy is to identify, for the purposes of housing development, the types of location where the plan required housing development to take place....It follows that if housing development is proposed in a location which does not accord with the types of locations specified in the policy, that proposal will be inconsistent with and unsupported by the policy and therefore not in accordance with it and in conflict with it".

15. A couple of other cases do not fall neatly within the policy topics considered below.

16. In R (Green) v South Downs National Park Authority [2018] EWHC 604 (Admin) Stuart-Smith J. had to consider whether in granting permission for the redevelopment of Madehurst Lodge, a Grade II listed building in the South Downs National Park the Authority had, by reference to opinions written by Landmark's James Maurici QC, failed to properly consider whether what was proposed was "major development" pursuant to NPPF1 [116]. At the time, indeed until NPPF2, "major development" had not been defined in policy and the Courts had rejected the view that it had the meaning given in the Town and Country Planning (Development Management Procedure) Order 2015 ("the Order") (or its predecessors) (Aston v Secretary of State for Communities and Local Government [2013] EWHC 1936 (Admin) and R (on the application of Forge Field Society) v Sevenoaks DC [2014] EWHC 1895 (Admin). In Green, the opinions were supported, subject to one statement that "whether something is 'major

development' for the purposes of the Order will be relevant albeit it will not determine the matter and may not even raise a presumption either way". The judge thought this went too far and suggested instead the way this should be formulated is that "[i]t is in theory possible that the categorisation of a proposal as a "major development" under the Order may in some cases be relevant and material. But what is relevant or material in any given case is fact sensitive and not susceptible to hard and fast rules or set criteria".

17. The extent of any difference between these formulations is unclear, but NPPF2 now defines "major development" in footnote 55 for the purposes of [172]-[173] as follows: "whether a proposal is 'major development' is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined".

18. In H J Banks & Company v. SSHCLG and others [2018] EWHC 3141 the Court considered NPPF [149] on coal extraction, which read as follows: "Permission should not be given for the extraction of coal unless the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or if not, it provides national, local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission".

19. This guidance has now been amended by NPPF2 [211] to sat that "Planning permission should not be granted for the extraction of coal unless: (a) the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or (b) if it is not environmentally acceptable, then it provides national, local or community benefits which clearly outweigh its likely impacts (taking all relevant matters into account, including any residual environmental impacts)". The treatment of NPPF1 [149] in the judgment must therefore be read in the light of this policy change, but the judgment of Ouseley J remains of interest.

20. The parties were agreed that at a simple level there was a two-stage test. Coal extraction is not permitted unless it is environmentally acceptable, or can be made so with conditions and obligations. If it remains environmentally unacceptable, the benefits of the proposal, comprising the "need" case but not confined to that, are brought into play to see if they clearly outweigh the likely impacts.

21. Next however, it was held as follows (at [21]-[25]: "I accept that there are two ways, at least, of approaching the two stage question. The first, which Ms Lieven submitted was the only way to do so rationally, was (i) at the first stage, to consider all that might be described as "environmental", whether adverse or beneficial, so that a proposal for coal extraction which was environmentally acceptable, after allowing for mitigation achieved by conditions and agreements, would be permitted before the "need" case or "national, local or community" benefits fell for consideration; and (ii) at the second stage, to consider all the adverse impacts as mitigated, environmental or not, and whether or not considered at the first stage, and all the benefits, including any which had already been considered at the first stage, and which had been found insufficient to outweigh the adverse impacts. Indeed, it was difficult to see

what benefits there might be which did not come within the scope of "national, local or community benefits". This approach was accepted as lawful by the other parties.

22. However, "Mr Elvin submitted that an equally rational approach, and the one which the Secretary of State had in fact adopted, as he was entitled to, and indeed as the Inspector had done, was (i) at the first stage, to proceed as Ms Lieven submitted should be done, but (ii) at the second stage, to consider on the one side, only the residual balance of the adverse effects, as mitigated and after allowing for environmental benefits, i.e. the net harm, and then to balance that net harm against the "national, local or community benefits," on the other side. These benefits were the only new factors brought in at the second stage, unless theoretically, there could be some relevant but non-environmental adverse impact left out at the first stage. A benefit considered at the first stage did not need to be brought forward at the second stage, because it would already have been given its full weight at the first stage, reducing the overall adverse balance brought forward to the second stage. The biodiversity environmental benefits did not come within the scope of "national, local or community benefits"; in any event, they had already been fully allowed for in the stage 1 netting off process and so could not rationally come in at stage 2 as well".

23. This approach too was regarded as "not itself irrational" (at [24]). But "what matters is that all the benefits and adverse effects have been taken into account without double counting or discounting. There is a risk, on the residual approach however, that a benefit may be excluded at stage 1, as going beyond mitigation, yet not included at stage 2, if the view is taken that "national, local or community benefits" encompasses no environmental benefits".

24. The true issue here was not therefore the interpretation of NPPF1 [149], but the interpretation of the decision letter. The Secretary of State did not follow the approach which he had been claimed to adopt, as he "ignored the biodiversity benefits in his overall conclusions, failing to carry them forward to the stage 2 exercise, and failing to have regard to all the considerations material to that stage. Paragraph 149 does not permit all the harm to be considered at stage 2 with only part of the benefits. If a residual approach is followed, both benefits and harms must be netted off to come to a single notional value for a reduced harm then used at stage 2; that he did not do" (at [48]).

Housing

25. Five cases of note this year which dealt with housing policy in NPPF1 were St Modwen, Hallam Land , Cheshire East, Jelson and CPRE. The case of Braintree is also worthy of a mention.

26. As with any case dealing with NPPF1, care will be needed in any attempt to read across judgments from previous statements of policy to the new NPPF2, which may be drafted differently. The cases set out below should be considered in this context.

27. In St Modwen Developments Ltd v SSCLG, East Riding of Yorkshire Council and another [2017] EWCA 1643, the Court of Appeal considered the concept of a supply of “deliverable” sites for the purpose of a local planning authority establishing a five-year housing land supply against their housing requirements under what was NPPF1 [47].

28. The term “deliverable" as defined in NPPF1 footnote 11, was follows: "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...”.

29. On an appeal the Inspector accepted the Council's evidence of a supply of 15,000 dwellings against a requirement of 14,000, based mainly on draft allocations in an emerging plan, none of which had planning permission. St Modwen had argued that the supply was closer to 5,000 dwellings based largely on sites with planning permission or a resolution to grant, with a windfall allowance. The Council's housing trajectory, prepared for the purpose of the emerging local plan, showed "on anticipated rate of delivery" of 7000 dwellings for the relevant five-year period.

30. The Inspector found that “it may well turn out that not all allocations currently identified as deliverable will in fact be delivered"; and that "the assessment of supply is distinct from that for delivery". St Modwen contended that the Inspector had misinterpreted the phrase "a supply of specific deliverable sites", as well as the purpose of a trajectory. The claim that there were 15,000 deliverable sites was alleged to be inconsistent with a trajectory showing that only 7,000 were likely to come forward over the relevant period.

31. The Court of Appeal rejected St Modwen’s case, which "misses the essential distinction between the concept of deliverability...and the concept of an expected rate of delivery". Thus “the fact that a particular site is capable of being deliverable within five years does not mean that it necessary will be” [35]. The reference to sites with planning permission in the definition "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]. It was held that sites may be included in the 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" (ibid).

32. This judgment would have given some comfort or even encouragement to local authorities facing housing land supply difficulties, the revised definition in NPPF2 (see fn 7 and Glossary) seems intended to pull back from its effect. The new definition advises that "sites with outline planning permission, permission in principle, allocated in the development plan or identified on a brownfield register should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years". Even this revised definition has caused problems, in particular because it states that "sites that are not major development... should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years"; and the government has considered it necessary to issue a "Technical consultation on updates to national planning policy and guidance" which advises that "the existing text could be clearer that sites that are not major development, and which have only an outline planning consent, are in principle considered to be deliverable" [36].

33. Overall though, it appears to be commonly accepted that authorities will find it more difficult to demonstrate the requisite supply and are not safe to assume that current assessments of supply will be sufficient to meet the new test.

34. In Hallam Land v. SSCLG [2018] EWCA Civ 1808 a challenge following an appeal into a housing scheme raised two main issues. One was whether the Secretary of State erred by not having regard to another decison on a different appeal. This is covered later. The other was whether, given that the Council could not demonstrate the requisite five-year supply of housing land, the Secretary of State established the shortfall with sufficient precision, and whether his relevant reasons were adequate. The findings on these issues remain relevant under NPPF2.

35. On this issue, the Court of Appeal held (at [52]-[53]) that "the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined". This task is left to the decision-maker and will not be the same in every case. There may be disagreements over the existence or extent of a shortfall "which the decision-maker will have to resolve with as much certainty as the decision requires". If there is a shortfall, "he will generally have to gauge, at least in broad terms, how large it is", albeit that "no hard and fast rule applies". But "it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant 'non-housing policies' in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in Hopkins Homes. For this reason, he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land".

36. On the facts, the Secretary of State could not be criticised, in principle, for not having expressed a conclusion on the shortfall in the supply of housing land "with great arithmetical

precision". He was entitled to "confine himself to an approximate figure or range – if that is what he did" and the NPPF did not require him to do more than that.

37. The Court also confirmed that "in a case where the local planning authority is unable to demonstrate five years' supply of housing land, the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth".

38. In Cheshire East Council v. SSHCLG [2018] EWHC 2906 (Admin) an Inspector concluded that he could not come to a definitive view on the question of a five year housing land supply in an appeal in circumstances where the respective positions of the parties straddled the requisite level of deliverable supply. The Inspector concluded that "I propose to adopt a precautionary approach, taking the worst case position within the range on housing land supply as I have found it, and apply the 'tilted balance' in the fourth bullet point of paragraph 14 in the determination of this case".

39. The claimant argued that there is nothing in policy or guidance to say that the benefit of the doubt about deliverability should be given to the developer; and that there was no reasoned conclusion why delivery at the bottom end of the housing range identified should be considered more likely than delivery at the top end of the range. The Court however accepted the submission of the Secretary of State that this approach was not, as the Council contended, an impermissible additional test. Properly interpreted it was an application of his judgment to answer the central question of whether the Council had demonstrated a five year supply.

40. In Jelson Ltd v. SSCLG [2018] EWCA Civ 24 the principal issue was whether the Inspector on an appeal adopted a lawful approach to identifying the "full, objectively assessed needs" for housing (in circumstances where it was accepted that the Core Strategy requirement had been settled before the NPPF and was out of date). The particular issue was whether she had lawfully rejected a figure of 980 dwellings per annum, as advanced by Jelson, as "a figure that should be considered in the calculation". Jelson had argued that a lower OAN arising from the SHMA was constrained or policy-on figure which should instead have included the 980 dwellings identified in the SHMA as the total amount of housing necessary to deliver the indicated housing need under current policy.

41. The Court of Appeal rejected the claim (see [24]-[25]), which offended the principle that matters of planning judgment are not for the court, but for the decision-maker: "National policy and guidance does not dictate, for decision-making on applications for planning permission and appeals, exactly how a decision-maker is to go about identifying a realistic and reliable figure for housing need against which to test the relevant supply...In this respect, government policy, though elaborated at length in the guidance in the PPG, is not prescriptive. Where the Government wanted to be more specific in the parameters it set for decision-makers considering whether a local planning authority could demonstrate the required five-

year supply of housing land, it was – in laying down the approach to calculating the supply of deliverable housing sites in paragraphs 47 and 49 of the NPPF, and, in particular, in carefully defining the concept of a 'deliverable' site".

42. Responsibility for the assessment of housing need therefore lay with the decision-maker: "Although the decision-maker is clearly expected to establish, at least to a reasonable level of accuracy and reliability, a level of housing need that represents the 'full, objectively assessed needs' as a basis for determining whether a five-year supply exists, this is not an not an 'exact science' (the expression used in paragraph 2a-014-20140306 of the PPG). It is an evaluation that involves the decision-makers exercise of planning judgment on the available material, which may not be perfect or complete…The scope for a reasonable and lawful planning judgment here is broad…Often there may be no single correct figure representing the 'full, objectively assessed needs' for housing in the relevant area. More than one figure may be reasonable to use. It may well be sensible to adopt a range, rather than trying to identify a single figure. Unless relevant policy in the NPPF or guidance in the PPG has plainly been misunderstood or misapplied, the crucial question will always be whether planning judgment has been exercised lawfully, on the relevant material, in assessing housing need in the relevant area…A legalistic approach is more likely to obscure the answer to this question than reveal it…" (at [25]).

43. On the facts, the inspector was held to have assessed housing need in an orthodox way. She took account of the most recent, complete assessment of housing needs, which was in the SHMA. She acknowledged that demographic calculations result in the total number of people and households likely to live in the borough, including those who could not afford market housing. The need for affordable housing were the products of separate and different calculations and assessments, which inevitably overlapped to a degree. She correctly identified that the main area of dispute was whether affordable housing need should be fully met by the OAN. She had understood how affordable housing need as a component of the OAN had been addressed in the SHMA, which identified a range taking account of the market signals, economic evidence and affordable housing need. The uplift from demographic projections was considered sufficient to make a tangible difference to meeting affordable housing needs. This was an entirely legitimate exercise of planning judgment.

44. She explained why the figure of 980 should be rejected; not least because it was "based on the current affordable housing contribution percentages required by each local [authority's] own policies", which expected between 10% and 40% contribution from private housing development over a certain scale. She was entitled to find that this figure was "clearly impractical and unreasonable", as its corollary was "a requirement of 196,825 units in the HMA as a whole, a considerable, inconsistent and thus unjustifiable increase on the 75,000 or so dwellings calculated from household projections to be needed by 2031". To describe the figure of 980 dwellings per annum as "purely theoretical" was correct and her conclusions which rejected any reliance on that higher figure were perfectly rational (see [37]-[43]).

45. It is questionable whether the above principles relating to the assessment of housing need will need to be revisited or refined, given the introduction of the standard method (in

whatever form it ultimately takes). However, in circumstances where the adopted housing requirement is more than five years old, NPPF2 (see [73] and Glossary definition of "local housing need") allows authorities to depart from the standard method where there is "a justified alternative approach" and the judgment will remain broadly relevant to the scrutiny where an authority takes that course.

46. CPRE v. Waverley BC [2018] EWHC 2969 (Admin) was a development plan challenge but it is covered here given that the approach taken by the Deputy Judge, Nathalie Lieven QC, followed the principles in Jelson. In response to an allegation that the examining Inspector to the Waverley Local Plan had erred in his approach to asking the Council to take a proportion of the unmet need from Woking, in particular by establishing a more accurate an up-to-date figure than the 2015 SHMA used by Woking, it was held (at [52]) that "The Inspector was placed in a difficult position. For the Plan to be sound he had to establish a figure for the OAN in Waverley, and ensure the Plan sought to meet that OAN and unmet need in the HMA, see NPPF para 182. However, he was not carrying out the Woking Local Plan examination and indeed Woking is very far off any such stage of its plan making process. He did not, and realistically could not have had, all the evidence which would have been necessary to determine whatever Local Plan housing requirement figure Woking will ultimately bring forward. The Inspector was carrying out a fundamentally different exercise from any future Woking Local Plan Inspector. Mr Stinchcombe says that the Inspector was under a duty to take into account the "best and most up to date evidence", but that has to be tested on the facts of the particular case. The NPPF and NPPG are clear that the Inspector had to carry out a proportionate exercise given his specific statutory task".

47. On this basis (see [53]): "Although the case of Jelson concerned a s.78 inquiry, in my view Lindblom LJ's analysis applies equally here, probably even more strongly. The WBC Inspector was necessarily going to have limited material in respect of Woking's OAN; how the SHMA figure should be varied; and how the identified need could be met. The determination of Woking's unmet need in the context of the WBC Local Plan, and how it was to be apportioned to Waverley, was certainly not an "exact science"; was necessarily based on imperfect material and involved a very large amount of planning judgment".

48. As for a claimed inconsistency of approach between the Inspector's approach to the DCLG housing projections in the context of Waverley's own OAN, and the level of Woking's unmet needs, this "ignores the fact that these two analyses were being carried out in two very different contexts. If the Inspector had gone down the line of trying to update the Woking OAN in line with the 2014 projections he would also have had to consider the role of the employment growth analysis and the supply position. This was not a case of doing one simple arithmetical calculation. To do this exercise for the Woking OAN was clearly outside his remit, as well as necessarily involving very significant delay in bringing forward the WBC Local Plan. He could have stopped the entire process and sought all the further information that the Claimants say he should have had. But in my view, there was no legal obligation upon him to do so. It is relevant in this regard that the SoS now has powers to require a joint plan, and to intervene in the process. Ultimately, if the SoS had thought that there was danger of a serious

level of over provision, or that the various authorities were not carrying out their plan making functions appropriately, he could have stepped in" (at [54]).

49. In Braintree District Council v SSCLG [2018] EWCA Civ 610 the issue before the Court of Appeal was whether an inspector determining a planning appeal misinterpreted [55] of NPPF1 which stated that local planning authorities "should avoid new isolated homes in the countryside unless there are special circumstances …". It was contended by the claimant that the phrase could mean either physically isolated relative to settlements and other development or, of equal importance, whether the site is functionally isolated relative to services and facilities. The proposal would only comply with the policy if neither consideration applied.

50. The Court of Appeal regarded this as a strained an unnatural reading of the policy (see [31]-[32]) which "simply connotes a dwelling that is physically separate or remote from a settlement". Whether a proposed new dwelling is, or is not, "isolated" in this sense "will be a matter of fact and planning judgment for the decision-maker in the particular circumstances of the case in hand". What constitutes a settlement for these purposes is also left undefined, but it "would not necessarily exclude a hamlet or a cluster of dwellings, without, for example, a shop or post office of its own, or a school or community hall or a public house nearby, or public transport within easy reach". Whether, in a particular case, a group of dwellings constitutes a settlement, or a "village", for the purposes of the policy will again be a matter of fact and planning judgment for the decision-maker.

51. NPPF2 [79] tweaks the wording of old NPPF [55] but not in a way which affects the application of this judgment to the term "isolated".

Green Belt

52. The steady flow of Green Belt cases has continued. Samuel Smith Old Brewery (Tadcaster) Limited v North Yorkshire CC [2018] EWCA Civ 489 was the latest challenge brought by the Yorkshire brewer and lawyers' friend. Here the target was a planning permission granted for the extension of a limestone quarry in the Green Belt outside Tadcaster. The claim alleged that the Council had misapplied NPPF1 [90], which stated mineral extraction is not "inappropriate development" in the Green Belt if it preserves the openness of the green belt. The same guidance is now in NPPF2 [146].

53. The officers' report had approached the question of "openness" by saying this: "It is considered that the proposed development preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Openness is not defined, but it is commonly taken to be the absence of built development. Although the proposed development would be on existing agricultural land, it is considered that because the application site immediately abuts the existing operational quarry, it would not introduce development into this area of a scale considered to conflict with the aims of preserving the openness of the Green Belt."

54. It was argued that this gave the impression that the effect on visual openness was not relevant. The Council sought to rely on other aspects of the report which included advice that there would be no material harm to the landscape and no other unacceptable visual impacts, such that when the officer came to consider the "openness of the Green Belt" she was concerned only with the likely effects on physical openness. The Court of Appeal quashed the decision as it was left with the "troubling impression" [32] that paragraph 90 had been misunderstood. Lindblom LJ held [37] that: "The concept of 'the openness of the Green Belt' is not defined in paragraph 90. Nor is it defined elsewhere in the NPPF. But I agree with Sales L.J.'s observations in Turner to the effect that the concept of 'openness' as it is used in both paragraph 89 and paragraph 90 must take its meaning from the specific context in which it falls to be applied under the policies in those two paragraphs. Different factors are capable of being relevant to the concept when it is applied to the particular facts of a case. Visual impact, as well as spatial impact, is, as Sales L.J. said, 'implicitly part of it'.

55. Thus "as a general proposition... the policy in paragraph 90 makes it necessary to consider whether the effect of a particular development on the openness of the Green Belt can properly be gauged merely by its two-dimensional or three-dimensional presence on the site in question – the very fact of its being there – without taking into account the effects it will have on the openness of the Green Belt in the eyes of the viewer. To exclude visual impact, as a matter of principle, from such a consideration would be artificial and unrealistic. The policy in paragraph 90 does not do that. A realistic assessment will often have to include the likely perceived effects on openness, if any, as well as the spatial effects. Whether, in the individual circumstances of a particular case, there are likely to be visual as well as spatial effects on the openness of the Green Belt, and, if so, whether those effects are likely to be harmful or benign, will be for the decision-maker to judge. But the need for those judgments to be exercised is, in my view, inherent in the policy" ([38]).

56. The Court also found that "preserving" openness did not mean that a proposal would be "not inappropriate" only if the openness was entirely unchanged. It could only mean that the effects on openness must not be harmful ([39]).

57. This may have emboldened the claimant in Euro Garages Limited v SSCLG [2018] EWHC 1753 (Admin), where the operator of a petrol filling station challenged an Inspector's decision to refuse retrospective permission for works involving the creation of a fenced storage area on one side of the shop, where an LPG storage tank was before, along with a side extension to relocate an external ATM.

58. The Inspector considered the proposals under NPP1 [89], which included within the exceptions to inappropriate development "limited infilling or the partial or complete redevelopment of previously developed sites, which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development". The Inspector found that the scheme would result in a 9.2% increase in floor area, and a 5% increase in volume on the existing buildings and "whilst these may be relatively small increases, the scale and mass of the resulting building would still be greater than at present". She concluded that "overall, I therefore consider that the scale and mass of the proposals would have a slightly greater impact on the openness of the Green Belt than the site did previously" A lack of visibility did not, in itself, mean that there would be no loss of openness and "moreover, even a limited adverse impact on openness means that openness is not preserved".

59. The Court held ([36]) that "the only basis on which the Inspector could have reached that conclusion was if she considered that the greater floor area and/or volume necessarily meant that there was a greater impact". The flaw in that reasoning was that under the policy "any infill (however limited) would necessarily result in greater floor area or volume" but it should "not be assumed, as the Inspector appeared to, that any change would have a greater impact". She ought to have specifically considered "the impact or harm, if any, wrought by the change".

60. NPPF2 [145] does not amend NPPF1 [89] so as to affect this finding.

61. In R (Tate) v. Northumberland County Council [2018] EWCA Civ 1519 the Court of Appeal again confirmed [37] that "the question of whether a particular proposed development is to be regarded as 'limited infilling' in a village for the purposes of the policy in paragraph 89 of the NPPF will always be essentially a question of fact and planning judgment for the planning decision-maker. There is no definition of 'infilling' or 'limited infilling' in the NPPF, nor any guidance there, to assist that exercise of planning judgment. It is left to the decision-maker to form a view, in the light of the specific facts". This judgment also remains applicable under NPPF2 [145].

62. Brown v. Ealing LBC [2018] EWCA Civ 556 concerned London Plan policy on Metropolitan Land, which is applied in the same way as Green Belt policy. The challenge was to the grant of planning permission for a first team training and academy facility at Queen's Park Rangers,

sports pitches, community facilities and associated development. Following Redhill Aerodrome Ltd. v SSCLG [2014] EWCA 1386, it is well established that the expression "any other harm" does not just mean any other harm to the Green Belt but takes in other factors as well. The claimant submitted that the structure of the officer's report suggested that she had either excluded non Green Belt harm such as loss of public access, or that she had double-counted by concluding that the proposed improvements to community facilities would balance out that harm, when she had already taken into account the same factor as part of the "very special circumstances" arising.

63. The Court disagreed. On the double-counting point, it found that "In principle, it is possible for a particular factor to be relevant, and to carry appropriate weight, in the consideration of more than one planning issue. It may serve to avoid or overcome or, at least, outweigh some real or potential planning harm, and it may also satisfy some planning need that would otherwise go unmet."

64. The officer's conclusions pointed up the two-fold relevance of the proposed improvement to recreational facilities. There was "no logical reason why the officer could not properly conclude, when considering the issue of 'Public Access', that the 'improvement to the existing facilities, in conjunction with the availability of other open space areas in the general vicinity of the application site' would 'outweigh the direct impact of the loss of public access to part of the development site', while also taking into account, under the heading 'Compelling Need for the Development' in her 'very special circumstances' balance, the deterioration of the existing facilities at Warren Farm through lack of investment, and the requirement in Policy 5.6 of the core strategy to provide improved facilities generally, and specifically at Warren Farm". This was not, in any sense, "double-counting". These conclusions were "distinct from each other, but mutually consistent" and did "not show a material consideration being given double weight, only a single factor being given due weight in two different respects: first, outweighing a "loss" that would be caused by the development itself; second, meeting an existing need that would not be satisfied without the development" ([32]-[33]).

Valued Landscapes

65. The concept of valued landscapes has generated a not inconsiderable degree of debate since its inclusion in NPPF1. Local objectors and some authorities began by seeing it as a useful means of resisting development, not only because of the greater "protection" that policy was considered to afford to them, but also because it was argued that a valued landscape was a specific policy of the NPPF indicating development should be restricted, which could disapply the tilted balance under paragraph 14.

