Bristol Planning Law and Policy Conference

2017 Legal Update

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Introduction

1. One of the difficulties in presenting a legal update is that both case-law and government reforms come forward in a somewhat random fashion, which results in a range of disparate headings with no obvious structure to link them.

2. The structure of this paper reflects the fact that it was prepared as the basis for a talk at the Bristol Planning Law and Policy Conference, where there was only limited time available to each speaker. It begins with the new EIA Regulations, because that is something the organisers of the conference specifically asked me to cover. Thereafter, it takes some of the most recent developments, discussed on a topic-by-topic basis, and works back through the different topics in a vaguely chronologically manner, on the basis that the further back in time the cases go, the more likely it was that delegates would be familiar with them - in which case, it would matter less if I ran out of time to say it.

EIA

3. As of 16 May 2017, the process of environmental impact assessment has been governed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. The new regulations apply unless the ES was submitted, or a scoping opinion was requested, before that date.

4. For the most part, the 2017 regulations are simply a consolidation of the 2011 Regs and subsequent amending instruments. However, there are some key differences. The main changes from the 2011 Regulations are as follows:

    a. They enable the Secretary of State to exempt developments in Scotland, Wales and Northern Ireland respectively which have national defence as their

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sole purpose from the environmental impact assessment ("EIA") procedures which would ordinarily be applicable;[2]

b. The introduction of co-ordinated procedures for projects which are also subject to assessment under the Habitats Directive or the Wild Birds Directive.[3] Note that these do not go as far as requiring "joint" procedures. In practice, it would be normal to expect a co-ordinated approach to EIA and HRA in any event, so on most cases this is unlikely to make much difference;

c. Changes in the information to be provided to inform a screening decision and the criteria to be applied when making a screening decision. In essence, these involve greater "front-loading", including details of mitigation measures proposed to avoid significant effects.[4] While this may mean more work "up front", it should reduce the number of schemes which are found to require full EIA. The three week timescale for receiving a Screening Opinion has been retained, but the ability to extend this has been limited to 90 days (subject to exceptional circumstances);[5]

d. although most of the screening criteria are unchanged, there has been a reduction in the threshold above which screening is required for industrial projects (from 5h to 0.5ha). This was not the subject if any consultation and I understand that there have been queries as to whether it was intended;

e. to the list of environmental factors to be considered as part of the EIA process. Some of these are largely changes in nomenclature – "human beings" has been replaced by "population and human health", "fauna and flora" has been replaced by "biodiversity"[6], but there is a new requirement to consider (where relevant) effects deriving from vulnerability to the risks of major accidents and disasters (including climate change);[7]

f. changes to the information to be provided within an ES and the way it is presented, including:

[2] regs 60. 61 and 62
[3] reg 27
[4] reg 6(2)
[5] reg 6(6) and (7)
[6] reg 4(2)(a) and (b)
[7] Schedule 3 para 1

i. the ES must be accompanied by a statement setting out the relevant qualifications of the experts used,[8] and the consenting authority must be satisfied as to the competency of those experts.

ii. the ES must be based upon the most recent scoping opinion (where one has been obtained);[9]

iii. changes to the requirements for considering alternatives: the ES must now include an "indication of the main reasons for choosing the selected option, including a comparison of the environmental effects".[10]

g. increase in the consultation period for a submitted ES, from 21 to 30 days;[11]

h. authorities are required to determine the procedures for monitoring significant adverse effects;[12]

i. the introduction of a requirement for decision-makers to avoid conflicts of interest, and (in cases where the proposal is being brought forward by an authority that is also the decision-maker) to ensure functional separation between the persons within the authority responsible for bringing forward a proposal and those responsible for determining it. [13]

5. Overall, the changes are not ground-breaking. However, those wishing to ensure they minimise the risk of judicial review would do well to take on board the changes to the content and presentation of screening requests and ESs, particularly in areas such as consideration of alternatives, which have in the past been a happy hunting ground for those seeking a basis on which to challenge both grants of planning permission and development plans.

Section 106 Agreements and Pooling Arrangements

[8] reg 18(5)
[9] reg 18(4)(a)
[10] reg 18(3)(d) together with Schedule 3 para 2
[11] reg 19(6), 20(2)(e)
[12] reg 26(1)(d), 26(3)
[13] reg 64

6. In terms of recent case law, the Supreme Court's decision in ***Aberdeen City and Shire Strategic Development Planning Authority v. Elsick Development Company Ltd***[14] may be prove to be one of the most significant planning cases this year. It concerns the use of Section 106 Agreements and Pooling Arrangements to fund the infrastructure required in areas which are expecting major new development across a number of sites.

7. The facts of the case are far from unusual. The authority's strategic development plan identified four strategic growth areas in the city. It also identified a number of major improvements to transport infrastructure, which could only be funded if the Authority was able to secure a percentage in the increase in land values associated with development in the strategic growth areas. Consequently, the Authority consulted on and adopted Supplementary Guidance, which established a fund to deliver these projects, to which developments within the growth areas were required to contribute.

8. Elsick was one of those developers, and owned land on which they were proposing to construct 4000 new homes. Throughout the consultation process, Elsick had objected to the Fund on the grounds that it was contrary to the guidance set out in Circular 3/2012 (which reflected the normal tests familiar to English planners). In particular, Elsick argued that the effect of the Fund was that they were being required to contribute to a large number of schemes, even though the figures showed that their own development would have no, or at most a *de minimis*, effect on that particular part of the road network.

9. When that argument failed with the Authority, Elsick took their challenge to the Courts. They succeeded before the Inner House, and that decision has now been upheld by the Supreme Court.

10. In a judgment which considers the tests for validity of conditions, section 106 agreements and the connection between the two, Lord Hodge began by affirming the longstanding "threefold test" that conditions must be imposed for a planning purpose, must fairy and reasonably relate to the permitted development, and must not be unreasonable.

