

ENVIRONMENTAL & PLANNING LAW UPDATE¹

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INTRODUCTION

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The cases are divided into the following themes:

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- I. CONSERVATION, BIRDS AND HABITATS

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A. ENFORCEMENT

The criminal law is the ultimate enforcement tool, and, severe financial and custodial penalties can be imposed as in the *Wyatt Bros* case². There was, however, a happier ending in the case of *R. (Manorgale Ltd) v Thames Magistrates Court and Hackney London Borough Council* [2013] EWHC 535 (Admin). There, Hackney had served an enforcement notice on the Claimant, Manorgale Limited, requiring the demolition of two extensions made to a dwelling house without planning permission. The notice was not complied with. Hackney initiated a prosecution in the Thames Magistrates' Court. In the run-up to the hearing, negotiations were ongoing between Hackney and Manorgale in relation to retaining a smaller structure, and the court hearing was adjourned twice. The Claimant was notified of the hearing in the Magistrates' Court the day before it was due to take place and, after calling the court, was under the impression that he did not have to attend because there would be an adjournment. The hearing went ahead and the Claimant was convicted and sentenced in his absence. He was fined the maximum £20,000 fine. The Claimant applied to the Magistrates'

² Thus, in *Oxfordshire County Council v Wyatt Brothers (Oxford) Ltd & Others* [2012] EWCA Civ 1921, the defendants ended up in prison in the following circumstances. The Wyatts and their company, Wyatt Brothers Oxford Limited, occupy a 12-hectare site at Waterstock near Oxford where they run a golf course and driving range. They unlawfully deposited waste on the site in the 1990s for which they received over £1 million. Enforcement notices were followed by injunction proceedings and, thereafter, by committal proceedings. In May 2010, McCombe J found that the Wyatts had failed to comply with court orders. He found them guilty of contempt and gave suspended sentences of four and six months respectively, suspending them for a year on condition that they make realistic efforts to comply with Crane J's order within 12 months. The Wyatts made no such efforts, and on 9 June 2011 the council applied to have the sentences activated. After several high court hearings in 2011, where, in one of which Thirlwall J had said that the Wyatts had "treated the court with contempt in the literal sense" but adjourned the hearing with prison periods to be suspended while the Wyatts took steps to comply with the original High court order. After further extensions and submissions of new material, it was eventually Cox J who concluded that the Wyatts' conduct constituted continued contempt of court and their sentences should be implemented. That implementation of sentence was appealed to the Court of Appeal. The Wyatts claimed that they had insufficient funds to remove the waste, that the order requiring them to do so was not accurate, that it is not in the public interest to send two old men to prison, that one of the Wyatts was in poor health. All of the grounds were rejected by Sir Scott Baker in the Court of Appeal, with whom Mummery and Patten LJ agreed, holding that: "It seems to me that the importance of committal in a case of this kind is to send out loud and clear the message that court orders are made to be complied with and, although nobody wants to send somebody to prison for non compliance with a court order, the time comes when, regrettably, there is no alternative."

Court under s.142 Magistrates' Court Act 1980³ to re-open the case but the application was refused on the ground: (a) that the Magistrates' Court did not want to act as an appellate court; (b) that it would be more appropriate for the matter to go to the Crown Court; and (c) that it only had power to re-open the case in the event of a substantial procedural error. The Divisional Court held that this reasoning had been flawed:

- (i) The Magistrates' Court had the power to re-open the case if it was in the interests of justice to do so and the right of appeal to the Crown Court did not allow for the Crown Court to correct a substantial procedural error.
- (ii) The sentence would be re-opened because when sentencing the Court had failed to take into account the question of financial benefit under s.179(9) TCPA 1990.⁴ The Claimant was entitled to make the argument that he had not benefitted financially from the breach of planning control.

Ioannou v Secretary of State for Communities and Local Government [2013] EWHC 3945 (Admin) remains a significant case of note for all practitioners in relation to the scope of the powers to grant permission on appeal under section 289 of the Town and Country Planning Act 1990. The case concerned a single family dwelling house which the appellant had converted into five self-contained flats without the necessary planning permission. The second respondent local authority issued an enforcement notice requiring the unlawful use to cease and various facilities to be removed. Whilst the background revealed the appellant's attempts to deceive both the planning authority and the Inspector about when the relevant use began, he was also alive to the fact that should he be forced to abandon his current use of the property then he would not need planning permission to return the house to use a single family house and, subsequently, to change its use to a house in multiple occupation.