66. In CEG Land Promotions It Limited v SSCLG and Aylesbury Vole District Council [2018] EWHC 1799 (Admin), the Secretary of State confirmed to the High Court NPPF [109] in relation to valued landscapes was not such a specific policy, although this appeared contrary to previous indications (see [20]). This issue has however been overtaken by NPPF2, where the list of specific policies identified now in footnote 6 is exhaustive and does not include valued landscapes.

67. The claim in CEG nonetheless remains of interest. It was another case of alleged "double-counting", this time of treating the harm done to "valued landscape" as additional to harm done to the landscape through breaches of development plan policy, which was also claimed to be irrational on the basis that the harm was the same.

68. Ouseley J dismissed the claim. On a fair interpretation of the decision, the Inspector was doing no more than pointing out that the development breached Local Plan policies which were consistent with the NPPF, which was necessarily also breached.

69. However the Court observed that [52] "when judging a 'tilted balance' under [14] which requires harm and benefit to be measured against the Framework policies, greater weight can rationally be given to harm which breaches its policies than to harm which only breaches Local Plan policies, or to put it another way, greater weight can be given to those policies than to other Local Plan policies. After all, s38(6) means that Local Plan policies which are inconsistent with the Framework still provide the statutory basis for the decision. But the weight given to the 'other material considerations' means that those which accord with the Framework are weightier".

70. A different approach would be required, however where local plan policies were consistent with the NPPF (see [53]): "Once a Local Plan policy and the harm arising is given its due weight because of the fullness to which it reflects the obligation in [109] of the Framework to produce such policies, then to give the policy, or the harm under it, greater weight because of the Framework policy, is to use the Framework policy twice over: once to give weight to the Local Plan policy because of the Framework and second to give weight to the Framework whose weight has already been reflected in the weight given to the Local Plan policy. That would be as irrational as double-counting harm".

71. Ouseley J went on (at [55]-[59]) to clarify the use of the term "demonstrable physical attributes" (or the assumed need for them), as drawn from Stroud DC v SSCLG [2015] EWHC

488 (Admin). He confirmed that in Stroud he "was not laying down or purporting to lay down any principle". In that case, the question of whether the judgment of "valued landscape" had to be reached by examining the "demonstrable physical attributes" of the development site alone, regardless of any wider area of which it formed part, was not the point. Instead, the concept of "demonstrable physical attributes" was simply the phrase adopted by the Inspector and "the argument in the case was whether he was right or wrong in law in his conclusions that the site did not possess them". Thus the Inspector's conclusion that the site did not possess, as a demonstrable physical attribute, a role in the setting of the AONB, was not unlawful, because the specific policy dealing with the setting of the AONB did not cover the site.

72. It is worth noting the endorsement by the judge of the approach taken by the Inspector in the CEG case, who had "analysed the issue very well and come to the entirely correct conclusion" ([59]). This involved the following assessment: "In coming to a view as to whether or not a site falls to be classified as a valued landscape within the terms of the Framework, it seems to me that one first has to consider the extent of the land which makes up the landscape under consideration before examining whether or not there are features which make it valued". In this respect:

    (1) "developments and appeal sites vary in size. For example it is possible to conceive of a small site sitting within a much larger field/combination of fields which comprise a landscape and which have demonstrable physical characteristics taking that landscape out of the ordinary";
    (2) "The small site itself may not exhibit any of the demonstrable physical features but as long as it forms an integral part of a wider 'valued landscape' I consider that it would deserve protection under the auspices of paragraph 109 of the Framework. To require the small site itself to demonstrate the physical features in order to qualify as a valued landscape seems to me to be a formulaic, literal approach to the interpretation of the question...";
    (3) "I do not accept that the Stroud case is authority for the proposition that one must only look to the site itself in seeking to identify demonstrable physical characteristics....When assessing what constitutes a valued landscape I consider it more important to examine the bigger picture in terms of the value of the site and its surroundings. That is not to borrow the features of the adjoining land but to assess the site in situ as an integral part of the surrounding land rather than divorcing it from its surroundings and then to conduct an examination of its value";
    (4) "I find some difficulty in ascribing the term landscape to an appeal site comprising one large agricultural field. To my mind the term 'landscape' denotes an area somewhat wider than the appeal site in this case. In this regard I note the reference of my colleague in the Loughborough appeal to the GLVIA definition of landscape as ' an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors '. I endorse the view that it is about the relationship between people and place, and perceptions turn land into the concept of landscape'".

Heritage

73. After the flurry of judgments dealing with the relationship between heritage policy in NPPF1 and the statutory requirements in the Planning (Listed Buildings and Conservation Areas) Act ("LBCAA") 1990, there have been further cases this year which clarify other aspects of the guidance.

74. First, Catesby Estates Ltd v. Steer [2018] EWCA Civ 1697 considered the question of the setting of a heritage asset.

75. By way of context, section 66 of the LBCAA 1990 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". NPPF1 [132] advised that the significance of an asset could be harmed by development within its setting, defined in the Glossary as the surroundings in which the asset was experienced. NPPF2 is to the same effect (see [194]). PPG (Reference ID: 18a-013-20140306) explains that setting may 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.

76. An Inspector had allowed an appeal for 400 houses on farmland which had once formed part of the estate of Kedleston Hall, a Grade I listed building. Objectors had contended that even though the development site would not intrude upon views to and from the Hall and surrounding parkland, it lay within the setting of both. They relied on the fact that the site had originally formed part of the estate and remained in its historic agricultural use 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. This was quashed in the High Court, Lang J concluding that the Inspector had taken too narrow a view of "setting" by treating the physical and visual connection as determinative.

77. This decision was overturned on appeal, where the developer and Secretary of State argued that the Inspector had exercised his planning judgment reasonably when applying relevant policy and guidance and had not disregarded historic considerations. Lindblom LJ accepted that "Generally, of course, the decision-maker will be concentrating on visual and physical considerations". But "it is clear from the relevant national policy and guidance...that the Government recognizes the potential relevance of other considerations - economic, social and historical. These other considerations may include, for example, 'the historic relationship between places'" [26]. Ultimately, impact on setting is a matter of planning judgment; and "none of the relevant policy, guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting" [29].

78. On the facts of the case, on a full reading of the Inspector's decision letter, he had not simply "set to one side" the historical considerations said to be relevant to the setting of Kedleston Hall or concentrate on visual and physical factors to the exclusion of everything else (see [38]-[41]).

79. R (Historic Buildings and Monuments Commission for England v. Milton Keynes Council [2018] EWHC 2007 concerned the grant of planning permission for the demolition of buildings at the Wolverton railway works site, where the first locomotive was built in 1845. The site lies within the Wolverton Conservation Area. The proposals included mixed use redevelopment including new employment floorspace. Historic England objected to the proposals on the grounds that the extensive demolition involved in the proposals would entail substantial harm to the significance of the Conservation Area which was not justified; and the extent of public benefits involved in the proposal were questioned as being unclear. There were also concerns about a heritage assessment which suggested that the use of the land for railway carriage manufacturing was the main contributor to the heritage significance of the Conservation Area, more so than the buildings and spaces which give the land the "special architectural and historic interest" for which it had been designated in the first place.

80. This concern led to one of the grounds of challenge, which was that the Council acted irrationally in assessing the heritage significance of the site in this way. The statutory context was section 72(1) of the LBCAA 1990, which provides that as regards the decision-making function "special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area".

81. Dove J held [63]-[64] that in the statute: "the phrase 'character or appearance' is not confined simply to the historic built fabric of the area"; and that although that will be integral to the appearance of an area, "the statutory test is quite deliberately not confined to simply visual matters" and the term "character" clearly broadened the range of qualities which can be relevant to the evaluative judgment, including historic uses. Thus there was no warrant in the statutory language for concluding that built fabric should be regarded as of paramount importance, or was pre-eminent over other dimensions of the historic interest of the area. Any judgment "needs to be comprehensive, and to include all of those historic aspects of the area which bear upon its value and the appreciation of it".

82. The judge therefore rejected any suggestion that it was not possible in principle to reach a judgment which afforded greater significance to the preservation of a use over the preservation of a particular building.

83. In Clay v. Welsh Ministers [2018] EWHC 2104 An Inspector's dismissal of an appeal concerning the replacement of a Grade II listed slate roof with an alternative variety of slate roof was upheld. Section 16(2) of the LBCAA 1990 Act provides that "in considering whether to grant listed building consent for any works the local planning authority or the [Welsh Ministers] shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses".

84. The Court was not persuaded that this provision imposed upon the Inspector the wide duty to consider alternatives as contended for on behalf of the Claimants. It was a question of planning judgment. The Inspector was asked to uphold or dismiss the appeal and not to make a choice between the competing types of slate proposed.

85. Bohm v. SSCLG [2017] EWHC 3217 (Admin) concerned a proposal to demolish and replace a house in the Hampstead Conservation Area. On appeal the Inspector considered not just NPPF1 [133]-[134] in relation to the Conservation Area, but also [135], which advises that in weighing applications that affect directly or indirectly non designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset. The new guidance in NPPF2 ([195]-[196] and [197] is to the same effect.

86. On a challenge to the appeal decision, it was argued that the Inspector had erred, because the loss of a building which makes a positive contribution to the Conservation Area must cause harm to that area, and that harm must be given considerable importance and weight, which the Inspector had failed to recognise. The challenge was rejected (see [33]), on the basis that "when considering the impact of the proposal on the Conservation Area....it is the impact of the entire proposal which is in issue. In other words the decision maker must consider not merely the removal of the building which made a positive contribution, but also the impact on the CA of the building which replaced it. She must then make a judgement on the overall impact on the CA of the entire proposal before her". Further, NPPF1 [135] called for weighing "applications" that affect an non-designated heritage asset, such that "the consideration under that paragraph must be of the application as a whole, not merely the demolition but also the construction of the new building". This then required a balanced judgment to be made by the decision maker. The challenge was dismissed.

87. In R (JH and FW Green Ltd) v. South Downs National Park Authority [2018] EWHC 604 (Admin) the Court considered NPPF1 [134] (now NPPF2 [196]), which advised that "where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use".

88. This policy was interpreted as follows (at [62]): "The guidance states that if there is only one viable use, that is the optimum viable use. In such a case, and assuming that the proposal incorporates the one viable use, it is easy to see how that is brought into the balance as a public benefit to be weighed against the harm to which the proposal will lead. What is less clear on the terms of paragraph 134 itself or the guidance is how the case should be approached if there are two viable uses. If the proposal is the one likely to cause the least harm to the significance of the asset, then it will be the optimum viable use, which paragraph 134 states should be included in the public benefits that are brought into the balance. Even so, the terms of paragraph 134 do not require that any and all other viable uses should be excluded from consideration. Furthermore, if the proposal were not to be the optimum viable use because (as explained in the guidance) there is another viable use which is likely to cause less harm than the proposal, the terms of paragraph 134 do not require automatic refusal of permission for that reason".

89. After reviewing previous authority in R (Gibson) v Waverley Borough Council (No. 1) [2012] EWHC 1472 (Admin) and R (Gibson) v Waverley Borough Council (No. 2) [2015] EWHC 3784

(Admin), Stuart-Smith J concluded (at [66]): "To my mind, they emphasise the need for alternative proposals to be demonstrably substantial rather than speculative before they can realistically be considered as candidates to be the optimum viable use. A proposal which is merely speculative is not viable, whether or not it might otherwise be optimal. This is, to my mind, clear both from the current guidance and from the Gibson cases. The gloss is that I can envisage circumstances where the difference in the level of harm inflicted by two proposals was limited so that, although one would be regarded as the optimum viable use, it would not be right to regard that as a compelling basis for refusing permission to the other if the overall balance between harm and public benefits favoured the other. This serves to reinforce that the planning authority's task is to weigh any harm to the significance of a designated heritage asset against the public benefits of the proposal and that securing optimum viable use is only one part of that balancing exercise". The challenge in that case failed as an over legalistic attack on the officer report in question.

90. Hot off the press is the judgment of the Court of Appeal in Dill v. SSCLG [2018] EWCA Civ 2619 in which the Court of Appeal confirmed that for the purposes of applications for listed building consent and enforcement, being on the list determines the status of the subject matter as a listed building at the time of the application or notice (at [33]). The case involved the removal of two early 18th century limestone piers, each surmounted by a lead urn of the same era. In 1973, these items had been moved by the appellant's father to Idlicote House, a Grade II listed building; and in 1986, each was separately Grade II listed. Their removal came to the knowledge of the local planning authority. After it refused retrospective listed building consent to remove the items and issued a listed building enforcement notice, the appellant argued before an Inspector on appeal that the items were not "buildings" so that listed building consent was not required. The Court of Appeal upheld the finding of the Inspector that it was not open to him to go behind the fact that an item appears on the list as a listed building.

Viability

91. Viability issues are commonly raised in planning decision, particularly regarding affordable housing. Although NPPF2 has tried to focus the consideration of viability at the plan preparation stage, it is doubtful whether site-specific assessments at application stage will disappear, given the site-specific nature of viability issues and the inevitable changes in financial circumstances following the adoption of any plan. It may well be that the process of pan preparation becomes more complicated and protracted to deal with this issue, without changing that much at the decision-taking stage. This means that any challenge dealing with financial viability issues will have continuing relevance; and the main case this year was Parkhurst Road Limited v SSCLG and London Borough of Islington [2018] EWHC 991 (Admin).

92. The claim involved a challenge to an Inspector's decision refusing an appeal against the decision of Islington Council to refuse planning permission for a residential scheme on a former Territorial Army site in the borough. The key issue in the appeal was whether Parkhurst's offer of 10% of affordable housing was the "maximum reasonable amount of affordable housing" in the context of Islington's affordable housing target of 50% of all new housing across the Borough. Central to that issue was the question of what was the correct Benchmark Land Value (BLV) for the appeal site. At the inquiry, Parkhurst argued that any more than a 10% affordable housing requirement was unviable on the site. It provided a range of market evidence to support its view that the BLV for the site was between £11.9m and £13.6m. Islington contended that the market evidence presented by Parkhurst failed to sufficiently reflect the development plan's expectation for affordable housing. It provided evidence to support a BLV for the site of £6.75m.

93. In short, Parkhurst adopted an approach based purely on market signals and comparable market evidence. The Council adopted an approach which: (a) took account of the negligible existing use value of the site ("EUV"); (b) reflected the fact that value on the site arose from its allocation in the Local Plan and from the prospect of planning permission, which consequently required value to be assessed with affordable housing policies in mind; and (c) took account of market comparators in that context, that is, recognising that unadjusted market data would not necessarily reflect policy compliant assumptions on affordable housing provision. Islington contended that the developer's approach was circular, seeking support for its assessment of BLV from land sales at prices which assumed little or no affordable housing provision to argue that the provision of substantial amounts of affordable housing was not therefore viable. The Council's BLV figure derived, at least in part, from a 'per market unit' analysis of comparable market evidence which, the Council contended, avoided the circularity inherent in the Parkhurst evidence.

94. After a 9-day inquiry, the Inspector dismissed the appeal, rejecting the developer's "pure market-based" approach as circular and policy non-compliant and accepting the Council's assessment of the BLV at £6.75m.

95. In the High Court the Claimant argued that the Inspector was wrong to regard LBI's "per market unit" as one which avoided the circularity which concerned him. Holgate J agreed,

noting ways in which LBI's "per market unit" approach failed to address the circularity problem the Inspector was concerned to avoid. However, the claim was dismissed because the Inspector's error made no difference to the outcome of the appeal.

96. The judge said (at [47]) that "where an applicant seeking planning permission for residential development in Islington proposes that the 'maximum reasonable amount of affordable housing' is lower than the borough-wide 50% target on viability grounds, it is his responsibility to demonstrate that that is so". Consequently, it appears that if an appellant's valuation evidence is validly rejected then it has failed to demonstrate that its affordable housing offer is the maximum reasonable amount and the appeal will be dismissed on that basis. An unrelated error in accepting the evidence of another party would not make any difference to the outcome of the appeal.

97. The judge held that the Inspector had validly rejected the evidence of Parkhurst because that evidence had failed to include any adjustment of market evidence to ensure it was policy compliant. Its purely market-based approach did not comply with PPG paragraph 023. Having had its evidence rejected on that basis, the claimant could not meet its burden of demonstrating that its offer of 10% was the "maximum reasonable amount of affordable housing". The fact that the Inspector erred in his reasons for accepting the Council's evidence did not undermine the fundamental rejection of the Parkhurst evidence.

98. The judgment is perhaps just as interesting due to the lengthy postscript which emphasised the importance of a nuanced approach to valuation evidence in the context of viability assessments in planning applications and appeals. The judge noted:

> "The present case illustrates the tension that has arisen in the application of paragraph 023 of the PPG. But the plain intention of that paragraph is to promote harmonisation between the three specified requirements when they are applied in decision-making. Thus, when estimating a BLV for a site, the application of the second and third requirements should "reflect", and not "buck," relevant planning policies (including those for the delivery of affordable housing). On the other hand, the proper application of those policies should be "informed by," and not "buck," an analysis of market evidence which reflects those policies (or where appropriate is adjusted to do so). As the PPG recognises, "realism" is needed when these matters are taken into account in decision-making. So, to take one example, a judgment may need to be made on relaxing one or more planning requirements or objectives where that would render a development on the site in question non-viable according to a viability case which uses (inter alia) land values which have adequately taken planning policies into account.
>
> According to the basic principles set out in the NPPF and the NPPG, it is understandable why a decision-maker may, as a matter of judgment, attach little or no weight to a developer's analysis which claims to show a "market norm" for BLV by doing little more than averaging land values obtained from a large number of transactions within a district. If those values are inflated by, for example, a

misjudgment about a site's development capacity and/or by a failure to factor in appropriate planning requirements, such an exercise does not establish a relevant "norm" for the purposes of paragraph 023 of the PPG. Such data should be adjusted (subject to any issues about reliability and cross-checking). A failure to obtain adequate information about comparables relied upon (including the planning context and circumstances influencing bids and the transacted price) would not be acceptable where development appraisal or viability is dealt with in the Lands Chamber or in an arbitration, and it is difficult to see why the position should be different where the same type of issue arises in the present type of case.

On the other hand, it is understandable why developers and landowners may argue against local policy statements that BLV should simply conform to an "EUV plus a percentage" basis of valuation, especially where the document has not been subjected to independent statutory examination prior to adoption. Some adherents appear to be promoting a formulaic application of "EUV plus." But as the RICS advised its members in its 2012 Guidance Note, an uplift of between 10 and 40% on existing use value is an arbitrary number and the method does not reflect the workings of the market (see paragraph 57 above). It has not been suggested that this valuation approach takes into account the value of the new land use for which the site is to be sold, whereas it might be said that a reasonable landowner would treat that as a primary consideration in valuing his property. In this context a document issued by a professional institution setting out "accepted good practice" for chartered surveyors ought to command great respect in the planning process unless there is a sound reason to the contrary. If, for example, a site value were to be negotiated so as properly to respect planning policy requirements but that price substantially exceeded an uplift of say 40% (or any other policy-specified percentage) on the existing use value of the site, the question would be posed why should that evidence not be treated as relevant to BLV? Otherwise, might it not be suggested that there is a risk of policy attempting to "buck" the market (see paragraph 143 above)? There is a difference between a policy which may have the effect of influencing market value, as compared with one which disregards levels of market value arrived at quite properly in arm's length transactions and consistent with the correct application of planning policies and sound valuation principles".

99. In concluding his postscript, the judge invited RICS to reconsider its 2012 Guidance Note on viability, perhaps in conjunction with DHCLG and the RTPI, in order to address any misunderstandings about market valuation concepts and techniques, the "circularity" issue and any other problems encountered in practice over the last 6 years, so as to help avoid protracted disputes of the kind seen in that case.

Habitats/EIA

100. If one case from the past year could be singled out for causing widespread discomfort amongst planners (and ecologists), it would be the recent decision of the CJEU) in the matter of People Over Wind and Sweetman v Coillte Teoranta (C-323/17). It immediately altered the commonly understood basis upon which the need for appropriate assessments under the Habitats Directive had been considered in the UK.

101. Under Article 6 of the Habitats Directive 92/43/EEC (the Directive) any plan or project likely to have a significant effect on a Natura 2000, either individually or in combination with other plans or projects, must undergo an appropriate assessment to determine its implications for the site. The competent authorities can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned.

102. The case concerned a decision to allow cables to be laid across two European Special Areas of Conservation in the Republic of Ireland. The cables were intended to connect an off-shore wind farm to the electricity grid, but they pass through an area rich in freshwater pearl mussel. The planning permission for the windfarm include a condition requiring compliance with an approved Construction Management Plan which was to "provide details of intended construction practice for the development, including … (k) means to ensure that surface water run-off is controlled such that no silt or other pollutants enter watercourses". Under the relevant Irish legislation, a decision was made that the proposal did not require appropriate assessment for the purposes of the Habitats Directive. In reaching that conclusion, the relevant authority relied on the "protective measures that have been built into the works design of the project".

103. The question referred to the CJEU was: "whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?".

104. Before answering that question, the CJEU noted that the High Court had referred "mitigating measures", whereas the promoter of the scheme had described them as "protective measures". The Court rejected the distinction (at [25]-[26]): "Article 6 of the Habitats Directive divides measures into three categories, namely conservation measures, preventive measures and compensatory measures, provided for in Article 6(1), (2) and (4) respectively. It is clear from the wording of Article 6 of the Habitats Directive that that provision contains no reference to any concept of 'mitigating measure'...It follows that...the measures which the referring court describes as 'mitigating measures', and which Coillte refers to as 'protective measures', should be understood as denoting measures that are intended to avoid or reduce the harmful effects of the envisaged project on the site concerned" (presumably "preventive measures using the Court's terminology).

105. The CJEU's answer to the above question was that the Habitats Directive "must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not

appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site".

106. The basis for that finding was not that convincing. The Court found (at [35]-[37]) that "the fact that...measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out". 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 purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive".

107. The CJEU's judgment is inconsistent with what had been established practice in the UK, which had been based on case law such as R (Hart DC) v SSCLG [2008] 2 P. & C.R. 16. In that case, Sullivan J found that mitigation measures should be taken into account in screening proposals under the Habitats Regulations and Directive: "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. What would be the point, from the proponents' point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA, and incorporating those proposals into the project, if the competent authority was then required to ignore them when considering whether an appropriate assessment was necessary?".

108. It would have been, Sullivan J found, "ludicrous" to require the decision-maker to "disaggregate the different elements of the package and require an appropriate assessment... only... to have to reassemble the package when carrying out the appropriate assessment". This judgment (and with it the approving judgments of the Court of Appeal in No Adastral New Town Ltd v. Suffolk Coastal DC [2015] Env LR 28 at [72]-[74] and Smyth v. SSCLG [2015] PTSR 1417 at [68]-[75]) must now be treated as superceded. The reasoning of the Supreme Court in R (Champion) v North Norfolk DC [2015] 1 W.L.R. 3710 on the question of "screening" under the Habitats Directive (see e.g. Lord Carnwath JSC at [42]), is now also to be doubted.

109. People Over Wind has created problems for developers and competent authorities, particularly in areas where the need for appropriate assessment is regularly screened out on the basis of well-established mitigation measures. It may well be necessary to instead proceed to the appropriate assessment stage, and consider mitigation measures in that context. That is the prudent approach as matters stand. Indeed the judgment will have prompted the speedy translation of many screening exercises into appropriate assessments. But the judgment leaves important questions unanswered, including what the project under assessment is now supposed to be and where the boundary lies between the project and the measures which cannot be taken into account. It is unclear what can be taken into account at the screening stage and is not caught as avoidance or reduction measures.

110. The difficulties are illustrated by the case of Langton v. SSEFRA [2018] EWHC 2190 (Admin), which concerned judicial reviews to licences granted by Natural England for badger culling in areas which encompass, or are in the vicinity of, sites protected under the Habitats Directive.

111. The claimant argued that in granting licences in Special Protection Areas and Special Areas of Conservation, Natural England had not complied with Directive requirements. The judgment referred to the Natural England standard form assessments and recorded that "in each case the conclusion to these screening assessments was that the licensed culling of badgers was unlikely to have a significant effect on the qualifying features of the relevant site. In none of the areas was an in-combination assessment considered applicable" (at [79]). The assessments had identified the possible effects of badger culling to include "disturbance to the species (firearm report, lamping, vehicles, humans), physical damage to habitats/species (vehicles, trampling, digging-in of traps), physical damage to non-target species, and indirect damage to species from an increased abundance of other mammalian predators (in particular foxes) due to reduced badger population density" (see [81]). But they referred to "mitigation measures" which had been incorporated into the proposal and stated that complying "with the mitigation measures will ensure that there is no significant likely effect alone". The measures in question amounted to restrictions that would be included as conditions on licences, in particular limiting shooting activities to outside the bird breeding season; restricting vehicles to existing tracks; and restricting the location of traps and activities (see [83]).

112. The challenge relied, in part, on the contentions (1) that Natural England had failed to apply a precautionary approach (especially to the risks arising from a proliferation of foxes after culling); and (2) that the conditions which Natural England had attached to the cull licences fell within the People Over Wind ruling so should not have been taken into account at the "screening" stage.

113. Dealing with the first issue, it was held that "Natural England's failures, even if only to record that no consideration of the risk was necessary with these close-by sites to cull areas, was a breach of its duty under the Habitats Regulations" (at [133]), but on the evidence, the outcome would not have been substantially different if Natural England had considered fox predation risk arising from granting culling licences.

