Landmark Chambers

20th Bristol Planning Law and Policy Conference –
Homing in on Housing
Legal Update

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Overview of this talk

- (1) NPPF case-law;
- (2) EIA and SEA;
- (3) Habitats;
- (4) Air quality;
- (5) Time limits: JRs and development plan challenges;
- (6) CIL cases and legislative changes;
- (7) Some other important cases.

Tried to focus on cases or issues that are relevant to housing.

(1) NPPF case-law

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National Planning Policy Framework

(1) NPPF case-law 1
Cases on paragraph 11's 'decision taking' part

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Para. 11 of the NPPF is the new para. 14 … (and note the footnotes 6 and 7 …)

*"For **decision taking** this means:*

c) Approving development proposals that accord with an up-to-date development plan without delay; or

d) Where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date7, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed6; or

ii. 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."

(1) NPPF case-law 2 – the footnotes

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The para. 11 footnotes:

Out-of-date: *7 - This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1.*

*"***policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing":** *6 The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.*

(1) NPPF case-law 3
When are policies "out-of-date"?

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- Footnote 7 – applies where no 5 year HLS, HDT test levels failed (plus transitionals)
- ***Wavendon Properties Ltd v SSHCLG*** [2019] EWHC 1524
- Disappointed developer argued that if *one policy* which was important was found to be out-of-date, then the presumption was engaged
- Court held that the decision maker must:

i. Establish which policies are the most important for determining the case;

ii. Examine each one to determine whether they are out-of-date, applying the Framework;

iii. Then judge whether taken as a whole they are to be regarded as out-of-date.

NB also ***Gladman v SSHCLG*** [2019] EWHC 127 – "*acid test*" of whether out-of-date is consistency with Framework.

(1) NPPF case-law 4
Paragraph 11 cases

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- Followed in ***Paul Newman New Homes Ltd v SSHCLG*** [2019] EWHC 2367. The judge also held:
  - **No relevant development plan policies:**
  - One relevant development plan policy prevents the presumption being triggered on the basis of no relevant development plan policy;
  - Relevant means anything more than a fanciful connection;
  - Relevant does not mean important for determining the application;
  - **Out-of-date:**
  - A policy is not out-of-date simply because it is time-expired;
  - A single policy in the set of policies 'most important' for determining the application can prevent that trigger from applying;
  - Paragraph 11 is not the same as paragraph 14 of the 2012 NPPF and should not be approached in the same way or on the basis of 2012 version case law.

(1) NPPF case-law 5
Paragraph 11- *Peel Investments 1*

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- ***Peel Investments (North) Ltd v SSHCLG*** [2019] EWHC 2143 further guidance on the exercise if judgement as to whether a policy or policies are out-of-date;
- A policy is not necessarily out of date because the plan period has expired;
- Such a conclusion cannot be drawn from the 2012 Development Plan Regulations;
- Whether a policy is out of date is a judgement;
- Question is not one of time but of consistency with the NPPF and potentially, depending on the facts, will turn on other considerations;
- These could include changes to other aspects of the Development Plan, or changes on the ground which affected the assumptions underlying some aspect of the policy. See also ***Gladman v SSHCLG*** [2019]

(1) NPPF case-law 7
Paragraph 11 - *Peel Investments 2*

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- One of the reasons for refusal was the development was contrary to a policy in the 2004-2016 UDP which prohibited development which would fragment or detract from the openness of a strategically important "*green wedge*".
- C argued that the policy should be considered out-of-date because it was a constituent policy within a development plan document which, as a whole, had passed its expiry date.
- Dove J noted that both the 2012 and the 2018 NPPF contained policies dealing with the approach to be taken as to whether or not a policy in the development plan should be considered out-of-date.
- The approach under the old NPPF was considered in ***Bloor Homes East Midlands v SSCLG*** [2014] EWHC 754 (Lindblom J).
- Dove J adopted the approach set out in ***Bloor Homes*** and held that the Inspector was entitled to conclude as a matter of planning judgment that the policy was not out of date and remained consistent with the NPPF ([63]).

(1) NPPF case-law 8
Paragraph 11 – *Peel Investments 3*

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- The judge said at [65]:

"a policy may continue to be effective in delivering its original objectives and, moreover, may have been saved as the present policy was, and thus remain part of the development plan to be applied in accordance with the statutory Framework. Thus, the exercise required by paragraph 213 of the Framework and the ***Bloor Homes*** *test is* ***not one which is dictated simply by the passage of time, but rather an assessment of consistency of the Framework****, and the factual circumstances in which the policy is being applied including, amongst other things, what the Inspector characterised as "results on the ground".*

(1) NPPF case-law 9
Paragraph 11 – *Peel Investments 4*

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- He then said at [66]

"It is very far from uncommon to have policies in a plan related to environmental protection whose objectives will, and are intended to, continue well beyond the end of a plan period... The kind of policies to which this might apply are policies such as Green Belt (one of the characteristics of which is its "permanence"), or policies pertaining to environmental assets such as those relating to heritage assets or internationally protected and irreplaceable habitats. It would be both counter-intuitive, and contrary to long standing provisions of national policy, if policies in a development plan protecting these interests were deemed out-of-date at the expiration of a plan period".

(1) NPPF case-law 10
Paragraph 11 – *Peel Investments 5*

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Conclusions on ***Peel***

- The judge's analysis suggests that certain kinds of policies are, by their nature, more likely to ***avoid*** being considered out-of-date notwithstanding the fact that a plan period has expired.
- The examples he gave were **green belt policies** and **environmental policies.**
- The judge also emphasised the fact that while the passage of time is relevant to a policy being considered out-of-date, the real question was whether the passage of time had resulted in a change of circumstances such that the policy was no longer consistent with the NPPF or delivering "*results on the ground."* He accepted that both were a matter of planning judgment.
- This case therefore emphasises the difficulty of challenging an Inspector's conclusion that an old policy is not out-of-date.