The appeal was brought against a planning inspector's refusal to accept an alternative proposal to replace the existing five flats with three on the basis that he had no power

³ Section 180(1) *A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so, and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.*

⁴ Section 179(9) *In determining the amount of any fine to be imposed on a person convicted of an offence under this section, the court shall in particular have regard to any financial benefit which has accrued or appears likely to accrue to him in consequence of the offence.*

to bring about the scheme in the manner suggested despite apparent agreement that the alternative proposal would be more desirable than use as a house in multiple occupation. It was held that an inspector's powers under section 177(1)(a) of the 1990 Act extended to the granting of planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or the land to which the notice related. Whilst an appellant appealing on the ground in section 174(2)(a) was deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, an inspector may only grant permission for an alternative such as the appellant's three flat scheme to the extent that can be achieved by granting permission for the whole or part of the breaches alleged in the notice. The complexity in *Ioannou* arose by virtue of the fact that, on the one hand, granting permission for the whole of the alleged breach would only serve to leave the existing five flats in place, whilst, on the other hand, granting permission for only part of the alleged breach would also require works to be carried out in order for the three flat scheme to come to fruition.

Having recognised the existence of such limitations, Mr Justice Ouseley then turned to the inspector's failure to consider applying section 173(4)(b). The three flat scheme could potentially have been achieved by imposing it through the requirements of the enforcement notice under that provision. Mr Justice Ouseley referred to the *Wheatcroft* principles in considering whether the inspector had asked himself whether the permission which would be granted (the three flat scheme) was substantially different from the scheme as developed (the existing five flats)⁵. Having acknowledged that the Inspector had not considered a relevant power "which could bring about the three flat scheme", it was held that the matter could have been decided differently.

⁵ Forbes J considered the exercise of the relevant discretion in *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1982) 43 P&CR 233 ("*Wheatcroft*"):

"[Would] the effect of the planning permission [be] to allow development that is in substance not that which was applied for? ... The main, but not the only criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation..."

An appeal is pending in *Ioannou*.

In *R. (Maistry) v Hillingdon LBC* [2013] EWHC 4122 (Admin), HHJ Mackie QC considered both the lawfulness of an enforcement notice and also a local authority's refusal retrospectively to extend time for the claimant to appeal against that notice. The enforcement notice related to unauthorised development comprising of a large front boundary wall and canopy at the claimant's property. Leaving aside the questionable attraction of having "a dual-pitched black-tiled ornamental roof" anywhere near the front of one's property, this case was the latest in a sequence of challenges and disputes between the parties relating to the same property and contained some interesting comment on the relevant provisions of the 1990 Act, particularly in relation to the authority's decision to refuse to extend time.

As to the lawfulness of the enforcement notice, the claimant argued that the wall had been reduced to below one metre in height before the notice was issued and so was permitted development (by virtue of falling within paragraph A1 of Schedule 2, Part 2 of the Town and Country Planning (General Permitted Development) Order 1995). Notwithstanding, it was held to have been reasonable for the local authority to conclude that the claimant was in breach of planning control, and there was no duty on an authority to seek measurements of a wall in such circumstances. Furthermore, in view of the claimant's suggestion that she could not have raised the relevant points on an appeal under section 174 of the 1990 Act, HHJ Mackie QC applied *R (Gazelle Properties Ltd) v Bath and North East Somerset Council* [2010] EWHC 3127 (Admin) and held that that "there [was] no basis for contending successfully that there are residual matters of the kind identified by Lindblom J". Whilst recognising that the question of expediency is "not a pure planning matter", the claimant's grievances remained "in substance issues which could and should have been brought on appeal, if at all".

As to Hillingdon's refusal to extend time, whilst the claimant argued that the local authority had acted unreasonably in failing to exercise its power to extend under section 173A of the 1990 Act, it was held that the matter had "to be seen in the context of what it is". The enforcement notice provided that it was to take effect on September 5 2012 unless the claimant appealed before that date. The claimant nevertheless

waited until September 12 2012 before requesting that the authority extend the time available for her to bring an appeal. The local authority concluded that it was proper and reasonable in the circumstances not to extend time despite the claimant's contention that she had previously misunderstood the date on which the notice was to take effect. In the circumstances, the reason behind the refusal of the request was "rational, coherent and well within the range of Wednesbury reasonableness".