11. Turning to the difference between conditions and section 106 obligations, Lord Hodge observed that, unlike conditions, the validity of planning obligations did not depend on their relationship to a particular permission: it was possible to enter into a section 106 obligation even if there was no planning application. Instead,

[14] [2017] UKSC 66

> "The legality of a planning obligation depends on whether it restricts or regulates the use of land."

12. Outside this, the only tests for the legality of an obligation were that it must be for a planning purpose, and not *Wednesbury* unreasonable.

13. In those circumstances:

    a. an obligation to pay a sum of money which was not tied to the commencement of development would not be lawful.

    b. a planning obligation which required a contribution for a purpose that did not relate to the burdened land would also be unlawful, because it would amount to the buying and selling of planning permission

> "an ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice"

14. However:

> "the question whether a benefit conferred by a planning obligation is a material consideration in the determination of an application is quite separate from the question whether a planning obligation restricts or regulates the development or use of a particular piece of land."

15. In this regard, the Supreme Court reaffirmed the observation of Lord Keith in ***Tesco Stores v. Secretary of State for the Environment***[15] that:

> "an offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration"

16. Critically,

> "The inclusion of a policy in the development plan, that the planning authority will seek such a planning obligation … would not make relevant what would otherwise be irrelevant."

[15] (1994) 68 P&CR 219

17. Applying these principles to the facts, the Supreme Court said that the SG in ***Aberdeen***:

    a. involved the pooling of contributions towards the funding of specified infrastructure where no one developer was liable for the cost of any of the specified interventions;

    b. required contributions in addition to the requirement that each developer mitigate the specific impacts of their scheme;

    c. contributions were fixed at a sum per unit which was not tied to the impact of a particular development on the transport network. This did not meet the criterion in the Circular that contributions had to be fairly related in scale and kind.

18. Having regard to these matters, the scheme of the SG was unlawful:

    a. because it entailed the use of a developer's contribution on infrastructure with which its development had no more than a trivial connection, and was thus not imposed for a purpose in relation to the development and use of the burdened site;

    b. because there had to be more than a trivial connection between the development and the interventions the contribution would fund.

19. Does this mean the end of pooling schemes? The answer is a qualified "no". Schemes will still be lawful where there is a clear link between the developments and the infrastructure which is to be funded, and where the LPA can demonstrate that the amount required of any particular developer is based on the impact which that development is likely to have. In practice, however, this will mean that:

    a. across the board tariffs are going to be more difficult to justify;

    b. pooling schemes which cover a large number of different infrastructure projects may have to be broken down into smaller pools, where the list developers required to contribute to any particular pool is more focused;

    c. LPAs will need to be able to demonstrate that money collected within a particular pool is used for projects which are part of that pool.

20. LPAs with pooling schemes covering a range of infrastructure would therefore be well-advised to review them in the light of the Supreme Court's decision. What is very clear is that pooling schemes cannot be used as an alternative to Community Infrastructure Levy.

21. Before leaving this topic, it should also be noted that the Court of Appeal heard argument just last week in the case of ***R (Wright) v. Forest of Dean District Council***[16] where, at first instance, Dove J quashed a planning permission for a wind turbine in the Forest of Dean because, in granting the permission, the Council unlawfully took account of promised annual "community donations" from the operator of the turbine to the local community.

22. The donations – promised by the applicant to total between £500,000 - £1,100,000 – were to be administered through a Community Benefit Society formed under the Co-operative and Community Benefit Societies Act 2014. The Council accepted that the donations had been taken into account in granting the permission. Noting that there were no particular community benefits to which these donations had to be applied, and that they could be used for anything, provided that it benefitted the local community in some way, Dove J concluded that they did not meet the test for materiality and were unlawful, and on the basis f the familiar principle that "planning consent cannot be bought or sold".

23. My prediction is that the Court of Appeal will uphold this, but it is one to watch.

Air Quality

24. The cases under this heading flow from the ***ClientEarth*** litigation relating to the Government's EU law duties to reduce nitrogen dioxide levels in the air. In particular, in a judgment given in November of last year, ClientEarth successfully challenged the Government's Air Quality Plan[17]. The High Court determined[18] that the Air Quality Plan was defective in a number of respects, not least because cost, rather than efficacy, had been the determining consideration when selecting measures to lower pollution levels. Further, basing the Plan on very optimistic forecast assumptions (which failed to reflect properly the revelations about 'defeat devices' being used in vehicle emissions testing) was held to breach the Directive.

[16] [2016] EWHC 1349 (Admin)
[17] which had itself been published pursuant to a mandatory order of the Supreme Court: *R (oao ClientEarth) v. SSEFRA* [2015] UKSC 28
[18] See Judgment of Garnham J in *R (oao ClientEarth) v. SSEFRA* [2016] EWHC 2740 (Admin)

The Government was ordered to produce a new draft Plan by 27 April 2017, and a final Plan by 31 July 2017.

25. Although not directly related to a planning decision, ***ClientEarth*** is already having an impact on proposed development in parts of the country which have identified Air Quality Management Areas and are struggling to meet the required limits. Two cases illustrate the way in which it is being used. [19]

26. First, in ***R (Shirley) v. Secretary of State for Communities and Local Government***[20] the Claimants challenged the Secretary of State's refusal 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.

27. In this regard, is generally well-established that the Secretary of State has a very broad discretion when deciding whether or not to call in an application, but in this case, the Claimants argued that this was overridden by the Secretary of State's obligations as a "competent authority" under the Air Quality Directive. The Claimants contended that the AQD required the Secretary of State to take all appropriate measures to ensure compliance, which included calling in the application in that case.

28. That application was rejected by Dove J on the grounds that the Secretary of State's obligations under Article 3 were clearly defined, and there was no justification for extending this to include wider responsibilities. However, although the claim in that case failed, in ***Gladman Developments Ltd v. Secretary of State for Communities and Local Government***[21] 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.

