PLANNING CASE LAW UPDATE

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1. The purpose of this talk is to deal with cases decided in the last year, ie since 4th June 2018, on topics other than enforcement.

DECISION MAKING BY LOCAL PLANNING AUTHORITIES

2. A decision by Mr Justice Dove, R (Historic England) v Milton Keynes Council and St Modwen Developments [2018] EWHC 2007 [2019] JPL 28, deals with the decision-making process by planning committees and whether it can be inferred that the reasoning in an officer report is the reasoning of the planning committee. Historic England challenged the grant of planning permission on the ground that the Council had failed to produce a statement containing the reasons for the decision, contrary to reg 24 of the EIA Regulations. The Council argued that a statement had in effect been produced in the form of the officers' report recommending the grant of permission. HE said the Council could not rely on the officer report, as it was clear from the minutes of the Committee meeting that several members did not accept the officers' views.

3. Dove rejected the argument saying at [51];

"As a matter of principle…. I do not consider that it is consistent with authority or an appropriate approach to practical decision-making in this area, to endorse the analysis of the claimant seeking to enquire into the individual reasons of members supporting

a recommendation, whatever may have been noted as comments by an unidentified number of them during the debate. This is not an appropriate enquiry in circumstances where the only issue before the committee is whether at the time of voting they are willing to support the resolution before them or not."

4. The case is also of note for the judge's treatment of the issue of character or appearance of a conservation area. He decided that it was not irrational for the planning officers to conclude that the historical use of the site for railway purposes was of greater importance than the preservation of the non-listed buildings. An area's character or appearance could include its historic uses as well as its historic built fabric.

5. In Patricia Thompson v Conwy County Borough Council [2019] EWHC 746 Mr Justice Dove re-visited the issue of committee reports. It was alleged that officers had misled the Committee in their report and oral presentation. The judge emphasised [33] that the question whether officers misled the members had to be judged on the basis of material as known to the officers at the time of the report, rather than facts that became known to them after the decision was reached.

6. In R (Broad) v Rochford District Council and the Sanctuary Group [2019] EWHC 628 the High Court had to consider the circumstances in which a Council's failure to consult on amendments to a planning application will lead to planning permission being quashed. The judge, David Elvin QC, applied [55] the principle that a duty to re-consult arose only where the differences made by the amendments were of a "very high order" and in that case, he held that they were not.

7. R (Buckley) v Bath and North East Somerset DC [2018] EWHC 1551 [2018] JPL 1231, a decision of Mr Justice Lewis, is an important reminder of the need for local planning authorities to take full account of their duties under section 149 of the Equality Act 2010 when determining planning applications. This was an application for redevelopment of a public housing estate. The focus of the challenge was on the need to have due regard to the impact on elderly and disabled residents of the loss of their existing home, even though they would all, no doubt, be re-housed. The judge upheld the claim. The Council should have had due regard to the impact on the residents with protected characteristics, and had not considered the issue. The case should be kept in mind by authorities undertaking estate renewal.

8. However, it was made clear [40] in Stroud v North West Leicestershire DC [2018] EWHC 2886 (High Court, HHJ Cooke) that in dealing with the section 149 duty, "the courts in interpreting and applying this duty should not do so in a way that introduces unnecessary and cumbersome formality and box ticking." In the circumstances of that case, the relevant considerations had been taken into account even though no reference was made in the committee report to section 149.

9. And in R (Lakenheath Parish Council) v Suffolk County Council [2019] EWHC 978 the High Court (HHJ Allan Gore) rejected a challenge to the grant of planning permission for a primary school near a noisy US Air Force base, even though no reference was made in the officer report to section 149 duties. Section 149 was in play because children with special needs would be pupils in the school. Due regard had been had to meeting their needs and removing or minimising disadvantages, so the requirements of the statute had been satisfied even though section 149 was not mentioned.

10. R (Guerry) v London Borough of Hammersmith and Fulham [2018] EWHC 2899 reminds us that although the courts always bear in mind the need to read officers' reports benevolently and are wary of approaching planning documents legalistically, where technical matters are concerned, the advice officers give has to be accurate. In this case the High Court (Justine Thornton QC) quashed the grant of planning permission where the committee had been misinformed about the interpretation of the BRE guidelines. In particular they were not told [52] that a reduction in distribution of daylight (measured by the No Sky Line test) can be a separate and distinct reason for objection on daylight grounds from failure to comply with VSC (Vertical Sky Component) guidelines. The judge emphasised [53] that this was not the fault of officers, who were simply repeating the analysis put forward by the applicant's daylight consultant. Many of the issues relevant to planning decisions are technical- daylight and sunlight are just an example. The case shows how such issues can be a trap for authorities, which often do not have the financial resources to obtain their own specialist advice.