Finally, no review of enforcement cases is complete without at least one case involving gypsies and travelers. In *Doncaster Metropolitan Borough Council v AC and Others* [2013] EWHC 45 (Admin) the Defendants - members of the Gypsy and Traveller community - had occupied a site in Askern to the north of Doncaster for several years and without planning permission. The LPA applied for an injunction to cease that use. The defendants argued that they had no alternative pitches to go to and granting an injunction would have a detrimental effect on their children and be a disproportionate interference with their rights, and their children's rights under article 8 ECHR. HHJ Richard Salter QC reviewed the authorities and reminded himself that, following *South Cambridgeshire DC v Gammell* [2005] EWCA Civ 1429, injunctive relief is unlikely unless properly thought to be proportionate to the breach of planning control that has taken place. A key consideration in the balancing exercise was the best interests of the Claimants' children and the Claimants' and their families' article 8 ECHR rights. It was a drastic step to require six families to move from their home. However, this had to be balanced against the fact that the claimants' occupation of the site had always been unlawful. The judge granted the injunction, reasoning that against the background of three and a half years' unlawful use of the site, there was a real risk that the planning system and criminal law would be brought into serious disrepute if the court were to hold that the grant of an injunction would be disproportionate because of the interference with the claimants' and their children's rights. It would not be correct to give only limited weight to a local authority's decision and the requirements of the criminal law.

As a note of practical relevance, it is also worth noting that *Stadium Capital Holdings No.2 Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3548 (Admin) held that the period to be allowed for compliance with a discontinuance

notice under the advertising regime could take into account the financial consequences for the advertiser. Such notices requiring the removal of lawful advertisements.

B. CHANGE OF USE

The case of *R. (Peel Land and Property Investments Plc) v Hyndburn BC* [2013] EWCA Civ 1680 considered whether the appellant company was entitled to rely upon a series of individual planning permissions granted by the Council for physical adjustments to its units in an out-of-town retail shopping park in order to secure release from use restrictions to which it had previously agreed in order to obtain its original planning permission for the park. Such restrictions only permitted the retail sale of bulky goods yet were qualified by “standard form provisos to cover subsequent planning events”. In particular, it was agreed that the use restrictions on goods “would not prohibit or limit the right to develop any part of the Peel Centre site in accordance with any planning permission granted after the agreements”.

The appellant was then granted a series of individual planning permissions which did not impose any express restriction on the kinds of goods that could be sold from the altered units. In light of this, and in what was described as “the self evidence aim” of its planning strategy, the appellant applied for certificates of lawful development of the units on the basis that the later permissions had granted permission for unrestricted A1 retail use at the site. In doing so, the appellant sought to rely upon the language and context of the Provisos and of the later permissions, section 75(2) and (3) of the 1990 Act and the “judicial doctrine that further permissions may open a new planning chapter”. Such points were taken by the appellant in order to establish that the benefits and burdens of the prior permissions would be entirely replaced by a new planning permission.

The Court of Appeal was persuaded that the judge reached the correct overall conclusions. In particular, the Court of Appeal noted that it did not sit “as a Board of Examiners obliged to mark every ruling in the judgment as if the judge were sitting an exam, if an error or mistake makes no difference to the overall judgment or to the outcome of the appeal”. As such, it was held that the grant of permission for

operational building works did not grant permission to develop the units in a relevant way. The grant of later permission, therefore, did not authorise a material change of use of any units. Furthermore, section 75 did not apply to the later permissions because they were not granted by the local authority for a material change of use of the units and there was no substantial or radical departure from the planning history prior to the grant of the later permissions. The later permissions “were only granted for building works, which did not involve a change of use and were compatible with the continuation of the existing restricted use, as agreed”.

R. (Sienkiewicz) v South Somerset DC [2013] EWHC 4090 (Admin) related to a claim for judicial review of a decision of South Somerset District Council granting planning permission to the Interested Party for the erection of a building for B1, B2 and B8 uses with associated infrastructure on land forming part of a former nursery. The relevant Local Plan allocated part of the former nursery for employment use. Industrial buildings had been constructed on two of the four plots allocated as such by the Local Plan. The operations of the Interested Party had “grown significantly in recent years” and they wanted to erect, and operate from, another building on the application site. The relevant area fell outside the area of the former nursery and was not allocated for employment use. Despite all the relevant development plan policies suggesting that the proposed development would not be permitted because it was large-scale business expansion in a rural area, the proposals found support in the NPPF given that the framework supports economic growth in rural areas.