(1) NPPF case-law 11
Footnote 6: disapplying the presumption *Monkhill* 1

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- ***Monkhill Ltd v SSHCLG*** [2019] EWHC 1993
- Holgate J sets out guidance on the process which should be followed when judging whether the footnote 6 provisions rule out the presumption under 11(d)(i):
- If 11(d) applies, the next question is whether one or more "Footnote 6" policies are relevant – if not, proceed to the tilted balance in 11(d)(ii)
- If there are, the Footnote 6 policy/policies need to be applied to the facts of the case;
- The application of some Footnote 6 policies requires all relevant planning considerations to be weighed (e.g. Green Belt);
- If carrying out that exercise (e.g. under Green Belt policies) indicates planning permission should be refused, there is no role for 11(d)(ii);
- In other cases, the application of the Footnote 6 policy may not require all planning considerations to be taken into account (e.g. para 196 – heritage assets); in such a case the other material considerations must be taken into account in the ordinary balance (but the Footnote 6 exercise means that the tilted balance does not apply).

(1) NPPF case-law 11
Footnote 6: disapplying the presumption *Monkhill 2*

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- ***Monkhill*** *(as above):* para 172
- C argued that the first part of para 172 ("*Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues*") did not qualify as a Footnote 6 policy because it did not (unlike the rest of the paragraph, which says that permission should be refused for major development in the AONB except in very limited circumstances) have a self-contained balance or test.
- The judge found that the first sentence of para 172 was capable of sustaining a clear reason for refusal and therefore its application was capable of disapplying the Framework under 11(d)(i).

(1) NPPF case-law 13 - Paragraphs 109 and 111

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- In ***Satnam Millenium Ltd v SSHCLG*** [2019] EWHC 2631, C succeeded in having a decision quashed on the basis of logical inconsistencies between the approach to highways harm and the approach to whether the scheme was deliverable at all.
- However, as part of the determination of the claim, the Court held:
- Paras. 109 and 111 need to be read together:
- Para. 109 "*Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe*".
- Para 111 requires a TA sufficient to be able to judge the question in para. 109 – without one, para. 109 does not itself apply; nevertheless, it is open to the decision maker to refuse permission on the basis of concerns about the absence of evidence showing an absence of harm.

(1) NPPF case-law 14
Conflicts with Neighbourhood Plans

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- In ***Chichester DC v SSHCLG*** [2019] EWCA Civ 1640, the Appellant argued that para 198 of the 2012 NPPF should have applied such that permission was refused.
- Para. 198 said that conflict with a made NP should lead to refusal; that has been recast in 2019 NPPF para. 12 as where an application conflicts with "*an up-to-date development plan (including any neighbourhood plans that form part of the development plan) permission should not usually be granted*".
- No Court decision on the interpretation of para. 12 (2019) but ***Chichester*** gives us a clue as to likely approach – the appeal failed because the relevant policy aspect (housing strategy) was not contained solely in the NP but spread between the NP and the LP.
- That disposed of the para 198 argument and also shows how para 12 judgements might be made.

(1) NPPF case-law 15 – other cases
East Bergholt

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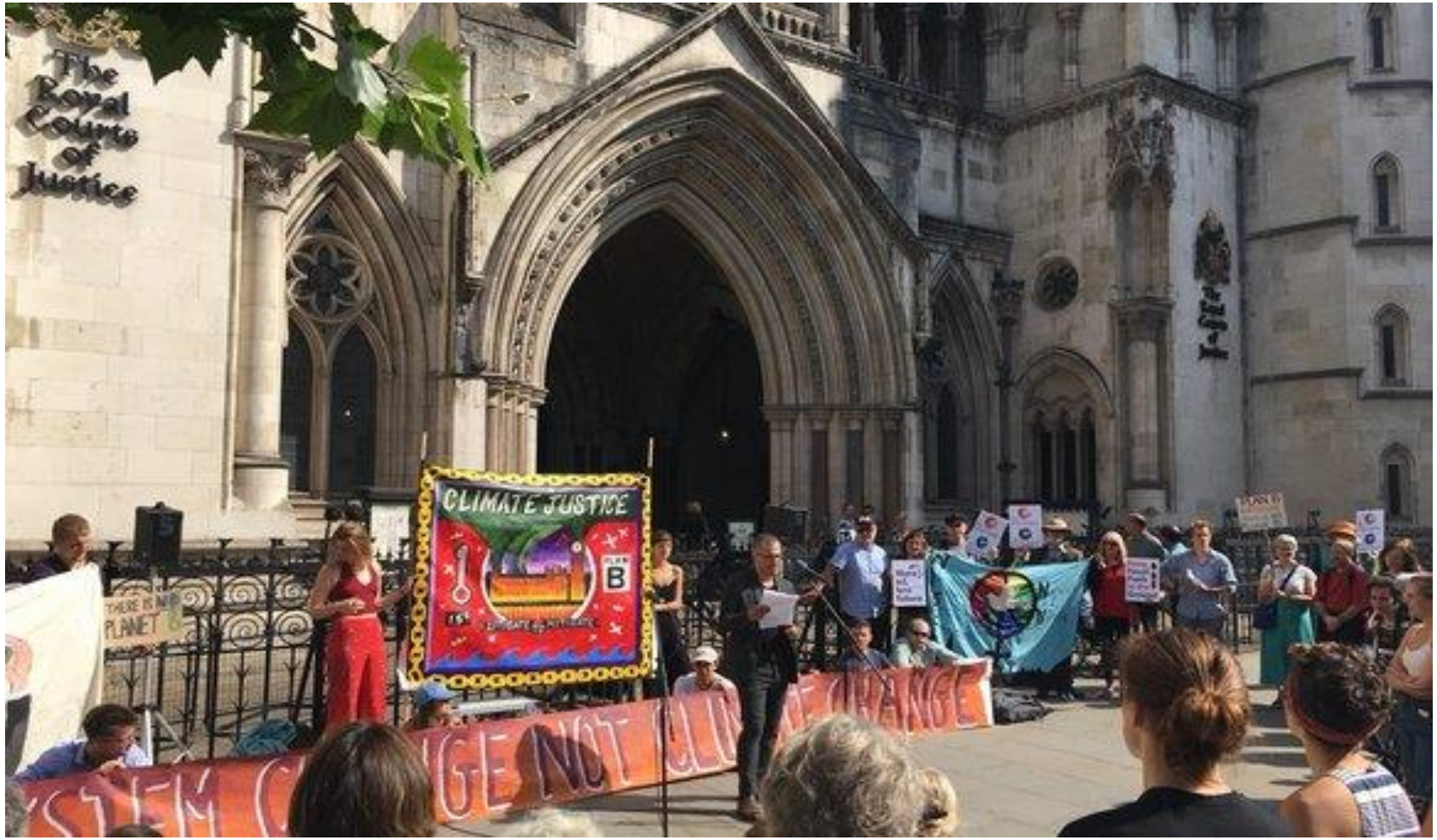
- In ***East Bergholt Parish Council v Babergh DC*** [2018] EWHC 3400 (December 2018), the High Court dismissed a challenge to the Council's grant of planning permission for 229 homes.
- This was a NPPF 2012 case focussing on deliverability and footnote 11 to para. 47 and ***St Modwyn Developments Ltd v SSCLG*** [2018] PTSR 746. 62.
- *"63… it is in my view it is not surprising that other local authorities should carry out the 5YHLS exercise in different ways given the broadly worded requirement in paragraph 47 of the NPPF and the absence of any prescribed method of assessment."*
- This case demonstrates the flexibility afforded to councils under NPPF 2012 in determining whether they have a 5 year housing land supply.
- Limited future importance given changes to NPPF.
- Permission has been granted to appeal to the Court of Appeal.