11. In Chesterton Commercial (Bucks) Limited v Wokingham DC [2018] EWHC 1795 the High Court (Upper Tribunal Judge Martin Rodger QC) dealt with a Council's power under section 70C of the 1990 Act to decline to determine a planning application where an enforcement notice is in force for development comprised in the application. The judge agreed with the Council that the discretion to decline to determine an application is available where there is *any* overlap between the matters covered by an enforcement notice and application, provided the overlap is not de minimis.

12. In R (Howell) v Waveney DC [2018] EWHC 3388, Sir Ross Cranston dismissed a challenge to a local planning authority's decision to discharge conditions attached to planning permission for a wind turbine. The case is notable for being the first to grapple with the principles applicable to "conditions precedent" following the judgement of the Supreme Court in Trump v Scottish Ministers [2015] UKSC 74.

13. The case concerned planning permission for a wind turbine. Permission was granted subject to condition 3, requiring written details of the turbine's exact height and position and lighting to be submitted three months before development started. The details were submitted after the date for implementation of the permission had expired and the Council discharged the conditions. Its decision to do so was challenged by a local resident. The Judge rejected the challenge, holding that condition 3 was not a condition precedent going to the heart of the permission (see Hart Aggregates v Hartlepool BC [2005] EWHC 840), as it did not require approval of the details, but only their notification, and the Ministry of Defence was content that the turbines would pose no danger to aviation.

14. In R (Newey) v South Hams DC and Killick [2018] EWHC 1872, Mr Justice Garnham applied the provision in Reg 7 (3) (b) of the Openness of Local Government Bodies Regulations 2014 that a local planning authority must give reasons for certain decisions taken under delegated powers to an officer's decision to discharge planning conditions. A salutary reminder that reasons for giving approval must sometimes be set out.

SECTION 73 OF THE 1990 ACT

15. In Finney v Welsh Ministers [2018] EWHC 3073 [2019] JPL 402, the High Court (Sir Wynn Williams) dealt with the ambit of the power under section 73. The judge decided (see [39]) that section 73 may be used to amend a planning permission so long as the amendment does not amount to a fundamental alteration. That was so even where the amendment would go beyond or contradict the "operative part" of the planning permission-ie the description of the development.

16. This has been a long-standing controversy, and in February 2019 the Court of Appeal gave permission to appeal the High Court's decision.

POLICY AND SPECIFIC SUBJECT AREAS

Does the NPPF need SEA?

17. In Friends of the Earth v Secretary of State [2019] EWHC 518 the High Court had to decide whether the NPPF was unlawful because it had not been subject to SEA. In short, Dove J decided that it was not, because no SEA was needed. He said that although the NPPF sets the framework for development consent decisions, its publication was not "required by any legislative, regulatory or administrative provision" (see [46] onwards).

18. Thus, the NPPF as a whole has survived. However, in Stephenson v Secretary of State [2019] EWHC 519 Mr Justice Dove decided that paragraph 209 (a) of the Framework, dealing amongst other things with fracking, was unlawful, because of defects in the consultation exercise that had been conducted.

National Policy Statements; the Heathrow litigation

19. Judgement was recently given on the challenges to the Airports National Policy Statement, specifying a third runway at Heathrow as the preferred location to meet the need for new airport capacity in South East England. The cases are R (Spurrier, Hillingdon, Wandsworth, Richmond, Windsor and Maidenhead, Hammersmith & Fulham, the Mayor of London, Greenpeace, Friends of the Earth and Plan B Earth v Secretary of State for Transport & Others [2019] EWHC 1070 (Hickinbottom LJ and Mr Justice Holgate, "1" in the references below) and R (Heathrow Hub Ltd and Runway Innovations Ltd) v Secretary of State for Transport [2019] EWHC 1069 (Hickinbottom LJ, Mr Justice Holgate, Mr Justice Marcus Smith).