Planning permission was subsequently granted but only subject to conditions including that the permitted building “shall only be carried out by [P] (or any successor company) during its occupation of the land subject to this permission”. The reason given for such a condition was that the South Somerset District Council wanted “to control the uses on [the] site to accord with the NPPF”. The challenge was brought on the basis that not only had the local authority failed to recognise the primacy of the development plan but it had also wrongly assumed that the NPPF superseded the policies contained in that development plan. Furthermore, the claimant suggested that the material condition was invalid and that the District Council had acted unlawfully in failing to treat the proposed development as requiring an EIA because

it could not be sure that the use of the site did not involve chemical conversion processes.

It was held that whilst NPPF could not change the development plan it remained a material consideration that could provide the reasons why an application for planning permission should be granted notwithstanding the extant development plan. Further, at paragraph [29] the submission of Mr Jones QC that “the provisions of a development plan might become outdated as national policy changed, or particular development plan policies might no longer meet current needs, or other changes may have occurred which made the particular provisions of the development plan less relevant” was accepted. In such circumstances, “other material considerations, such as more recent national policies, might assume greater importance and indicate that the application for planning permission should be approved” (also at paragraph [29]). Mr Justice Lewis concluded that, when “read as a whole and in context”, the report “was merely saying that the approach of permitting only small-scale development in rural areas was no longer up to date, as the NPPF recognised that it might be appropriate to support business expansion more generally”. It was lawful for the report to then consider whether permitting a larger-scale business expansion would be acceptable in planning terms.

Having summarised the law and policy relating to the imposition of conditions (including notable mention of paragraphs 13 and 14 of the judgment of Elias LJ in *Hulme v Secretary of State for Communities and Local Government* [2011] EWCA Civ 638), Mr Justice Lewis noted that the “usual position” is that planning permission is concerned with the use of the land, rather than the identity of the user. Whilst the material condition was held to be invalid as failing to serve a planning purpose, not “fairly and reasonably related to the development”, and irrational, there was nothing to suggest that the identity of the present user bore any relevance for the grant of such permission. Planning permission was granted for the erection of a building irrespective of the identity of the present user. The land could be used only for B1, B2 and B8 purposes irrespective of the identity of the present user. It was also held that, in light of the detailed advice received from planning consultants as to the production process, the local authority had been entitled to proceed on the basis that the proposed development would not require an EIA.

In *Reed v Secretary of State for Communities and Local Government* [2014] EWCA Civ 241, it was submitted that the inspector had applied the wrong test for material change of use and had, therefore, erroneously concluded that mere intensification amounted to a material change. It was held that the inspector should have directed himself to the correct test if he was concluding that an extra caravan constituted a material change of use. Rather, the inspector offered no explanation, beyond simple mathematics, and did not say that there had been a change in the character of the use of the land, let alone why he thought that was the case. Indeed, the inspector had not referred to intensification at all in his decision. That would not necessarily have been fatal had he correctly directed himself on material change of use; however, he had not expressly concluded that there had been a change in character of the mixed use of the land, and on the face of his decision the mixed use remained the same. The only express reason for the inspector's conclusion was that he had erroneously adopted the approach that mere intensification amounted to a material change in use. Indeed, the judge's reasoning had largely endorsed the inspector's and confirmed that the only matter to which the inspector had had regard was the number of caravans on site whereas the appropriate question was whether the definable character of the mixed use had changed and not the number of caravans on site.

The argument in *R (Sellars) v Basingstoke and Deane Borough Council* [2013] EWHC 3673 (Admin) raised three questions: whether the identification of the relevant planning unit was a material consideration for the purposes of s.191; whether the local authority had failed to take it into account; and whether any such failure had made a difference to the outcome of the application. The case serves as a useful reminder that the planning unit might be larger than the area which is the subject of a lawful development certificate application. In *Sellars*, a certificate was sought in respect of model aircraft flying from a farm. The application was in respect of a limited part of the farm but was quashed because the local planning authority failed to appreciate that determining the lawful use of the application site might require consideration of the use of a land beyond that site. Indeed, enforcement on the ground of a material change of use would not be confined to the piece of land on which that use was taking place, nor could it be confined by

the occupier's specifying that only a particular area of land should be taken into consideration. The process would involve identifying the appropriate planning unit; considering whether, in relation to that unit, there had been a material change of use; and considering whether the new use had been continuing for 10 years. Thus, identifying the use of land, and determining whether it has become lawful by the passage of time, depends upon the identification of the planning unit.