(1) NPPF case-law 16 – other cases
Chilton

- In ***R (Chilton PC) v Babergh DC*** [2019] EWHC 280 Robin Purchase QC sitting as a Deputy HC Judge held that failure to take account of an emerging Housing Land Supply Statement on 5YHLS did not justify the quashing of a permission.
- He said at [52] "*[t]here 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.*"
- The judge held that it will only be a legal error to fail to take account of an emerging 5YHLS figure if it would be *irrationa*l not to consider it (i.e. the test for material considerations): this was not the case here ([52]).

(2) EIA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PLAN B
THERE IS NO PLANET

(2) EIA 1: *Wingfield and* salami-slicing

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- In ***R. (Wingfield) v Canterbury City Council*** [2019] EWHC 1975 (Admin), the High Court discussed what a "project" was for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, and in particular how to determine whether two nearby developments are in fact a single project.
- C applied for judicial review of her local authority's decision to grant permission for a mixed-used development.
- In essence she argued that the local authority should have considered the development in question and a nearby development as the same project for the purposes of the EIA Regulations (But NB they had been considered as separate projects by the Council and the developer with separate environmental statements.)

(2) EIA 2: *Wingfield* and salami-slicing

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- The High Court (Lang J) refused the application; and held what constituted a "project" for the purposes of the Regulations was a matter of planning judgment subject to an irrationality or other public law challenge ([63]).
- Relevant factors included ([64]):
  - Common ownership of sites (more likely)
  - Simultaneous planning determinations (more likely)
  - Functional interdependence (more likely)
  - Stand-alone project (less likely)
- Applying those factors, the two sites alleged to be the same project by C were separate projects ([65]).

(2) EIA 3 – *Squire (1)*

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- ***R (Squire) v Shropshire*** [2019] Env LR 36 Judicial review of permission for intensive poultry-rearing facility dismissed by High Court
- Court of Appeal disagreed, finding a breach of the EIA Regulations
- The issue related to the impacts of spreading poultry manure on surrounding land
- EIA had relied on the need for an EA permit for the operations; and that this would cover the issue.
- Lindblom LJ held that effect of the environmental permit had properly been understood to include manure spreading, but the scope of the "*manure management plan"* has been misunderstood, because it would not result in any management of manure spread beyond the applicant's landholding [60].
- Similarly the EIA was flawed for failing to assess the impacts of manure spreading outside the landholding as an indirect effect of the project [69].

(2) EIA 4 – *Squire (2)*

- Reminder that full effects need to be considered.
- For facilities which produce waste (or other product) for use elsewhere this may include impacts beyond the site.
- Caution as to reliance on EPR; as providing necessary protections – need to be sure that is correct.
- Note the attempt to address matters through a later s 106 failed [81-82].

(2) SEA

- (1) ***Friends of the Earth v SS*** [2019] EWHC 518 – revised NPPF not require SEA;
- (2) Case C-305 ***Verdi Ambiente e Societa*** [2019] Env LR 33 – SEA required for legilsation that revised upwards the capacity of existing waste incineration facilities and provided for the construction of new facilities;
- (3) ***R (Berks, Bucks & Oxon WT) v SST*** [2019] EWHC 1786 (Admin) – SST's acceptance of HE's preferred choice for the Oxford to Cambridge expressway did not require SEA – not a plan, so no need for SEA;
- (4) ***R (Spurrier) v SST*** [2019] J.P.L. 1163 – allegations that Environmental Report inadequate to be judged vs ***Blewett*** test/***Wednesbury*** not a higher standard of review but:
  - (a) outstanding appeal: focus on Case C-723/17 ***Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer***
  - (b) ACCC/2017/156 …

(3) Habitats

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(3) Habitats: *People Over Wind*

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- The fallout from the CJEU's bizarre decision in ***People over Wind*** continues.
- ***People Over Wind v Coillte Teoranta*** (C-323/17) [2018] P.T.S.R. 1668: mitigation measures can only be considered in appropriate assessment, not screening stage.
- So CJEU adopted the approach that English Courts said would be *"ludicrous"* and contrary to common sense!
- Over the last year:
- (1) English Courts beginning to try to make some practical sense of the ludicrous and non sensical …
- (2) While also the torrent of CJEU case-law on habitats continues … with a seemingly ever stricter interpretation of the Habitats Directive by the CJEU.

(3) Habitats: new CJEU case-law

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- New cases from CJEU this year include:

- (1) Cases C-293/17, C294/17 ***Cooperatie Mobilisation for the Environment & Vereniging Leefmilieu*** [2019] Env. L.R. 27 ("the Dutch Nitrogen case")
- (2) Case C-411/17 ***Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres***

- Focus on (1) below.
- (2) holds that Habitats Directive applies to extension of life of a project, NB position different in EIA: see Case C-275/09 ***Brussels Hoofdstedelijk Gewest v Vlaams Gewest*** [2011] Env L.R. 26.