20. In a review of this nature it is not possible to deal with these long judgements in detail. All the claims were rejected. Among the points decided by the Court were the following.

    a. The Court rejected (1/97, 100, 106, 107, 111) the argument that an alternative to the scheme proposed in an application for development consent under the Planning Act 2008 cannot be considered in the DCO process. Alternatives schemes could be presented by objectors where an NPS does not lay down policy, for example in relation to a particular location or type of technology. If

a particular location has not been rejected by the NPS, objectors to a DCO scheme are entitled to suggest an alternative site to the one proposed.

b. On consultation, the Secretary of State is required (134, 137) to undertake a broad consultation exercise, considering the whole range of responses, and then to form his own conclusions. He is not obliged to consult on every detail.

c. In assessing whether the consultation exercise that was undertaken was adequate, the Court did not decide whether apparent, as opposed to actual, pre-determination was sufficient in order to justify quashing a decision, but proceeded on the basis that it was (1/535).

d. In relation to the requirement in section 5(7) of the Planning Act 2008 for the Secretary of State to give reasons for his policy, the Secretary of State is required to give reasons, ie a rationale, for his policy, but he is not required to give reasons for rejecting every point made in response to consultation (1/118, 119,122).

e. The Court rejected the submission for the Secretary of State that judicial review of an NPS could succeed only if it related to a policy or factual consideration that made the proposal so obviously unacceptable that the only rational course would be to abort it without further ado (1/159). However, the Court must be astute to see that a challenge is not in effect a challenge to the decision-maker's judgement on the merits, (1/170) and (1/179) an enhanced

margin of appreciation should be accorded to decisions involving or based on scientific or predictive assessments.

f. One of the grounds of challenge was based on the fact that the air quality thresholds in the Air Quality Directive were breached in the relevant area. However, just as in the R v Shirley and Rundell case (see elsewhere in this paper) that did not mean the Secretary of State had to call an application in, so here it did not require the Secretary of State to reject an application for development consent or take a particular approach in an NPS (1/235-237).

g. The Planning Act does not enable an NPS to avoid or override the requirements of Articles 6(3) and (4) of the Habitats Directive (1/331), but an alternative proposal (1/341-343) is not an "alternative solution" unless it meets the core policy objectives of the statement.

h. Strategic Environmental Assessment is required of an NPS. The Court (1/404, accepted the test in Blewett ([2003] EWHC 2775) as applying to adequacy of the environmental statement for the SEA. To justify quashing, the document must be so deficient that it could not reasonably be described as an environmental statement, and (1/414) the Court should not be involved in reviewing the adequacy of the *quality* of the environmental report's treatment of environmental effects.

i. In formulating an NPS, the Secretary of State has a discretion whether to take account of international commitments which had not been transposed into national policy (1/647).

Interpreting National Planning Policy Guidance

21. In Solo Retail Ltd v Torridge DC [2019] EWHC 489 the High Court (Mrs Justice Lieven) gave guidance on the approach that should be taken to National Planning Policy Guidance, in the context of a retail case. The claimant operated a large out of town retail outlet and judicially reviewed the grant of permission for a 32,500 sq ft rival outlet. The claim was brought on the basis that the developer's retail impact assessment ("RIA") had failed properly to assess the convenience element of the proposed new store. The claimants relied on guidance in the NPPG which sets out the elements of an RIA, and said those elements were not contained in any assessment submitted by the applicants.

22. The judge rejected the challenge. She said the NPPG was not laying down mandatory tests. Her words, set out below, mean that challenges based on failure to comply with NPPG guidance will be hard to make.

"[33] In my view the NPPG has to be treated with considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out therein… As is well known the NPPG is not consulted upon, unlike the NPPF and Development Plan policies. It is subject to no external scrutiny… It can, and sometimes does, change without any forewarning. The NPPG is not drafted for by lawyers, and there is no public system for checking for inconsistencies or tensions between paragraphs. It is intended, as its name suggests, to be guidance not policy and

it must therefore be considered by the Courts in that light. It will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in Tesco v Dundee applied to the Development Policy there in issue."

Policies and aims of a Neighbourhood Plan

23. In Chichester DC v Secretary of State [2018] EWHC 2386 [2019] JPL 141, the High Court (Judge Grubb) decided that an inspector was entitled to draw a distinction between policies and aims in a Neighbourhood Plan. The judge referred to R (Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567, and the distinction drawn in that case between policy and supporting text. The judge said at [59] that while an underlying "aim" of the Plan included avoiding development in a particular location, it was not explicitly part of the relevant policies. The inspector was entitled to rely on the policies themselves in order to decide whether the proposal was in accordance with the Plan.

24. Chichester DC was followed in Bassetlaw DC v Secretary of State [2019] EWHC 556, a decision of Mrs Justice Andrews. However, an appeal is pending against the Chichester decision.