114. Turning to the issue of mitigation, the judgment refers (at [155]) to People Over Wind as involving measures "which seem to have involved reducing run-off" and which the CJEU thought "should be understood as denoting measures intended to avoid or reduce the harmful effects of the envisaged project on the site concerned". The claimant is then recorded as submitting (at [156]) that "the conditions which Natural England had attached to the cull licences...were that no culling activity would take place in certain locations (eg Severn Estuary SPA) or at certain times of the year (eg bird-breeding season with Dorset Heathlands SPA and Poole Harbour SPA)".

115. It was then held (at [157]) that: "In my view the licence conditions which Natural England attached to the licences in Areas 16 and 17 are not the mitigating or protective measures

which featured in the People Over Wind ruling. They are properly characterised as integral features of the project which Natural England needed to assess under the Habitats Regulations. I accept Natural England's submission that it would be contrary to common sense for Natural England to have to assume that culling was going to take place at times and places where the applicants did not propose to do so."

116. This suggests that "integral features of the project" can be taken into account; and although it may be possible to discern how features which essentially define the physical or temporal scope of a project fall into this approach, it is not clear where the line is to be drawn with other potential features of a scheme. Terms such as "embedded mitigation" which are often taken to include the application of standard construction methods to prevent contamination would appear to risk falling on the wrong side of the line.

117. Of perhaps as much importance as People over Wind is a further case concerning ecological protection in lreland, again brought by Mr Sweetman. ln Grace and Sweetman v An Bord Pleanala and ESB Wind Developments (C-164/17), the CJEU considered the concept of "compensation", as opposed to mitigation. The significance of the distinction is that compensation, properly understood, can only be taken into account under Article 6(4) of the Directive, as part of the stringent IROPI test, and not when conducting the prior appropriate assessment under Article 6(3).

118. The CJEU had already foreshadowed its treatment of this distinction in Orleans v. Vlaams Gewest (C-387/15) [2017] Env LR 12, where it had held (at [52]) that "as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future…". Further, (at [58]) "as the Court has already observed, the effectiveness of the protective measures provided for in art. of Directive 92/43 is intended to avoid a situation where competent national authorities allow so-called "mitigating" measures — which are in reality compensatory measures — in order to circumvent the specific procedures provided for in art.6(3) and authorise projects which adversely affect the integrity of the site concerned…".

119. In Grace and Sweetman, the challenge was to a decision to grant permission for a wind farm project on land designated as a Special Protection Area because it hosts the natural habitat of the hen harrier. The proposal would cause the permanent and temporary loss of habitat, through tree clearance of trees at each turbine location and indirectly due to disturbance to foraging hen harriers which would not come within 250m of a wind turbine. However the applicant proposed a species and habitat management plan, which provided for the restoration of various areas to blanket bog, suitable for hen harriers, as well as a phased "sensitive" management regime that would involve felling and replacing of a canopy forest to ensure that there would be perpetually open canopy forest as foraging habitat and an ecological corridor between two areas of open bog.

120. Thus although the wind farm would have an impact on fluctuating hen harrier habitat, the application proposed dynamic measures to deal with the fact that although habitat would be

lost it would be dealt with progressively - as it fluctuated the amount of habitat suitable for the species would not be reduced and might ultimately be enhanced.

121. The claimants argued that the management plan measures should be treated as compensatory measures which could not be taken into account at appropriate assessment stage. The Irish Supreme Court referred the issue to the CLEU.

122. It construed the referred question "as asking, in essence, whether Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which 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 that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and 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 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, or whether that fact falls to be considered, if need be, under Article 6(4) of the directive."

123. The CJEU explained that the "Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures' — which are in reality compensatory measures — in order to circumvent the specific procedures laid down in Article 6(3) of the directive and authorise projects which adversely affect the integrity of the site concerned". It noted that "there is a distinction to be drawn between protective measures forming part of a project and intended avoid or reduce any direct adverse effects that may be caused by the project in order to ensure that the project does not adversely affect the integrity of the area, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the project on a protected area and cannot be taken into account in the assessment of the implications of the project".

124. It was held (at [51]) 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 a measure may be taken into consideration when the appropriate assessment is carried out"..

125. It then found (at [52]) that "as a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future."

126. The Court found (at [57]) that "Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which 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 that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and 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, if need be, under Article 6(4)".

127. So quite apart from the implications of People over Wind, which will involve the need to consider whether "mitigation" measures are an integral feature of the project being assessed, Grace and Sweetman requires an answer to the question of whether those measures are effectively designed to compensate for a reduction in those parts of the site that provide a suitable habitat for the relevant species. If this is so, then the prospects of a positive appropriate assessment under Article 6(3) may well be diminished.

128. Whilst on one analysis this case could be seen as a straightforward application of a previously identified distinction between "mitigation" and "compensation", the judgment does risk introducing uncertainty given an earlier finding (at [52]-[53]): "As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future...In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development".

129. This may be taken to suggest that where the identification of "potential" impacts is uncertain, the adoption of only "potential" measures, which could not allow benefits to be assessed with the requisite certainty, thereby took them outside Article 6(3), notwithstanding any question of whether the measures were compensation as properly understood (future creation of new habitat as opposed to preventive measures to avoid or reduce effects). To the extent that this concern did influence the decision, this case suggests that adaptive mitigation could be more difficult to take into account under Article 6(3). The expected benefits of any mitigation measures will have to be certain at the time of the assessment.

130. Another CJEU judgment, which has not had the same high profile as People over Wind but is nonetheless instructive, came forward in the joined cases of Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu; and Stichting Werkgroep Behoud de Peel and College

van gedeputeerde staten van Noord-Brabant (C-293/17 and C-294/17). This case will be relevant for schemes relying on a higher-level appropriate assessment, such as one undertaken under a local plan, or where a single assessment is carried out to cover several projects.

131. Both cases concerned authorisation schemes for agricultural activities which cause nitrogen deposition in sites protected by the Habitats Directive, where critical deposition values for the habitat types designated have been substantially exceeded. These exceedances are taken to mean that the risk habitat being negatively affected by the acidifying and eutrophying effects of nitrogen deposition cannot be ruled out in advance. The aim of the scheme, known as the "programmatic approach to tackling nitrogen deposition" ("PAS") was to conserve and, where necessary, restore the identified sites to achieve a favourable conservation status at national level, whilst allowing the economic activities that are sources of nitrogen deposition in those areas.

132. The method underlying the PAS is based on ascertaining critical deposition values for each site, above which there is taken to be a risk of the quality of the habitat being significantly affected by nitrogen deposition. Each site is analysed as part of the appropriate assessment relating to the PAS, which is supported by a regulatory regime that is used to grant authorisations for activities which cause nitrogen deposition. The PAS also includes site-specific restoration measures, such as hydrological measures as well as source-directed measures, such as low-emission fertilisation, which allow for a reduction in nitrogen deposition compared with that already considered to be achievable by means of "autonomous" external measures adopted outside the PAS. The authorisation procedures draw a distinction between three categories of projects: no authorisation is required where a project causes nitrogen deposition below an identified level; those causing nitrogen deposition above that level but below another identified level are also permitted without prior authorisation, but they must be notified; and then those causing nitrogen deposition above that threshold are subject to the permit requirement. In the last instance, the assessing authority must examine whether the activity would cause an increase in nitrogen deposition, compared with either the situation before the issuing of a permit or the highest level of deposition actually caused in an identified past period. If on analysis there would be no increase, the authority may issue an authorisation by reference to the appropriate assessment on which the PAS is based. If there would be an increase, however, an authorisation may only be issued if room for development is available by reference to an assumed decrease by in deposition in future years relative to the no-PAS world.

133. Various questions were posed by the referring court about the operation of this regime, which were answered as follows.

134. The grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity the sites may be classified as a "project" within the meaning of Article 6(3) of the Habitats Directive, even if those activities, in so far as they are not a physical intervention in the natural surroundings, do not constitute a "project" within the meaning of Article 1(2)(a) of the EIA Directive.

135. Article 6(3) of the Habitats Directive does not preclude "national programmatic legislation which allows the competent authorities to authorise projects on the basis of an 'appropriate assessment' in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only if a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain" (at [104]).

136. The Court also observed (at [103]) that "where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited".

137. Similarly the Directive does not preclude the exemption from individual approval of certain projects which do not exceed a certain threshold or limit value in terms of nitrogen deposition; albeit that the national court must be satisfied that the appropriate assessment of the programme, carried out in advance, meets the relevant legal tests (see above).

138. But, the Court referred to how the appropriate assessment of the programme ruled out adverse effects from the expected extent of the agricultural activities on the basis that "on average, an increase in nitrogen deposition caused by those activities could be ruled out". An average value was not, however, capable in principle of ensuring that there are no significant effects on any single protected site. Therefore the Directive "must be interpreted as precluding national programmatic legislation...which allows a certain category of projects...to be implemented without being subject to...an individualised appropriate assessment.... unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites, which it is for the referring court to ascertain" (at [120]).

139. A further finding related to a question about how far measures adopted outside the project in question could be taken into account. The Court considered (at [123]) that "it would be contrary to the effectiveness of Article 6(1) and (2) of the Habitats Directive for the effects of necessary measures under those provisions to be invoked in order to grant, under paragraph 3 of that article, the authorisation of a plan or project which has implications for the site concerned before they are actually implemented"; and (at [124]) "nor can the positive effects of the necessary measures under paragraphs 1 and 2 of Article 6 of the Habitats Directive be invoked in order to grant, under paragraph 3 of that article, authorisation to projects which have an adverse effect on protected sites". It also noted that under the programme in question, some of the measures proposed "may be taken only in the future" and that others "still must be regularly renewed" (at [127]). Thus "for some of them, those measures have not yet been taken or have not yet yielded any results, so that their effects are still uncertain" (at [128]).

140. The Court found (at [130]) that "the appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty".

141. It is not entirely clear how the formal decision on this issue relates back to the preceding analysis, but it concludes as follows (at [132]): "Article 6(3) meant that an 'appropriate assessment' within the meaning of that provision may not take into account the existence of 'conservation measures' within the meaning of Article 6(1), 'preventive measures' within the meaning of Article 6(2), measures specifically adopted for a programme such as that at issue in the main proceedings, or 'autonomous' measures, in so far as those measures are not part of that programme, if the expected benefits of those measures are not certain at the time of that assessment".

142. This case related to agricultural practices, but the issue of nitrogen deposition is also relevant to the consideration of air quality issues, in particular those arising from the impact of traffic movements associated with new development. Judgments will be required on whether the future benefits of measures, both within and without the plan, are certain at the time of the assessment.

143. Concerns over air quality have also had a wider influence on the planning world, as explained further below.

144. The habitats cases kept on coming in the form of Holohan v. An Bord Pleanala (C-461/17), another request for a preliminary ruling, from the High Court in the Republic of Ireland. The case relates to the approval of a ring road around Kilkenny, proposed in 2008 and approved in 2014 (such that the recent amendments to the EIA Directive did not apply).

145. The reference raised both habitats and EIA issues, but is mainly of interest in habitats terms because the CJEU appears to have gone further than previous cases in setting out what is required of an appropriate assessment.

146. The High Court posed the following questions:

(1) whether the Habitats Directive has the effect that a Natura impact statement must identify the entire extent of the habitats and species for which the site is listed;
(2) whether the Habitats Directive has the effect that the potential impact on all species (as opposed to only protected species) which contribute to and are part of a protected habitat must be identified and discussed in a Natura impact statement;
(3) whether the Habitats Directive has the effect that a Natura impact statement must expressly address the impact of the proposed development on protected species and habitats both located on the SAC as well as species and habitats located outside its boundaries;

(4) whether the EIA Directive has the effect that an environmental impact statement must expressly address whether the proposed development will significantly impact on the species identified in the statement;

(5) whether an option that the developer considered and discussed in the environmental impact assessment, and/or that was argued for by some of the stakeholders, and/or that was considered by the competent authority, amounts to a 'main alternative' within the meaning of Article 5(3)(d) of the EIA Directive, even if it was rejected by the developer at an early stage;

(6) whether the EIA Directive has the effect that an environmental impact assessment should contain sufficient information as to the environmental impact of each alternative as to enable a comparison to be made between the environmental desirability of the different alternatives; and/or that it must be made explicit in the environmental impact statement as to how the environmental effects of the alternatives were taken into account;

(7) whether the requirement in Article 5(3)(d) of the EIA Directive that the reasons for the developer's choice must be made by 'taking into account the environmental effects', applies only to the chosen option or also to the main alternatives studied, so as to require the analysis of those options to address their environmental effects;

(8) whether it is compatible with the attainment of the objectives of the Habitats Directive that details of the construction phase (such as the compound location and haul routes) can be left to post-consent decision, and if so whether it is open to a competent authority to permit such matters to be determined by unilateral decision by the developer, within the context of any development consent granted, to be notified to the competent authority rather than approved by it;

(9) whether the Habitats Directive has the effect that a competent authority is obliged to record, with sufficient detail and clarity to dispel any doubt as to the meaning and effect of such opinion, the extent to which scientific opinion presented to it argues in favour of obtaining further information prior to the grant of development consent;

(10) whether the Habitats Directive has the effect that the competent authority is required to give reasons or detailed reasons for rejecting a conclusion by its inspector that further information or scientific study is required prior to the grant of development consent; and

(11) whether the Habitats Directive has the effect that a competent authority, when conducting an appropriate assessment, must provide detailed and express reasons for each element of its decision.

147. AG Kokott delivered an Opinion on 7 August 2018, which is as always worth reading to understand the wider context for the CJEU decision. The CJEU grouped some of these questions together and held as follows. Its findings will probably also require developers and decision-makers to review the content of appropriate assessments.

148. The Court considered that "By its first three questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 6(3) of the Habitats Directive

must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue all the habitat types and species for which a site is protected, and, on the other, identify and examine both the effects of the proposed project on the species present on the site, but for which that site has not been listed, and the effects on habitat types and species to be found outside the boundaries of that site" (at [32]).

149. It held (at [40]) that: "Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site" [emphasis added].

150. The emphasised part of this finding may go beyond what some appropriate assessments have included, although the qualification which follows should limit the extent to which this finding has any potential implications for findings which have already focussed on the conservation objectives of the European site in question.

151. The CJEU went on to deal with a practice which has been undertaken routinely in EIAs over the years, whereby some details of the construction phase are left for post-consent decision. The CJEU found that "By its eighth question.., the referring court seeks, in essence, to ascertain whether Article 6(3) of the Habitats Directive must be interpreted as meaning that it enables the competent authority to grant to a plan or project development consent which leaves for later decision the determination of certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, and, if so, whether those parameters may, at that later stage, be determined unilaterally by the developer and merely notified to that authority".

152. It held that this was lawful: "the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site" (at [47]).

153. Then, it explained that "by its 9th, 10th and 11th questions, which can be dealt with together, the referring court seeks, in essence, to ascertain whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of ensuring certainty that, notwithstanding such an opinion, there is no reasonable scientific doubt as to the environmental impact of the work envisaged on the site that is the subject of those findings".

154. It was held that "the competent authority should be in a position to state to the requisite legal standard the reasons why it was able, prior to the granting of development consent, to achieve certainty, notwithstanding the opinion of its inspector asking that it obtain additional information, that there is no reasonable scientific doubt with respect to the environmental impact of the work envisaged on the site concerned"; and "where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons, capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned" (at [51]-[52]).

155. The judgment also dealt with EIA-related issues. The CJEU explained first that "by its fourth question, the referring court seeks, in essence, to ascertain whether Article 5(1) and (3) of, and Annex IV to, the EIA Directive must be interpreted as meaning that they require the developer to supply information that expressly addresses the potentially significant impact on all the species identified in the statement that is supplied pursuant to those provisions".

156. It held that "as observed by the Advocate General in points 84 and 85 of her Opinion, it follows from those provisions that the obligation imposed does not extend to all effects on all species present, but is restricted to the significant effects, a concept to be interpreted in the light of Article 1(1) and Article 2(1) of the EIA Directive, according to which projects that are likely to have significant effects on the environment must be subject to an assessment of their effects" (at [58]). Thus "the answer to the fourth question is that Article 5(1) and (3) of, and Annex IV to, the EIA Directive must be interpreted as meaning that the developer is obliged to supply information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions" (at [59]).

157. Next "By its fifth, sixth and seventh questions, which can be examined together, the referring court seeks, in essence, to ascertain whether Article 5(3)(d) of the EIA Directive must be interpreted as meaning that the developer must supply information in relation to the environmental effects both of the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account their environmental effects, even if such an alternative was rejected at an early stage" (at [60])

158. It was held that "the EIA Directive must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage" (at [69]). The analysis which led to that conclusion included the following findings:

(1) the EIA Directive contains no definition of the concept of 'main alternatives', but the decisive factor, in order to identify those alternatives that should be regarded as 'main' alternatives, is whether or not those alternatives influence the environmental effects of the project. The time when an alternative is rejected by the developer is of no relevance (at [65]);

(2) since only an outline of those alternatives must be supplied, it is not necessary for the main alternatives studied to be subject to an impact assessment equivalent to that of the approved project (albeit that the developer must indicate the reasons for his choice, taking into account at least the environmental effects (at [66]);

(3) the outline referred to in that provision must be supplied with respect to all the main alternatives that were studied by the developer, whether those were initially envisaged by him or by the competent authority or whether they were recommended by some stakeholders (at [68]).

159. R (Crematoria Management Ltd) v. Welwyn Hatfield BC [2018] EWHC 382 (Admin) involved a challenge to a planning permission for a crematorium and the demolition of existing buildings on a 1.2ha site. The new buildings would be in an area of less than 1ha. There was no screening decision, but an officer of the Council produced a witness statement saying that he had considered whether the proposals amounted to EIA development and concluded that they did not. This was accepted by the Court, which went on to consider whether the development was an "urban development project" under Schedule 2 to the EIA Regulations.

160. Wyn Williams J relied upon the dictum of Buxton LJ in R (Goodman) v London Borough of Lewisham [2003] Env. L.R. 28 at [8] on the interpretation of the terms in Schedule 2: "If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions, the concept of reasonable judgment, as embodied in Wednesbury, simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions might be legitimately available".

161. He held (at [32]) that: "the phrase 'urban development project' cannot be given a precise meaning. I agree with the observations made by Buxton LJ at paragraph 13 of his judgment in Goodman.... However, it does seem to me that at its core the development must be urban in

character. The standard dictionary definition of the word "urban" is "in, relating to or characteristic of a town or city". I do not suggest that the phrase "urban development project" should be defined strictly by reference to this dictionary definition. It does, however, provide a useful starting point. Without doubt, however, a variety of factors will usually be relevant to an assessment of whether development is to be characterised as urban. It would be wrong to seek to lay down an exhaustive set of criteria by which to assess whether a project constitutes urban development. No doubt, such factors as its nature, size, location and the use to which it will be put are likely to be relevant in most cases. However, I cannot stress too much that this is not intended to be an exhaustive list of factors by which to make the relevant judgment. It is simply meant to be an acknowledgment or an indication that a variety of factors will usually need to be considered in any given case before a judgment is reached. It should not be forgotten, too, that it will sometimes be the case that factors under consideration will themselves be imprecise".

162. In the light of that analysis, it was concluded (at [33]) that the officer "did not act unlawfully when he determined that the development of the Site for which planning permission was sought did not constitute an 'urban development project'.... He was entitled to conclude and rely upon his assessment that the development was not in an urban area, that it was not of an urban nature when looked at as a whole and that it would not have a significantly urbanising effect on the local environment. In my judgment those factors properly led him to conclude the permission was not being sought for an urban development project".

Air Quality

163. The ClientEarth litigation relating to the Government's EU law duties to reduce nitrogen dioxide levels in the air has also influenced planning challenges. ClientEarth has successfully challenged on no less than three occasions the Government's Air Quality Plan (see the latest judgment at R (Client Earth) No. 3 v. SSEFRA [2018] EWHC 315 (Admin)). As this litigation has progressed, it has been relied on used by those concerned about proposed development in parts of the country which have identified Air Quality Management Areas and are struggling to meet the required limits.

164. In R (Shirley) v. Secretary of State for Communities and Local Government [2017] EWHC 2306 (Admin) the claimants challenged the refusal of the Secretary of State to call in an application where they were concerned that the Council had failed to deal properly with their arguments about the impact of a proposed urban extension of some 4000 dwellings on an Air Quality Management Area.

165. It is generally well-established that the Secretary of State has a broad discretion when deciding whether to call in an application, but the claimants contended that this was overridden by his obligations as a "competent authority" under the Air Quality Directive. It was argued that the Secretary of State was required to take all appropriate measures to ensure compliance, which included calling in the application in that case.

166. That argument was rejected by Dove J on the grounds that the Secretary of State's obligations under the Directive were clearly defined, and there was no justification for extending this to include wider responsibilities. The judgment examined the remedies under the Directive where a member state was in breach of its requirements regarding limit values, finding that the required response was the production of an air quality plan. There was "no freestanding responsibility to take any specific actions [such as calling in a planning application or refusing consent] as a consequence of the Air Quality Directive's requirements" (see [49]). The Directive could not, of itself, require the refusal of permission or even require call-in.

167. An appeal against this judgment was heard in September. On appeal it was argued that the Secretary of State is in a special position regarding issues with compliance with the Directive and that this required him to call in the proposals. It was also contended that he was required by the Directive to refuse permission or impose conditions that prevented adverse effects on air quality. Judgment is awaited. A challenge to the adoption of the Canterbury Local Plan (CO/3841/2017) was refused permission on grounds that reflected the judgment of Dove J. The renewed application for permission has been adjourned pending the decision of the Court of Appeal in Shirley.

168. Air quality issues can however be material considerations and as such justify the refusal of permission. In Gladman Developments Ltd v. Secretary of State for Communities and Local Government [2017] EWHC 2768 (Admin) the Court was asked to consider an appeal decision in which the Inspector had refused planning permission for 115 new homes in Swale, inter alia because of the impact on air quality. The locality of the proposed development was already in

breach of the Air Quality Directive 2008/50/EC by reason of excessive nitrogen dioxide levels and the local council had declared two Air Quality Management Areas accordingly. The developers accepted that their development would have a substantial or moderate impact on local monitoring sites via vehicle emissions; but contended that improvements in general emissions standards up to 2020 could be relied on to counteract this. The Inspector rejected this argument, and found that although the developers had offered c.£311,000 towards mitigation measures, such as more electric charging points, there was no evidence to show how effective they would be.

169. The claimants argued that the Inspector failed to apply the ratio of the second client Earth judgment, despite accurately summarising its effect that the Air Quality Plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020 as a target date. It was argued that the Inspector should have proceeded on the basis that the government would comply with the law, instead of assuming that the breaches would continue.

170. In upholding the decision, Supperstone J concluded (at [31]) that the Inspector had properly understood that the effect of the ClientEarth litigation was that the Government had to achieve compliance by the earliest possible date. The fact that there was a duty to produce and implement an air quality plan did not mean the inspector was required to presume that the UK would become compliant with the EU Directive in the near future. It was also held that this was not an area where there were any other regulatory controls which could be relied upon to address the air quality impacts of the claimant's development. The Inspector was not required to impose a Grampian condition preventing development until a scheme for mitigation had been devised, because this was never suggested to him and in the light of his decision on the effectiveness of the proposed mitigation, it was questionable whether such a condition would have been reasonable.

171. This case is also the subject of an appeal.

Environmental information

172. The litigation successes of ClientEarth have continued, most recently in connection with access to environmental information. In 2014 ClientEarth asked the European Commission to disclose: (1) an impact assessment report for a proposed binding instrument which sets a framework for inspection and surveillance in relation to EU environmental legislation, with an opinion of the Impact Assessment Board; and (2) a draft impact assessment report relating to access to justice in environmental matters at Member State level in the field of EU environmental policy, with an opinion of the Impact Assessment Board.

173. ClientEarth relied in particular on Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Article 1 of the Regulation states that: "the purpose of this Regulation is: "(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission... documents...in such a way as to ensure the widest possible access to documents...". Article 4 establishes 'Exceptions', with paragraph (3) providing that: "Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure".

174. The Commission refused to disclose the information, relying on Article 4(3), contending (inter alia) that the impact assessments were intended to help it in preparing its legislative proposals and that their contents were used to support the policy choices made in such proposals. Therefore, according to the Commission, the disclosure, at that stage, of the documents at issue would seriously undermine its ongoing decision-making processes.

175. The CJEU ultimately held that the Commission was not entitled to presume that, for as long as it had not made a decision regarding a potential proposal, disclosure of documents drawn up in the context of an impact assessment could seriously undermine its ongoing decision-making process, regardless of the nature of the proposal envisaged. It found that the Commission was wrong to have refused to disclose the documents without undertaking a specific assessment in relation to each document, and had otherwise failed to provide an adequate justification for non-disclosure.

Challenges to policy

176. It is convenient to group various categories of challenge under this heading, ranging from government policy to development plans and supplementary planning guidance.

Written ministerial statement

177. For a case which illustrates the avoidable difficulties which arise when government introduces new layers or glosses to existing policy, look no further than Richborough Estates Limited and others v SSCLG [2018] EWHC 33 (Admin).

