

## LANDMARK CHAMBERS WEBINAR – RESPONSE TO QUESTIONS

### A COMPREHENSIVE GUIDE TO THE LATEST PLANNING LAW, PRACTICE AND POLICY (PART 1 ON 15 APRIL 2020, PART 2 ON 22 APRIL 2020)

#### Introduction

1. On 15 and 22 April 2020, Landmark Chambers hosted a two-part webinar entitled “A Comprehensive Guide to the latest Planning Law, Practice and Policy, with Sasha White QC, Gwion Lewis, Zack Simons, Matthew Fraser and Kimberley Ziya as speakers.
2. During the webinar, attendees submitted a number of questions, and for those that were not answered at the end of the webinar, we have provided answers here. We have not been able to provide answers to questions involving particular cases or particular sites.

The 10 leading planning cases over the past year: Gwion Lewis

*Qu: Is it correct, in your view, that if an Inspector states that there is a clear reason to dismiss the appeal applying para. 11(d)(i) of the NPPF, the tilted balance does not then apply?*

3. If the test in para 11(d)(i) of the NPPF is met (i.e. the application of NPPF policies that protect areas or assets of particular importance provides a clear reason for refusing permission), the test in para. 11(d)(ii) (i.e. the tilted balance) is otiose as the presumption in favour of granting permission will already have been disapplied by para. 11(d)(i).

*Qu: In Woodcock [2015] EWHC 1173 paras 88-104, Holgate J found that "policies" in NPPF 2012 para 49 referred also to policies in draft plans, and that the same therefore applied to "policies" in para 14. How does this play out with the new wording in NPPF 2019 para 11?*

4. *Woodcock* concerned the interpretation of this sentence in para. 49 of the 2012 NPPF: "Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a 5-year supply of deliverable housing sites". It was held that "relevant policies" for this purpose could include emerging development plan policies if the LPA did not have a 5-year supply of housing.
5. In the 2019 NPPF, para. 11(d), read with footnote 7, states that, in a housing case, "the policies which are most important for determining the application" will be considered "out-of-date" if the LPA does not have a 5-year supply or fails the housing delivery test. Accordingly, should the "most important" policies in a particular case be in an emerging plan, they will still

#### London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

#### Birmingham

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

#### Contact us

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

#### Follow us

 @Landmark\_LC  
 Landmark Chambers

be deemed to be "out-of-date" policies (and thereby trigger the presumption in favour of granting permission) if the LPA does not have a 5-year supply or fails the housing delivery test.

*Qu: Given the final decision of the courts in the Canterbury City Council case, should it be read that the Council had assessed every possible development site within their administration and determined that none - other than those listed in the policy - were appropriate for housing? If not, how can it be concluded, without case-by-case assessment through the planning determination process, whether any other site may be suitable?*

6. This should not be read into the judgment. It was not that the Council had concluded that residential development would necessarily be inappropriate on all sites other than those identified in the relevant Local Plan policies. Rather, it was a case of those policies identifying, in addition to the allocated sites, the full range of locations where development might be expected to receive planning permission to meet the requirements of the plan (subject to relevant criteria being met). This did not rule out planning permission being granted for development on a site that was not supported by the development plan, should a material consideration (or considerations) justify that as a matter of planning judgment.

*Qu: Does the judgment in Lambeth also supersede the judgment in "I'm your Man" and obviate the absence of a condition?*

7. The Supreme Court did not overrule *I'm Your Man* in *Lambeth*; *Lambeth* was concerned with the particular context of a s. 73 application whereas *I'm Your Man* was concerned with a standard application for a temporary planning permission. The prudent approach would be (i) to continue to apply the principle in *I'm Your Man* that only conditions can restrict a use approved by planning permission; but (ii) to be aware that if that is not done due to error or oversight, it *may* still be possible, post-*Lambeth*, to argue that the use is restricted applying the "reasonable reader" test to the interpretation of the planning permission as a whole, if (unusually) there are other statements within the permission that are consistent with a restriction being imposed.

*Qu: Following the Heathrow judgment, is it not likely that Local Plans will be challenged or found unsound more often now if they do not explain how they have taken the Climate Change Act/Paris Agreement into account?*

8. I think this is unlikely. The key point about the Heathrow case is that there was a failure to comply with a specific statutory duty to explain how government policy on climate change had

#### London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

#### Birmingham

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

#### Contact us

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

#### Follow us

 @Landmark\_LC  
 Landmark Chambers

been taken into account in preparing the policy statement. There is no corresponding, specific duty under the Planning and Compulsory Purchase Act 2004 to explain how government policy on climate change has been taken into account in preparing local plans. There is a high-level duty to prepare a plan document with the objective of contributing to achieving sustainable development, but no duty that specifically relates to climate change policy.

The Government's emerging planning reforms set out in "Planning for the Future": Kimberley Ziya

*Qu: Are there any plans to extend Prior Approval consents where Covid-19 restrictions have prevented the completion of the development?*

9. Not as far as I am aware. However, the Government is live to the risk that planning consents (whether permissions or prior approvals) lapsing poses to the economic recovery and is looking at options to prevent this from happening.

*Qu: What are three key reforms needed to effect real change? Are there any indicators that a more radical approach will be forthcoming in the Planning White Paper?*

10. It is clear that the Planning for the Future document is not as radical as many in the planning industry would have liked. In particular, it did not pick up on the more significant reforms proposed in the Jack Airey and Chris Doughty paper published in January. In my view, reforms on that level will be necessary to effect a real, noticeable change to our planning system. The three that particularly caught my eye were:

- (1) End detailed land use allocations in favour of a binary (development land/non-development land) zonal system;
- (2) Make the test for permission in development zones whether the application breaks certain rules in the development plan to reduce the scope for subjective judgments in decision-making; and
- (3) Take the politics out of planning applications by making these purely administrative processes (while ensuring local authorities still retain control over setting the rules in local plans).