Green Belt, "valued landscapes" and open space

25. In Euro Garages v Secretary of State [2018] EWHC 1753 the High Court (Mrs Justice Jefford) considered the application of the policy in paragraph 89 of the 2012 NPPF (now paragraph 145 of the current NPPF) allowing limited infilling of previously developed land which would not have a greater impact on the openness of the Green

Belt than the existing development. She said ([24]) that the question whether the new development will have a greater impact on openness can be answered by asking whether there is "greater harm", and applied the guidance in Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2018] EWCA Civ 489 that where openness of the Green Belt is in issue, both visual and spatial impact are to be considered. She said ([30]) that if there is no visual impact, that ought to be a material consideration for the obvious reason that it is the less likely that the openness of the Green Belt will be harmed.

26. It should be noted, however, that the Samuel Smith case is to be considered by the Supreme Court.

27. In CEG Land Promotions II Ltd v Secretary of State [2018] EWHC 1799 [2018] JPL 1362, the High Court (Mr Justice Ouseley) returned to the reference to "valued landscapes" now contained in paragraph 170 of the NPPF. In Stroud DC v Secretary of State and Gladman Developments Ltd [2015] EWHC 488 the judge had decided that the concept of "valued landscapes" was not confined to landscapes which had a particular designation and in each case the decision-maker would have to consider whether on the facts of that case, the landscape in question was a valued one within the meaning of paragraph 170. In CEG the claimant contended that the development site itself had to have such characteristics as would make it a "valued landscape." Mr Justice Ouseley rejected that suggestion.

28. In R (Brommell) v Reading BC [2018] EWHC 3529 [2019] JPL 555, the High Court considered the meaning of guidance on loss of open space in what is now paragraph 97 of the NPPF. The guidance provides that existing open space should not be built on

unless (amongst other things) the loss would be replaced by "equivalent or better provision in terms of quantity and quality…".Mrs Justice Lang held that this does not mean the provision must be better in both quantity and quality, but only that both quantity and quality are relevant in the overall judgement that the new provision is equal or better. The case also illustrates the courts' reluctance to require alternative sites to be considered, save in exceptional cases.

Housing

29. In Hallam Land Management Ltd v Secretary of State [2018] EWCA Civ 1808 [2019] JPL 63 the Court of Appeal examined the obligations on planning inspectors and the Secretary of State when determining planning appeals for housing development, to calculate the extent of any shortfall in a local planning authority's 5 year housing supply. The Court held that logically the weight that should be given to out of date development plan policies should be less if any shortfall in the housing land supply is large and more if it is small.

30. A planning inspector or the Secretary of State is not always required to quantify the precise extent of the shortfall but the balancing exercise that needs to be carried out means that the issue is not just about whether a 5 year supply exists but also at least broadly how large any shortfall is. Therefore, in planning appeals for housing development the decision-maker will normally have to identify at least the broad magnitude of any shortfall in housing land supply (see the judgement at [52]).

31. Hallam was applied by the High Court (Mr Justice Dove) in Gladman Developments Ltd v Secretary of State [2019] EWHC 128.

32. In Swale Borough Council v Secretary of State [2018] EWHC 3402 [2019] JPL 574 the High Court (CMG Ockleton) refused to apply the Hallam approach to traveller cases, because (see [23]) unlike in housing cases, where the lack of a 5 year supply leads to the "tilted balance" being applied, the Planning Policy for Travellers' Sites simply says that the lack of a 5 year supply is a significant material consideration, without going on to apply a presumption in favour of the grant of planning permission.

33. Another recent decision on housing need is CPRE Surrey and Powcampaign Limited v Waverley Borough Council, Secretary of State and Dunsford Airport Ltd [2018] EWHC 2969 [2019] JPL 379. CPRE challenged the Waverley Local Plan together with an appeal decision granting permission for a new settlement. The argument centred on the approach the Local Plan inspector took to the Objectively Assessed Need for housing in the neighbouring borough of Woking. Mrs Justice Lieven held (see [52-54]) that there were limits to a Local Plan inspector's duty to calculate the OAN in another district. The inspector in this case did not have all the evidence needed to do so, and therefore his approach, which involved accepting SHMA figures for Woking (whereas he had rejected the SHMA figures for Waverley) could not be faulted.

34. The Court of Appeal has given permission for an appeal against the High Court's decision.

35. In R (Chilton PC) v Babergh DC [2019] EWHC 280 the High Court (Robin Purchas QC) held that failure to take account of an *emerging* 5 year housing land supply figure did not justify the quashing of a planning permission.

36. After all, as the judge said at [52]

> "There is.. no proper basis for speculation as to whether or how the approach or methodology or detailed figures would or would not be changed or require further consideration following the examination by senior officers."