29. In upholding that decision, Supperstone J concluded that:

    a. 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;

[19] See also the challenge brought on air quality grounds to the draft Planning Policy Statement on airports (which failed due to timing): *R (Hillingdon BC) v. SS Transport* [2017] EWHC 121 (Admin)
[20] [2017] EWHC 2306
[21] [2017] EWHC 2768

b. 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;

c. 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; and

d. the Inspector was not required to consider whether the issue could be addressed by a Grampian condition requiring mitigation which had not been suggested to him.

30. Elsewhere in the country, we are still waiting to hear the fall-out of the revelations by Cheshire East Council in August concerning the deliberate manipulation of air quality data over the last three years. However, according to news reports the Council is now reviewing permissions that have been granted in over five towns in the area.[22]

31. Together, these examples demonstrate the critical importance of the air quality to planning cases, and suggest that the issue is going to be a growing area of concern for authorities and developers alike.

Neighbourhood Planning

32. The most important case in neighbourhood planning this year is the Court of Appeal's decision in ***R (oao DLA Delivery Ltd) v. Lewes DC.***[23] This concerned a problem which is not unusual in the context of neighbourhood plans. Under the terms of the Localism Act, a neighbourhood plan is required to be in "general conformity with the strategic policies contained in the development plan for the area".[24] NPs are also required to have regard to national policy and advice – i.e. the NPPF and the PPG. This is all very well where the local planning authority has an up-to-date, NPPF compliant local plan, but a number of neighbourhood plans have been brought forward in circumstances where the adopted development plan is badly out of date.

33. In ***DLA Delivery***, the claimant contended that these requirements could not both be met unless there was an up-to-date local plan in place. Upholding the decision of

[22] See https://www.theguardian.com/environment/2017/aug/02/cheshire-east-council-admits-falsifying-air-pollution-data and reports on the Council's website.
[23] [2017] EWCA Civ 58, since followed by Lang J in (Admin) which held that it was not unlawful for a neighbourhood plan also to seek to be consistent with an emerging local development plan.
[24] Under Town and Country Planning Act 1990, Sch 4B 8(2)(e)

Foskett J at first instance, the Court of Appeal rejected that argument on the basis that the requirement for 'general conformity' was flexible and did not require absolute conformity with an out-of-date plan. Further, no conformity was needed with policies which specifically planned for a previous time period that was not covered by the neighbourhood development plan. There was no requirement for the making of a neighbourhood plan to await the adoption of an up-to-date local plan.

34. ***DLA Delivery*** has since been followed and applied in two decisions, handed down within a fortnight of one another.

35. First, in ***Hoare v. Vale of White Horse***[25] the Court found that there had been a legal error by the neighbourhood plan examiner in failing to identify a clear conflict between the neighbourhood plan and a policy in the Local Plan. However, the mere fact that there was a conflict between one policy in a neighbourhood plan and one strategic policy in the development plan did not necessarily mean that the policies in the neighbourhood plan collectively were not in general conformity with the strategic policies in the development plan as a whole. It was highly likely that, had the examiner and the local authority realised that the neighbourhood plan policy conflicted with the local plan policy, they would still have concluded that the draft neighbourhood plan was in general conformity with the strategic policies in the development plan. In those circumstances, since the outcome for the claimant would not have been substantially different if the identified legal error had not occurred, relief was refused pursuant to the Senior Courts Act 1981 s.31(2A).

36. In the second case, ***R(Bewley Homes Plc) v. Waverley BC***[26], the Farnham Town Plan had been brought forward in advance of the new local plan, and proposed allocating sites which were beyond the settlement boundary in the adopted (but out of date) Local Plan. The Claimants[27] argued that the NP could not be therefore be in general conformity with the development plan. That argument was rejected by the Examiner, whose decision was upheld by Lang J., largely on the basis of ***DLA Delivery***.

37. Lang J's judgment also considers the standard of reasons required of an examiner examining whether a neighbourhood plan meets statutory requirements. Reflecting the comments of Holgate J in ***Crownhall Estates***[28], Lang J considered that there were obvious differences between the role and function of an inspector deciding a contested appeal, which was an adversarial process, and an examiner examining

[25] [2017] EWHC 1711(Admin)
[26] [2017] EWHC 1776
[27] who were, ironically, promoting other sites in Farnham which were also beyond the settlement boundary
[28] *R (oao Crownhall Estates Ltd) v. Chichester DC* [2016] EWHC 73 (Admin)

whether a neighbourhood plan met the statutory requirements, which was an inquisitorial process. The adversarial process gave rise to a particular obligation to inform the parties of the reasons why their main arguments succeeded or failed, and the extent to which their evidence was accepted. An examiner conducting an inquisitorial process into a neighbourhood plan was not subject to the same obligation as he or she was undertaking a function which was narrowly prescribed by statute and therefore subject to a limited statutory duty to give reasons. The principles in *South Bucks*[29] had to be modified to reflect those differences.

38. Finally, in the "watch this space" category, the High Court last week heard argument in ***Richborough Estates v. SSCLG***, where the claimants are challenging the December 2016 Written Ministerial Statement on neighbourhood planning, which states that neighbourhood plan policies in plans that allocate housing sites are not to be treated as 'out of date', unless less than a 3 year housing land supply can be demonstrated. The principle grounds of challenge are the failure to consult over what is essentially an amendment to para 49 of the NPPF, and alleged irrationality. Dove J has indicated that judgment can be expected before the end of term.

National Policy: Policies for the Supply of Housing and The Presumption in Favour of Sustainable Development

39. After nearly a dozen conflicting High Court decisions, the Supreme Court's decision in ***Richborough Estates v. Cheshire East, Suffolk Coastal v. Hopkins Homes***[30], finally gave us a definitive answer to the meaning of the phrase "policies for the supply of housing". Overruling the Court of Appeal's decision in this point, the Supreme Court found that the phrase 'policies for the supply of housing' is limited to policies dealing only with the numbers and distribution of new housing, and excludes any other policies of the development plan dealing generally with the disposition or restriction of new development in the authority's area. In other words – contrary to the Court of Appeal's view - "policies for the supply of housing" did not include policies relating to development in the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks or policies for the conservation of wildlife or cultural heritage.