11. We will have to wait for the White Paper to discover whether the Government has taken any of these more drastic recommendations on board.

**London**

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

**Birmingham**

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

**Contact us**

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

**Follow us**

 @Landmark\_LC  
 Landmark Chambers

12. There is in my view cause for optimism in relation to the White Paper being more radical in its approach. The Housing Minister has proven himself in recent weeks to be exceptionally pro-development and prepared to support robust planning decisions (for example, on applications for inappropriate development in the Green Belt). It is hoped that this confidence in the development sector, together with the need to boost the economy as we emerge from the public health crisis, will lead to a more significant reform agenda.

*Qu: Would you expect greater priority on employment provision in response to BBBB in order to balance the current emphasis on housing delivery?*

13. In my view the focus will still be centred on housing delivery with employment considered as part of a wider place or community building agenda. This marries with the approach of the BBBB report and the Planning for the Future paper.

*Qu: Any insight into how the formula for deriving local housing need may be amended?*

14. Unfortunately, there is no detail given in Planning for the Future aside from "we will introduce a new approach which encourages greater building within and near to urban areas and makes sure the country is planning for the delivery of 300,000 new homes a year." There do not appear to have been any developments on this since. However, given that this proposal is still at the review stage there may be an opportunity for stakeholders to feed in their views.

*Qu: Have MHCLG said when further advice will be coming on CIL payments?*

15. They have not. However, while Simon Gallagher recognised the importance of this issue, he also noted that the CIL Regulations are affirmative meaning that any amendment to them required positive approval by both Houses of Parliament. This makes a quick fix more difficult.

Key themes and trends in residential planning appeals over the past year: Sasha White QC

*Qu: Are there any Appeal decisions dealing with loss of local Green Space?*

16. I have no doubt there would be but I am not aware of any in the past year.

*Qu: Should the guidance on planning appeals be changed to clarify the Wheatcroft position?*

17. Yes. It would be of benefit for all to have more clarity about the criteria that will be applied and for the decision of the Inspector to come forward much sooner than at the opening of the inquiry or hearing.

#### London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

#### Birmingham

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

#### Contact us

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

#### Follow us

 @Landmark\_LC  
 Landmark Chambers

The 10 leading decisions of the Secretary of State over the past year: Matthew Fraser

18. All questions relating to this talk were answered live at the end of the webinar.

LPA powers and decision making during the COVID-19 lockdown: Zack Simons

*Qu: Do you foresee challenges to LPA decisions made in virtual committees where the technology partially fails and prevents full participation by Members and or the public ?*

19. Dropped connections during the meeting presents a legal risk: see Jenny Wigley's discussion of this topic [here](#).

20. On how that risk can be managed, see §4.6-§4.10 of the LLG's remote meetings protocol [here](#).

*Qu: In regard to the erection of planning site notices at a time when the country is in lockdown and the government has specified that large sections of the population should stay at home at all times self-isolating, could LPA's be discriminating against those who have been told to not leave their homes, by only consulting on planning applications by way of site notices (given that a swath of the population would not be able to see the notices and so participate in the consultation) and so failing their 'Public Sector Equality Duty under Section 1 & 149 of the Equality Act 2010, Article 6 of the Aarhus Convention and breaching natural justice?*

21. Remember – site notices under the DMPO are not the **only** way of publicising applications.

22. Depending on the scheme, there may be requirements for adverts in the newspaper and/or services on neighbours.

23. So it remains perfectly possible for local people to be notified of important local applications without leaving the house.

24. Nonetheless, it will be prudent for LPAs to consider what further steps can be taken to make sure members of the public are notified of what's happening – so that they are not relying on site notices alone.

*Qu: have you had heard any more from MHCLG re CIL payment holidays in COVID19 crisis?*

25. We have not, albeit Simon Gallagher has said that the issue is under discussion.

*Qu: What about changing SCIs?*

#### London

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

#### Birmingham

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

#### Contact us

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

#### Follow us

 @Landmark\_LC  
 Landmark Chambers

26. Indeed, and that has already happened at LPAs to make their SCIs consistent with the requirements of lock-down, e.g. at East Suffolk.

*Qu: Can LPA site visits be outsourced to a 3rd party company/consultancy?*

27. The officer who writes the report and, in a case of delegated powers, makes the decision should have made the site visit herself.

*Qu: For members of public who normally are entitled to speak, can that be replaced with a request to submit a written transcript which is either provided in full to Committee Members or read out by Officers at the meeting, or do they have to be allowed to speak in real-time at the Committee?*

28. Which members of the public are entitled to speak depends on the standing orders of the individual LPAs.

*Qu: Are LPAs justified in delaying the public consultation process on live applications until the lockdown restrictions are lifted?*

29. There is no legal impediment to continuing public consultation procedures in the vast majority of cases during lock-down.

30. If there are further queries please do not hesitate to contact any of us.

**SASHA WHITE Q.C.**

**GWION LEWIS**

**ZACK SIMONS**

**MATTHEW FRASER**

**KIMBERLEY ZIYA**

**6 May 2020**

**London**

180 Fleet Street  
London, EC4A 2HG  
+44 (0)20 7430 1221

**Birmingham**

4th Floor, 2 Cornwall Street  
Birmingham, B3 2DL  
+44 (0)121 752 0800

**Contact us**

 [clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)  
 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

**Follow us**

 @Landmark\_LC  
 Landmark Chambers