37. In another case involving Babergh DC, East Bergholt Parish Council v Babergh DC [2018] EWHC 3400, the High Court (Sir Ross Cranston) rejected a challenge to the Council's grant of planning permission for 229 homes. The Parish Council's complaint was that when assessing the issue of 5 year supply, the District Council had considered sites without planning permission only where the planning committee had resolved to grant planning permission subject to a section 106 planning obligation. The Court held that the Council's approach had been lawful. Permission has been granted to appeal against this decision to the Court of Appeal.

38. In Canterbury City Council v Secretary of State and Gladman Developments Ltd [2018] EWHC 1611 the High Court (Mr Justice Dove) quashed an appeal decision where the inspector had declined to hold that a housing proposal falling outside the categories specifically permitted by the Local Plan (allocated sites and non-identified sites in urban areas) was in conflict with the Plan. The judge said [34] that there was no requirement for a Local Plan to say expressly that proposals not falling within the permitted categories were in conflict with the Plan. The Court of Appeal (Gladman

Developments Ltd v Canterbury City Council [2019] EWCA Civ 669) has dismissed Gladman's appeal against Mr Justice Dove's decision. Lindblom LJ said at [31]

"Although each of the individual policies comprising the strategy was in permissive terms, it is necessary to consider their true effect in combination. Together they formed a suite of policies for housing development, which left out none of the locations where such development might be expected to receive planning permission, subject to relevant criteria being met. Their effect was to identify, in addition to the allocated sites the whole range of potentially acceptable locations for housing development, the type and scale of development suitable in each location, and the circumstances in which such development was likely to be approved."

39. The Master of the Rolls agreed. He referred to what Lindblom LJ had said about silent policies in Bloor Homes East Midlands Ltd v Secretary of State [2014] EWHC 754 at [50];

"The answer to the question 'Is the plan silent?' will sometimes be obvious, because the plan simply fails to provide any relevant policy at all. But… I do not think a plan can be regarded as 'silent' if it contains a body of policy relevant to the proposal being considered and sufficient to enable the development to be judged acceptable or unacceptable in principle."

40. The Court considered that this case fell within the latter category.

Heritage

41. The Court of Appeal summed up the correct approach on setting of designated assets in Catesby Estates Ltd v Steer & Historic England [2018] EWCA Civ 1697 [2018] JPL 1375. The case concerned a development on land 1.5km to the south of the Grade 1 listed Kedleston Hall. Mrs Justice Lang quashed the inspector's decision, saying the

inspector had wrongly focused on finding a visual connection and had set to one side the historic, social and economic connections. The Court of Appeal allowed an appeal against her decision. The inspector's conclusion that the effect of the development on the setting of the Hall was negligible was beyond challenge.

42. Lindblom LJ said

"[25] .. If the proposed development is to affect the setting of the listed building there must be a distinct visual relationship of some kind between the two-a visual relationship which is more than remote or ephemeral and which in some way bears on one's experience of the listed building and its surrounding landscape or townscape.

But he went on to say…

[26] This does not mean.. that factors other than the visual and physical must be ignored when a decision-maker is considering the extent of the listed building's setting."

43. Dill v Secretary of State [2018] EWCA Civ 2619 [2019] JPL 460 concerned limestone pedestals bearing lead urns. They had been separately listed. In an appeal against refusal of listed building consent and a listed building enforcement notice, the claimant argued that the listing was a mistake because the items were not buildings.

44. The Court of Appeal dismissed the claimant's case. It was clear from the wording of the Planning (Listed Buildings and Conservation Areas) Act 1990 that for the purpose of applications for listed building consent and enforcement, Parliament intended presence on the list to be determinative of protected status. Challenge was only

possible by judicial review of the listing decision and not as part of an appeal against refusal of listed building consent or a listed building enforcement notice.

45. As a comment, what if a judicial review of the listing had been brought in timely fashion? Could the pedestals and urns be regarded as buildings? They are structures, so why not?

Retail

46. Waterstone Estates Ltd v Welsh Ministers and Neath Talbot County Borough Council [2018] EWCA Civ 1571 draws attention to the differences between Welsh and English retail policy. The Court held ([73]) that government policy as set out in Planning Policy Wales requires need to be demonstrated and in the absence of need there is a breach of PPW policy. This is a clear difference from English policy, but the Court said that there was no reason when interpreting the Welsh and English guidance that planning policy in the two countries is the same.