178. This was a challenge by 25 landowners and housebuilders to the written ministerial statement ("WMS") made on 12 December 2016 by the then minister. It will be recalled that notwithstanding policy in NPPF1 [49] (that relevant policies for the supply of housing should not be considered up-to-date if the local planning authority could not demonstrate a five-year housing supply), the WMS advised that relevant policies for the supply of housing in a neighbourhood plan should not be deemed to be out-of-date where: the WMS was less than two years old or the neighbourhood plan had been part of the development plan for two years or less; the neighbourhood plan allocated sites for housing; and the local planning authority could demonstrate a three-year supply of deliverable housing sites. Essentially this reduced the five-year supply requirement to three years where an up to date neighbourhood plan allocating sites for housing was in place.

179. This statement has now been superceded by NPPF2 [14] and [216]; but the principles in the judgment remain relevant.

180. Apart from a skirmish on disclosure, which this paper does not consider, the claimants challenged the WMS on various grounds. They argued that: (1) it was inconsistent with NPPF1 [14] and [49] and, by amending [49] without expressly changing that policy, the minister took an unlawful approach; (2) the government had made factual errors in the research that was relied upon in formulating the policy; (3) the WMS was invalid due to uncertainty about how the three years' supply was to be calculated; (4) it was irrational given the intention of the NPPF to "boost significantly the supply of housing"; and (5) there had been a breach of a legitimate expectation that there would be public consultation before housing policy was changed by the WMS.

181. The challenge was rejected on all grounds. Dove J held that the government has a broad discretion in how it brings forward planning policy: "Provided…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 [sic] a matter entirely for the defendant".

182. The policy was "quite capable of being understood and applied in practice" ([45]). It was impossible to conclude that the decision to publish the WMS was irrational on the basis that either the evidence was not understood by the defendant, or alternatively the evidence was wholly inadequate to substantiate the issuing of the policy. The requirements of the policy were "clear and do not contradict, but augment, the requirements of national policy for those cases where the criteria of the WMS and NPPG are not satisfied" ([46]). And whilst the NPPF clearly promoted as a key priority a significant increase in the supply of homes, that was "not an objective which existed on its own and isolated from the other interests addressed by the [NPPF]" ([46]).

183. It was also held that the evidence did not establish any unequivocal assurance on the basis of practice that a WMS in relation to national planning policy for housing would not be issued without prior consultation. On at least two occasions the defendant had issued WMS without consultation affecting national planning policy for housing.

184. Holgate J has recently refused permission to challenge the WMS on energy policy of 17 May 2018, in an ex tempore judgment (CO/3256/2018). The claimant argued that the WMS required SEA, but it is understood the Court accepted the submissions of the Secretary of State that the WMS simply reiterated existing policy and did not require SEA.

Development plan challenges

185. Before the publication of NPPF2, when government had indicated that the standard methodology for assessing housing need would be used for plans submitted after 31 March 2018, some local authorities faced with a large prospective increase in their OAN figure hurried to submit their plans for examination. It appears that Epping Forest were one such authority. CK Properties v. Epping Forest District Council [2018] EWHC 1649 (Admin) involved a challenge to the decision in December 2017 to proceed with regulation 19 consultation of the submission version of the Council's emerging local plan, prior to its submission to the Secretary of State for examination.

186. CK Properties complained that the appendix to the site selection report which considered the sites considered for allocation was not available at the time the Council made its decision to consult, despite assurances in its statement of community involvement that such background documents would be made available. The Claimant obtained an order from the Planning Court on 20 March 2018 restraining the Council from submitting the plan for examination until the claim had been determined.

187. At the hearing of the substantive claim, the Council argued that the effect of section 113 of the Planning and Compulsory Purchase Act 2004 was that any challenge would have to wait until the plan had been adopted. This issue had been considered earlier by the High Court in Manydown Company Limited v Basingstoke and Deane Borough Council [2017] EWHC 977 (Admin), where the Court allowed the bringing of judicial review proceedings to challenge the approval for consultation of a pre-submission draft core strategy for consultation (essentially the regulation 18 stage under the Town and Country Planning (Local Planning) (England)

Regulations 2012). Lindblom J suggested that the position might be different in relation to the submission draft of a plan but considered that section 113 did not preclude challenges to pre-submission drafts.

188. Supperstone J held that the Council's decision to prepare for submission of the plan was not excluded by section 113. The preclusive provisions only related to an adopted plan. It is a development plan document that may only be questioned upon its adoption and within six weeks of that date ([51]). Further, the claimant was challenging the steps taken, or not taken, by way of preparation for submission of the local plan and that was not a challenge to the development plan document or local plan itself.

189. The judgment is notable otherwise for emphasising the scope for procedural errors to be addressed through the examination of the draft plan by the appointed Inspector. The Court rejected an allegation that when members of the Council decided to submit the draft plan for examination they had insufficient evidence before them to decide whether the plan was sound, but added ([73]) that "Whether or not it is reasonable for the Council to reach that conclusion, Parliament has decided is a matter for the Inspector to consider".

190. It was also accepted ([82]-[85]) that although a proposed submission document had not been made available during the six-week period stipulated by regulation 19, that regulation did not involve a consultation exercise but was instead the mechanism by which interested persons were provided with an opportunity to make representations on the draft plan under regulation 20, to enable them to participate in the process of independent examination. The claimant had made regulation 20 representations, challenging the soundness and legal compliance of the draft plan, that would be considered by the Inspector appointed to examine the local plan. Accordingly the unavailability of the document would not cause any prejudice, particularly as the Council had more recently published the finalised version of the relevant material and offered interested parties the opportunity to supplement their representations. The Inspector also had wide powers to remedy any procedural shortcomings or unfairness and there was no real likelihood of the Inspector refusing to take into account any such representations.

191. Challenges to neighbourhood plans have not enjoyed much success, as Kebbell Homes Ltd v Leeds City Council [2018] EWCA Civ 450 further illustrates. This case concerned a neighbourhood plan which in its draft form included a policy that returned a site, safeguarded to meet future development needs, to the Green Belt. The landowner objected on the grounds that the return of sites to the Green Belt was a strategic matter. The neighbourhood plan examiner agreed. His report concluded that the offending policy and all associated text should be deleted from the plan. The local community complained to Leeds City Council, the local planning authority, asking for the reinstatement of text setting out the reasons why the plan steering group had rejected possible sites for housing, including the one owned by the claimant. The Council obliged and whilst deleting the offending policy, re-inserted some of the text in the neighbourhood plan, giving reasons why the parish council did not think the site was suitable for housing development.

192. The ability of an local planning authority to modify a neighbourhood plan is prescribed by paragraph 12 of Schedule 4B to the Town and Country Planning Act 1990, with one of the options being to correct errors. The Council claimed that the decision to reinstate text was to correct an "error in cross-referencing".

193. A challenge to this decision was dismissed by Kerr J in the High Court and then by the Court of Appeal.

194. The Court of Appeal considered (at [36]-[40]) the Council's modification to be within the scope of what is allowed: "Taken as a whole, it was, I think, both a modification under paragraph 12(6)(a) , to secure compliance with the 'basic conditions' in paragraph 8(2) , in particular the 'general conformity' requirement in paragraph 8(2)(e), and a modification under paragraph 12(6)(e) , for the correction of an error that would otherwise have resulted from confining the modification to the strict terms of the examiner's recommendation. The modification was faithful to the examiner's recommendation to delete the offending policy and the text explaining and justifying it...". The change was consistent with the recommendation because the examiner had not concluded that the neighbourhood plan should avoid referring to the parish council's opinion on the development potential of the relevant sites. What was required was the deletion of the offending policy which was impermissibly strategic in its substance, along with the associated text to the extent that it explained and justified that policy. A reasons challenge was also rejected (at [44]).

195. It was also contended that the modification should be been consulted upon, under paragraph 13 of Schedule 4B. However it was held that whereas paragraph 13 limits necessary consultation to circumstances where the modification involves "new evidence or a new fact or a different view ... as to a particular fact", the modification made by the Council did not fall within these three criteria. In any event, the regulations concerning who should be consulted had not been enacted at the time the Council modified the plan (at [47]-[56]).

196. The case is also of interest due to the short additional judgment of Singh LJ (see [61]-[69]), which emphasised the distinction between (i) procedural fairness in the treatment of persons whose legally protected interests may be adversely affected and (ii) public participation in a public authority's decision-making process. He expressed the view that although the word "consultation" is often and understandably used in the former context, it would be preferable to reserve it for use in the latter context, to the extent that the word is said to have legal significance.

197. R (Legard) v. Royal Borough of Kensington & Chelsea [2018] EWHC 32 (Admin) concerned another challenge to a decision of a local planning authority to permit a neighbourhood plan to proceed to referendum. The plan had been promoted by the second interested party in the claim, the St Quintin & Woodlands Neighbourhood Forum. One of its most controversial proposals was the designation of a parcel of land as a "Local Green Space" ("LGS") pursuant to NPP1 [77] (now NPPF2 [100]). The claimant was the owner of the site and wanted to pursue the residential development of the site. The main ground of challenge was an allegation was of apparent bias by the Council towards the Forum, based on detailed evidence relating to

claims of persistent lobbying of members, alleged influence over the process of appointing an examiner, inappropriate access to and pressure on officers and members, and allowing the Forum access to the examiner's report and decision report of the Council prior to publication.

198. Dove J rejected these allegations on the facts, emphasising (at [140]-[144]) that it was necessary to have regard to the following principles: (1) the Council officers were public officials who had a responsibility to seek to take account of legitimately expressed interests raised with them by the members of the public who they are employed to serve; (2) councillors were politicians and policy makers; and as democratically elected representatives they are expected to receive and consider representations and lobbying from those interested in the issues they are determining; and (3) the narrative of events would be understood by the well informed and fair minded observer in the context of the requirement on the Council to provide advice and assistance to the Forum in order to facilitate the making of the plan.

199. In the circumstances, the Forum was were legitimately lobbying the Council and making the representations they wished to on the plan. The Council had changed the officer who would select the examiner to avoid the continuation of a strained relationship between the Council and the Forum, but the well informed, fair minded observer would detect any real possibility of bias in what occurred. It was necessary to bear in mind the role that the Forum would have in the process of selecting the examiner pursuant to paragraph 7(4) of Schedule 4B of the 1990 Act. Action by the Forum to establish the position of candidates in the local election in relation to the Neighbourhood Plan immediately prior to the poll (including making plain that a vote depended upon a member's attitude to particular issues about which they are being lobbied) was "simply part and parcel of the democratic process" [157]. As regards correspondence with the examiner "I have no doubt that the interests of transparency in the process would have been better served by all correspondence from all parties with the Examiner being open and available, for example, on a convenient associated website.". But this was more "related to good practice, rather than giving rise to any substantive concern about apparent bias" [179].

200. Another ground of challenge related to the interpretation of NPPF1 [77] (now NPPF2 [100] to the same effect). This stated that the LGS designation should only be used: "where the green space is in reasonably close proximity to the community it serves; where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and where the green area concerned is local in character and is not an extensive tract of land."

201. The claimant argued that the site did not at the time of the examination "serve" the local community in any way at all. They had no access to it and it had a very limited visual envelope; and this failure to meet the criteria had not been properly addressed by the examiner. The Court accepted submissions from the Council that there was no separate and distinct test proposed by the use of the word "serves" in the first bullet point of paragraph 77. The bullet points are intended to be read and applied together and there will necessarily be an element of overlap between each of the bullet points. What the word "serves" is cross-referring to is how the green space serves the community by being "demonstrably special" in one of the

ways illustrated in the non-exhaustive list of the second bullet point. The reasons provided by the examiner were perfectly adequate when this was understood.

202. R (on the application of Oyston Estates Limited) v. Fylde BC [2017] EWHC 3086 (Admin) serves as a reminder of time limits in neighbourhood plan challenges. Here the challenge was to the decision made by the local planning authority on 26 May 2017 to make the St-Annes-on-Sea neighbourhood plan. The authority argued that the challenge was out of time, despite being made on 5 July and within 6 weeks of the order for the plan.

203. Kerr J explained that under section 61E and Schedule 4B to the 1990 Act, the process for making a neighbourhood plan involves sequential procedural requirements, including the following relevant stages (at [34]-[43]:

(1) "The first is the examiner's report under Schedule 4B, paragraph 10. There is no right to challenge it as such. A judicial review challenge to an examiner's report brought under CPR Part 54 would inevitably be met with an argument that there is a suitable alternative remedy";

(2) "The second stage is consideration by the local planning authority of the examiner's report, and its decision what action to take. This arises from paragraph 12(2) of Schedule 4B to the 1990 Act. The decision must be published: see paragraph 12(11) . It can be challenged, but according to the negative formulation of the time bar, the challenge may not be entertained unless it is brought by judicial review, and is made within six weeks, starting with the day after the decision is published: see section 61N(2)...";

(3) "The third stage arises if the local planning authority has decided that a referendum must be held, or is directed by the Secretary of State to hold one. Section 61N(3) applies where a challenge is brought to question 'anything relating to a referendum under paragraph 14 or 15 of Schedule 4B'. The challenge can only be entertained if brought by judicial review within six weeks, beginning the day after the day the referendum result is declared. Paragraph 14 of Schedule 4B deals with arrangements for the referendum and who is entitled to vote. A challenge could be brought if, for example, persons entitled to vote were not able to do so, such that the referendum result was tainted by impropriety".

(4) "The fourth and final stage of the process is that once the referendum result is known, if more than half of those voting have voted in favour of making the order for the NDP, the local planning authority must make the order as soon as reasonably practicable after the referendum is held and in any event, by not later than any date prescribed: see section 61E(4). I interject that no date has been prescribed by regulations....The decision to act under section 61E(4) or, as the case may be, (8), must be published: see section 61E(11) . A challenge to a decision either to make the order or not to make it in reliance on the exception relating to EU obligations or human rights law can be brought, but once again cannot be brought unless the same two conditions are met: it must be brought by judicial review, and it must be brought before expiry of six weeks starting with the day after "the decision" is published: see section 61N(1)";

(5) "It is apparent, therefore, that the legislation dealing with the stages in the decision making process, the method of challenge and the timing of any challenge is

meticulous and precise. There is none of the vagueness that has given rise to the criticism of the timing of provisions in CPR Part 54".

204. Against this background, it was held (at [46]-[47]) that that a challenge to the making of an order following a referendum "should not be entertained if the ground of the challenge in truth attacks, say, the rationality of the authority's consideration of the examiner's report and the resulting decision to hold the referendum in the first place. Still less should such a challenge, after the referendum has been held, hark back to the content of the examiner's report, which in turn has informed the authority's decision on how to proceed on the basis of that report".

205. In that case, the six week period having already expired, the prohibition against entertaining the challenge had come into play and it could not be "outflanked by dressing up the challenge as one not to the authority's decision to hold a referendum, but to the subsequent decision to make an order on the strength of the referendum result" ([48]).

Mayoral SPG

206. The main driver of Mayoral SPG on Affordable Housing and Viability was the need to secure an increase in the number of affordable homes delivered through the planning system. To this end, the SPG was drafted to embed the requirement for affordable housing into land values used as part of viability appraisals, along with steps to make the process of assessing viability faster and more consistent, transparent and speedy.

207. One aspect of this was to introduce a "Fast Track Route" which removed the requirement to provide a viability statement for proposals that offer 35% affordable housing (with exceptions that are not relevant for present purposes). Otherwise a "Viability Tested Route" would have to be followed, requiring detailed viability evidence in a "standardised and accessible format", which will be "scrutinised" to ascertain "the maximum level of affordable housing". The SPG made provision for "Early" and "Late Stage" viability reviews, to ensure that changes in circumstances which might allow for additional levels of affordable housing provision after the grant of planning permission were picked up. An Early Stage review would be triggered if an agreed level of progress on implementation were not made within two years of the permission being granted or as agreed with the local planning authority. A Late Stage review would take place at the point at which 75 per cent of units were sold or let, resulting in a financial contribution for additional affordable housing provision in the event that viability had improved since the application stage.

208. The statutory context is that section 334(1) of the Greater London Authority Act 1999 requires the Mayor to produce a "spatial development strategy"; this is known as the London Plan. It must, by subsection (2), "include a statement formulating the Mayor's strategy for spatial development in greater London." By subsection (3), his strategy "includes his general policies in respect of development and use of land in Greater London." This is however limited by

subsection (5): the spatial development strategy "must deal only with matters which are of strategic importance to Greater London."

209. McCarthy and Stone Retirement Lifestyles Limited, Churchill Retirement Living Limited, Pegasus Life Limited, Renaissance Retirement Limited v. The Mayor of London [2018] EWHC 1202 (Admin) was a challenge to the SPG brought by specialist providers of retirement homes who were concerned in particular about the effect of the late stage review mechanism on their businesses. The claimants developed smaller sites "usually brownfield, higher build costs, significant communal facilities and spaces which were not for sale – making them costlier per square metre than most market housing, and particularly so in London. These schemes were constructed in a single phase, and could not meet affordable specialist housing accommodation requirements on-site, as had been accepted for years; they always provided viability appraisals to justify off-site contributions to affordable housing, and always had to be completed as a whole before any elderly occupiers moved in; they had a markedly slower selling rate. This made the Claimants less able to compete with general house builders in site acquisition."

210. They argued that "the acute pressures, on the viability of specialist housing schemes, made it essential that the risk of the development's returns falling significantly below expectations was reduced to a minimum. They relied on various forms of borrowing to fund site purchases. The standard but notional 20 percent development return used in such appraisals was the bare minimum "on the basis that the risk associated with the affordable housing cost is known…If there is a risk that [that] cost might rise significantly; the risk profile becomes unacceptable…." The uncertainty about the amount of money which might have to be paid over at the late stage review was claimed to affect the calculation of risk for borrowing, in such a way as to make the funding impossible.

211. The SPG was challenged on three grounds, including grounds relating to the public sector equality duty and strategic environmental assessment, but these were rejected for reasons that do not need to be addressed here. As for the remaining ground, it was contended (see [22]-[23]) that the SPG contained policies which could only be within the London Plan itself pursuant to section 334: "the 35 percent threshold, the fast-track, and the viability tested route, with three viability appraisals, (initial, early stage and late stage), the deliberately slow-track."

212. Before the hearing, all of these policies had been proposed as policy in the draft London Plan.

213. Ouseley J observed (at [31]) that "had the Mayor not later proclaimed the aspects complained of by Mr Warren to be policies, I would have held them to be SPG on the simple 'policy' or 'not policy' argument Mr Warren presented... They amount to detailed advice, not without expressions of Nelsonian expectations as to its observance, about how to conduct the negotiations for affordable housing contributions envisaged by policy 3.12 of the London Plan".

214. But he found (at [32]) that section 334 "does not draw a simple distinction between what is and what is not policy and I do not want this judgment to be misread as holding that the SPG, and at this level of detail, must as a matter of law be in the London Plan or alternatively that the SPG cannot lawfully be included in the Plan as policy". He did not therefore find that these matters could never be the subject of SPG. He also made it clear that his analysis of the SPG should not dictate the content of the draft London Plan, in advance of any Inspector's consideration of what "strategic" policies should be contained in the Plan.

215. But the judge did accept the argument that the SPG was unlawful because it was inconsistent with the adopted London Plan.

216. Inconsistency on its own would not lead to any SPG being unlawful (at [42]): "I am not prepared to hold that conflict with development plan policy of itself makes a non-statutory document unlawful. If it states that it is in conflict with the development plan because that plan is now out of date, for example because of changes in Government policy as might be found in the NPPF, or because the review of the Plan was delayed for proper reasons, I see no basis for it to be unlawful. The weight to be given to it is quite another in the light of s38(6), but the NPPF contains advice which conflicts with development plans up and down the country, and is not on that account unlawful. If an authority seeks to put forward some policy to cover the period when it is out of date, which could happen very quickly with new government policy, I see no reason to hold its actions unlawful. The plan-led system is supported by the proper application of s38(6), which can readily accommodate expressions of policy in conflict with the development plan. It does so often when a new draft plan is issued."

217. However "here the Mayor clearly did not intend to produce SPG in conflict with the London Plan, let alone to avoid the development plan process". The Executive Summary of the SPG at [4] stated that it is "guidance to ensure that existing policy is as effective as possible…it does not and cannot introduce new policy." The intention had therefore been to introduce SPG that was consistent with the London Plan (see [41]).

218. Two inconsistencies were alleged: "(1) the most important, is the introduction by the SPG of a late stage review to single phase sites where the London Plan only envisaged those for phased developments; (2) the adoption of a 35 per cent affordable housing on-site threshold at which no viability information was required, whereas the London Plan required each site to provide the maximum reasonable amount of affordable housing, which could be greater than 35 percent."

219. It was held (see [54]-[55]) that the 35% threshold was not inconsistent with the adopted Plan: "I think that policies 3.11 and 3.12, especially 3.12B permit him to take the view that an incentive to developers to make generally very much larger proportions of a site available for affordable housing is a proper use of the development control procedures to which SPG can be properly applied. After all it is no more than offering the opportunity to avoid a process, but not at the price of the fundamental aim. The need to encourage development, [3.12(c)], and to promote mixed and balanced communities, [3.12(d)], are relevant to that approach".

220. There was, however, inconsistency as regards the policy for a late stage review (see [51]-[52]): “This SPG is directed at [policy] 3.12B, and the factors which should be taken into account in negotiations, including (f) the specific circumstances of individual sites. One of those, drawn from the definition of "contingent obligations", will be the time a development is likely to take to build it out, phased or not. Provision can be made for an early stage review, lest substantial progress is delayed to the developer's advantage, for whatever reason. However, this SPG requires an early and a late stage review on every site yielding affordable housing below 35 percent on-site, in addition to the initial appraisal, regardless of the time development is anticipated to take or is in fact taking or has taken. This is contrary to the definition of "contingent obligation" which envisages re-appraisal only when related to the likely length of time a development may take, or against the risk of a delayed start...This is quite inconsistent with re-appraisals regardless of the actual or expected duration of implementation. It is also quite inconsistent with re-appraisal, let alone two regardless of time, on every site. ... It is not consistent with an obligation to consider "the specific circumstances of individual sites” (see too [55]).

221. Thus the result allowed both sides to present the judgment as some sort of victory. The Mayor welcomed the judgment that supported the threshold approach to affordable housing as not unlawful in principle. The claimants had however won on the main point that had concerned them. The order of Ouseley J later included a declaration confirming that the last sentence of paragraph 10 of the SPG was unlawful: "…early and late viability reviews will be applied to all schemes that do not meet the threshold in order to ensure that affordable housing contributions are increased if viability improves over time." The declaration is not exclusive to retirement homes, but any advantage to developers may be short-lived as the same policy is contained within the emerging London Plan that is currently under examination.

Conditions

222. It is well-established that a permission under section 73 of the 1990 Act to amend a condition on a planning permission results in a new, freestanding planning permission which stands alongside the original. When granting permission under s. 73, it is therefore certainly good practice, if not a legal requirement, for the new permission to bring forward all the conditions from the old permission which need to be carried over (although section 73(5) prohibits changes to conditions which extend the time for commencement of development or for the submission of an application for reserved matters approval).

223. Lambeth v. Secretary of State for Communities and Local Government [2018] EWCA Civ 844] shows the potential implications of not following this approach. The case concerned a planning permission granted in 2010 for a DIY store, subject to a condition restricting the range of goods which could be sold. In 2014, the owners applied to vary that condition to widen the range of permitted goods. They specifically proposed wording for a new condition, which although it was wider than the original, was also restrictive.

224. Lambeth granted permission, setting out in the description of the development the full text of the old and proposed new conditions. However, the proposed condition was not, in fact, repeated as a condition subject to which planning permission was granted. Instead, condition 1 simply stated that the development should be begun within 3 years of the date of the decision. The owners then applied for a lawful development certificate to confirm that the 2014 permission allowed the unrestricted retail sale of all retail goods. The application was refused by the Council but upheld on appeal by the Inspector, on the basis that the 2014 permission was a new permission, which had no condition restricting the nature of the retail use.

225. In the High Court, that decision was upheld by Lang J and then by the Court of Appeal. The Court recorded [pp.23-26] 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 [2015] UKSC 74. Lewison LJ cited the words of Lord Carnwath: "Any such document of course must be interpreted in its particular legal nd 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... lt 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 [7999] PLCR 72, 79). 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".

226. Lewison LJ emphasised that despite 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. It was 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. Such an interpretation could not be used to supply a whole clause which the parties had mistakenly forgotten to include. 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.

227. Lewison LJ accepted that it was possible to imply words into a public document such as a planning permission. But great restraint was required, given the possibility of criminal sanctions. What Lambeth were contending for in the instant case was a wholly new condition, which was an important difference from Trump, where the only point potentially at issue was whether on implication could be mode into on extant condition that was incomplete. The limited range of available extrinsic evidence was also critical. 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. 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.

228. In Finney v Welsh Ministers [2018] 3073 (Admin)), the High Court provided further guidance on the application of the Arrowcroft principle under which section 73 of the 1990 Act may be used to amend a planning permission, so long as the amendment does not amount to a fundamental alteration. It was held that this principle applies even where that amendment would go beyond the description of development (see [38]-[40]). A section 73 permission, changing a condition requiring adherence to plans showing wind turbines with tip heights of 100m, could lawfully be granted to allow an increase in height to 125m, even if the same tip height was included in the description of development.