40. However, of at least equal importance is what the Supreme Court went on to say about the practical significance of this conclusion.

[29] *South Buckinghamshire DC v. Porter (No 2)* [2004] 1 WLR 1953
[30] [2017] UKSC 37

41. Prior to the Supreme Court's decision, paragraph 49 had been regarded as important because it was seen as the gateway into the paragraph 14 "presumption in favour" of sustainable development. In particular, paragraph 14 states that where relevant policies of the development plan are absent, silent or out-of-date, planning permission should be granted unless "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole." On the face of it, that is an instruction to put the development plan to one side, and determine the application by reference to the NPPF. Prior to the Supreme Court's decision, it was therefore considered extremely important to know whether a policy was a policy for the supply of housing because – if it wasn't – the developer could not rely on para 49 to demonstrate that it was out of date.

42. The Supreme Court's decision impacts on this in three ways.

43. First, as Lord Carnwath explained, if there is a shortfall in five-year housing land supply, that shortfall is of itself enough to trigger the operation of the "tilted balance" in paragraph 14. There is, therefore, no need for a "legalistic exercise" to decide whether individual policies do or do not come within the expression "policies for the supply of housing".[31] In this sense, ***Richborough Estates*** in fact makes it easier, rather than harder, to get into paragraph 14.

44. However, what Lord Carnwath's judgment gives to developers with one hand, it immediately takes away with the other. In particular, the second way in *Richborough* impacts on paragraph 14 is in its conclusion that a policy that is deemed "out-of-date" is not therefore necessarily to be "set aside",[32] nor does this determine the weight to be accorded to that policy, either generally or within the "tilted balance". Weight is a matter for the consideration of the decision maker and may be affected by such matters as the degree of consistency of a policy with the NPPF, the particular purpose of the policy and the degree of any shortfall in five-year housing land supply. The Supreme Court has also made clear, as a corollary of this, that policies which are <u>not</u> for the supply of housing should not be given <u>added</u> weight just because they cannot be deemed out- of-date by NPPF para 49.[33]

45. Finally, Lord Carnwath also had something to say about the second limb of para 14, which states that the "tilted balance" does not apply where "specific policies in this Framework indicate development should be restricted." Footnote 9 then gives a list

[31] Paragraph 59 of the Supreme Court Judgment in *Richborough Estates* [2017] 1 WLR 1865
[32] *Crane v. SSCLG* [2015] EWHC 425 (Admin), at paras 70-75
[33] Paragraph 66 of the Supreme Court Judgment in *Richborough Estates* [2017] 1 WLR 1865

of examples of what is meant by "specific policies"[34]. Stressing that the list of examples in footnote 9 is "not exhaustive", Lord Carnwath went on to say that "although the footnote refers in terms only to policies in the Framework itself, it is clear in my view that the list is to be read as including the related development plan policies".[35]

46. Where all this leaves paragraph 14 is, in my view, something of a mess. As a matter of law, it must be right that the NPPF cannot override the development plan[36]. However, the literal wording of paragraph 14 contains a clear injunction to decision-makers to determine applications simply by reference to the policies of the Framework. The consequence of the Supreme Court's decision is that we can no longer assume that paragraph means what it says. Even if policies of a development plan are out of date, they can still be given weight if the decision-maker so chooses. Moreover, the "tiled balance" may not even be engaged if there are specific policies in the development plan which indicate that development should be restricted. On that basis, everything goes back into the melting pot, and it is still a matter of balance for the decision maker. Plus ca change …

47. Although ***Richborough*** resolved a number of arguments about the meaning of paragraph 14, there are two other important questions which it left open:

    a. the <u>consequence</u> if a specific 'restrictive' policy is in play. In particular, if there is a specific policy, does this mean that you can never rely on paragraph 14?

    b. is there a "presumption in favour of sustainable development" <u>outside</u> paragraph 14?

48. The first of these had been considered in ***Forest of Dean DC v. SSCLG***[37] last year, where Coulson J held that if, after the application of a "restrictive" policy, the outcome was in favour of development then the weighted or tilted balance in favour of development under the first limb "resurfaces and could be applied."[38] That

[34] "For example, those policies relating to sites protected under the Birds and Habitats Directive (see paragraph 119) and/or designated as Sites of Special Scientific Interest, land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the roads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."

[35] Per Lord Carnwath at paragraph 14 of *Richborough Estates*

[36] indeed, the NPPF itself states that this is not its intention

[37] [2016] PTSR 1031

[38] That approach was also followed by Holgate J in *R (oao LEGLAG) v. Tewkesbury BC* and was supported by Lang J in *Borough of Telford & Wrekin v. SSCLG and Gladman*

conclusion has now been endorsed by the Court of Appeal decision in ***East Staffordshire***[39] where Lindblom LJ said:

> "Once identified, the specific policy in question has to be applied – and, where that specific policy requires it, planning judgment exercised – before the decision-maker can ascertain whether the 'presumption in favour of sustainable development" is available to the proposal in hand"

49. As to the second question ("is there a presumption in favour of sustainable development beyond NPPF para 14?") it is not unusual for a developer to find that, although the LPA may not have had a 5YHLS when the application was first made, that situation has been remedied by the time the appeal against refusal comes to be heard. In those circumstances, developers have had to fall back on the argument that, because the government's objective is to maximise the supply of housing, housing targets should not be treated as a ceiling, and a development that is otherwise should still benefit from the "presumption" in favour, whether or not the strict tests in paragraph 14 were met.

50. This argument originally succeeded in the High Court decision of Coulson J in ***Wychavon DC v. SSCLG***[40] but this was in direct conflict with a decision of Jay J in a different case on the same day.[41] Three subsequent High Court decisions[42] also doubted the decision in ***Wychavon***. The issue was also settled in ***East Staffordshire BC v. SSCLG***[43] where the Court of Appeal made it absolutely clear that neither the 'golden thread' nor the policy presumption in favour of sustainable development has any application outside the confines of paragraph 14.