(3) Habitats: *Dutch Nitrogen 1*

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- Continues trend of CJEU case-law of rejecting any uncertain future measures as mitigation even at the AA stage;
- CJEU at [126] and [130] –
- *“126 … it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment’…*
- *130 … The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty.”*

(3) Habitats: *Dutch Nitrogen 2*

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- Issues:
  - How far does this case (and others earlier ones e.g. Case C-164/17 ***Grace and Sweetman v An Bord Pleanála*** [2019] P.T.S.R. 266 and Case C-387/15 ***Orleans v Vlaams Gewest*** [2017] Env. L.R. 12) prevent mitigation measures being looked at AA stage when they are unimplemented future proposals?
  - How certain is certain? Well for one thing it is clear that "certain" does not actually mean certain, it means no reasonable scientific doubt;
  - ***Dutch Nitrogen*** being used in various on-going Local Plan challenges including to argue:
    - SANGS: not sufficiently certain;
    - Improvements in air quality assumed for future predictions by DMRB not sufficiently certain.
  - CJEU seeking to push more cases into Article 6(4) …
  - Can read too much in to ***Dutch Nitrogen*** case? Perhaps not as radical as some suggest?

(3) Habitats: dealing with *PoW 1*

- (1) ***R. (Cairns) v Hertfordshire CC*** [2019] Env. L.R. 6, [28]-[29]: exclusion of mitigation measures at the screening stage is confined to the habitats context, and had no application to EIA.
- (2) ***R. (Langton) v Secretary of State for Environment, Food and Rural Affairs*** [2019] Env. L.R. 9 – the High Court held that conditions attached to badger culling licences are "*integral features of the project*" rather than mitigation measures and so can be considered at screening stage.
  - What else can still be considered on the basis it is not mitigation but an integral feature of the project?
  - The Court of Appeal gave judgment in ***Langton*** on 17 September 2019 ([2019] EWCA Civ 1562) but did not rule on the point because Natural England had re-authorised fresh licences on the basis of an AA rendering the point academic.

(3) Habitats: dealing with *PoW 2*

- **(3)** ***Canterbury CC v SS*** [2019] EWHC 2001 (Admin) – 2 cases where decisions had failed to apply ***PoW***.
  - Dove J in the first case refused to quash as an exercise of discretion since the screening report and ES were detailed and there was no information not before the decision maker which an AA would have generated and there was therefore no basis for considering an AA would have made any difference to the decision.
  - The second decision (Crondall PC) was quashed but that resulted from a material error in applying policy so there was no basis for considering exercising discretion.
- **(4)** ***Wingfield)*** (above) also a habitats issue raised. Lang J. exercised the court's discretion despite the fact that a permission on which a RMA was based failed to take account of ***PoW*** but the outline grant preceded the judgment in ***PoW*** and she found the error could be cured at RMA stage. Likely to be exceptional.

(3) Habitats: dealing with *PoW 3*

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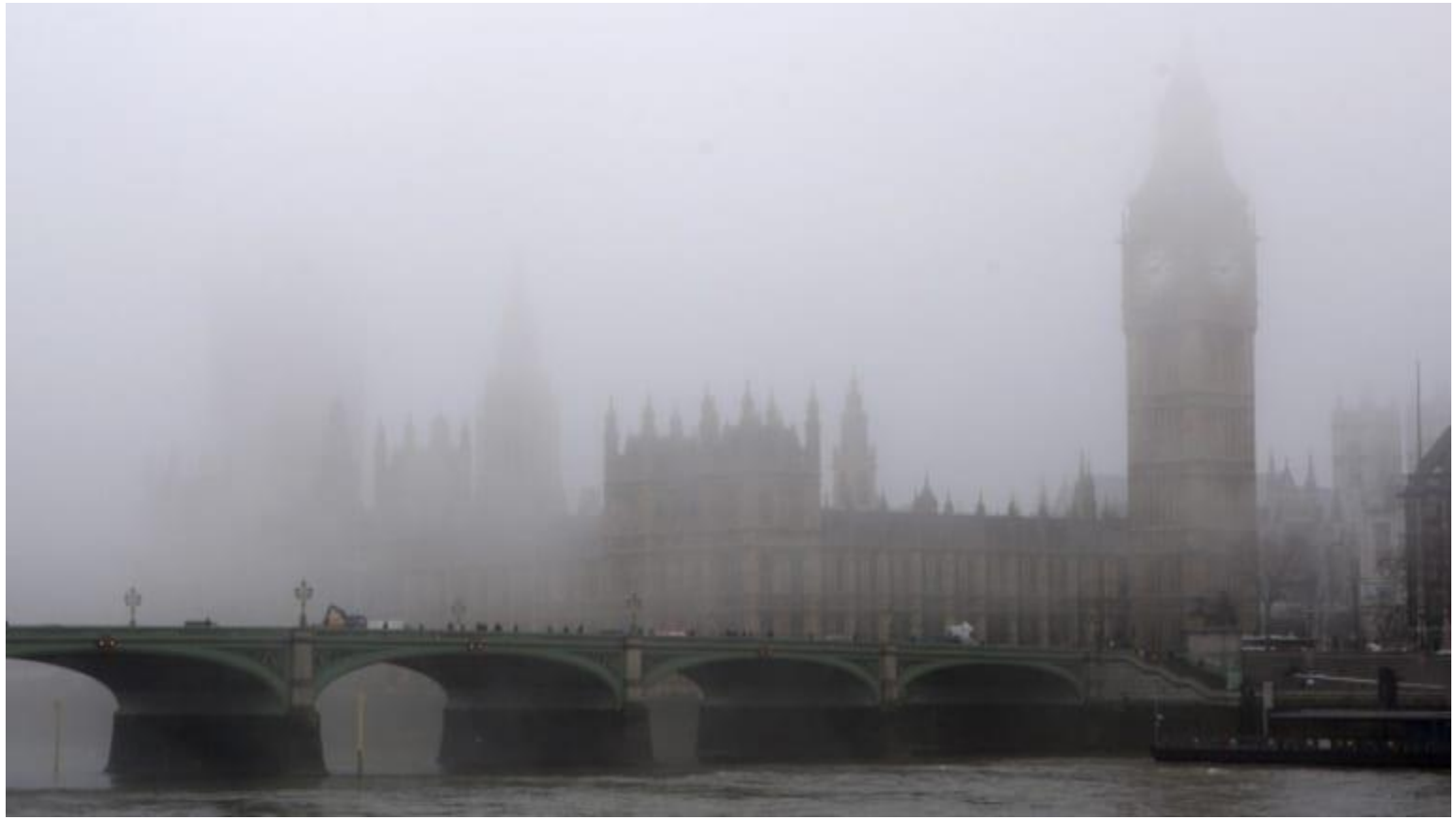
- Paragraph 177 of NPPF amended to deal with the issue caused by ***PoW***. In the July 2019 version, the presumption was disapplied if an AA was required. It now reads: "*The presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site.*"
- See ***Gladman Developments Ltd v SSHCLG and Medway*** [2019] EWHC 2143
- IR completed in March 2018 but reps made on ***PoW*** after in July 2018. Decision in early November 2018. Dismissed partly on basis of Habitats.
- Gladman argued that NPPF policy had never been (e.g. in July 2018) to disapply presumption if AA had shown no harm; alternatively that the Technical Consultation (preceding NPPF changes) should have been treated as in effect in November 2018.
- Court rejected challenge: the policy had not changed as at November 2018.