229. Conditions were also central to a challenge to a Secretary of State appeal decision in Verdin v SSCLG and Cheshire West and Chester [2018] EWHC 2079 (Admin). In this case the Secretary of State decided not to take into account conditions which sought to ensure that a housing proposal on the edge of Winsford supported the local economy and local people.

230. The proposed conditions required 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, the Secretary of State rejected an Inspector's recommendation that permission should be granted. He found that the proposed conditions should be given no weight because the employment-related condition was insufficiently precise and would be difficult to enforce,

and the procurement-related condition was not strictly related to planning and would also be difficult to enforce because of the difficulty in detecting a breach. It was also concluded that the position in relation to the availability of businesses within the specified area to meet the criteria was unclear.

231. Robin Purchas QC, sitting as a High Court Judge, held there was no evidence as to any specific difficulty in enforcing the employment condition. The Secretary of State had not sufficiently explained why he had concluded that there was insufficient precision or difficulty in enforcing that condition. The inadequacy of the reasons had substantially prejudiced the claimant. Further, the procurement condition met the relevance test as it related to the local policies for the economic and other support of the local area. Insufficient reasons had been given as to why it would prove difficult to detect a breach of the condition, not least because arrangements could be put in place to ensure that the necessary information was regularly provided to the local authority, to demonstrate the performance of the condition. And there was no evidence to justify any conclusion that there were not enough businesses in the area to support the supply of materials and services to the required level. The decision was quashed accordingly.

Obligations

Materiality and CIL Regulations 2010 regulation 122

232. There have been a few more cases on obligations this year, following the review of legal principles relating to the validity and materiality of planning obligations by the Supreme Court decision in Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd [2017] UKSC 66.

233. In R (Wright) v. Forest of Dean District Council [2017] EWCA Civ 2102 Dove J had quashed a planning permission for a wind turbine in the Forest of Dean because the Council unlawfully took account of promised annual "community donations" from the operator of the turbine to the local community. The donations were promised to be between £500,000 and £1,100,000 and were to be administered through a Community Benefit Society formed under the Cooperative and Community Benefit Societies Act 2014. There was no dispute that the donations had been taken into account in granting the permission. The authority argued that although it was an "off-site" benefit, the contribution had a planning purpose and a real connection with the turbine. But there were no particular community benefits to which the donations had to be applied, and they could be used for anything, provided that it benefitted the local community in some way. This did not meet the test for materiality and were unlawful.

234. The Court of Appeal dismissed an appeal against this finding. It 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. Hickinbottom LJ held that donation did not meet these tests. The promised donation was clearly distinct from the other socio-economic benefits of the development. It did not have a planning purpose and did not relate to the use of the turbine. The money might be used to fund community causes that had no planning purpose or connection to the turbine. The donation was not a material consideration and the local authority had not been entitled to take into account.

235. The Supreme Court has granted permission to appeal.

236. A similar decision was reached in Good Energy Generation Limited v. SSCLG [2018] EWHC 1270 (Admin), which was heard after the Court of Appeal decision in the Forest of Dean case. The claimant originally argued that an Inspector and Secretary of State acted unlawfully in failing to have regard to particular benefits: (1) financial contributions to a community benefit fund; (2) a community investment scheme open to local residents; and (3) a reduced electricity tariff, open to local residents. Following judgment in Forest of Dean, the challenge in respect of the community benefit fund was abandoned.

237. The local tariff was a scheme whereby eligible persons would receive at least a 20% reduction in electricity bills. The tariff was to be funded by the community benefit fund. It was held that it was correct not to have taken this into account (see [80]-[82]): "it was difficult to make any meaningful distinction between the community benefit fund itself and the projects funded by the community benefit fund...It was clear upon consideration of the terms of the unilateral

undertaking that the local tariff was entirely discretionary – there was no firm commitment that it would be made available, and even if it was introduced, it could be withdrawn at any stage. Even the eligibility criteria were not specified - it was not clear whether, and to what extent, members of the local community would benefit...As Lord Collins said in Sainsbury's Supermarkets Ltd , 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".

238. As for the community investment scheme (see [88]-[90], none of the details of the scheme were disclosed. Instead, it was said that the community investment scheme, when eventually published by the developer, would set out details including "the type and terms of investment opportunity to be made available to local individual community or institutional investors"; and (ii) "the mechanism by which the scheme will be administered, including how and when it will be made available, including any preferential terms for investors within the locality". 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" (at [89]).

239. The relationship between the tests in regulation 122 of the CIL Regulations 2010 and those for the materiality of a planning obligation has continued to exercise the Courts in other ways. Regulation 122(2) provides that "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".

240. In Savage v Mansfield District Council [2015] EWCA Civ 4 the Court of Appeal had summarised the position as follows (at [68]): "regulation 122 will only be engaged if that particular planning obligation was a reason for granting planning permission. If proposed development is acceptable in planning terms the securing of additional benefits by means of a planning obligation is not unlawful: Derwent Holdings Ltd v Trafford BC [2011] EWCA Civ 832 at [15]". This finding therefore indicated that it was permissible to take into account a planning obligation which secured planning benefits even if it was not necessary, in circumstances where the proposal was otherwise acceptable.

241. In Wright, however, Hickinbottom LJ said (at [28(iii)]), albeit without reference to Derwent or Savage: "For a benefit to be material, it does not have to be necessary to make the development acceptable in planning terms; although, by section 106 of the Town and Country Planning Act 1990 and regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948), a planning obligation may only be taken into account in the determination of any planning application if it is so necessary".

242. There appears to be tension between these positions and the difficulty in the relationship was illustrated in Amstel Group Corporation v SSCLG and North Norfolk DC [2018] EWHC 633 (Admin). There a developer proposed a mixed use scheme including a new primary school. a

section 106 obligation included a commitment to providing land for the school and to pay a contribution to the Council for release to the relevant Diocese towards the cost of constructing the school; but if the school were not built within 3 years, the contribution would be used to increase the capacity of the local schools. The Inspector found that the new school would accommodate not just the children from the new development but also those currently attending the existing village primary school, which it would replace. But since the capacity of local schools could be increased through the contribution to accommodate the requirement for additional school places, the construction of the new school was not necessary to make the development acceptable in planning terms.

243. Lang J held that this was a matter for the planning judgment of the Inspector, such that he was prevented by regulation 122(2) of the CIL Regulations 2010 from treating it as "a reason for granting planning permission for the development" (see [64]). However it was common ground between the parties that the Inspector also had to give separate consideration to the benefits of the new school, as it was part of the proposed development, which he had failed to do and the decision was quashed on this basis. It is not entirely clear how the benefits of the proposed school, if it was part of the proposed development, fell for consideration, whereas an obligation to secure the delivery of the school, as part of the development, were not.

244. In H J Banks & Company v. SSHCLG and others [2018] EWHC 3141 (Admin) Ouseley J (at [60]) said this in respect of the relationship between regulation 122 and the concept of "materiality": "There is an obvious difficulty in drawing a distinction between what is material, and what, in any given decision, constitutes a reason for the grant of permission: does it mean that it could be taken into account in favour of the grant of permission just so long as it did not constitute of itself a reason for the grant of permission? My initial reaction was that the language of regulation 122 should be interpreted as if it forbad a non-compliant CIL from being a material consideration. But I now consider that cannot be right in the light of the very specific language and tests in regulation 122, and the different tests for materiality and the lawfulness of conditions. Problematic though it may be, drawing a distinction between 'reasons for the grant of permission' and 'a material consideration' would fit with the tests in the CIL Regulations being more stringent than those necessary for a lawful condition or a material consideration. It may not be easy to operate in practice, but then neither would the straight substitution of 'material consideration'". On the facts of that case, the differing treatments given in the decision to obligations which did not comply with regulation 122 did not show that an error of law had been made. It appears therefore that an obligation may not be necessary under the CIL Regulations, but the more fundamental question may be whether they are material considerations.

Modification, discharge and enforcement

245. It is also worth noting R (Mansfield DC) v. SSHCLG [2018] EWHC 1794 (Admin), which considered the correct approach to considering an application under Section 106A to modify or discharge a planning obligation. Section 106(6) provides that the appropriate authority

"may determine (a) that the planning obligation shall continue to have effect without modification; (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications".

246. It was held that the term "useful purpose" was not restricted to a useful planning purpose. Four considerations led to that view (at [37]-[38]): "First, the statute itself contains no qualification to the expression of "useful purpose". Second, the practitioner's text, the Planning Encyclopaedia, suggested no such qualification. Third, reading-in the word "planning" invites debate about what constitutes a planning consideration in this context, and therefore leads to uncertainty. Fourth, and perhaps most importantly, I see no reason why, as a matter of principle, the precise character of the useful purpose served by the obligation should determine whether or not the authority has the power to discharge it. The critical question is whether the objection serves some useful function, the absence of which makes the maintenance of the obligation pointless. It follows, in my judgment, that the question for the Inspector here was whether the obligation served any useful purpose, not any useful planning purpose".

247. The case of The Council of the City of York v. Trinity One (Leeds) Limited [2018] EWCA Civ 1883 is a useful example of what may happen when section 106 obligations are drafted without anticipating future changes in circumstances. The case involved a section 106 agreement that provided for a commuted sum to be paid towards affordable housing. The exact amount to be paid was to be calculated in accordance with a formula. When the agreement was executed in 2003 that formula would have generated a commuted sum of £500-700,000. But by the time that it was triggered, the basis for calculating the formula had been abolished, so there was no way of arriving at an appropriate figure. The local planning authority sought £533,058 plus interest. The developer refused and the dispute went to the Court of Appeal.

248. The relevant clause in the agreement provided that the commuted sum "shall be calculated on the amount of Social Housing Grant necessary to secure affordable rented homes of an equivalent type and size on another site [in a similar residential area in the City of York] which grant for the avoidance of doubt shall be calculated at normal grant levels from regional TCI tables provided on an annual basis by the Housing Corporation or such equivalent grant calculation current at the time and supported by the Housing Corporation". Social Housing Grant was defined as "the grant that may be provided in respect of affordable housing in the Council's administrative area in accordance with Government and Housing Corporation Guidance."

249. The TCI tables were the Total Cost Indicator tables that were previously used by the former Housing Corporation to calculate old Social Housing Grant. The agreement only went as far as providing that if TCI tables ceased to be published, the calculation was to be done on the basis of "such equivalent grant calculation current at the time and supported by the Housing Corporation". But there was nothing more to indicate the implications of social housing grant disappearing altogether.

250. The Court of Appeal summarised the issue as turning on "the balance between giving effect to the intention of the parties and the language of the contract". It held that the clause was not unenforceable due to uncertainty about how the sum should be calculated. The relevant legal principles had been set out by Lord Neuberger in Arnold v. Britton [2015] UKSC 36 (Supreme Court, 10 June 2015): "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

251. The Court of Appeal relied particularly on the first and sixth principles (see [32]): "First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.....Sixth in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention...".

252. It was then held that the parties had intended that a commuted sum was to be paid; and the uncertainty related not to the principle of payment but to its quantification. The purpose of the agreement would be defeated if the clause were unenforceable as Trinity One would receive the benefit of planning permission without providing affordable housing or a commuted sum: "In simple terms, that was not the bargain" ([35]). Quantification "should be that which is equivalent to the amount of money which would have been provided had the SHG remained in being"(at [38]). Although this departed from the literal words of the contract "this is the only sensible solution to the problem posed by the abolition of the SHG on which the clause is premised. The clause provides that the developer should pay enough money so that the Council can provide equivalent affordable housing: the best the court can do is work out a roughly equivalent figure for that sum" ([38]). The figure of £533,508 was a "reasonable attempt to reach a figure equivalent to the SHG which would have been payable before 2006" (at [39]).

CIL

253. The case of London Borough of Hillingdon v. SSHCLG [2018] EWHC 845 (Admin) is another cautionary tale about the need to check over statutory notices (see later), this time demand notices under the CIL regime. There the Council sought judicial review of a decision of PINS by which it accepted an appeal made under regulation 117 of the CIL Regulations 2010. The appeal arose out of a decision by the Council to impose surcharges and interest in respect of breaches by McCarthy & Stone of the Regulations involving failures to submit an assumption of liability notice and a commencement of development notice. When McCarthy & Stone realised that they had failed to submit the notices, they asked for a demand notice to be issued under regulation 69 so that notice of the liability could be removed from the register of local land charges. Two demand notices were served (albeit the Council only relied on the latter). In both cases, the demand notice gave no breakdown of how the surcharge element of the notice figure had been calculated, and no information concerning rights of appeal.

254. It was held that no compliant demand notice had been given, so time for submitting an appeal did not run from the date it was alleged to have been sent (see [51]): "Regulation 69(2)(a) requires that a demand notice must be issued in the form published by the Secretary of State, or in a form substantially to the same effect. Regulation 69(2)(e) requires that the demand notice state the amount payable (including any surcharges imposed or interest applied to the amount) and the day on which payment of the amount is due. The requirement to use a prescribed form might have been thought a sufficient indication on its own of the necessary contents of a demand notice, but reg.69(2)(g) requires additionally and separately that the demand notice must include the other information specified in the form... When one sees that the additional information includes the statement that 'You may appeal against this surcharge of the Planning Inspectorate within 28 days of the date of this notice' it can readily be understood why the inclusion of that information should have been thought important".

255. It was than concluded as follows (at [52]-[55]): "There is no doubt in this case that the information concerning rights of appeal was omitted from both notices. There is greater doubt about the adequacy of the statement of the amount payable (including surcharges and interest) and whether the second demand notice departed from the Secretary of State's form in that respect also. If the hard copy of the demand notice can be relied on as having been received by McCarthy & Stone, that uncertainty would be resolved in Hillingdon's favour. I would be prepared to accept, despite the limits of the evidence relied on, that it is more likely than not that the invoice was included with the text of the demand notice, so that reg.69(2)(e) would be satisfied if the hard copy was received... Nevertheless, Ms Kabir Sheikh's reliance on the hard copy of the notice depends on her being able to establish, on the evidence, that the hard copy of the notice was properly despatched. As I have already indicated, the evidence concerning Hillingdon's relevant procedures is rather weak...[and] does not, in my judgment, go far enough to satisfy me, on balance, that service may be deemed to have been effected in the ordinary course of post... It is therefore necessary for the claimant to rely on the email version of the notice which was received on 29th September. The email version makes no specific reference to the surcharges, and no reference to the right of appeal...".

256. No compliant demand notice had been given in this case. The Court however declined to quash the decison of the Inspectorate to accept the appeal. The parties could decide that the procedural defect in the demand notice should be acknowledged and waived by all parties on the understanding that PINS would then determine the appeal, they might think the better course would be for the Council to serve a compliant notice and for the whole process to begin again.

257. For an explanation of the relationship between CIL and the determination of planning applications, the decision of the Court of Appeal in Oates v Wealden District Council [2018] EWCA Civ 1304 is helpful. There a planning permission for housing development was alleged to be unlawful because it was made on a false understanding of the CIL Regulations 2010.

258. The officer report had considered the effect of traffic generated by the scheme, in particular on junctions where improvement works had been provided for in the Council's list of infrastructure to be funded by CIL, as set out in its CIL charging schedule. After referring to the inclusion of these works in that list, the report advised that "It is acknowledged that this does not necessarily ensure that the required junction improvements will be delivered within the timescale required before any development is occupied, which was a concern originally raised by ESCC Highways in their first consultation response when they objected to the application on this basis. The timing of the delivery of the improvements however is not within the developer's control. A requirement that the highway improvements are delivered prior to development is inconsistent with the highways improvements being on the CIL list. In paying the CIL contributions the developer is doing everything that can be asked of them in terms of mitigation for those items on the CIL list...".

259. The Court saw some force in the criticisms of the latter part of that advice (at [42]): "Regulations 122(2) and 123(2) prescribed circumstances in which planning obligations made under section 106 of the 1990 Act may or may not "constitute a reason for granting planning permission …". They do not however compel a local planning authority to grant planning permission for a proposed development if, for whatever reason, that development is unacceptable in planning terms, or if it cannot be made acceptable either by a planning obligation, or by the imposition of conditions. Similarly they do not preclude planning permission being refused if, for example, the local planning authority considered that the local road network would not be able to cope satisfactorily with the traffic generated by the proposed development. Nor do they preclude planning permission being granted subject to a lawful condition specifically preventing the occupation of the development until necessary infrastructure, such as the improvement of a particular road junction, has been provided..."

260. But when the report was read as a whole, it was clear that the officer did not regard the effects on the highway as unacceptable in any event, as a matter of planning judgment (see [47]): "The officer's approach, it seems to me, was pragmatic and realistic. Her starting point, the basic assumption in her assessment, was that developers could not be required to provide highway improvements that were going to be funded by CIL – however desirable that might

be. It was on this basis that she assessed the acceptability of the likely impact of traffic from this proposed development. She said nothing about the possibility of a lawful Grampian condition being imposed to ensure that the development would not be adding to the traffic on the local and wider road network until specified junction improvements had been undertaken – most obviously, perhaps, by specifically preventing the new dwellings from being occupied until those junction improvements were in place. Logically, however, no such advice was called for if... there was no need for such a condition to be imposed – because unacceptable effects on the highway were going to be avoided in any event. If, on the other hand, she had thought that the effects would be unacceptable, and that a lawful Grampian condition could not be imposed to avoid them, her advice would have been quite different".

Reasons

261. The jurisprudence on reasons continues to develop, with the Supreme Court considering the relevant legal principles in Dover District Council v Campaign for Rural England and China Gateway International [2017] UKSC 79.

262. The case concerned a proposal for major development in an AONB, which was approved by members, contrary to officer advice, without them giving any reasons for doing so. There is now no general requirement to give reasons for the grant of permission, save in cases involving EIA development; and this was involved EIA development. The Council accepted that it should have given reasons pursuant to the EIA Regulations, but it argued that the breach could be remedied by a declaration.

263. In his judgment, Lord Carnwath conducted a wide-ranging review of the authorities on the requirement or sufficiency of reasons when planning decisions are made. First of all, he noted 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. There was no corresponding requirement applying to decisions on written representations appeals, but referring to Martin v SSCLG [2015] 3435 (Admin) ([51]), "it is the practice for a fully reasoned decision to be given. It has been accepted (on 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..." ([26]).

264. Lord Carnwath also explained that whilst there was no duty to give reasons, local authority officers making any decision involving the grant of a permission or licence had been required since 2014 to produce a written record of the decision and reasons for it (see Article 7 of the Openness of Local Government Bodies Regulations 2004). And under Regulation 24(1)(c) of the 2011 EIA Regulations, 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 (see now regulation 30(1)(d)(ii) of the EIA Regulations 2017).

265. Given the existence of a specific duty under the EIA regulations in that case, it was strictly unnecessary to decide what common law duty there might be on a local planning authority to give reasons for grant of a planning permission. Lord Carnwath considered the authorities however and found ([51]) that "Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed". In the planning context, it was noted that the Court of Appeal had already held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (R v Aylesbury Vale District Council, Ex p Chaplin (1998) 76 P & CR 207, 211-212 per Pill LJ); and although this general principle had been reaffirmed recently in Oakley v South Cambridgeshire District Council [2017] 2 P & CR 4, the court there held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure

from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Lord Carnwath considered that Oakley had been rightly decided (see [57]).

266. He acknowledged that this endorsement of the Court of Appeal's approach might be open to the criticism that it left some uncertainty about what particular factors are sufficient to trigger the common law duty. However, "the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong" ([58]).

267. Further, "it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases" ([59]).

268. As for the standard of reasoning, it was confirmed that the formulation of Lord Brown (at [36]) in South Buckinghamshire DC v Porter [2004] UKHL 33 applied to decisions by local authorities as they did to decisions of the Secretary of State or inspectors on appeal. The reference in Regulation 24(1)(c) to the "main" reasons did not materially limit the ordinary duty in such cases. Lord Carnwath referred to R (on the application of Hawksworth Securities Plc) v Peterborough City Council [2016] EWHC 1870 (Admin), where it had been concluded that, in comparison with an inquiry, a local planning authority was not adjudicating upon a dispute was not therefore required to give reasons for rejecting objections. He thought that the difference between these processes was not significant; and where there was a legal requirement to give reasons, an adequate explanation was needed of the ultimate decision ([41]). In the case of local authority decisions, if the recommendation of officers is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However "the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for 'genuine doubt … as to what (it) has decided and why'" ([42]).

269. On the facts of that case, the members of the Council had provided no reasons why they were departing from officer advice on fundamental issues, including how landscaping measures could reduce or offset the harm to the AONB and the potential for granting permission without any legal mechanism to secure economic benefits as part of a "single comprehensive scheme."

270. In the Historic England case considered above, Dove J emphasised ([50]-[53]) that a planning committee reaches a collective decision undertaken by means of a resolution. Individual members may have their own particular reasons for choosing to vote for or against a resolution (which may or may not be articulated) but it is the terms of the resolution which they are voting on which comprises the collective decision and is therefore the focus of the court's enquiry. Further, little useful purpose would be served by a forensic enquiry into the particular reasons why individual members may have voted in a particular way. In that case the Court was satisfied that in respect of Regulation 24(1)(c)(ii) of the EIA Regulations, reasons for the decision, together with details of public participation in the decision-making process, were provided in the form of the officer's report supporting the recommendation that planning permission should be granted, as followed by members.

271. The issue of reasons arose in a different context in R (on the application of Save Britain's Heritage) v. Secretary of State for Communities and Local Government [2018] EWCA Civ 2137, which related to the decision of the Secretary of State's not to call in the application for the proposed Paddington Cube development. The issue was determined by reference to the doctrine of legitimate expectations. A discrete ground of appeal, that Lang J had wrongly failed to find that there was a general duty to give reasons, was rejected.

272. At first instance, Lang J had accepted that a legitimate expectation had developed as a result of ministerial statements in 2001 and 2010 which advised that the Secretary of State would give reasons when deciding not to exercise his power to call in planning decisions. She held, however, that "in 29 February 2014, in the course of preparation for the High Court case of Westminster City Council v Secretary of State for Communities and Local Government [2014] EWHC 708 (Admin), a departmental decision was made to cease the practice of giving reasons", so that the earlier statements and practice "could no longer found an expectation that reasons would be given. If any such expectation was held, it had ceased to be a legitimate one, because of the change in practice".

273. The Court of Appeal rejected this analysis, in terms that were highly critical of the government position: "...it is a recipe for administrative chaos if a legitimate expectation can be generated by an unequivocal ministerial promise, only for it then to be lost as a result of an unadvertised change of practice....It appears that, in the Westminster case, the Minister had given reasons for not calling in the decision which were plainly wrong on their face. As a result of this error, somebody (and it is quite unclear who) within the Department for Communities and Local Government decided that it would be more prudent for reasons not to be given under s.77. In consequence, changes were made to the template letter sent out (to the relevant LPAs, or to the objectors who had requested call in) when a decision was made not to call in an application under s.77. Mr Harwood QC was therefore right to say that this was not an open or transparent way to withdraw a public ministerial promise made in Parliament".

274. Coulson LJ continued: "From the SoS' point of view, therefore, so far, so bad: but it gets worse. Ms Lieven QC was counsel for the SoS in the Westminster case. When Lang J asked her how it was that the change in practice had occurred, it was apparent from her answers (given on instructions) that, at the time of the Westminster case in 2014, nobody in the Department

recalled or had in mind the unequivocal promise made in 2001 (and repeated in 2010). Thus, Mr Harwood QC was right to submit that the change in practice relied on by the SoS was brought about in ignorance of the 2001 policy promise. So, even on the SoS' case, the promise to give reasons was never consciously withdrawn, whether for good reason or not; it had instead been forgotten altogether. In consequence, neither of the typical answers to a legitimate expectation claim identified in paragraph 39 above (a conflict with other statutory duties or a reasonable decision not, after all, to honour the promise) can arise on the facts of this case. It is difficult to see how a person can be said to have changed a policy of which they were unaware at the relevant time."

275. It was held therefore that "the legitimate expectation rightly identified by Lang J did not come to an end as a result of the confusion and muddle generated by the Westminster case and/or the apparent decision to make, at best, minor changes to the template letter. An unequivocal promise was made, and that unequivocal promise should have been publicly withdrawn when (or if) a conscious decision was taken no longer to give reasons for not calling in applications under s.77. For these reasons, I consider that SAVE's legitimate expectation case has been made out".

276. The case of Newey considered below under the heading of "Reserved Matters" addressed reasons at the reserved matters stage.

Officer reports

277. The principles which apply to challenges based on the advice given in officers' reports are now well-established and were summarised in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314 (at [42]):

> "(i) The essential principles are as stated by the Court of Appeal in R. v Selby DC Ex p. Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge LJ, as he then was). They have since been confirmed several times by this court, notably by Sullivan LJ in R. (on the application of Siraj) v Kirklees MBC [2010] EWCA Civ 1286 at [19], and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J, as he then was, in R. (on the application of Zurich Assurance Ltd, t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at [15]).
>
> (ii) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R. (on the application of Morge) v Hampshire CC [2011] UKSC 2 at [36], and the judgment of Sullivan J, as he then was, in R. v Mendip DC Ex p. Fabre [2017] P.T.S.R. 1112; (2000) 80 P. & C.R. 500 at 509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison LJ in R. (on the application of Palmer) v Herefordshire Council [2016] EWCA Civ 1061 at [7]). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (iii) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother DC [2016] EWCA Civ 795; [2017] J.P.L. 25), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, R. (on the application of Watermead Parish Council) v Aylesbury Vale DC [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R. (on the application of Williams) v Powys CC [2017] EWCA Civ 427; [2017] JPL 1236). But unless

there is some distinct and material defect in the officer's advice, the court will not interfere."