51. In other words, paragraph 14 alone defines the circumstances in which the presumption in favour of sustainable development applies. Development that appears to be 'sustainable' by reference to other parts of the NPPF will only benefit from the presumption in favour if paragraph 14 is triggered. The corollary to this is that, in order to benefit from the policy presumption, a development it *only* needs to meet the relevant tests in paragraph 14. ***East Staffordshire*** makes it clear that there is no additional requirement that a development proposal must be found to be sustainable first, nor that it must meet all three roles of 'sustainable development'

[39] *East Staffordshire v. SSCLG* [2017] EWCA Civ 893, at para 22(3)
[40] *Wychavon DC* v. SSCLG [2016] EWHC 592 (Admin)
[41] *Cheshire East BC v. SSCLG* [2016] EWHC 571 (Admin),
[42] *Trustees of the Barker Mill Estates v. SSCLG* [2016] EWHC 3028, *East Staffordshire BC v. SSCLG* [2016] EWHC 2973 (Admin) and *Thorpe-Smith v. SSCLG* [2017] EWHC 3028 (Admin)
[43] [2017] EWCA Civ 893

simultaneously (as per NPPF para 8 and as set out in NPPF para 7) in order to benefit from the policy presumption under paragraph 14.

52. However, this does not mean that the "sustainability" of an application is not a material consideration in the normal planning balance. In ***Mansell v. Tonbridge & Malling BC***[44] the Court of Appeal upheld the Council's decision to grant planning permission for conversion of an agricultural barn in circumstances where the committee report had advised that the scheme was contrary to the development plan, but that the NPPF's emphasis on sustainable development was relevant. It was common ground that paragraph 14 was not engaged, and the claimant argued that the committee report had misled members into thinking it was. The Court disagreed: officers had not suggested that there was a para 14 presumption in favour of the proposal, but had rightly advised that the sustainability of the scheme in the wider context of the NPPF was material.

Housing

53. In order to get in to the presumption in favour of sustainable development via paragraph 49, one has to be able to demonstrate that the LPA does not have a five year "supply of deliverable housing sites". But what exactly does this mean? Does it require the LPA to demonstrate that it has a supply which is large enough to ensure that the numbers required over the next 5 years will in fact be delivered, or is it enough to be able to point to sites which, individually, have a reasonable prospect of being delivered and which – if added together – would give year a 5 year supply, even though (in reality) it is unlikely that they will all come forward in that time?

54. This was the central issue in ***St Modwen Developments Ltd v. Secretary of State for Communities and Local Government***[45] where the local planning authority had included within its 5YHLS a number of sites which did not have permission, and had not been allocated in the adopted development, but were included in a submission draft allocations document. The Inspector upheld that calculation.

55. Of itself, there was nothing surprising about that, since the PPG advises that:

> "planning permission or allocation in a development plan is not a prerequisite for a site being deliverable in terms of the five year supply."

[44] [2017] EWCA Civ 1314
[45] [2017] EWCA Civ 1643

56. However, in the High Court (and Court of Appeal) the claimant challenged the Inspector's conclusion on the basis that it erroneously focused on "deliverability" rather than "delivery". Para 49, it was argued, was concerned with the probability of delivery.

57. That argument was rejected by Ouseley J at first instance, and his decision has been upheld by the Court of Appeal, where Lindblom LJ said:

> "Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be."

> "paragraphs 47 and 49 .. are consistently worded to refer to a supply of housing sites that can be regarded as 'deliverable', not sites that are regarded as certain to be delivered."

> "had the Government's intention been to frame the policy … in terms of a test more demanding than deliverability, this would have been done".

58. The practical effect of this decision is that LPAs need only to be able to show that they have enough sites which are deliverable, to make up a 5YHLS, even if in reality not all of these will be delivered in that time.

59. This decision will doubtless embolden LPAs to claim a 5YHLS in advance of formal adoption of an emerging plan. It also provides a potential argument against a trend, sometimes seen in planning appeal decisions, of discounting a percentage of a 5YHLS figure to allow for non-delivery, on the grounds that what is required is a supply of sites that are "deliverable", and not a supply of sites that will necessarily be delivered.

60. While on the topic of housing, but in the "watch this space" category, we are now awaiting the result of the government consultation on "Planning for the right homes in the right places". Key proposals in the consultation paper include:

    a. A standardised approach to calculating housing need, by reference to a simple formula which takes demographic projections, adds an adjustment factor based on a "local affordability ratio" which reflects the ratio of house prices to earnings, subject to an overall cap. The standardised approach would apply to all plans submitted after 31 March 2018. Authorities which

wish to depart from the methodology will have to justify their approach, which will be "tested rigorously by the Planning inspector through examination of the plan". LPAs using the standardised approach would be able to rely on the evidence base used to justify their plan for a period of 2 years from the date on which they submit their plan.

b. A requirement that all planning authorities produce a statement of common ground detailing how authorities have worked together under the duty to co-operate.

c. Amending the test of soundness to require plans to be based on effective joint working and a strategy informed by agreements over the wider area, evidenced by the SCG.

d. Streamlining the process for identifying the needs of individual groups.

e. Requiring LPAs to set out housing figures for designated neighbourhood planning areas.

f. Improvements to the way plans are tested for viability, with amendments to the NPPF to make it clear that, where policy requirements have been tested at the plan stage, the issue should not usually need to be tested again at the planning application stage.

g. Making viability assessment simpler and more transparent.

h. Allowing LPAs "who are delivering he homes their communities need" to increase their planning fees by 20%.

61. Many of these proposals are short on details, and likely to be the subject of heated debate. However, the prospect of the new standardised approach is already being taken seriously by LPAs, but is having markedly different results depending on where in the country you are. In the south-east, the effect of the changes will generally be that housing requirements go up, so many authorities are now racing to submit their plan before next year. In contrast, for a number of authorities in the north, housing numbers would go down, and some authorities – such as Leeds CC – are now trying to amend plans which have already been submitted to take advantage of the lower numbers.