(4) Air quality



(4) Air Quality 1

- 3 cases to consider:

- (1) ***R (Shirley) v SSHCLG*** [2019] PTSR 1614;
- (2) ***Gladman Developments v SSCLG*** [2019] EWCA Civ 1543 (yes a 3rd ***Gladman*** case in this update …); and
- (1) ***R (Spurrier) & Ors v SST*** (above).

(4) Air Quality 2: *Shirley (1)*

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- Objectors to a scheme of 4,000 dwellings appealed against the dismissal of their claim for judicial review of the SS's decision not to call in the scheme.
- Argued:
  1. SS was the "*competent authority*" under AQD and obligated to take all measures to ensure compliance with AQD;
  2. This includes all measures required to meet the obligation to comply with AQ limit values under Article 13 – which, it was argued, is not to be remedied solely by the production of an Air Quality Plan under the AQD and transposing Regulations;
  3. Duty to meet limit values an overriding consideration in circumstances where either: (i) the thresholds were exceeded or (ii) the development would have the potential to impact upon the requirement to reduce exceedances in a period which has to be kept as short as possible.
  4. So SS required to call-in such planning applications and refuse them.

(4) Air Quality 3: *Shirley* (2)

- Court of Appeal (Lindblom, Singh and Coulson LLJ) rejected the claim and upheld the decision of Dove J at first instance:
  - AQD contains its own remedy for breaches of Article 13: the requirement under Article 23 to establish and implement an AQP which is effective and reduces any periods of exceedance.
  - Therefore no basis for reading in a duty to take particular actions in relation to permits or development consents

(4) Air Quality 3: *Shirley* (3)

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- *"33. Dove J's description of article 23 as providing the "specific and bespoke remedy" for a breach of article 13 therefore seems apt... The case law does not suggest, for example, that in such circumstances [i.e. a breach of article 13] a member state must ensure that land use planning powers and duties are exercised in a particular way—such as by imposing a moratorium on grants of planning permission for particular forms of development, or for development of a particular scale, whose effect might be to perpetuate or increase exceedances of limit values, or by ensuring that decisions on such proposals are taken only at ministerial level.*
- *"40. If a proposed development would cause a limit value to be breached, or delay the remediation of such a breach, or worsen air quality in a particular area, neither the Air Quality Directive nor the 2010 Regulations states that planning permission must be withheld or granted only subject to particular conditions. These may of course be material considerations when an application or appeal is decided…"*

(4) Air Quality 5: *Gladman* (1)

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- Proposed development of 330 dwellings plus 60 care units; appeal dismissed on grounds including the impact on air quality.
- Inspector took into account the quashing of the Government's air quality plan; found it would be unsafe to rely on vehicle emissions falling between 2015 and 2020 to the extent assumed in the developer’s models.
- Despite proposed mitigation measures, the proposals would have an adverse effect on air quality.
- Challenge failed in High Court and Court of Appeal.

(4) Air Quality 6: *Gladman* (2)

- *"48. It follows in my view that the NPPF did not compel the inspector to assume that the requirements of the Air Quality Directive would have been complied with soon enough, and in such a way, as to make the effects of the proposed development on air quality acceptable. He was not obliged by any such policy to disregard the Government's failure to comply with the Air Quality Directive, as found by the court in* ***ClientEarth (No.2)****, or to assume that it would comply within any given time."*
- Harsh decision by Inspector? Certainly contrary to many, many decisions where LPAs and Inspectors have accepted future improvements in air quality. Gladman may have struck it unlucky with its Inspector (see ***South Somerset DC v SSE*** (1993) 66 P. & C.R. 83 - "*[t]he deputy judge, who has immense experience of town and country planning, may have found the decision surprising. He may well have been right. The appellants may have struck it lucky*".

(4) Air Quality 7: *Spurrier*

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- The Airports Litigation.
- 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 ***Shirley***, that did not mean the SS had to call the application in- so here it didn't require the SS to reject an application for development consent or take a particular approach in an NPS (***Spurrier***: [235-237]).
- This aspect of claim refused permission to apply for JR; not appealed.
- Appeal confined to: (i) Habitats; (ii) SEA; (iii) climate change; and (iv) competition law. Appeals heard October 2019. Judgment awaited.

(5) Time limits

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(5) Planning JR Time Limits 1

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- How late is too late to bring a judicial review of the grant of planning permission?
- Apparently not five and a half years, according to the Court of Appeal: ***R (Thornton Hall Hotel Ltd) v Thornton Holdings Ltd*** [2019] EWCA Civ 737.
- Thornton Holdings Ltd applied for planning permission to erect three weeding marquees in 2010.
- The Council resolved to grant planning permission subject to condition that the use would cease after five years: however when planning permission was granted no such condition was attached, and the marquees were not removed after five years.
- C, a rival wedding venue, brought a judicial review in 2017.

(5) Planning JR Time Limits 2

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- The Court of Appeal (The Master of the Rolls, Lindblom LJ and Irwin LJ) upheld the High Court's decision to allow the judicial review notwithstanding the fact it was five and a half years out of time.
- The Court of Appeal agreed with the High Court's view that the extension of time sought was "e*xtreme*" ([25]), but that, as the circumstances were unique, there was an exceptional case for extending time ([26]).
- The Court emphasised at [51]

  "We stress once again that the court will not lightly grant a lengthy extension of time for a challenge to a planning decision by a claim for judicial review, nor will it lightly grant relief after a long delay. It will insist on promptness in bringing such challenges in all but the most exceptional circumstances. Here the circumstances are most exceptional. They are wholly extraordinary. This is a case where it can truly be said that the exception proves the rule."