278. The benevolence accorded to reports by the Courts means that challenges are often difficult to sustain, but for an example of a case where the Court considered in great detail the advice given on a sunlight and daylight report and compliance with BRE guidance on sunlight and daylight. Errors including a failure to accurately describe the findings of the report were enough to justify the quashing of the decision: R (Rainbird) v. Tower Hamlets LBC [2018] EWHC 657 (Admin).

279. And in R (Aldingbourne Parish Council) v. Arun District Council [2017] EWHC 3450 (Admin) permission was quashed where there had been no evidence to support the bald assertion in an officer's report that Grade 2 agricultural land had no reasonable prospect of being farmed in the future.

Consistency in decision-making

280. This issue has been gathering momentum in recent years and has been considered by the Court of Appeal in a trio of recent cases.

281. In DLA Delivery Ltd v Baroness Cumberlege of Newick and SSCLG [2018] EWCA Civ 1305, which considered a situation in which the Secretary of State came to opposite views about the same policy in the same district within a matter of weeks.

282. The Secretary of State allowed an appeal brought by DLA relating to 50 houses on the edge of Newick in Lewes district. He concluded that the settlement boundary policy CT1 for the village of Newick out-of-date because it had been drawn up at the time of the old Local Plan, which only covered development needs up to 2011. Nine weeks earlier, the Secretary of State had found the same policy up-to-date in respect of Ringmer village, again in Lewes district. The Ringmer appeal was not mentioned in the decision on the Newick appeal, even though both decision letters had been written by the same DCLG official. No-one involved in the later appeal brought the decision on the earlier appeal to the attention of the Secretary of State.

283. The Court quashed the grant of permission to DLA due to this inconsistency. Lindblom LJ reasoned as follows (at [34]):

> "I would accept three general propositions, which I think accord with the basic principles referred to by Mann L.J. in North Wiltshire District Council and applied since in several decisions of this court, and which align with the judge's conclusions in this case (in particular, in paragraphs 100 to 105 of his judgment). First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering. This may sometimes be so even though none of the parties has relied on the previous decision or brought it to the Secretary of State's attention (paragraph 100). And it may be necessary in those circumstances, in the interests of fairness, to give the parties an opportunity to make further representations in the light of the previous decision.
>
> Secondly, the court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. It may be material, for example, because it relates to the same site, or to the same or a similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases (see paragraph 92 of Holgate J.'s judgment in *St Albans City and District Council*).
>
> Thirdly, the circumstances in which it can be unreasonable for the Secretary of State to fail to take into account a previous appeal decision that has not been brought to his notice by one of the parties will vary. But in tackling this question, it will be necessary for the court to consider whether the Secretary of State was actually aware, or ought to have been aware, of the previous decision and its significance for the appeal now being determined (paragraphs 100, 101 and 105 of the judgment). As the judge said, "[before] the close of the "adversarial" part of the proceedings, the Secretary of State and his inspectors can normally

rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further enquiries about any matter, including about other … decisions that may be significant" (paragraph 101)".

284. He concluded (at [58]): "I therefore agree with the judge that the Secretary of State erred in the Newick appeal in failing to take into account and distinguish his own decision in the Ringmer appeal. As the judge said, aptly in my view, "[it] can only undermine public confidence in the operation of the development control system for there to be two decisions of the Secretary of State himself, issued from the same unit of his department … within 10 weeks of each other, reaching a different conclusion on whether or not a development plan policy is up-to-date without any reference to, or sufficient explanation in the later one[,] for the difference" (paragraph 122 of the judgment)". The decision was quashed.

285. In Hallam Land v. SSCLG [2018] EWCA Civ 1808, there was a reasons challenge based on a failure of the Secretary of State to explain his conclusions on five-year housing land supply, having regard to two previous Inspector decisions on the same issue, in what were called the Bubb Lane and Botley Road appeals.

286. Lindblom LJ held (at [63]-[64]): "It is not clear whether the Secretary of State confronted the conclusions of the inspectors in the Bubb Lane and Botley Road appeals, and in particular the latter. Had he done so, he would have appreciated that the conclusions they had reached on the scale of the shortfall in housing land supply could not reasonably be reconciled with his description of that shortfall, in paragraph 17 of his decision letter, as 'limited'. The language used by those two inspectors was distinctly different from that expression, and incompatible with it unless some cogent explanation were given. No such explanation was given. In both decision letters the shortfall was characterized as 'significant', which plainly it was....They are, on any view, quite different concepts. Quite apart from the language they used to describe it, the inspectors' findings and conclusions as to the extent of the shortfall – only 'something in the order of four year supply' in the Bubb Lane appeal and only '4.25 years' supply' in the Botley Road appeal – were also substantially different from the extent of the shortfall apparently accepted or assumed by the Secretary of State in his decision in this case, which was as high as 4.86 years' supply...".

287. Lindblom LJ concluded (at [65]) that "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 decision was quashed.

288. The Court noted however, in respect of unpublished Inspector's reports, that 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". This would be a "distortion" of the principle of consistency, as it would be consistency "between a decision and a non-decision" (at [75]).

289. In the Tate v Northumberland CC case mentioned above, the planning officer failed to address an earlier Inspector's report, which was material to the issue of whether a development proposal represented "limited infilling" within the context of Green Belt policy. The "need for reasons to be given to explain such inconsistency is not removed by the fact that the judgment is relatively straightforward" (at [44]).

Reserved matters

290. Outline planning permissions will frequently be granted requiring the later submission of applications for not only reserved matters approvals, but the approval of other schemes, such as those requiring noise mitigation. The case of R (Ornua Ingredients Ltd) v. Herefordshire Council [2018] EWHC 2239 (Admin) is a useful reminder of the need to address the potential relationship between the different applications which need to be made after the initial grant of permission.

291. In that case, the claimant challenged a decision of the Council to approve reserved matters including the layout of a housing development at Ledbury. Members had been informed in a report to committee that the layout had been referred to the environmental health officer, who had initially been concerned that it might not be possible to achieve acceptable noise mitigation, but advised that "the work that has been completed by [Wardell Armstrong, consultants to the Council] has demonstrated that there are measures that can be taken. The provisions of condition 21 remain in force and it is incumbent upon the developer to provide further information for the condition to be discharged, but officers are sufficiently content that noise from [the cheese factory and the road] can be mitigated on the basis of the layout shown above".

292. Prior to the decision being issued under delegated authority, the claimant sent an email enclosing acoustic report which cast doubt on a previous conclusion that it would be possible to produce a scheme for mitigation of noise emitted by the claimant's factory, such that it would be reduced to acceptable levels at houses built to the proposed layout. The approval of reserved matters was issued anyway.

293. The claimant argued that the council had failed to take into the report by acoustic engineers prior to the issue of the decision. it was contended (see [22]), first, that issues relating to noise were inevitably material considerations in addressing the reserved matters application because of the link between layout and perceived noise at the houses, notwithstanding the existence of the separate condition specifically requiring acceptable noise mitigation. The council was obliged to be satisfied at least that acceptable mitigation was possible in principle before approving a given layout, even if the detail was then left to a later application to discharge the condition. Alternatively, if the council was not obliged to take noise issues into account at that stage it was entitled to do so if it wished, and since the council had in this case plainly chosen to take noise into account at the reserved matters stage it had become a material consideration even if it need not have been treated as such.

294. The Council argued that there was no legal error because the outline permission was in any event subject to condition 21, that before any development the council must first have approved "a scheme of noise mitigation for outdoor living areas, bedrooms and living rooms" for the houses to be built which would "include details of proposed ameliorative measures to mitigate against noise from operations within the nearby industrial estate… including the [claimant's] cheese factory…". It was contended that the reserved matters decision did not amount to discharge of this condition, so that if it turned out in due course that acceptable

noise mitigation could not be achieved with the approved layout no development could in any event begin and the developer would have to produce a revised layout, for which acceptable noise levels could be achieved. The representations on noise issues were not, therefore, material considerations at the point of approving the layout and no error was committed by ignoring them.

295. Rejecting the submissions of the Council, the Court did not reach a final view on the first contention of the claimant (although saw force in it (at [25])). But the claimant succeeded on the second argument (see [27]-[28]) that: "The interaction of layout with satisfaction of the noise condition was in my view plainly such that the Council was entitled to have regard to it in considering the reserved matters application. It is evident from the consultation, the officers' report and the minutes of the meeting that it did so, and approached the matter on the basis it required to be satisfied that satisfaction of the noise condition would not be rendered impossible. The advice given to members was expressly on the basis that having regard to the measures the developer had proposed officers and the EHO were satisfied the condition was capable of discharge without changing the layout, and the delegated authority given to the officers was plainly premised on that advice.. In this context it is clear, it seems to me, that further information coming to light that cast significant doubt on the validity of that advice amounted to a material consideration. It would, adopting the test set out in Kides, have been bound to tip the balance of consideration to some extent".

296. In Pearl v. Maldon District Council [2018] EWHC 212 (Admin) a reserved matters approval was quashed because the Council failed to take into account representations made by an objector. The decision itself is straightforward in this respect but it also contains a useful review of the law relating to the definition and scope of reserved matters.

297. R (on the application of Newey) v. South Hams District Council [2018] EWHC 1872 (Admin) concerned a challenge to decisions first to approve a Construction Method Statement provided for by Condition 4 of a planning permission and secondly, to vary a condition of the same permission (Condition 3) such that the new condition would require a full structural engineering report for construction above slab level, rather than before commencement.

298. It was argued (1) that the Council had failed to give reasons for the decisions, which were taken under delegated powers, contrary to regulation 7 of the Openness of Local Government Bodies Regulations 2014 ("the 2014 Regulations").

299. It was also contended (2) that the Council had failed to have regard to the purpose for which Condition 4 was imposed, or to the harm that the proposed construction method would cause to residential amenities and to the alternative construction methods that would reduce or avoid such harm. The reason given for Condition 4 was "to ensure that the construction phase of the development does not result in harm to the living conditions of occupiers of adjoining premises".

300. Finally, it was argued (3) that in granting permission to vary Condition 3, the Council failed to have regard to the potential damage to the Claimant's property that could arise as a result of excavation and construction up to slab level.

301. In relation to the reasons challenge (1), regulation 7 of the 2014 Regulations creates a duty to produce a written record of any decision "would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either (a) under a specific express authorisation; or (b) under a general authorisation to officers to take such decisions and, the effect of the decision is to (i) grant a permission or licence; (ii) affect the rights of an individual...".

302. The Court accepted that "the enjoyment of the claimant's property would be profoundly affected by the conduct of the construction works". It was also "beyond argument, that the right to quiet enjoyment of one's own property is a right within the meaning of that expression in Regulation 7; the noise and dust from the conveyor belt moving materials and waste outside the first-floor window of Grants Cottage plainly affects the Claimant's quiet enjoyment of her property"[34]. Although it was not necessary to go further, "I would also hold that the works potentially affect the Claimant's rights under Article 1 of Protocol 1 of the European Convention on Human Rights ("ECHR"). It was not necessary to show that those rights would be breached to engage the statutory requirement. There had therefore been a breach of the 2014 Regulations.

303. However the Court found the discharge of a condition such as that imposed in this case was "not a species of planning permission" and "is simply a method of controlling how that permission is delivered". It did not have the effect of a grant of licence or permission ([42]).

304. The Court also rejected the proposition that there was a separate duty at common law to provide reasons: "This case does not fall into the sort of cases being described by Lord Carnwarth in R (CPRE Kent) v Dover District Council [2017] UKSC 79. Lord Carnwarth described a case in which a Statement of Reasons was required where statute did not require them as one where: 'permission has been granted in face of substantial public opposition and against advice of officers, a project which involved major departures from the development plan or from other policies of recognised importance…such decision call for public information not just because of their immediate impact but also because…they are likely to have lasting relevance for the application of policies in future cases'. None of those considerations apply here" [44].

305. Ground of challenge (2) was also rejected: "The context here is a condition designed to make manageable and tolerable the construction phase of the development. In my judgment, a sensible reading of this condition demands a qualifying word to be read in ahead of the word "harm". As must have been obvious to all, building works of this type cannot conceivably be carried out without causing some harm to the occupiers of neighbouring premises. I can see no basis on which it can be said that the officer taking this decision failed to give the consideration to all the available documents. Having done so he is bound to have appreciated

that some harm was inevitable from these building works. It was then a matter for him to determine the appropriate construction methods to achieve the objective set out in the permission" [50]-[51].

306. Ground (3) succeeded however. The Court observed that a retaining wall between the claimant's cottage and the development site had previously collapsed without warning; and that the officer's report for the relevant decision made no mention of paragraph 121 of NPPF1 which requires that planning policies and decisions should also ensure that the site is suitable for its new use taking account of ground conditions and land instability. Given the sudden collapse of the wall, prior to the decision it was incumbent upon the officer to draw the Committee's attention to this fact and to paragraph 121 and the failure to do so undermined the decision ([58]). The Court directed re-determination of the approvals.

Permitted development

307. In R (on the application of Marshall) v East Dorset District Council & Anor [2018] EWHC 226 (Admin) the Court addressed the meaning and procedural application of the permitted development rights available for the construction of new agricultural buildings under Part 6 Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO").

308. The case concerned an agricultural building proposed pursuant to Class A which permits, subject to prior approval, the carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area, works including the erection of a building "which are reasonably necessary for the purposes of agriculture within that unit".

309. The application form had stated that "the building is to be used (a) to winter house 45 ewes and their lambs through the winter period..". The application stated elsewhere that the proposed agricultural building was not to be used to house livestock, but also that the building was reasonably necessary for the purposes of agriculture because it would be used to house the ewes and their lambs.

310. The particulars of the application were significant because the proposed building was within 400 metres of several dwellings (which fell within the definition of "protected buildings" under Class A); and paragraph A.1(i) excluded from the definition of permitted development works within that distance of protected buildings, if such agricultural building is to "be used for the accommodation of livestock". Further, paragraph A.2(1)(a) imposed conditions on the exercise of permitted development rights, in that "where development is carried out within 400 metres of the curtilage of a protected building, any building... or works resulting from the development are not used for the accommodation of livestock except in the circumstances described in paragraph D.1(3)".

311. The Council had failed to respond to the prior approval application within the prescribed 28 day period. It issued a decision stating that "prior approval is not required" and "The development, therefore, constitutes permitted development in accordance with the provisions of Part 6 of the [GPDO] and is subject to the standard conditions." The notice added as follows "The applicant is advised that as the building would be siting within 400m of a number of protected buildings its use for the keeping of livestock, other than in accordance with Schedule 2, Part 6, Class A (A.1(i) of the [GPDO] as amended and planning consent would be required".

312. On a challenge to this decision, the claimant argued that because the application was for the "accommodation of livestock", within the meaning of paragraph A.1(i) of Part 6 it was one of the types of "Development not permitted" under Class A. The use described in the application would also be in breach of the condition in paragraph A.2(1)(a), as it fell outside the terms of the exception in paragraph D.1(3).

313. The Council argued that the only determination it made was that prior approval could not be required for any development falling within Class A of Part 6 because the 28 day statutory time limit for determining the application had expired. It did not make any other decision. It did not have power to make a determination on whether the proposed development fell within the scope of Class A of Part 6; its powers were limited to the issue of prior approval of site, design, and external appearance.

314. Lang J held that in issuing its decision, the Council had decided unlawfully that the proposals amounted to permitted development. Further, it was necessary to follow the judgment of the Court of Appeal in Keenan v Woking Borough Council & Anor [2017] EWCA Civ 438, and in particular the finding of Lindblom LJ that, in order to be lawful, the development proposed had to fall within the description of "permitted development" in the relevant Class. The GPDO did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. Its purpose was to enable the authority to determine whether its own "prior approval" would be required for those specified details of that "permitted development". If it decided that prior approval was not required the developer could proceed with the "permitted development," but not with any development that was not "permitted development". If the authority failed to make a determination within the 28-day period, the developer could proceed with the "permitted development", but not with any development that was not "permitted development". The developer would not at any stage have planning permission for development that was not "permitted development".

315. Lang J therefore held (at [45]) that the Council had exceeded its powers and quashed the decision but refused to make any declaration as to the lawfulness of the development within the meaning of Part 6 Class A.

Procedural issues

Failure to comply with notice requirements

316. The legal implications of a failure to comply with a statutory notice requirement were addressed in Maximus Networks Ltd v SSCLG [2018] EWHC 1933. The claimant was an electronic communications code system operator and sought to expand coverage of its services by making applications for the installation of infrastructure in the form of telephone kiosks pursuant to Part 16 Class A of Schedule 2 of the GPDO. On receipt of a series of applications, Hammersmith and Fulham LBC noted that there had been a failure to comply with condition A.3(1) and A.3(4)(c) of Class A because the applications were not accompanied by evidence that the developer had given notice of the proposed development to any person who was an owner of the land to which the development related before the application was submitted. The failure to validate was contentious, as the claimant contended that because the land covered by the application was in the ownership of the highway authority who were also the local planning authority, there was no need to comply with this condition. PINS took the view that the failure to comply with the procedural requirements meant that it had no jurisdiction to entertain any appeals. On a challenge to that decision, Maximus argued that although it is unlawful for a local planning authority to accept an application which does not meet the statutory validation requirements (section 327A of the TCPA 1990) the position is different on appeal, where under section 79 the Secretary of State had a discretion to waive any procedural irregularity.

317. Dove J accepted that PINs did have a discretion to treat the appeals as valid: "section 79 of the 1990 Act provides the defendant with a discretion to exercise as to whether or not to accept an appeal even if it is found to be wanting in relation to any procedural aspect. This discretion arises both under section 79(1) which contains a wide discretion for the Secretary of State to allow or dismiss an appeal, reverse or vary the local planning authority's decision or any part of it, and deal with the application as if made to the defendant in the first instance. A discretion also arises under section 79(6) which provides that the defendant has a discretion to decline to determine an appeal or proceed with its determination if it emerges during the course of the appeal's determination that the local planning authority could not have granted planning permission…".

318. However, he considered that PINS had in fact exercised its discretion rather than assuming that they had no power to entertain the appeals: "I am unable to accept that what follows in terms of PINS' decision involves a complete negation of the exercise of discretion under section 79. The decision goes on to note the view that had been formed that there had been a failure to comply with the formal requirements in relation to notice under part 16 of schedule 2 of the GPDO and in my judgment that is not evidence of PINS assuming that they only have power to conclude that there was no jurisdiction to entertain appeals, but rather explaining their justification for concluding in applying section 79 of the 1990 Act that the applications have not been valid and therefore the appeals should not be entertained. In my judgment a fair reading of the decision leads to the conclusion that it is a concise analysis of the basis upon which PINS were declining to accept jurisdiction in respect of the appeals,

rather than an assertion that PINS had no power at all to do anything other than refuse to accept the appeals" ([35]).

319. He held that PINS had exercised its discretion rationally in finding that a local planning authority could be prejudiced where it was not served with notice of the making of an application in its capacity as landowning highways authority: "A local authority as a land owner may have very different interests and concerns to take account of in exercising its powers to own and control land. It cannot be assumed that when an application of this kind is made to a local planning authority that the element of the local authority exercising its planning functions will automatically or of necessity consult that part of the council concerned with protecting its interests as a land owner or automatically be aware of all matters which the department responsible for safeguarding the council's interests as land owner would wish to draw to their attention". Furthermore it was simply not possible to conclude that there had been no prejudice by the failure to adhere to the procedural formalities in circumstances where they had not been complied with ([39]).

320. So PINS was entitled to refuse to determine the appeals. But it was not all bad news for the developer, as it was held that the application fees were refundable in the result: "In my view where, as here, the defendant concludes that an appeal is to be rejected on the basis that the application is invalid (and he declines to exercise his discretion under section 79 to nonetheless continue to consider the appeal) then that is in effect a conclusion that the application was and should have been rejected as invalid and therefore falls within the scope of regulation 14(3) of the 2012 Regulations". It followed that the claimant was entitled to have its fees refunded".

Fees

321. In Provectus Remediation Ltd v Derbyshire County Council [2018] EWHC 1412 (Admin) the Court considered when the right arises to be refunded a planning application fee following non-determination by the local planning authority in accordance with Regulation 9A of the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits)(England) Regulations 2012.

322. Regulation 9A(1) provides that "Subject to paragraph (2), any fee paid by an applicant in respect of an application for planning permission, or permission in principle or for the approval of reserved matters shall be refunded to the applicant in the event that the local planning authority fail ... to determine the application within 26 weeks of the date when a valid application was received by the local authority" By regulation 9A(2) "Paragraph 1 does not apply where: (a) the applicant and the local planning authority ... have agreed in writing that the application is to be determined within an extended period; (b) the Secretary of State gives a direction under section 77 of the 1990 Act in relation to the application before the period mentioned in paragraph (1) has expired; (c) the applicant has appealed to the Secretary of State under section 78(2) of the 1990 Act before the period mentioned in paragraph (1) has expired; or (d) any person who is aggrieved by any decision of the local planning authority or

the Secretary of State in relation to the application has made an application to the High Court before the period mentioned in paragraph (1) has expired".

323. The developer submitted a planning application to develop an area of land for coal mining which was validated on 25 January 2016. The application fee was £44,752.00 (which was originally paid on an earlier withdrawn application). On 28 April 2016, the council sought further information from the developer by 28 June 2016. Following requests from the developer's agent, the response date was extended to 29 July 2016, when the required information was provided. On 3 August 2016, the Council sought an extension of time for determining the application. The developer agreed and the period was extended to 7th November 2016. On 28 December 2016, following further correspondence and dispute over requested information from the council, the developer appealed against the failure to determine the application within the agreed extended period and sought a refund of the application fee.

324. It was held that the wording of Regulation 9A is clear in that any agreed extension beyond the 26 week period disapplies the right to a refund of the application fee.

325. In particular, the judge held: "it is of some note that the 26 week period mentioned in reg. 9A(1) is not the statutory period within which planning applications must be determined in accordance with the statutory provisions governing the time limits for making decisions upon applications. Depending upon the nature of the development in question the statutory time limit for determining a planning application can be 8 weeks, 13 weeks or 16 weeks. It follows that the period of 26 weeks specified in reg.9A(1) is a period chosen specifically by Parliament and which relates to a point in time after which a fee refund may be due. In my judgment, however, in specifying that period (which is significantly longer than any period allowed for determining a planning application) Parliament has quite deliberately chosen to limit the circumstances in which a fee is to be refunded to those mentioned expressly in the 2012 Regulations. That is not surprising. The fees payable upon the submission of a planning application go some way, at the very least, to fund the administration of the whole system of planning regulation".

Declining to determine

326. In Chesterton v Wokingham BC [2018] EWHC 1795 (Admin) considered whether a local planning authority had lawfully exercised its discretion to decline to determine a planning application under section 70C of the TCPA 1990. Section 70C allows an authority to decline to determine where this would involve granting permission for the whole or any part of the matters specified in a pre-existing enforcement notice as a breach of planning control.

327. The facts were that an enforcement notice had been issued against a building comprising a boathouse and a garage, which were linked by a "store room". On appeal, the Inspector varied the notice to require only the removal of the "store room". The claimant later applied for

permission to build a "balcony", to link the boathouse and the garage instead of the "store room". The authority declined to determine this application, relying on section 70C.

328. It was held that the provision was not concerned with the existence of differences between two developments, but with the existence of similarities. Thus, the discretion is available where any part of an enforced against matter was involved, regardless of whether the application would also involve granting permission for matters which were not specified in the enforcement notice, or whether the application would involve consideration of different planning merits. Building the "balcony" would involve retaining some parts of the "store room", so granting permission for the "balcony" would involve granting permission for part of the matters specified in the enforcement notice and therefore the local authority had acted lawfully.

Statements of Community Involvement

329. In R(Matthews) v. York City Council [2018] EWHC 2102 (Admin), the claimant challenged a grant of planning permission based on alleged failures to comply with the Council's Statement of Community Involvement ("SCI"). The SCI stated that "if you have commented on an application the Council will advise you about the time and place of the meeting"; and that "the Council will consult all respondents again…if amendments [to a planning application] are significant or would directly affect a neighbour".

330. The complaints were that the Council had failed to notify the claimant of committee meeting and to consult on amendments to the application (involving the provision of dropped kerbs and tactile paving opposite the claimant's living room window).

331. In relation to first complaint, it was common ground that the claimant had a legitimate expectation of being notified about date of committee meeting. The dispute was whether he was "advised" about it. The Council produced screenshot from its computer system showing emails sent to objectors, including the claimant, which were stated to be notification of the committee meeting. Copies of such emails were routinely not kept due to the potential impact on data storage capacity. The claimant argued that he did not receive an email; and that the screenshot was insufficient evidence to show the email to him had actually been sent.