Alternative Proposals

62. In planning law, it is generally recognised that applications have to be determined on their own particular merits. Consequently, the case law has for many years recognised that:

    a. if a particular proposal is not inherently harmful, the fact that there are other sites on which it could have been proposed is normally irrelevant: ***Trusthouse Forte Hotels v. Secretary of State for the Environment***[46];

    b. in the absence of a development plan policy reserving a site for a particular purpose, it is also normally irrelevant that, if permission is refused, some other – arguably more desirable – development might come forward: ***R (Mount Cook Land) v. Westminster City Council***.[47]

63. The second of these points has recently been re-affirmed by the Court of Appeal in ***Lisle-Mainwaring v. Carroll***.[48]

64. The case concerned the infamous "stripey house" in Kensington and Chelsea. When purchased by Mrs Lisle-Mainwaring, No. 19 had last been in active use as an office falling within use class B1, but this had been changed to B8 under permitted development rights. She then applied for permission to convert it to residential use. Although RBKC's development plan had a clear policy restricting the conversion of offices to residential, there was no comparable restriction on conversion from B8.

65. On appeal, the Inspector granted permission on the grounds that the change from B8 to C3 was in accordance with the development plan. In so doing, he rejected the argument advanced by Mrs Lisle-Mainwaring's next door neighbour, that the change from B1 to B8 had been a sham, and that permission should be refused on the grounds that refusal would lead to a resumption of the B1 use.

66. That decision was challenged by Mr Carroll. In the proceedings, the central issue in this case was the circumstances in which it would be appropriate to refuse planning permission for a proposed development on the grounds that there was an alternative, possible use of the land. In the High Court, Lang J quashed the inspector's decision on the grounds that the Inspector had failed to grapple properly with Mr Carroll's argument. However, the Court of Appeal overturned that decision,

[46] [1977] 1 WLR 926

[47] [2003] EWCA Civ 1346

[48] [2017] EWCA Civ 1315

finding not only that the Inspector had grappled with the issue, but also that the conclusion he had come to was the only one open to him.

67. Citing the judgment of Auld LJ in ***Mount Cook Land***, Lindblom LJ said that the law was clear on the circumstances in which a potential alternative future use of the site on which development was proposed was a material consideration. The ***Mount Cook*** principles aligned with "the most fundamental principle of development control decision-making: that an application must be determined on its own merits, in accordance with the statutory scheme". If the proposed development was acceptable in its own right, the alternative proposal was normally irrelevant. Alternative proposals would only be material in "exceptional circumstances", and even then, only if the alternative was not "inchoate or vague" and there was a "real possibility" of its being implemented in the foreseeable future.

68. Against this backdrop, the "loss" of the benefit of a possible alternative use could not qualify as "planning harm" which would bring the case within the exceptional circumstances test, because this would be inimical to the very requirement that circumstances had to be exceptional.

Section 73 Permissions and the Use of Conditions

69. It is well-established that a permission under section 73 to modify a condition subject to which planning permission has been granted is a new, freestanding planning permission which stands alongside the original. Accordingly, when granting permission under s. 73, it has long been recognised that it is at the very least good practice, if not a legal requirement, for the new permission to repeat all the conditions from the old permission which need to be carried over. Slightly less well known is the fact that under section 73(5), it is not possible to use section 73 to extend the time for commencement of development or for the submission of an application for approval of reserved matters.

70. Sadly, both these points are lost on many planning authorities, and in ***Lambeth v. Secretary of State for Communities and Local Government***[49] the Council appears to have been oblivious to either.

71. The case concerned a 2010 planning permission for a DIY store which had had a condition attached restricting the range of goods which could be sold. In 2014, the owners applied to vary that condition so as to widen the range of goods. They specifically proposed wording for a new condition, which – although wider than the original – was also restrictive.

[49] [2017] EWHC 2412 (Admin)

72. In granting that application, Lambeth set out, in the description of the development for which permission was being granted, 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 stated that the development should be begun within 3 years of the date of the decision.

73. When the owners applied for a LDC certifying that the 2014 permission allowed the unrestricted retail sale of all retail goods, their 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.

74. In the High Court, that decision was upheld by Lang J. Although the 2014 permission was ambiguous, it was impossible to interpret the conditions in the 2014 permission as including the "proposed wording" set out in the description of the development. Nor could it be implied into the permission. In this regard, Lang J accepted that the decision in ***Trump v. Scottish Ministers***[50] allowed not only the correction of "incomplete conditions", but also the imposition of new ones (albeit in rare cases). However, in order to imply a condition, it was not sufficient to show that it reflected the LPA's purpose, or that it would be fair: it must be necessary to give efficacy to the document. In the present case, that test was not satisfied.

75. Lang J also held that condition 1 was invalid.

76. The case is therefore – yet another- salutary warning to local authorities considering section 73 applications.

77. In a second case on section 73, ***Wet Finishing Works Ltd***, Singh J upheld a section 73 application which had been to increase the number of units which could be constructed under an original permission for only 84 units. Appling the earlier decision in ***Arrowcroft***, Singh J said the question was whether the change amounted to a *fundamental alteration* of the proposal put forward in the original application. This was a matter of planning judgment.

78. It is questionable whether this decision is correct. A s.73 application can only change the conditions attached to a permission, and not the description of development itself. On the face of it, a planning permission for 84 units is specific as to the

[50] [2015] UKSC 74

number of units which may be built, and any additional unit would be operational development for which there was no permission.

Heritage

79. There have been four cases of note concerning heritage issues in the last year. The first, ***R (oao Hayes) v. City of York Council***[51], concerned the meaning and effect of paragraph 141 of the NPPF, which states that where heritage assets are lost or partly lost, local planning authorities and developers should make archaeological records publicly available, but "the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted".