(5) Planning JR Time Limits 3

- An increasingly important issue in challenges to neighbourhood plans is the timing of when a challenge is brought.
- This was considered in ***R. (Oyston Estates Ltd) v Fylde BC*** [2019] EWCA Civ 1152 (5 July 2019).
- This case was about the statutory provisions in section 61N of the Town and Country Planning Act 1990 for proceedings to challenge the steps taken by a local planning authority in making a neighbourhood plan.
- C promoted a site for inclusion within the settlement boundary as part of the neighbourhood plan process without success.
- Its claim for judicial review sought an order quashing the borough council's decision to make the plan.

(5) Planning JR Time Limits 4

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- The first instance judge, Kerr J, held that the challenge was brought out of time.
- The issue was that at each separate stage of the neighbourhood plan-making process contained in section 61N, a strict 6-week time limit applies to bring a judicial review challenge.
- The judge held that a claimant could not bring a challenge at the end of the process (the making of the plan) if in reality the challenge related to the lawfulness of a decision made at an earlier stage of the process (the decision to proceed to referendum).

(5) Planning JR Time Limits 5

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- In the Court of Appeal, Lindblom LJ agreed ([35]):

"…*to construe section 61N as if claimants were free to choose when to bring a challenge to the decision or action to which each subsection relates, whether within the relevant six-week period or outside it, would be to undo the express time limits for the bringing of claims. It would upset the carefully constructed arrangements for challenges to be brought only within a specific time from a specific decision or action. To read this qualification into section 61N would be to add words Parliament did not insert, and negate the effect of the words it did. The time limits in subsections (2) and (3) would be otiose if a challenge of any kind could be begun within six weeks of the plan being made. There would have been no point in providing those time limits if the only one that was effective was in subsection (1)*."

(5) Planning JR Time Limits 6

Landmark Chambers

Conclusions

- If aggrieved by a decision made early on in the neighbourhood plan-making process, *challenge the decision as soon as possible*. Do not wait until the plan is almost made, as it may be too late to bring a challenge.
- It may be possible to get interim relief: see ***R (Lochailort Investments Ltd) v Mendip District Council*** [2019] EWHC 2633 (QB) (08 October 2019). Interim injunction preventing the respondent local planning authority from holding a referendum on a neighbourhood plan pending a claim for judicial review seeking to quash the authority's decision that the plan meets the basic conditions.
- If defending a challenge to a development plan, check that the challenge is not in substance a challenge to a decision made at a much earlier stage of the plan-making process. If so it may be out of time to bring a judicial review.

(6) CIL cases

Landmark Chambers

Community Infrastructure Levy (CIL)
Planning Application Additional Information Requirement

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Following the introduction of the Community Infrastructure Levy (CIL) all applicants for full planning permission, including householder applications and reserved matters following an outline planning permission, and applicants for lawful development certificates are required to provide the following information.

Please return the form to planning@rbkc.gov.uk within 7 days of receipt, to ensure that your application can be processed. Alternatively, please send to: Planning & Borough Development, Town Hall, Hornton Street, London, W8 7NX

Please read the associated Guidance Notes before you complete the form. Notes on the questions are provided at www.rbkc.gov.uk

1. Application Details

Applicant or Agent name:
DP9

Planning Portal reference (if applicable):

Local authority planning application number (if allocated):

Site Address:
19-27 YOUNG STREET, LONDON

Description of development:
DEMOLITION OF THE EXISTING CAR PARK AND CONSTRUCTION OF A PART 5 STOREY AND PART 8 STOREY RESIDENTIAL BUILDING COMPRISING 53 UNITS WITH ANCILLARY LANDSCAPING AND BASEMENT CAR PARKING.

2. Liability for CIL

Does your development involve:

a. New build (including extensions and replacement) floorspace of 100 sq ms or above?

Yes ✓☐ No ☐

b. Proposals for one or more new dwellings (houses or flats, either through conversion or

(6) CIL cases 1

Landmark Chambers

- In ***R. (Shropshire Council) v SSCLG*** [2019] P.T.S.R. 828, C (the LPA) applied for judicial review of an inspector's decision that the notification requirements regarding the commencement date of a self-build home development had been substantially complied with.
- As a self-builder the interested party received a CIL exemption certificate. Under reg.54B(6), he would have ceased to be eligible for the exemption if he did not submit a commencement notice before the development was commenced. Under reg.2(1), a commencement notice referred to a notice under reg.67, which required that it be in a standard form.
- The interested party e-mailed the local authority to inform them about the commencement of the development but not in the standard form.

(6) CIL cases 2

- The High Court (CMG Ockelton, VP of the Upper Tribunal) agreed with the local authority's interpretation of the Regulations,
- The Court rejected the "substantial compliance" argument: a commencement notice was defined under the CIL Regulations as a notice which met the requirements, and accordingly there was no commencement notice submitted: "*If the path of compliance has not, so to speak, been trodden at all, there is likely to be little scope or need for analysis of error or omissions in attempted or partial compliance*" ([29])
- This case represents a very narrow approach to the issue of commencement. Query whether it is correct: see the obiter comments of Lord Carnwath in ***R (Trail Riders Fellowship and another) v Dorset County Council*** [2015] UKSC 18 in which he described this kind of approach as "*too narrow*" ([55], quoted in ***Shropshire*** at [34]).

(6) CIL cases 3

- In ***R. (Giordano Ltd) v Camden LBC*** [2019] EWCA Civ 1544, a developer appealed against a decision upholding the LA's determination that it was liable to pay CIL on a property undergoing development.
- The developer argued it was entitled to a deduction under reg.40(7)(ii) because the intended use following completion of the development was one that was able to be carried on lawfully and permanently without further planning permission:
  - [deduct] *"(ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development"*

(6) CIL cases 4

Landmark Chambers

- The Court of Appeal (Sir Ernest Ryder, Lindblom LJ, and Hickinbottom LJ) allowed the appeal. Lindblom LJ said at [33]:

  "It seems clear, therefore, that the requirement in regulation 40(7)(ii) is not that the intended use of the retained parts of the building must match their extant lawful use as it happens to be on the relevant day, but a use that has, by then, been authorized or would in any event be lawful. They are not the same thing. The latter would certainly include an extant lawful use. But it would also embrace - as in this case - a use that can lawfully be carried on in the retained parts of the building under an implementable planning permission granted before, or on, the relevant day, or with the benefit of "permitted development" rights."