JUDICIAL REVIEW PROCEDURE

47. R (Thornton Hall Hotel) v Thornton Holdings Ltd (C1/2018/0793), a decision of the Court of Appeal, shows that in an exceptional case the courts are prepared to quash a planning permission even where the judicial review application is brought years after the permission was granted. Thornton Holdings Ltd applied for planning permission to erect wedding marquees in 2010. The Council resolved to grant planning permission subject to a condition that the use would cease after five years. However

when the permission was formally granted in December 2011, no conditions at all were attached to it, and the marquees were never removed. The claimant, which owned a rival wedding venue nearby, launched a judicial review challenge in 2017. When the error was noticed, the Council initially attempted to put matters right by generating a fictitious decision notice and manipulating the planning register, rather than revoking the permission or issuing a discontinuance order. Thornton Holdings Ltd were well aware from the outset that the planning permission had been wrongly issued however and knew precisely what the Council's error had been.

48. When the matter came to court, the Council supported the judicial review application. The Court held that this was an exceptional and indeed unique case, in which time to apply for judicial review should be extended.

49. In R (CK Properties) (Theydon Bois) Ltd v Epping Forest District Council [2018] EWHC 1649 the High Court (Mr Justice Supperstone) was presented with an application for judicial review to quash a *submission* local plan. The defendant argued that such a challenge must be brought under section 113 of the Planning and Compulsory Purchase Act 2004. But the judge held section 113 applied only to adopted, as opposed to submission plans. A challenge to a submission plan could be brought by way of judicial review.

50. In R (Spragge) v Westminster Canham [2018] EWHC 2058 Mr Justice Supperstone gave useful guidance about costs awards where a judicial review claim is withdrawn. The case establishes that where a claim for judicial review is withdrawn following the grant of permission, the defendant is entitled to recover all of its costs including those incurred prior to the grant of permission. The judge also held that a defendant in a

claim for judicial review may recover the costs of local authority officer time incurred as a result of defending the claim, such time falling within the definition of costs under CPR 44.1

51. Salutary costs lessons for judicial review defendants were set out in R (Mark Tentori) v Central Bedfordshire Council CO/1322/2018), a decision of the High Court (David Elvin QC). The defendant Council asserted in pre-action correspondence that the claim would be resisted, but failed to file acknowledgement of service or detailed grounds of resistance after permission to seek judicial review was granted on paper. The Council then waited until after the claimant had filed its skeleton argument before consenting to judgement. The Court quashed the defendant's decision and ordered it to pay the claimant £20,000 in costs, observing that in deciding the amount it had taken into account "the lack of diligence by the Council in these proceedings… and its failure to respond appropriately to Court orders, or to act appropriately… and the necessary prolongation of these proceedings despite an initial response that the claim would be defended."

52. The case shows that it is important for judicial review defendants to take a considered view of their position at an early stage in order to avoid the risk of a significant costs award if they later decide that the claim is indefensible.

PLANNING APPEAL PROCEDURE

53. In DLA Delivery Ltd v Baroness Cumberledge of Newick [2018] EWCA Civ 1305 [2018] JPL 1268, the Court of Appeal dealt with the Secretary of State's duty to take account of his previous decisions.

54. This was a case where the claimant sought to apply the principle in North Wiltshire District Council v Secretary of State (1993) 65 P & CR 137 to a case where the Secretary of State had not been asked at the inquiry to take account of a previous decision. The Court of Appeal held that he should have done so. Lindblom LJ said (at [34] that

"the Secretary of State and his inspectors can normally rely.. 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."

55. The judge concluded that in this case, where the decisions were both issued by the Secretary of State himself and within 10 weeks of each other, and both concerning whether a particular development policy was up-to-date, the Secretary of State had a duty in the later case to consider his earlier decision. In fact what happened was that the conclusion reached about the development plan policy was different in the two cases, with no explanation.

56. In North Norfolk DC v Secretary of State [2018] EWHC 2076 [2019] JPL 87 Mr Justice Ouseley gave guidance on the Secretary of State's re-determination duties after one of his appeal decisions is quashed. After a public inquiry, the appeal decision was quashed. On the recommendation of the inspector chosen to deal with the re-determination, the Secretary of State decided to deal with the re-determination by way of written representations.

57. Mr Justice Ouseley decided that the Secretary of State's decision to proceed in this way was lawful. The PINS procedural guide suggested that in such a situation, redetermination would normally be by way of an inquiry, but in an appropriate case

written representations could be chosen. The judge made the point that the new inspector would have the benefit of the previous inspector's notes of the oral evidence, including cross examination at the inquiry, and said at [29]

"The new inspector, who is to decide the appeals, was able to assess all the evidence and written submissions placed before the previous inspector with a view to suggesting the mode of re-determination He made his recommendation having considered complexity and the need for formal questioning…. The judgement about how complex the issues actually are, the need for testing through advocates and how they can be resolved with further written representations and site visit is very much a matter for the expertise of the inspector."