80. The development in that case was a proposal to construct a new visitor centre at Clifford's Tower in York. The construction involved archaeological works and disturbance to buried artefacts. The issue in the case was whether paragraph 141 meant that the commitment to record evidence of disturbed artefacts could be taken into account *at all* in the decision to grant planning permission. Kerr J considered that the literal interpretation of paragraph 141 was that the recording of evidence could not be a material factor in the decision. But, after considering the purpose and context of the policy, as illuminated by its previous iterations, he rejected that literal interpretation and effectively implied the word 'decisive' before 'factor' in para 141:

> "It follows that, on the literal reading … the officer's report would have taken account of a legally irrelevant consideration and the decision consequently flawed. But rejecting, as I do, the literal interpretation in favour of a sensible and liberal construction of the paragraph in its proper historical context, the officer's report and the committee's decision were not taken inconsistently with the concluding words of NPPF paragraph 141. The recording of evidence of the past was not the sole justification for the development. It was treated as part of the public benefit flowing from the project, but that was not unlawful."

81. The second and third cases concern the concept of the setting of a heritage asset. This is a matter on which the guidance issued by Historic England suggests that the concept is broad.

[51] [2017] EWHC 1374 (Admin)

82. In ***R (Williams) v. Powys CC***[52] the LPA had granted planning permission for a wind turbine approximately 1.5km away from a Grade II* listed church. The Court of Appeal quashed the permission because the Council had failed to consider the harm to the setting of the church that would potentially be caused by the inter-visibility between the turbine and the church (the ability to see one from the other) and by the 'co-visibility' of the two (that is, the fact that the turbine and the church could be seen together from some viewpoints). The fact that the issue of the impact on the church had not been raised by consultees or the public at the time of the grant of permission did not relieve the planning authority of its duty under s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

83. Of particular note were Lindblom LJ's comments on what was required before there could be an impact on setting. Specifically, he said that for there to be an impact on setting there must be a distinct visual relationship of some kind between the heritage asset and the development, a relationship "that was more than remote or ephemeral and which in some way bore on one's experience of the listed building in its surrounding landscape or townscape". However, physical proximity was not always essential for such an effect, and harm could be caused by the inter-visibility and co-visibility of the two.

84. This indication that setting involves a visual connection is in contrast to the decision in ***Steer v. SSCLG***[53] where - in a judgment handed down just a few weeks after ***Williams*** - Lang J held that the Inspector had erroneously determined that a physical or visual connection was necessary for the appeal site to form part of the setting of Kedleston Hall. In Lang J's view, the Inspector had erred by failing to consider whether the existence of a historical, social and economic connection between the Hall and its agricultural estate lands could be sufficient to bring those lands within the setting of the Hall.

85. The Court of Appeal decision in ***Williams*** was not available at the time of the hearing before Lang J and she did not refer to it in her judgment. Her decision is not easy to reconcile with Lindblom LJ's suggestion that there could only be an impact on setting if there was a distinct visual relationship between the development and the heritage asset. However, it is important to remember that in ***Williams*** Lindblom LJ was only looking at the visual connection, and was not asked to consider whether non-visual relationships could influence the extent of a heritage asset's setting; whereas in ***Steer*** the point was squarely in issue and was therefore considered in some detail.

[52] [2017] EWCA Civ 427
[53] [2017] EWHC 1456 (Admin),

86. My personal view is that, although one needs to be careful about extending the concept of setting too far, it must be right that setting is concerned with more than just a visual relationship. If nothing else, the way in which one experiences a heritage asset is also influenced by factors such as sound: a noisy development in the vicinity of a tranquil ruin would undoubtedly affect one's experience of the latter, even if the development was not visible. Whether this can be extended to historic, social or economic connections is more difficult. I understand that an application for permission to appeal has been made in ***Steer***, so the Court of Appeal may soon be able to clarify the matter.

87. Finally, on the issue of heritage, in ***R (Khodari) v. Royal Borough of Kensington and Chelsea***[54] the Court of Appeal has confirmed that whether or not a non-listed building is a "heritage asset" is a matter of planning judgement for the decision maker. Whilst "heritage assets" includes designated heritage assets and assets identified by the local planning authority (for example, through local listing), the term can include other assets of heritage interest.

Green Belt

88. There have been a number of important cases on Green Belt policy this year.

89. In ***R (Boot) v. Elmbridge BC***[55] the Court held that paragraph 89 of the NPPF was clear in providing that new buildings comprising facilities for outdoor sport, outdoor recreation and cemeteries would *only* be appropriate development in the Green Belt so long as they preserved the openness of the Green Belt and did not conflict with the purposes of including land within it. *Any* harm to openness or to those purposes would mean that the development could *not* be appropriate development in the Green Belt.

90. Three further cases concern the application of the decision in ***Turner***[56] last year. In ***Turner*** the Court of Appeal concluded that visual impact can be an aspect of impact on openness. This year:

    a. in ***R (Samuel Smith Old Brewery) v. North Yorkshire CC***[57] the High Court held that whether visual impact is relevant will depend on the circumstances of

[54] [2017] EWCA Civ 333
[55] [2017] EWHC 12 (Admin)
[56] *Turner v. SSCLG* [2016] EWCA Civ 466, followed in *Goodman Logistics Developments v. SSCLG* [2017] EWHC 947 (Admin) in which the Court held that an Inspector had erred in law by treating visual impact as irrelevant to the issue of openness.
[57] [2017] EWHC 442 (Admin)

the case and there is no requirement in every case to take into account visual impact when assessing openness;

b. in ***Goodman Logistics v. SSCLG*** Holgate J concluded that the visual impact of the proposal in that case was "obviously relevant", and the failure to consider it was an error of law;

c. in ***Smith v. Secretary of State for Communities and Local Government***[58] the court was concerned with an application to convert a single storey industrial shed into two semi-detached dwellings. The applicant had argued that this was appropriate development, because para 90 of the NPPF allowed the re-use of buildings that are of permanent and substantial construction, but this had been rejected by the Inspector on the grounds that para 90 was subject to the caveat that the development would preserve the openness of the Green Belt. The Inspector observed that, although there would be no extension of the existing buildings, the new garden areas would be enclosed by 2m tall fences and there would be "domestic paraphernalia" which would have an impact (albeit limited) on openness. In the High Court, that conclusion was challenged on the grounds that the visual impact associated with these features was not a result of any built development, and that impacts of this kind were inherent in the reuse of any building. Both arguments were rejected. Openness was an "open textured" concept which was not limited to the impact of new buildings, nor was the additional paraphernalia proposed in this case inherent in the reuse of a building.