- Accordingly a statutory deduction can be applied for where an intended use is new but already authorised (e.g. by a different planning permission)

(6) CIL cases 5

- ***Manor Oak Homes Ltd v Secretary of State*** [2019] EWHC 1736
- Case concerned the approach that an Inspector should adopt to the grant of permission where highway infrastructure, necessary to make the development acceptable, depends in part on contributions from other developments, as yet without permission or contributions secured by agreement.
- The developer, highways authority and LPA all agreed a s. 106 agreement requiring funding of highways infrastructure would dispose of highways objections.
- However, Inspector did not accept agreement as sufficient to address highways objections because of as yet unsecured contributions.

(6) CIL cases 6

Landmark Chambers

- Argued that Inspector had unlawfully required certainty that the other contributions form other schemes would come forward.
- Court held Inspector had not adopted an unduly high standard for judging what risk should be run that highway improvements would not be forthcoming.
- No policy, guidance or case law to guide Inspectors or LPAs as to the level of certainty required of a mitigation measure before it is relevant/acceptable to dispose of an objection to which it is directed (pooled schemes no exception).
- The contributions would not of themselves address all highway problems and certain works required contributions from other development sites.
- The question, therefore, was: what would happen if those other contributions did not come forward? Answer, the agreed solution would not occur and the Inspector was entitled, as a matter of judgment, to refuse the appeal. Certainty had been used in the sense that the achievement of the necessary highway infrastructure for the development to be acceptable, had to be "*beyond sensible doubt*".

(6) Changes to CIL

- The new amendments are contained in the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019/1103.
- The amendments only apply in England.

Key changes:

Calculation of chargeable amount

Commencement notices

Infrastructure funding statements

Monitoring fees

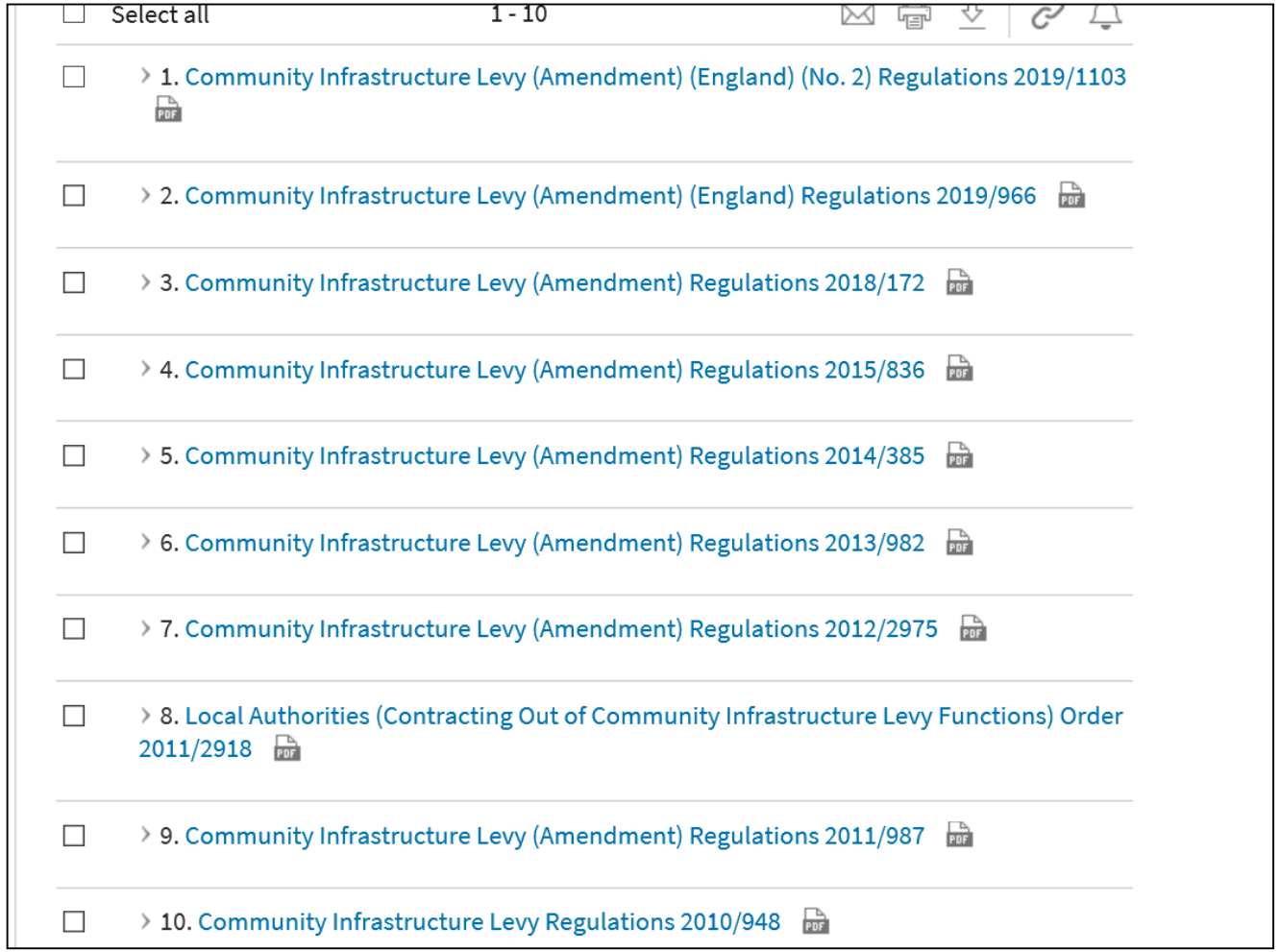
Pooling restrictions

(6) CIL: A work in progress

- Since the introduction of CIL in 2010, the Regulations have occasionally been amended by the government.