C. PLANNING POLICIES, PLANNING JUDGMENTS AND CONSIDERATION OF THE FRAMEWORK)

The sea-change in the approach to an objective interpretation of planning policy since March 2012 has stemmed from the Supreme Court's decision in *Tesco Stores v Dundee City Council* [2012] UKSC 13. After *Tesco v Dundee* came two English cases in the Court of Appeal. The first, *R. (TW Logistics) v Tendring District Council and Anglia Maltings (Holdings) Ltd* [2013] EWCA Civ 9, concerned a challenge to certain sections of a Conservation Area Management Plan which, the claimants argued, were inconsistent with the relevant parts of a Local Plan. TW, a port operator, contended that a warehouse was capable of use in its current form for port uses in accordance with the Local Plan, which provided that the quayside area was first and foremost for port-related uses and not for mixed use "regeneration" schemes and that a change of use could not be allowed unless and until all port-related uses had been excluded. The Conservation Management Plan, on the other hand, encouraged the re-development of the warehouse as part of the re-organisation of the port.

Dismissing the claimant's appeal, the Court of Appeal held that the fact that the local plan did not specifically promote the reorganisation of the port or the redevelopment of the warehouse for non-port-related purposes did not mean that either of them was prohibited. The Management Plan was not inconsistent with the Local Plan and was therefore not unlawful. On the wider issue of policy interpretation the case is helpful with the Court of Appeal's emphasis that as a local plan was to be objectively construed the public was, in principle, entitled to rely on it as it stood without having to investigate its provenance and evolution; that a local plan might include policies which were not in complete harmony; and where different parts of the local plan

pointed in different directions it was for the planning authority to decide which policy should be given greater weight in relation to a particular decision.

The second, *R. ((1) Manchester Ship Canal Company Limited; (2) Peel Holdings (Land & Property) Limited v Environment Agency* [2013] EWCA Civ 542, arose from an appeal by the Environment Agency against the decision of Lang J. who had quashed its decision to categorise sluices on the Manchester Ship Canal as ‘formal defences’ because they serve a dual purpose: both maintaining Canal water levels for safe navigation by large ships and also passing to the sea the water impounded as a consequence of the original canalization of the river. The original claim had been brought by the Manchester Ship Canal Company and Peel Holdings (Land and Property) Limited because, between then, they owned and operated the Canal and also owned land around it which it proposed to develop for housing. The consequence of the Agency’s decision was to place the Canal and nearby land within Flood Zone 3 when- if it were otherwise- that land would be in Flood Zone 2. The planning consequence of that Zoning was to place the land at the back of the (then) PPS25 (now NPPF) sequential test development queue so that land in Zones 2 and 1 was required by PPS25 to be developed first.

Since the original Agency decision, the Supreme Court had decided *Tesco v Dundee*. In the *Canal* case, the Agency (as lead advisor on flood risk matters) had discussed with the challengers’ experts for a considerable time the basis of that risk and how to categorise the Canal’s flood risk: on the one hand it had been operated without failure for a long time; on the other, the very impounding of water as part of the original canalisation process meant that water had to be conveyed down to the sea or a flood may occur. The Agency had formulated a policy in light of PPG25, and later PPS25, as to how it categorised defences as either formal flood defences (having ‘a’ primary purpose of flood relief) or as de facto flood defences. It had only two categories. That policy was issued to its internal staff and, whilst available if requested, not subject to formal consultation processes akin to a development plan. The Agency sought to square the two purposes of the Canal by categorization of their sluices as formal defences. However, in doing so, the Agency did not choose between the two purposes and instead considered that the sluices had two-fold primary purpose.

In the Court of Appeal, Moses LJ gave the lead judgment. He identified that the absence of categorization of the whole canal as a formal flood defence showed the flaw in the Agency's approach: "*Either the whole of the Canal and the structures by which it is operated are a formal flood defence or none of them are*". He applied the *Dundee* case and ruled that the Agency had, in effect, created a third category between the two express policy categories. That new (implied) category was not something that it was entitled to establish. If it had wanted to have such a category, it ought to have published a policy with that additional category in, or considered the sluices as an exception to its published policy. As it had done neither, it was not then further entitled to construe its own policy to mean what it thought it meant, as opposed to what it did mean. The default position was that the sluices were to be treated as de facto defences (and in consequence the land affected became categorised as Flood Zone 2 rather than 3). On that basis, the Agency's judgement was outside the range of responses available to it.