91. Taken together, these decisions leave this part of Green Belt policy in something of a mess. The stringency of ***Boot*** makes it difficult to see how many applications for new sports facilities could ever be appropriate, and there are no clear guidelines on how to tell whether the visual aspects of openness fall on the ***Samuel Smith*** or the ***Goodman Logistics*** side of the line. It is understand that ***Samuel Smith*** may go up on appeal, so there may yet be an opportunity for the Court of Appeal to provide some clarification.

Habitats

92. In January this year, in ***SSCLG v. Wealden DC***[59], the Court of Appeal upheld a decision of Lang J to quash a planning permission for housing development granted on appeal by the Secretary of State. The Court considered that Lang J was right to determine

[58] [2017] EWHC 2562 (Admin)
[59] [2017] EWCA Civ 39

that the Inspector had erred in failing to consider the deliverability and efficacy of mitigation measures in circumstances where the Inspector had concluded that those mitigation measures were necessary to ensure that there would be no significant effects on the Special Area of Conservation ("SAC").

93. In a second case concerning the same SAC, Wealden District Council successfully applied to quash the Joint Core Strategy ("JCS") prepared by neighbouring Lewes District Council and the South Downs National Park Authority. WDC's grounds related to the impact of the JCS development on traffic flows on routes within 200m of the SAC.

94. Specifically, Natural England had advised that if the expected increase in traffic ("AADT flows") was less than 1,000 cars per day or 200 HGVs per day or if there was less than a 1% increase in traffic generated compared to that predicted at the end of the JCS period, then it could be concluded that the effect on the SAC would not be significant and the effect could be 'screened out' without needing to carry out an appropriate assessment under the Habitat Regulations. Unfortunately, that advice was given simply in the context of increases attributable to predicted growth from within the JCS area, and failed consider those effects of the JCS in combination with the neighbouring core strategy already adopted by Wealden District Council in 2013. If the Wealden development was included, the 1,000 threshold for significant effects would have been exceeded, resulting in the need for an appropriate assessment under the Habitats Regulations.

95. In the High Court, Jay J concluded that the failure to amalgamate those two figures was in breach of the legal requirement to consider *in combination* effects. NE's advice that there would be no significant effects and that no appropriate assessment was required was 'obviously wrong' and this error had infected the decision-making process and the lawfulness of the resulting JCS.

96. The issue in ***Wealden*** is of general application. More than one authority has had to go back and revisit its emerging plan in the light of this decision.

97. Under the heading Habitats, note that as of the end of November 2017 we will have new regulations. These make only minor changes here (but irritatingly change all the regulation numbers).

Reasons

98. There have been a number of cases this year concerning the duty to give reasons in planning cases.

99. In terms of the whether local planning authorities are obliged to give reasons for deciding to grant planning permission, as a matter of common law it has been clear since the decision of the Court of Appeal in ***Chaplin***[60] in 1998 that there is no general common law duty to give reasons. Between 2003 and June 2013 however there was a statutory duty[61] on local planning authorities to give summary reasons for a decision to grant planning permission. Logically, on the revocation of that statutory duty (in non-EIA cases), one might have thought that we would simply return to the position as it was under ***Chaplin***. However, for the moment, ***Chaplin*** must be read subject to two recent decisions of the Court of Appeal, where the Court conclude that there was a need to give reasons:

    a. in ***R (CPRE) v. Dover***[62] the Court of Appeal concluded that the Council had failed to give adequate reasons for the grant of permission for major development in an AONB. Laws LJ concluded that the Council was under a duty to give reasons because the Planning Committee had departed from the officers' recommendation, and because of "the pressing nature of the policy expressed in NPPF paragraphs 115 and 116" which gave the highest status of protection in relation to landscape and scenic beauty. In his view

        > " A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must surely give substantial reasons for doing so."

    b. in ***Oakley v. South Cambs DC*** **[2017] EWCA Civ 71** Elias J saw considerable merit in a general duty to give reasons, in all cases other than where the Committee's reasons are clear from the officer's report[63] but eventually decided the case on the narrower basis that, in the case before him, the committee had disagreed with the officer's recommendation, and in addition has done so in circumstances where its decision was not consistent with the development plan and involved inappropriate development in the Green Belt.

100. The Supreme Court appeal from the ***CPRE*** decision was heard last month, so expect a decision on this shortly before or after Christmas.

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[60] *Chaplin* (1998) 76 P & CR 207

[61] This was when the duty to provide summary reasons for the grant of permission (under Article 31(1)(a) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) was repealed.

[62] *R (oao CPRE) v. Dover DC* [2016] EWCA Civ 936

[63] See judgment of Elias LJ at paras 45 to 55 in *Oakley* but note that the Judgment of Sales LJ at paras 70 to 76 does not fully support this rationale.

101. As for planning applications not determined by Committee but decided by a planning officer under delegated powers, the recent decision of the High Court in *Shasha*[64] confirms that there is a statutory duty[65] on the delegated officer to produce a written record of the decision along with reasons for the decision. Of course, usually there is an officer's report in such cases and the reasons can be inferred from that.

[64] *R (oao Sasha) v. Westminster CC* [2016] EWHC 3283 (Admin)
[65] Under regulation 7 of the Openness Government Bodies Regulations 2014