- The most recent amendments come into effect as of

  1 September 2019.



(6) CIL changes: calculation of chargeable amount

Landmark Chambers

- CIL liability for s 73 permissions has now changed.
- Changes to planning permissions can be applied for under section 73 of the TCPA 1990.
- Previously when a new s.73 permission resulted in an increased CIL liability, the total floorspace was calculated with reference to the CIL rate in existence at the time of the new permission- reflecting the fact that s.73 grants an entirely new permission.
- However, this was somewhat unfair to developers as it meant that the entire development was subject to indexation rather than additional floor area.
- The new regulations change this: now the previously permitted floor area will be charged at the rate that was in force at the time it was permitted.

(6) CIL changes: commencement notices

- The new regulations reduce the penalties for non-compliance with commencement notices.
- Certain kinds of development are entitled to relief from CIL or exempt entirely.
- In most cases, developers must submit a commencement notice to the charging authority before work starts or the exemption/relief is lost and the full CIL amount has to be paid.
- Previously, failure to serve a commencement notice on the local planning authority before commencement resulted in the developer losing the benefit of their CIL exemptions.
- Now a developer will only be charged a surcharge for failing to meet this requirement.
- New reg. 83(1A): "*the collecting authority must impose a surcharge equal to 20 per cent of the notional chargeable amount or £2,500, whichever is the lower amount.*"

(6) CIL changes: infrastructure funding statements

Local authorities have an important new obligation: the production of an annual infrastructure funding statement.

- Regulation 123(4) of the CIL Regulations provided for charging authorities to set out a list of projects or types of infrastructure intended to be funded by CIL.
- Charging authorities were required to report annually on how much CIL has been received, and how it has been spent.
- There was significant variation in the detail of the information provided by authorities.
- Regulation 123 lists have now been replaced with a requirement for local authorities (including those who have not implemented CIL) to provide an annual infrastructure funding statement by 31 December each year.

(6) CIL changes: infrastructure funding statements

Landmark Chambers

- The PPG gives guidance on the contents of infrastructure funding statements:

"Infrastructure funding statements must set out:

•A report relating to the previous financial year on the Community Infrastructure Levy;

•A report relating to the previous financial year on section 106 planning obligations;

•A report on the infrastructure projects or types of infrastructure that the authority intends to fund wholly or partly by the levy (excluding the neighbourhood portion).

The infrastructure funding statement must set out the amount of levy or planning obligation expenditure where funds have been allocated. Allocated means a decision has been made by the local authority to commit funds to a particular item of infrastructure or project."

Paragraph: 176 Reference ID: 25-176-20190901

Revision date: 01 09 2019

(6) CIL changes: limits on monitoring fees

Landmark Chambers

- Monitoring fees are now on a statutory footing.
- Explanatory Note:

  "Regulation 10 amends regulation 122 to ensure charging authorities can include provision for monitoring fees in agreements under section 106 of the Town and Country Planning Act 1990."
- They will now be subject to a test of 'reasonableness' relevant to the scale and type of development.
- Any fee must not "*exceed the authority's estimate of its costs of monitoring the development over the lifetime of the planning obligations which relate to that development.*"
- Important to note: Monitoring fees can include "*reporting under these regulations*": allowing Local Authorities to pass on the cost of annual infrastructure funding statements to developers.

(6) CIL changes: pooling restrictions

Landmark Chambers

- Pooling restrictions have now been removed.
- Pooling restrictions were introduced to encourage Local Authorities to adopt CIL charging schedules.
- The number of contributions from section 106 agreements was limited to 5 per infrastructure project or type.
- However some applications were refused on the basis that the number of contributions had already been met.

(6) CIL changes: pooling restrictions

Landmark Chambers

- Now Local Authorities can collect more than 5 contributions for the same piece of infrastructure.

> Q: Does this mean developers will pay for the same infrastructure twice (i.e. Local Authority "double-dipping" is back)?
>
> A: Probably not as Reg. 122 will continue to apply: the obligation must still be necessary in planning terms and be sufficiently related to the development.

- The removal of pooling restrictions could encourage charging authorities to stop charging CIL. However, a charging authority that wants to stop charging CIL will have to follow a prescribed procedure (amendment reg. 4).

(6)CIL changes: conclusions

Landmark Chambers

- It remains to be seen whether the new CIL changes will be an improvement or simply introduce further complications.
- Infrastructure funding statements are the main change and may result in an increased burden on local planning authorities: although in theory the cost can be passed on to developers …

(7) Other cases

(7) Other cases:

A few other important cases:

1.Scope of s. 73: ***Finney v Welsh Ministers*** [2019] EWCA Civ 1868: see below;

2.CPRE Surrey v Waverley Borough Council [2019] EWCA Civ 1826: reasons in Local Plan Inspector reports; OAN issues;

3.London Borough of Lambeth v SSCG [2019] UKSC 33 on interpretation of PPs and implication of provisions into PPs;

4.Wright v Forest of Dean - SC decision awaited on scope of material considerations.

5. Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC being heard soon in SC on relevance of visual matters to Green Belt.

Other cases

- Stop press: On 5 November, ***Finney v Welsh Ministers*** [2019] EWCA Civ 1868.
- A developer had been granted conditional planning permission to construct two wind turbines. The description of development in the permission specified that the turbines were to have a height of 100m. One of the conditions required the development to be carried out in accordance with specified plans. The developer then applied under s.73 of 1990 Act to vary this condition to insert plans showing turbines with a height of 125m. This application was allowed on appeal by the Welsh Ministers.
- The Appellant challenged this decision in the High Court on the ground that the grant of permission was ultra vires because the imposition of this condition would require a change to the height specification in the description of development. The claim was dismissed by Sir Wyn Williams (sitting as a High Court Judge).
- However, this decision was reversed by the Court of Appeal, which has held that s.73 may not be used to obtain a varied planning permission when the change sought would require a variation to the terms of the "operative" part of the permission. This is arguably the most significant decision relating to this commonly-used power since ***R v Coventry City Council, Ex P Arrowcroft*** [2001] PLCR 7.

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Thank you for listening

A copy of these slides will be available in .pdf format on the conference website after the event or ask me for a copy: jmaurici@landmarkchambers.co.uk

Thanks to Alex Shattock of Landmark Chambers for his assistance in writing this talk.

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