58. The importance of fair play for third party participants in an inquiry was shown in the High Court decision of Barlow v Secretary of State [2019] EWHC 146, a decision of Mrs Justice Andrews. The appellant submitted a new traffic management plan to PINS and the Council,- but not to third parties, who received it by email two weeks before the inquiry opened, when it was placed on the Council's website. The local residents sought an adjournment from the inspector, who refused. The judge decided that in this particular case the third parties had a proper opportunity to respond to the new evidence, but the case shows that any third parties, even if they are not Rule 6 parties, will be entitled to expect a reasonable opportunity to respond to opposing evidence, in accordance with Hopkins Developments v Secretary of State [2014] EWCA Civ 470.

59. The Court of Appeal gave guidance on the time limits for lodging a planning appeal challenge under section 288 of the 1990 Act, in Croke v Secretary of State [2019] EWCA Civ 54. The question was whether the six week time limit for a section 288 challenge was absolute, in circumstances where the applicant was not wholly

responsible for the late filing of the application. Time expired on 23rd March 2016, the Wednesday before Easter and the application was lodged on 29th of March. The Administrative Court Office, within the Royal Courts of Justice, closed at 4.30 pm on 23rd March. The applicant tried to lodge his claim on 23rd of March but missed his train. A Mr Miller tried to file the claim on Mr Croke's behalf, and sought to gain entry to the Royal Courts of Justice at 4.25pm but was turned away by the security guard, who told him the building was now closed.

60. The Court held that Mr Croke was too late and time could not be extended. Kaur v Russell [1973] 1 QB 336 lays down that time can be extended where a time limit expires on a day when the court is not sitting, but that did not help Mr Croke here. It was his responsibility to get to the Administrative Court before it closed, and that included dealing with security at the entrance to the RCJ.

61. The High Court's decision in Visao Ltd v Secretary of State [2019] EWHC 276 (Neil Cameron QC) illustrates the limited utility of the Secretary of State submitting further evidence to explain one of his decision letters. One of the Claimant's grounds of challenge was that the inspector had failed to take into account the right drawing. His decision referred to drawing 10E and not drawing 12A. The inspector submitted a witness statement saying that he had, in fact, taken the later drawing into account. But the judge was not convinced. He said at [48] –[49];

"To allow a decision maker to supplement a decision letter by providing a statement setting out the matters taken into account would, save in exceptional circumstances, undermine the purpose of the decision letter. Further the Court in determining

applications under section 288 should be cautious before entering into disputed issues of fact the proper resolution of which would require oral evidence…

In my judgement the decision letter itself, read in a fair, reasonably flexible and objective way, leads the reader to conclude that the inspector will did not have regard to Drawing 12A. Given that the decision letter is a public document on which the parties and others were entitled to rely, I base my analysis on my reading of the decision letter in preference to the statements made in the inspector's witness statement."

SECRETARY OF STATE'S DISCRETION WHETHER TO CALL IN APPLICATIONS UNDER SECTION 77 OF THE 1990 ACT

62. In R (Shirley and Rundell) v Secretary of State [2019] EWCA Civ 22, the Court of Appeal considered the breadth of the Secretary of State's discretion to call in applications under section 77 of the 1990 Act. The context was that in the relevant local planning authority area, the limit values in article 13 of the Air Quality Directive were breached. The Court held that all the Directive required was that where limits were breached, the Member State had to produce under article 23 an air quality plan for achieving compliance with the limits. As the Court said at [47];

"No requirement of the air quality legislation, either alone or in combination with others, has the effect of imposing on the Secretary of State a legal duty to call in an application for planning permission."

63. Section 77 was also considered in Save Britain's Heritage v Secretary of State [2018] EWCA Civ 2137 [2019] JPL 237. The Court of Appeal followed previous decisions in deciding (see [30], [51]) that there was no general duty on the Secretary of State to

give reasons for not calling in an application, but that in that particular case he had created a legitimate expectation that he would give reasons, and therefore the absence of those reasons was unlawful.

CIL

64. The Court of Appeal decision in R (Oates) v Wealden District Council & Catesby Estates [2018] EWCA Civ 1304 deals with the impact of CIL as a material consideration. Traffic generated by a proposed development would be unacceptable in the absence of junction improvements, some of which were included on the Council's CIL list. The Highway Authority initially objected on the ground that there could be no guarantee that the CIL works would be finished before the houses were occupied, but then withdrew its objection, accepting that if the developer paid CIL, it was doing all it could to secure provision of the works.