332. It was held that the email had been sent. There was evidence that the emails to others had been sent and received; and the claimant had received all the other emails relevant to the application which had been sent by the Council (at [14]). Further, in the absence of any challenge to the use of email for notification, the obligation on the Council under the SCI was discharged by the sending of the email, even if it was not received (at [18]). There had been no prejudice to the claimant anyway, because he had made written representations to a committee meeting which determined a resubmitted (and amended) planning application which encompassed points he would have made on the earlier application; and those representations made no difference to the Council's decision.

333. In relation to the second issue of the amendments, the claimant argued that the decision not to re-consult should have been reported to committee and was irrational. It was held, however, that the decision on whether an amendment fell within the scope of the SCI was a matter of planning judgment for the officer considering whether any amendments were significant or would directly affect a neighbour (at [59]).

Amendments

334. For a while now, where an applicant for planning permission wants to amend its scheme, the scope to do so has been judged by decision-makers against the "Wheatcroft" test, drawn from the well-known case of Bernard Wheatcroft Limited v Secretary of State for the Environment (1982) 43 P. & C.R. 233: "The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals. There may, of course, be, in addition, purely planning reasons for concluding that a change makes a substantial difference."

335. This test was scrutinised in a judgment of John Howell QC sitting as a Deputy High Court Judge in Holborn Studios and Brenner v. the London Borough of Hackney [2017] EWHC 2823 (Admin). The case involved a judicial review of the grant of planning permission for the redevelopment of Eagle Wharf, on the south side of the Regents Canal in Hackney. After the submission of a planning application, the applicant suggested amendments which were accepted by the Council, but the permission was subsequently challenged, on grounds including failures to consult upon the proposed amendments.

336. The Deputy Judge conducted an instructive review of the Wheatcroft test and found that it conflated substantive and procedural tests which should be separately applied to the issue of whether an amendment can lawfully be made. As regards substantive changes, the Court looked at the different routes by which changes could be made and identified the various formulations of the relevant test, including whether the change produced a development which is "substantially or significantly different" to what was applied for; whether it would involve a "fundamental alteration"; or whether the amendment would create a scheme that "in substance not that which was applied for" (see [67] and [66]-[69] generally).

337. As for the procedural test, it was held (at [79]-[80]) that "in considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any

representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended. I do not accept that the test for whether re-consultation is required if an amendment is proposed to an application for planning permission is whether it involves a "fundamental change" and involves a "substantial difference" to the application or whether it results in a development that is in substance different from that applied for. These are three potentially different tests that have been suggested as stating the substantial constraint on what changes are impermissible. Depending on how each is interpreted, it is possible that the test would indicate re-consultation was not required when fairness would require it. As I have explained, even if the proposed amendment was not of any these types, a person may still have representations that he or she may want to make about the changes, given their nature and extent, if given the opportunity. In my judgment it is preferable to ask what fairness requires in the circumstances". It was held that in the circumstances the claimants had been deprived a fair opportunity to comment on the proposed changes; and it was not possible to say that the opportunity to comment would have had no effect on the decision anyway (at [122]).

338. In Sykes v. Cheshire West and Cheshire BC [2018] EWHC 3655 (Admin) it was held that the Council had acted in a procedurally unfair manner by not consulting on changes to a scheme for a water sports hub which were introduced shortly before the committee determination, in particular clarification through "late information" which added to the officer report and advised that the facility would be used by members of the public as opposed to private members only.

Late submission of new material

339. Juliette Benson v. SSCLG [2018] EWHC 2354 (Admin) concerned the different procedural issue of the late submission of new material at inquiry.

340. In that case, when the Inspector opened an inquiry into an enforcement notice appeal, which dealt with a claim of immunity under ground (d), there was no written evidence, and no witness statement supporting the appellant's case. There was then produced a 38-page bundle on behalf of the appellant, with an application that it should be admitted. The Inspector allowed the material to be admitted and adjourned the inquiry to allow for its consideration. After that pause, the appellant gave evidence in chief and was cross-examined, on the basis of what was said to be a series of tenancies in the annex which had been provided that morning. When pressed on dates, the appellant referred to documents available to her in a folder. When asked what those documents were, the appellant said they were bank statements, recording payments of rent which helped her remember the dates of the various tenancies. At some point the appellant said, "you can see the statements if you want to", and the advocate for the Council said that she did not need to do so. The Inspector at some stage observed that the bank statements could not provide evidence of anything other than payment, and in particular could not provide evidence of occupancy of any particular premises. Nobody substantively countered that intervention. There was not, however, an

application to adduce further evidence which resembled in any way the application made in relation to the 38-page bundle at the beginning of the hearing.

341. On a challenge to the Inspector's decision to dismiss the appeal, it was argued that the Inspector acted irrationally by allowing the appellant to refer to the bank statements and a related letter during cross-examination, but refusing to look at the documents themselves and making his decision on the basis that the documents were not produced. Alternatively, it was alleged that by failing to respond appropriately to applications to adduce the extra material as evidence, the Inspector failed to take into account a material consideration, or failed in his duty to give intelligible reasons, or both.

342. The challenge was dismissed (see [56]-[63]) on the grounds that (1) the findings of fact on which the Inspector reached his conclusion were fully supported by evidence. His conclusion on the significance of breaks in occupation over the relevant four-year period was a matter of planning judgment which had not been challenged; (2) the assertion that there was an application made to the Inspector to adduce the extra material had not been made out; (3) even if an offer to make the documents available were to be interpreted as an application to have them admitted into evidence, it unsupported by any reason why the documents should be admitted at that late stage; and (4) the appellant had not lost anything by the non-admission of the extra material.

Recovery of appeals

343. Connors, Connors, Doran and Sines v. SSCLG [2017] EWCA Civ 1850 concerned two appeals made by appellants each of whom was either a Gypsy or a Traveller. They respectively argued that an appeals related to the proposed stationing of a caravan or mobile home in the Green Belt, and against an enforcement notice directed at the same development, were unlawfully recovered by the Secretary of State under a discriminatory policy or practice for recovery.

344. The context for these challenges was a suite of planning policy and ministerial statements on gypsy and traveller sites. "Planning policy for traveller sites," published by the Government in March 2012 provided policy and guidance on the determination of applications for planning permission for such development, including proposals for sites in the Green Belt.

345. On 1 July 2013 the Parliamentary Under Secretary of State for Communities and Local Government issued a written ministerial statement, entitled "Protecting the Green Belt", which referred to the 2012 guidance and advised that "As set out in that document and in [the NPPF], inappropriate development in the green belt should not be approved except in very special circumstances. Having considered recent planning decisions by councils and the planning inspectorate, it has become apparent that, in some cases, the green belt is not always being given the sufficient protection that was the explicit policy intent of Ministers...The Secretary of State wishes to give particular scrutiny to Traveller site appeals in the green belt, so that he can consider the extent to which "Planning Policy for Traveller Sites" is meeting this Government's clear policy intentions. To this end he is hereby revising the appeals recovery

criteria issued on 30 June 2008 and will consider for recovery appeals involving traveller sites in the green belt... The Secretary of State will apply this criteria [sic] for a period of six months, after which it will be reviewed".

346. On 17 January 2014 a further written ministerial statement was issued, entitled "Green Belt". It said: "The Secretary of State remains concerned about the extent to which planning appeal decisions are meeting the Government's clear policy intentions, particularly as to whether sufficient weight is being given to the importance of green-belt protection. Therefore, he intends to continue to consider for recovery appeals involving traveller sites in the green belt".

347. In the earlier case of Moore and Coates v Secretary of State for Communities and Local Government [2015] EWHC 44 (Admin) it had emerged that notwithstanding the policy in the written ministerial statement of 1 July 2013, the Secretary of State had since September 2013 recovered all appeals for the development of sites for Gypsies and Travellers in the Green Belt. It was held (at [179], [180] and [182]) that the *practice* of recovering all appeals was unlawful.

348. In reaching his judgment in the instant case in the Court of Appeal, Lindblom LJ held that at first instance Lewis J had made no error in disposing of the argument that the Secretary of State, when he promulgated the *policy* for the recovery of appeals in the written ministerial statements, neglected the relevant statutory duties or acted in breach of the appellants' human rights: "The essence of the argument... was that the policy announced in the written ministerial statement of 1 July 2013 'involved unjustified differential treatment of Travellers and Gypsies as compared with those seeking planning permission for conventional housing in the Green Belt whose appeals may be determined by inspectors not the Secretary of State'. This, it was suggested, 'was to treat people differently by reason of their race or ethnicity', and 'would involve … applying different procedures to Travellers and Gypsies as compared with persons who were not Travellers or Gypsies'. Lewis J. dealt comprehensively with this argument in paragraphs 132 to 142 of his judgment. I cannot fault his analysis, or the conclusions to which it led" (at [32]).

349. Thus "to hold that either of the two written ministerial statements constituted, in itself, a conflict with section 19 of the Equality Act 2010, or a failure to discharge the public sector equality duty in section 149, or a breach of any of these appellants' human rights under articles 6, 8 and 14 of the Human Rights Convention, would be to go further than did Gilbart J. in Moore and Coates (see paragraphs 179 and 180 of his judgment, quoted in paragraph 14 above). And I would not do that. As Mr Warren submitted, the intention expressed in the written ministerial statement of 1 July 2013, to give 'particular scrutiny' to appeals relating to development for Gypsies and Travellers in the Green Belt, and to make this the basis for a revision of the criteria for the recovery of appeals, was not irrational or unfair. Nor was it inherently discriminatory against Gypsies and Travellers in comparison with people who are not Gypsies or Travellers. Nor again was it inimical to the duty to 'have due regard' to the aims stated in section 149(1) of the Equality Act 2010; neither in its terms nor in its substance was it inconsistent with the public sector equality duty. Adjusting the criteria for recovery in this way was not, in my view, unlawful in any of those respects....The same may also be said of the proposition in the written ministerial statements that 'unmet demand' [or, as it was put in the

second, 'unmet need'], whether for Traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the 'very special circumstances' justifying inappropriate development in the [Green Belt]'. Indeed, that statement of policy is explicitly and deliberately non-discriminatory" (at [33]).

350. In any event, the decisions to recover the appeals could not be said to have automatically generated, in his decisions on the appeals themselves, a conflict with the statutory requirements or any breach of the appellants' human rights. The decisions on the appeals fell to be reviewed by the court in accordance with familiar public law principles, so the appellants would still have to show that that unlawfulness in the recovery decisions infected the decision-making process itself, which they had not (at [34]).

351. Further, the "inescapable difficulty" for the appellants in the first appeal here was that in none of these cases was a timely challenge made to the Secretary of State's recovery directions, or to the policy in the written ministerial statements (at [35]).

352. The Court went on to find that the statement in the 2012 guidance (at [25]), which confirmed that a local planning authority's failure to demonstrate an up-to-date five-year supply of deliverable sites "should be a significant material consideration…when considering applications for the grant of temporary planning permission," was not discriminatory (at [54]).

353. In relation to the second appeal, the Court confirmed that the challenges were also out of time (at [86]), but went on to consider other issues raised in the appeal. These included the allegation that if the recovery decisions were unlawful, any decisions on the appeal were a nullity. Logically, this involved the prior question of whether the court itself had jurisdiction to address that primary question as to the Secretary of State's jurisdiction on appeal when that question was posed in a claim for judicial review, rather than in an application or appeal made under the provisions in Part XII of the 1990 Act.

354. The Court rejected the submission that sections 284 and 288 of the 1990 Act did not preclude a claim for judicial review being made to challenge a decision of the Secretary of State on a planning appeal when that decision was alleged to be "ultra vires" because the recovery direction preceding it was unlawful. The allegation was that the appeal decisions were, "not within the powers of [the 1990 Act]" and such as challenge was squarely within the scope of section 288 (section 288(1)(b)(i)) and thus subject to the ouster provision in section 284(1)([102])(although an unlawful recovery direction could itself be challenged before the court by a timely claim for judicial review before the appeal itself is determined). Further, even if the Secretary of State's recovery directions were a nullity, it did not follow that his determination of the appeals are also a nullity because the statutory framework conferred jurisdiction on him to determine the appeals, whatever the lawfulness of his decisions to recover them for his own determination (at [110]-[117]).

Re-determination after quashing

355. North Norfolk v. SSHCLG [2018] EWHC 2076 (Admin) considered the power of PINS to select the route for re-determination of a planning appeal following quashing. Section 319A of the 1990 Act, which provides generally for determination as to the procedure for determining, also applies to re-determinations. By section 319A(6), the Secretary of State must publish the criteria that are to be applied in making determinations under subsection. Those criteria are set out in the Procedural Guide to planning appeals in England published by PINS. Annex K includes the general criteria for determining the mode of appeal. Annex L deals with challenges to appeal decisions. Paragraph L.12.4 advises that "Where the appeal was originally dealt with by an inquiry, it will probably be re-opened. Where there have been significant changes in circumstances (eg new legislation or local or national policies) since the original inquiry or hearing the Inspector would normally allow further evidence to address these".

356. Ouseley J confirmed that "the legal effect of the Guidance was that the decision had to accord with the criteria, unless PINS decided that circumstances warranted a departure from them, for which it should provide a reasoned explanation" (at [21]).

357. On the facts, PINS had decided that the written representations procedure should be used, because (1) PINs now knew far more about the cases being advanced, since it had all the evidence from the previous inquiry; (2) there had been no significant changes in circumstances since the inquiry in relation to evidence required; (3) the criteria of complexity and of the need for formal questioning were not now met, in the light of the new Inspector's appraisal of the issues based on the evidence at the previous Inquiry; (4) a written representations procedure could deal with what needed to be dealt with.

358. Although the decision read as if the decision were being taken by applying the Annex K criteria, without taking Annex L as the proper starting point, the decision did not involve any misinterpretation of the Guidance: "Where an Inspector has considered the previous Inquiry papers, rationally concluded that further written representations and site visit are all that is needed in the light of the fullness of the material already submitted, and the absence of significant changes in circumstance, it is difficult to say that the Guidance in L12.4 must be read as requiring something more. A considered and rational view that, in all the circumstances, the resources required for a Public Inquiry are not needed for a proper and fair determination of the issues ought to suffice... I cannot see what is unlawful about it deciding that, all told, good enough reasons were provided for not doing what it normally would do, and concluding instead that further written representations and site visit was the better way to proceed" (at [35]-[36]).

Re-opening determination of appeals to the High Court

359. In Goring-on-Thames Parish Council v. South Oxfordshire DC [2018] EWCA Civ 860 the Parish Council challenged the decision of the District Council to grant planning permission for a hydroelectric scheme by way of judicial review in November 2016. At first instance Cranston

J held that the district council had acted unlawfully but declined to quash the decision. Permission to appeal was refused on the papers.

360. Since October 2016, parties refused permission to appeal on the papers have not then been entitled to renew their application at an oral hearing unless rule 52.30 of the Civil Procedure Rules (CPRs) applies. CPR 52.30 states that. " (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy".

361. The appellant sought to rely on these provisions, arguing that Cranston J had made fundamental errors in his judgment. The Court of Appeal unsurprisingly rejected the application, holding (at [29]) that "The court's jurisdiction under CPR 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". It is "exceptional" in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered "Yes", the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong".

Ex gratia compensation payments

362. D2M Solutions Limited v. SSCLG [2017] EWHC 3409 (Admin) considered the application of the ex gratia scheme for paying financial compensation for errors by PINS. The main issues raised were first whether, as a matter of interpretation, the scheme included a claim for loss of profits or earnings and secondly, whether the claimant was entitled under Article 1 of the First Protocol of the European Convention on Human Rights ("A1P1") to compensation for loss of profits resulting from such an error.

363. The error in question had been made by an Inspector determining a wind farm appeal, where he treated the amount of renewable energy that would be produced each year as 170,000 kWh rather than 1.7m kWh. Permission was granted on a redetermination, but the claimant contended that if the first Inspector had not made the error, it would have been possible for the Claimant to obtain a higher generation tariff rate which was not now available due to changes in the Feed-in Tariff regime.

364. After reviewing "PINS guidance on reviewing claims for financial compensation by an ex-gratia payment", which draws on the HM Treasury document "Managing Public Money", it was held that "the scheme does not cover losses which go beyond expenditure incurred as a result of an error or failing. It does not include a loss of profits or earnings, whether in the past or the future. The document contains no indication that the scheme provides compensation for an adverse effect on the profitability of the development of a site resulting from a mistake in the decision-making process" (at [42]).

365. In so far as the restoration objective underpinning the scheme was aimed to "put the Claimant in the position in which he would have been if the error had not occurred" (at [49]), "there is no logical reason to think that [the first Inspector] would have reached any different conclusions as regards the adverse effects of the proposal upon heritage assets and residential amenity", even he had not committed the error on output (see [51]-[52]). The claim for compensation depended upon an unjustified assumption that in the absence of the error about the project's output, planning permission would have been granted.

366. The A1P1 ground also failed: "It has to be accepted that the State is entitled to control the use and development of land in the public interest. Accordingly, a mere refusal of planning permission does not amount to an interference with the peaceful enjoyment of possessions under the first rule in A1P1. Furthermore, simply making a mistake in the exercise of planning control, even one which is required to be corrected, does not alter that analysis, a fortiori where the correction of that mistake either may, or may not, result in the same outcome" (at [74]). No authority had been cited to show that merely deciding to refuse an application for planning permission involves an interference with property or a possession or otherwise engages A1P1.

Consultation

367. Consultation could have its own heading (and has been referred to in the context of other case law above), but it is convenient to add a further case on this topic here.

368. The recent case of R ((Sefton MBC) v Highways England [2018] EWHC 3059 (Admin) involves a helpful review of the law. There Kerr J rejected a challenge to the "preferred route decision" of Highways England relating to the routing of a new access road to improve transport links with the Port of Liverpool. The case was brought before the formal DCO pre-application consultation stage, but was accepted as amenable to judicial review.

369. Sefton argued that it was unfair for Highways England to consult on only two options, Option A, involving the upgrade of the existing and heavily congested A5036 route, and Option B, involving a new route through the Rimrose Valley Country Park. Sefton argued that Highways England should also have consulted on its preferred option, which had significant local support, of a tunnel running under the Rimrose Valley Country Park, thereby preserving the rural tranquillity of the park. It also claimed that Highways England was under a duty to consult

by reason of its "license", which contains statutory guidance on how it should exercise its functions.

370. The court rejected this argument, holding that Highways England *"e*xercises its functions according to a regime established under statutory authority and must follow directions and have regard to guidance from the Secretary of State. It is required to engage with bodies such as the council which have responsibility locally for planning and highways. On the other hand, Highways England is not a body whose functions have to be conducted according to a formula. Within the limits of the 2015 Act and the Licence, it has considerable freedom to act in the manner it considers best calculated to perform its duties efficiently and economically. It does not have to consult widely or in detail on every decision, though in practice will doubtless do so where major infrastructure projects are contemplated".

371. Kerr J went on to say that he agreed with Maurice Kay J in the earlier case of Medway [2002] EWHC 2516 (Admin) that, in general, a decision maker is entitled to "narrow … the range of options within which he would consult and eventually decide". Further, the references to consultation in the license are "general and pitched at quite a high level".

372. Highways England was therefore entitled to limit the parameters of the consultation and was also not obliged to consult on a proposal that was beyond the budget constraints of the project on an equal footing with the other two options. There was no unfairness in deciding that the tunnel was not practical due to budget constraints. The budget for the project was a political question and the balance to be struck between environmental protection and economic regeneration was a matter for the executive. Further, the requirements to be met before a DCO is granted were relevant to the fairness issue because the DCO process would provide further opportunities for the objectors at the pre-application consultation stage and during the public examination of the ES.

373. This case can be read with the judgment in Langton, considered above in the context of habitats, where it was held that although a government consultation document on supplementary culling was "not ideal", it contained sufficient information and was part of an overall consultation process which was conducted lawfully (see [98]-[117], which refers in summary to the relevant authorities in this area).

Enforcement

Lawful issue of notices

374. Nafeena Beg, Muzzafar Beg, Neelam Beg, Mohammed Baig Nasser v Luton Borough Council [2018] J.P.L. 703 considered whether justices erred in law by rejecting the appellants' contention that an enforcement notice was issued unlawfully. The scheme of delegation within the constitution of the Council provided that the Development Control Manager had delegated authority to "issue and serve" planning enforcement notices. The decision to issue the notice had been taken by a Deputy Development Manager. A legal assistant at the Council drew up the notice and sent it to the persons to be served. It was argued that the Development Control Manager had no power to delegate the function of issuing and serving an enforcement notice to another individual.

375. This argument was said to be based upon the judgment of Lewis J in Pemberton International Ltd v LB Lambeth [2014] EWHC 1998 (Admin) where the judge stated that: "If…the Council has arranged for a function to be exercised by a particular officer or officers, section 101 of [the Local Government Act of 1972] does not itself permit those officers to sub-delegate the carrying out of the function to other officers".

376. But it was recognised that in Provident Mutual Life Assurance v Derby City Council [1981] 1 WLR 173 the House of Lords had established that: "Depending on the nature of the function in question one officer may be regarded as having authority to act on behalf of another officer who is authorised to exercise the function"; and in Fitzpatrick v Secretary of State for the Environment [1990] 1 PLR 8 the Court of Appeal held that this reasoning proceeded on the basis of section 111 of the Local Government Act 1972 ("LGA 1972") , which confers upon a local authority power: "…to do anything …which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".

377. Lewis J in Pemberton had then decided that the ability to delegate a function under section 111 is not confined to a delegation to one identified officer. It may be to a group: "So long as the scheme as a whole either identifies the officers, or sets out the process by which the officers authorised to exercise certain functions can be identified, the scheme will, in my judgment, be compatible with section 101 of the 1972 Act".

378. In that case, the scheme of delegation lawfully provided that "An officer to whom a power, duty or function is delegated may nominate or authorise another officer to exercise that power, duty or function, providing that officer reports to or is responsible to the delegator".

379. Turning to the present facts, it was held that no legal distinction could be drawn between delegation expressed in that form and the constitution of the Council in the present case. In any event, on the facts the relevant officer was employed to undertake the duties of Development Control Manager when she took the decision to issue the enforcement notice (see [13]-[17]).

380. It was also held that there was nothing in the primary or secondary legislation requiring the notice to be signed. The signing of the enforcement notice was an administrative act separate to the decision to issue the notice and it did not require to be the subject of a delegation under section 101 of the LGA 1972. Section 234 of the LGA 1972, as relied upon by the appellants, "is a permissive provision dealing with mechanisms by which a notice or other document issued by a local authority may be authenticated". It may be signed by "the proper officer". A document purporting to bear the signature of the proper officer (including a facsimile) is deemed to have been duly given unless the contrary is shown. Section 234, moreover, "does not treat the signing of a document as forming part of the decision to issue that document, including here the consideration of the tests set out in s.172 TCPA 1990. Signing is simply a means of authentication. In the present case, therefore, section 234 did not have the effect of requiring that only the Development Control Manager or another officer empowered to issue an enforcement notice could sign that document. An administrative task of this nature could be performed by a legal assistant signing, as the notice states, the document on behalf of the Council.

Ground (b) appeals

381. In Oates c. SSCLG [2018] EWCA Civ 2229 it was held that it was not unlawful for an inspector deciding an appeal under section 174(2) of the Town and Country Planning Act 1990 to uphold an enforcement notice that required the complete demolition of three "new buildings" whose construction had incorporated parts of the buildings previously on the site.

382. A building constructed partly of new materials and partly of usable elements of previous structures on the site, after other elements of those previous structures have been removed through demolition, may or may not in fact be a "new" building, depending on the facts and circumstances: "in principle, the retention of some of the fabric of an original building or buildings within the building that has been, or is being erected, does not preclude a finding by the decision-maker, as a matter of fact and degree, that the resulting building is, physically, a "new" building, and that the original building has ceased to exist" (at [38]).

Ground (a) appeals

383. The case of Langmead v. SSHCLG [2018] EWHC 2202 (Admin) serves as a useful reminder of the need for ground (a) enforcement notice appeals to focus on the alleged breach of planning control.

384. The case related to a planning permission for the formation of an agricultural hard standing subject to a number of conditions, including the following ""4. At no time should any mobile homes or caravans be stationed on the permitted hard standing other than those required for occupation by seasonal workers on the farm and all such caravans shall be removed immediately at the end of the season". A separate condition 5 provided that notwithstanding condition 4, "at no time shall any mobile homes or caravans be stationed on the permitted hardstanding except between the period 1 March to 31 October every year". An enforcement

notice was issued alleging a breach of condition 4, on the grounds that caravans were stationed permanently on the permitted hardstanding and were occupied by persons who were not seasonal workers.

385. As the judgment recorded, section 177(1) of the 1990 Act provides that on the determination of an appeal under section 174 , the Secretary of State may "(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control". The Inspector found when dealing with the ground (a) appeal that "there have been breaches of other conditions imposed on the 2005 permission but it is not open to me to review any of the other conditions imposed on the original planning permission because to do so would widen the scope of the notice".

386. A challenge to that decision alleged that the Inspector had erred in failing to take into account landscape measures which were directed at mitigating the "effects of the winter presence of the caravans". The claim was dismissed, on the grounds that (1) the Inspector had to bear in mind that condition 5 would remain and her powers did not enable her to lift or vary that condition; (2) the caravans would, therefore, not be permitted to be stationed on the land during the months of November to February inclusive; (3) mitigation designed to ameliorate the effects of the winter presence of the caravans did not then fall for consideration.