65. The Council granted permission, without a Grampian condition preventing occupation of the houses until the CIL works were complete.

66. The Court decided the grant of permission was lawful. The planning officer was not (see [47]) obliged to suggest to the Committee a Grampian condition if she considered, as she did, that the CIL works would likely be complete in time to avoid unacceptable highway impacts.

67. R (Shropshire Council) v Secretary of State [2019] EWHC 16 [2019] JPL 584, a decision of the High Court (CMG Ockleton) is a reminder in the context of CIL how important it is that formal requirements are complied with. Mr Jones was a self-

builder. He failed to serve a commencement notice in accordance with the requirements of Reg 67 of the CIL Regulations, and instead, sought retrospectively to rely on an informal email. He failed, and his failure cost him nearly £40,000, because the Council served on him a notice requiring payment on the ground that development had commenced without a commencement notice being sent to the Council.

68. R (Giordano Ltd) v Camden LBC [2018] EWHC 3417 [2019] JPL 495 WW (High Court, Mrs Justice Lang) is a decision on reg 40(7) (ii) of the CIL Regulations. An appeal is pending against this decision.

GENERAL PERMITTED DEVELOPMENT ORDER

69. Westminster City Council v Secretary of State [2019] EWHC 176 is an illustration of a general principle about the interpretation of the GPDO. The High Court (Mr Justice Ouseley) had to deal with modern telecommunications and the GPDO. New World Payphones Ltd runs a network of phone kiosks around the country. It replaces old style phone boxes with open structures offering LCD interactive screens and Wi-Fi internet access. Mr Justice Ouseley held that these installations required planning permission. They did not fall within the relevant provisions of the GPDO, Sch 2 Part 16, because the development as a whole did not fall squarely in the provision, which concerned for the purpose of a telecommunications network. The judge followed [37] the decision of the High Court in Keenan v Woking BC and Secretary of State [2017] EWCA Civ 438, in which Lindblom LJ referred to the need for a development to fall 'fully' or 'squarely' within the applicable class of the GPDO in order for permission to be granted by it. If a proposed development falls partly outside the class, it falls outside it. An appeal is pending against this decision.

70. The decision of the High Court in Bright Horizons Family Solutions Ltd v Secretary of State [2019] EWHC 14 [2019] JPL 595 answers the question what is a school for the purposes of Sch 2, Part 7, Class M of the General Permitted Development Order. In short, the judge (CMG Ockleton) decided that a nursery is not a school as it is not an institution for the provision of education for young people of school age (see [16]).

HABITATS DIRECTIVE AND HABITATS REGULATIONS

71. In R (Langton) v Secretary of State [2018] EWHC 2190 the High Court (Sir Ross Cranston) considered licensing for badger culling, and in particular the issue of screening out the need for an appropriate assessment under the Conservation of Habitats and Species Regulations 2017. He rejected the contention that having regard to the effect of the licence conditions when screening out an appropriate assessment infringed the approach of the Court of Justice of the European Union in People Over Wind & Sweetman v Coillte Teoranta Case C-323/17 12.4.18.

72. The claimant had submitted that the conditions which Natural England had attached to the cull licences fell within the People Over Wind ruling and should not have been taken into account at the screening stage. The conditions 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 in Dorset Heathlands SPA and Poole Harbour SPA).

73. The judge said at [157]

"In my view the licence conditions which Natural England attached to the licences…are not the mitigating or protecting 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 Habitat Regulations. I accept Natural England's submission that it would be contrary to common sense to assume that culling was going to take place at times and places where the applicants did not propose to do so."

74. The reasoning in this case is hard to reconcile with the recent CJEU decisions, as it appears the conditions were added at least in part to mitigate adverse impact. An appeal is pending against this decision.

75. See also Edel Grace & Sweetman v An Board Pleanla Case C-164/17 CJEU 25.7.18.

PUBLIC WORKS CONTRACTS

76. In Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532 the Court of Appeal decided that a development agreement between a developer and a Council was not a public works contract within the meaning of the relevant European legislation (Directive 2004/18/EC) and the Public Contracts Regulations 2006, because the developer's obligations to do the work were contingent on it choosing to "draw down" the land (see [48]-[51]). However, the agreement was unlawful, as it involved the Council committing itself to the procurement of works from the developer, if the developer chose to draw down the land. It would then be too late to carry out the required procurement process. The Court therefore granted a declaration of ineffectiveness.

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