Direct action

387. Usher v. Forest Heath DC [2017] EWHC 2511 was a challenge to the decision of the Council to take direct action under section 178(1) of the 1990 Act in order to demolish the claimants' dwelling house. The construction of the dwelling had been the subject of an enforcement notice against which the claimants had unsuccessfully appealed. A subsequent appeal against a refusal to grant planning permission for the same development had also been dismissed. The claimants argued that the decision was unlawful on several grounds, including that (1) the Council failed to invite representations from the claimants as to its enforcement action, or to notify them of the decision; (2) the maintenance of the deadline with no "soft strip" was disproportionate and unreasonable; and (3) there was a failure to consider alternatives contrary to government guidance.

388. It was held in relation to (1) that the requirements of procedural fairness are highly context specific and in this case the Ushers had a statutory right to make representations on whether the property had to be demolished, through the mechanism of the enforcement notice appeal under section 174 of the 1990 Act. They had also appealed against the refusal of planning permission. and put forward their representations to the second Inspector. In any event they had every opportunity to make representations on how the requirements of the enforcement notice should be met (at [29]-[30]).

389. Ground (2) was also dismissed. The period of time between the final relevant determination of the Council and the deadline of 31 January was very short (around 10 days), but that had to be seen in the context of an enforcement notice which had been in effect since June 2014; a period of 5 months from the dismissal of the planning appeal; and the Council being very

clear about the end of January deadline. The timing of any direct action and its form were matters for the Council and the Court should be slow to intervene (at [41]).

390. As for ground (3), although PPG advised in relation to direct action that "these default powers should be used when other methods have failed to persuade the owner or occupier of land to carry out, to the local planning authority's satisfaction, any steps required by an enforcement notice" (Paragraph: 023 Reference ID: 17b-023-20140306), this did not suggest that a local planning authority must take some other action, such as an injunction or a prosecution, before they decided to take direct action. In any event if the PPG had said this it would not accord with the 1990 Act which requires no hierarchy or priority of further enforcement steps (at [51]).

391. The Council accepted that it was in breach of regulation 8(1) of the Openness of Local Government Body Regulations 2014 because it did not publish the relevant decision or its reasons on its website at the time the decision was made. But this was not considered a good ground to quash the decision, as the Claimants were fully aware of the Council's position and had ample opportunity to make representations upon it (at [45]).

Prosecution

392. In R v The Knightland Foundation & Anr [2018] EWCA Crim 1860 the Court of Appeal upheld the decision of the Crown Court to stay a prosecution brought for failure to comply with an enforcement notice as an abuse of process, where correspondence between a planning authority's enforcement officers and the planning team demonstrated that the former were determined to prosecute and provided a detailed criticism of the planning application in internal correspondence. On the facts, the evidence showed that improper influence had been brought to bear on the planning team to refuse the application. The enforcement officer had also failed to take into account local and national planning guidance to the effect that enforcement by way of prosecution should be a last resort; and although the planning application was a material consideration in determining whether to initiate a prosecution, the issues with its determination tainted the entire prosecution process. The way in which the determination of the 2016 application had been conducted led the judge to conclude that it would have been oppressive to have allowed the prosecution to proceed. Notwithstanding the degree of criticism that might well be laid at the respondents' doors for failing to carry to comply with the enforcement notice, this could not override the culpable acts and omissions for which the local authority as a whole were responsible.

Public Sector Equality Duty ("PSED")

393. Challenges which allege failures by local planning authorities to take planning decisions in accordance with the PSED have tended to fail, as recently demonstrated by the Richborough, Churchill and Connors cases this past year.

394. There was however a successful challenge in R (on the application of Peter Buckley (on behalf of Foxhill Residents Association) v. Bath and North East Somerset Council [2018] EWHC 1551 (Admin), in which Lewis J quashed the grant of permission for the development of a residential estate where the claimant lived.

395. The developer had applied for outline permission to develop part of the estate by demolishing 542 homes (of which 414 were affordable) and building 700 new ones (of which 210 were affordable). The planning statement recorded how there were significant levels of deprivation on the estate and explained a process of re-housing whereby 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 more specialised property (such as a home for older people or those with specialised needs), or into low-cost home ownership (see [12]). Policy H8 of the development plan supported the redevelopment of social housing where the condition of the housing stock was poor and/or there was socio-economic justification for redevelopment, but presumed against a net loss of affordable housing, subject to viability and social balance considerations. Officers advised that the loss of affordable housing complied with Policy H8.

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

397. It was held (see [30]-[31]) that the grant of outline planning permission involved the exercise of a statutory function by the local authority, such that section 149 of the Equalities Act 2010 applied. The consideration of certain reserved matters at a later stage might affect the content or scope of the duty, but that did not prevent it applying to the decision to grant outline permission; and the compliance with policy H8 did not automatically involve compliance with the section 149 duty, because it did not involve assessing the needs of particular groups or the impact of the demolition on persons with protected characteristics.

398. Further (see [35]-[40]), the local authority had to consider the impact on the elderly and the disabled of losing their existing homes, which could affect those persons differently to others. No equality impact assessment had been carried out, however, and there had been no reference in the material before the Council to the PSED. The local authority had focussed on the impact of displacement on residents but "did not specifically address or have regard to the impact on groups with protected characteristics, in particular the elderly and the disabled, of the loss of their existing home" (at [43]).

399. The Court added (ibid) that "it may well be that not a great deal would have needed to be said on this matter. It may have been sufficient to draw that matter to the decision-maker's

attention and then the decision-maker could have decided whether the contemplated benefits of the proposed development did outweigh any negative impacts". Ultimately, however, there were matters relevant to the discharge of the public sector equality duty which the relevant decision-maker needed to have due regard to but which were not drawn to the decision-maker's attention; and the decision was quashed.

400. Stroud v North West Leicestershire District Council [2018] EWHC 2886 (Admin) is another recent failed PSED challenge. In that case, there was no explicit reference to the duty either in an officer's report or in the discussion at the committee meeting which determined an application for the change of use of a convenience food store (use class A1) to a hot food takeaway (use class A5). It was agreed by the parties that "it is not necessary in all cases that there should be any such reference, still less that every decision requires to be accompanied by any form of structured assessment of whether there is or is not any implication of the decision for persons with one or other of the protected characteristics". The Court also held that it should not interpret the duty in a way "that introduces unnecessary and cumbersome formality and box ticking. A duty to have 'due regard' to matters does not require the decision taker in all cases to go looking for possible implications for any or all of the protected characteristics, but only to consider them properly where they are substantively raised on the facts" (at [40]).

401. The challenge failed on the facts, where "this was not a decision relating to ceasing a service provided by the authority itself, and the planning authority had no power to secure that even the existing permitted use was so exercised as to continue to operate the sort of local shop presently there. In the circumstances the duty was sufficiently discharged by recording the fact that among the objections raised references had been made to elderly users of the shop, but it was not necessary to take the matter any further in circumstances in which those representations did not appear to be putting any case (and neither the officer nor the decision takers themselves considered that any issue arose) that such persons would be unable to make use of, or materially affected by having to make use of, the alternative shops that were available" (see [39]-[41]).

Town and village greens ("TVG")

402. Registration of land as a town or village green has significant consequences for developers and landowners, as it essentially protects against development the uses which the neighbourhood made of the land prior to registration.

403. Section 15 of the Commons Act 2006 provides in subsection (1) that "[any] person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies". All three of those subsections apply where "(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality", have "indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years". Subsection (2) applies where "(b) they continue to do so at the time of the application". Subsection (3) applies where "(b) they ceased to do so before the time of the application but after the commencement of this section" and "(c) the application is made within the relevant period", which is defined in subsection (3A) as meaning "(a) … the period of one year beginning with the cessation mentioned in subsection (3)(b)".

404. This area has generated significant litigation already on the interpretation of section 15. In R (Newhaven Port and Properties Limited) v East Sussex County Council [2015] UKSC7 the Supreme Court held that section 15 did not allow registration if that would be incompatible with any other statutory function to which the land was to be put. That issue was a question of statutory construction. Other cases have followed this year.

405. R (Lancashire County Council) v Secretary of State and R (NHS Property Services Ltd) v. Timothy Jones [2018] EWCA Civ 721 concerned two conjoined cases. In the first, the Council, as education authority, faced applications for registration as a TVG of five areas of land it owns next to one of its primary schools. The inspector appointed to determine the application concluded that four of the five areas should be added to the register. The judicial review claim by the Council, on grounds relating to statutory incompatibility, was dismissed by Ouseley J and the Council appealed. In the second, NHS Property Services Limited faced an application for registration as a village green of land it owns next to Leatherhead Hospital. The Inspector recommend to Surrey County Council that the application be refused on grounds including statutory incompatibility. The Council rejected the recommendation and registered the land. Gilbart J quashed the registration on the grounds that the Council had failed to consider properly the question of "statutory incompatibility". The Council appealed.

406. The Court of Appeal reviewed the principles set out in Newhaven, where there was held to have been an incompatibility between the use of the harbour company's statutory functions in relation to the harbour and registration of the beach as a TVG. It distinguished that case from the circumstances of the Lancashire case (at [41]): "The statutory powers and duties relied upon here were general in their character and content, comprising a local education authority's functions in securing educational provision in its area. There was no statutory obligation to maintain or use the land in question in a particular way, or to carry out any particular activities upon it. The basis of the asserted incompatibility between section 15 of the 2006 Act and the provisions of the Education Acts on which the county council sought to

rely could only be that the carrying out of its general obligations to provide schools in its area – its compliance with a "target duty" – might be or become more difficult or less convenient, not that it would be prevented from carrying out any particular statutory function relating specifically to the land whose registration as a town or village green had been applied for. There was no statutory duty to provide a school on the land, or to carry out any particular educational activity on it. There were no proposals to develop it for a new school. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a "statutory incompatibility"... The relevant statutory purposes were capable of fulfilment through the county council's ownership, development and management of its property assets as a local education authority without recourse to the land in question ...The registration of the land as a town or village green would not be at odds with those statutory purposes".

407. The same conclusion applied to the NHS case (see [45]): The statutory functions on which NHS Property Services relied, and the statutory purposes underlying them, were also general in character and content: the general functions of a clinical commissioning group to provide medical services to the public, and, under section 3(1) of the National Health Service Act 2006, the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities. The registration of the land as a green under section 15 of the 2006 Act would not, in itself, have any material effect on NHS Property Services' function under section 223(1) of the National Health Service Act 2006, to hold land for the NHS Surrey Downs Clinical Commissioning Group. Nor would it prevent the performance by the clinical commissioning group, or any other NHS body, of any of statutory function relating specifically to the land in question. Beyond their general application to land and property held by NHS Property Services, none of those statutory functions could be said to attach in some specific way to this particular land...".

408. The land was not therefore being used for any "defined statutory purposes" with which registration would be incompatible. No statutory purpose relating specifically to the land would be frustrated. The upshot is that the concept of statutory incompatibility will depend upon the invocation of specific statutory purposes which are inherently inconsistent with the use of the land for the purposes for which TVG registration is sought.

409. In the Lancashire case, the Council also argued, unsuccessfully, that (1) the relevant local ward could not comprise the "locality" under section 15 because it had been subject to boundary changes over the 20 years ([69]-[70]); and (2) that there should be a sufficient geographical spread of users across the locality ([74]-[78]).

410. R (Cotham School) v Bristol City Council [2018] EWHC 1022 (Admin) concerned an application for registration as a village green of 22 acres of land owned by the Council, which was also the relevant registration authority. The judgment explains (at [12]) that "large parts of the land were laid out as playing fields. There have been football and rugby pitches on the land in the winter and a cricket field and an athletics track in the summer for many years. Until about 2000 these pitches were used as school playing fields for Fairfield School; thereafter Cotham School became the user of the pitches. Over many years the pitches were also used by local

sports clubs under arrangements made with the schools and/or the local education authority".

411. Following a 9-day inquiry, an Inspector recommended that the application be rejected because the user had not been "as of right", due to signs warning people not to trespass on the playing fields and that the land was private. The Council disagreed and resolved that the land be registered, concluding that the signs were not sufficiently clear.

412. On a challenge by the school to that decision, the Court reviewed the jurisprudence on the meaning of "as of right" and concluded that the inspector was right to conclude "that the use of land by local inhabitants would be made contentious by the erection of sufficient and suitably placed signs which were visible to users of the land and which had been seen by a significant number of persons using the land" (at [53]). The Council had not properly analysed the facts and had not provided adequate reasoning for its rejection of the Inspector's recommendation (at [55]-[60]).

413. A further ground of challenge alleged that the Inspector had erred in his approach to evidence there were periods when local inhabitants were excluded from the land when organised sports were being played, as well as during formal sports days. It was held that the Inspector was entitled to conclude on the facts that the rights of the landowner and the rights of the local inhabitants were capable of co-existing and that it was not appropriate to infer that the inhabitants' use had been with the permission of the landowner ([86]).

414. The issue of statutory incompatibility was also considered, but in the light of the Lancashire judgment, it was held that the inspector was correct when he "concluded that the duties and functions of the landowner (as education authority in respect of educational provision) can be carried out – albeit with difficulty (including financial difficulty) in some instances – even if registration takes place" (at [96]). A specific argument that registration would be incompatible with a restriction in the Academies Act 2010 as to the disposal of land was rejected, on the basis that registration was not a disposal for the purposes of that Act (at [98]-[101].

415. Another TVG case was heard by the Court of Appeal more recently, in TW Logistics Ltd v Essex County Council & Anor [2018] EWCA Civ 2172. The appeal was made by the landowner against the dismissal of its challenge to the registration of an area of its working port as a town or village green. The area had been used for the qualifying period by a significant number of local people for walking and sports activities alongside, and to a lesser extent by commercial port activities including the loading and unloading of commercial vehicles and storage.

416. The landowner accepted that there had been co-existence of both recreational and commercial activities on the land throughout the qualifying period, but contended that registration should not occur if: (1) the effect of registration would be to criminalise the landowner's continuing use of the TVG for the same commercial purposes as took place throughout the 20-year period; (2) "permission" for recreational use could be implied from the interaction of the two uses; or (3) the two uses were not concurrent but sequential. The respondents (the Council and the applicant for registration) argued that: (1) potential

criminalisation is not of itself a bar to registration of a TVG; and (2) on the facts found by the judge there was no implied permission or sequential use.

417. The appeal was dismissed for the following reasons. First, in principle, although registration of a TVG curtails many potential uses of the land so registered, the owner of the soil of a TVG is entitled to continue his pre-existing activities as long as they do not interfere unduly with the recreational rights to which the registration gives rise. Likewise, those entitled to exercise recreational rights must do so in a lawful way: “I consider, therefore, that the principle of "give and take" enables the landowner to continue to use his land in the way that he did before registration of the TVG, where that use is not incompatible with recreational use” ([32]).

418. Secondly, potential criminalisation was not a bar to registration as a TVG if all the criteria for registration were met ([62]); and thirdly, continuation of the pre-registration use in this case would not amount to a criminal offence because the use was compatible with the recreational use ([77]).

419. Fourthly, the Court rejected the argument that permission should be inferred from the fact that the landowner did not object to locals pursuing recreational activities at times when it had no particular need for the land, or it was not being used as such ([86]-[97]).

420. In Forbes v Wokingham Borough Council [2018] EWHC 2530 (Admin) the Court rejected a renewed application for permission to apply for judicial review, following refusal on the papers, of a decision by the Council to reject an application to register land in Wokingham as a new town or village green. The judgment is of interest mainly due to its treatment of issues that are unrelated to the interpretation of section 15.

421. It was held that the Council had not erred in not holding the whole of its decision-making process in public, because there is no statutory procedure for making this kind of decision and the Council was entitled to adopt any procedure which it thought appropriate, subject only to any relevant requirements of legality and fairness. The procedure adopted by the Council under its constitution gave every proper opportunity for public input into a decision ([11]-[12]).

422. Further, the Court rejected an application for a costs capping order. The Criminal Justice and Courts Act 2015 (disapplication of sections 88 and 89) Regulations 2017 (SI 100/2017), read with Civil Procedure Rules, Part 5, Section VII, have the effect that cost capping in accordance with the Aarhus Convention continues to apply to a judicial review which challenges the legality of a decision within the scope of Article 9(3) of the Convention. The interpretation of Article 9(3) of the Aarhus convention, which requires that members of the public have access to judicial procedures to challenge acts and omissions by public authorities which "contravene provisions of its national law relating to the environment", was to be informed by the definition of "environmental information" found in Article 2(3). It was held that “the recognition or otherwise of a town or village green carries no implication for the state of the land or any modifications to the land or its use. Any such changes might be the subject of

further processes of application or permission, but there is nothing in the law relating to commons which of itself impinges on any of the factors set out in article 2(3) of the Convention" (at [31]).

423. In an attempt to prevent the use of village green applications either frustrate or delay development proposals, the Growth and Infrastructure Act 2013 included a series of trigger events which prevented an application for registration being made (see now section 15C and Schedule 1A of the Commons Act 2006). The case of Cooper Estates Strategic Land Limited v Wiltshire Council [2018] EWHC 1704 (Admin) considered what constitutes a trigger event for the purposes of these provisions.

424. The land in question was located within Royal Wootton Bassett, and was registered as a TVG by the Council. The claimant challenged the registration by judicial review. The case considered whether two key policies in the Wiltshire Core Strategy (adopted in 2015) could be considered to identify the land for potential development and therefore apply as a "trigger event" under paragraph 4 of Schedule 1A, which refers to: "a development plan document which identifies the land for potential development is adopted under section 23(2) or (3) of the Planning and Compulsory Purchase Act 2004".

425. The relevant policies were: (1) CP1, which provides a hierarchy of settlements and identifies what is expected in each settlement type. Royal Wootton Bassett is one of the market towns that 'have potential for significant development'; (2) CP2, which provides for the delivery strategy within the defined limits of the development, creating a presumption in favour of sustainable development within the market towns listed in CP1.

426. The land in question fell within the defined limits of the town and is shown on the insert plan within the core strategy. The issue was therefore whether these policies identified the land for potential development and made the land ineligible for registration as a town or village green.

427. Quashing the registration of the land, the Court held that the fact the land was identified on a plan within the boundary line of a market town was sufficient to bring it within paragraph 4: "that line is used here to define the boundary of this market town within which there is a presumption in favour of sustainable development which is sufficient to identify the land for potential development".

428. Further, "'identified for potential development' does not mean that any application on any part of the site has to be one likely to succeed. 'Potential' is a very broad concept, is not qualified, and is not to be equated with likelihood or probability". And the fact that the land formed only part of the land identified for sustainable development did not preclude the application of paragraph 4.

429. This judgment is under appeal.

Assets of Community Value ("ACV")

430. In comparison with town and village green applications, the listing of land or buildings as an asset of community value - under section 88 of the Localism Act 2011 ("the 2011 Act") - has relatively limited legal consequences for a landowner. Community groups must be given an opportunity to bid for any disposal of a freehold or long leasehold interest in the asset, but the bid does not have to be accepted; and although listing can be material when an application for planning permission is being considered, it is for the decision-maker to decide what weight to give the listing. Nonetheless, landowners will seek to protect their interests by opposing listing and this year the Courts have considered this regime in a few cases.

431. In Banner Homes Ltd v. St Albans City and District Council [2018] EWCA Civ 1187 the Court of Appeal considered the case of a 12 acre field owned by Banner Homes since 1996. It had been used by the local community for more than 40 years for various recreational activities, such as children's play, walking, kite flying, exercising dogs, and the photography of flora and fauna. Banner Homes did not give express permission or grant a licence for the local community to use the Field (beyond the public footpaths), but it knew without objecting that the Field was used in this way by the local community and until more recently took no steps to stop it ([2]).

432. A local residents' association nominated the field, and the Council listed it, as an ACV. Shortly before the Council conducted a review hearing into the listing, Banner Homes fenced off the Field so that only the public footpaths could be accessed by members of the public. Use of the field beyond the public footpaths was acknowledged to amount to a trespass.

433. Section 88 of the 2011 Act provides in part that: " (1)… a building or other land in a local authority's area is land of community value if in the opinion of the authority (a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community". The issue in the appeal was "whether such unlawful use can constitute a qualifying use (or "actual use" to use the statutory language) for the purpose of listing ([5]).

434. It was held that "the words 'actual use'... are on their face, unambiguous, and if construed literally, are plainly apt to cover the use (the actual use, dare I say it) that the local community made of the Field, before it was fenced off" ([46]). The claimant did not suggest to the contrary; but instead relied on the presumption that the law should serve the public interest and the in bonam partem doctrine, a principle of construction that presumes against the construction of a statutory provision so as to reward an unlawful action with a benefit, unless a contrary Parliamentary intention is revealed.

435. This approach was rejected: "If Mr Edwards QC is right, the choice is a binary one. Any taint of unlawfulness, no matter how trivial or technical, in the use of the asset in question would mean that it could not be listed under the Scheme as an asset of community value. I do not consider his argument is right however. Nor do I accept the principles he refers to, lead to the sort of inflexible (and binary) approach for which he contends in this case. It seems to me that

whichever canon of statutory construction is adopted, the legislative intention is plainly that 'actual use', in this statutory context, should mean what it says" ([48]).

436. The Court of Appeal rejected any reliance on the "notorious" facts of Welwyn Hatfield Borough Council v Secretary of State [2011] UKSC 15 (the concealed house of Mr Beesley). Lord Mance found there that "[w]hether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision". This was inconsistent with the "bright line" approach invited by the claimant. The legislative regime for ACVs was different and had a "self-policing mechanism by requiring an actual use that in the opinion of the local authority furthered "the social wellbeing or social interests of the local community" ([60]).

437. A further example of an attempt (this time by a pub chain) to resist ACV listing, this time through using the Assets of Community Value (England) Regulations 2012 to launch an unmeritorious attack on the process of nomination, is Punch Partnership (PML) Limited v Arun District Council [2018] UKFTT CR-2018-0001 (GRC) (7 June 2018).

438. Another regime which has potentially significant effects on the delivery of new development is public procurement. As with village greens, a detailed analysis of the legal background is beyond the scope of this paper, but those involved in negotiating development agreements should be aware of the recent Court of Appeal decision in Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532. This case concerned an appeal by Faraday, which owned the leasehold of sites at an industrial estate in Newbury, the freehold of which was owned by the Council"). The Council had entered into a development agreement with St Modwen Developments Ltd for the disposal of land at the estate for the purpose of redevelopment. Faraday argued unsuccessfully before Holgate J that the award of the development agreement was in breach of Directive 2004/18/EC "on coordination of procedures for the award of public works contracts, public supply and public service contracts" and the Public Contract Regulations 2006. The Court of Appeal allowed the appeal.

439. The Court considered whether the development agreement would qualify as a "public works contract" as defined in the legislation. Although it lacked a number of the requirements of such a contract, not least because St Modwen was not under an immediately enforceable obligation to carry out the development, the Court found that the Council had bound itself through the development agreement once the St Modwen exercised an option under it. The agreement, even though it did not commit the developer to undertake public works until it elected to serve the option notice to draw down land, was nonetheless a public works contract (see [61]):

"In this case, judged by that test, the development agreement clearly did provide, at the date it was entered into, for a procurement by the council of the development it was intended to deliver. At that date, no further act of procurement by the council remained to be done, for which a lawful public procurement procedure could later be conducted. The time for that had passed. When it entered into the development agreement, the council had nothing more to do to ensure that a 'public works contract' would come into being. It had, in fact, done all that it needed to do to procure. It had committed itself contractually, without any further steps being required of it, to a transaction that will fully satisfy the requirements of a 'public works contract'. It had committed itself to procuring the development from St Modwen. The development agreement constitutes a procurement in its result, and a procurement without a lawful procurement procedure under the 2004 Directive and the 2006 regulations. The procurement crystallizes when St Modwen draws down the land. The ground lease entered into by St Modwen will contain an unqualified obligation to carry out works, and a corresponding obligation will also be brought into effect in the development agreement itself. The development agreement made that commitment on the part of the council final and provided also for a reciprocal commitment on the part of St Modwen. It did so without a public procurement process, and without affording any opportunity for such a process to be gone through before the 'public works contract' materializes. At that stage it would be too late. Thus a 'public works contract' will have come into being without a lawful procurement

process. The regulation of the council's actions in procuring the development will have been frustrated".

440. By entering into the development agreement, therefore, the council effectively agreed to act unlawfully in the future. In effect, "it committed itself to acting in breach of the legislative regime for procurement. As Mr Giffin submitted, that is in itself unlawful, whether as an actual or anticipatory breach of the requirements for lawful procurement under the 2004 Directive and the 2006 regulations, or simply as public law illegality, or both. The only other possibility would be that a contracting authority is at liberty to construct a sequence of arrangements in a transaction such as this, whose combined effect is to constitute a 'public works contract, without ever having to follow a public procurement procedure. That would defeat the operation of the legislative regime" (at [62]).

Conclusions

441. Having looked back, any reader in eager anticipation of more case law will not have to wait too long. Some of the cases mentioned above will soon be the subject of Court of Appeal judgments. As ever, other cases are in the pipeline. Those to watch out for include the challenge to the NPPF by Friends of the Earth (on SEA grounds); and there are no less than six conjoined challenges to the Airports NPS.