The High Court's judgment raised a number of questions about the application of *Tesco v Dundee*, questions which the Court of Appeal did not take the opportunity to resolve. Crucially, the question whether a policy must always have one uniquely correct meaning for the court to ascertain, or whether it is enough that the decision maker gives the policy a meaning it is legally *capable* of bearing, will have to be decided on another occasion. The Court of Appeal ultimately decided this case on its particular facts. However the case is of interest as a warning to administrative decision makers to exercise caution in the application of their policies to the particular facts. The potential for three Lords Justices of Appeal to bring lawyers' scrutiny to bear on a policy designed as a technical rather than legal document may be some distance from its original author's mind. But, gone are the days when a decision maker may simply assume that approaching difficult policy questions can be justified by an unchallengeable consideration of their implied meaning or of their 'spirit'. Today, more than ever before, claimants are seeking recourse to the Courts and the Courts are showing increased willingness to intervene.

A number of recent cases have dealt with the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 for planning authorities, Ministers and Inspectors to decide applications in accordance with the development plan unless material considerations indicate otherwise. Of particular note is *Bloor Homes East Midlands*

Ltd v Secretary of State for Communities and Local Government [2014] EWHC 745 (Admin), in which Lindblom J held that the section 38(6) duty remains following the introduction of the NPPF, which does not displace it.

At first instance, *R. (RWE Npower Renewables Limited) v Milton Keynes Borough Council* [2013] EWHC 751 (Admin) concerned the LPA's adoption of the Wind Turbines Supplementary Planning Document. The Wind SPD contained an emerging policy that planning permission would be granted for proposals to develop wind turbine renewable energy sources unless, inter alia, any turbine generator over 25m in height was not separated from residential premises by a certain minimum distance, which varied according to its height. Planning permission would still be granted where the distance condition was not met if the owners and occupiers of all affected residential premises agreed.

The Claimant, which developed and operated wind turbine schemes, was concerned about the application of separation distances in the Wind SPD to its two proposals for wind farms within the LPA's area. It argued that it should have been adopted as a development plan document (DPD) because it contained statements, falling within the Town and Country Planning (Local Planning) (England) Regulations 2012 reg.5(1)(a)(iv), regarding development management policies intended to guide the determination of applications for planning permission, and that as a DPD, it was required to have survived a more rigorous examination than it had been exposed to as an SPD. It was also submitted that even if the Wind SPD was rightly characterised as an SPD, its adoption was still unlawful as the emerging policy within it conflicted with the adopted local development plan, contrary to the requirement under reg.8(3).

The Court (John Howell QC) held that the Wind SPD was a document containing statements regarding the matters mentioned in reg.5(1)(a)(iii) which could be an SPD. Accordingly, the local authority had been entitled to so adopt the Wind SPD. However, Policy D5 of the adopted Local Plan (2005) did not simply provide that renewable energy development would be permitted subject to addressing any adverse impacts. Rather, the structure of the policy was to provide that planning permission for proposals to develop renewable energy sources, including wind turbines, would be granted unless certain conditions were met. The Policy did not require planning

permission to be refused if there was a significant adverse impact: the proposed development merely ceased to benefit from the policy that planning permission would be granted for it.

However, the LPA's view that the separation distances in its emerging plan were not in conflict with the development plan was one which no reasonable person could have adopted, and the emerging policy was in breach of reg.8(3) (i.e. it was in conflict with the adopted development plan). In consequence, the adoption of the Wind SPD had been unlawful on that basis.

In *R (on the application of Houghton and Wyton Parish Council v Huntingdonshire District Council* [2013] EWHC 1476 (Admin) the challenge concerned the legality of the St Ives West Urban Design Framework ("the UDF") and its categorisation. It identified a 47 hectare area as having a capacity for 500 new homes up to 2026, as outlined in the Hunts Core Strategy. The Parish Council contended that the LPA had acted unlawfully (1) by seeking to allocate land for a particular use or development otherwise than by the adoption of a development plan document ("DPD") and (2) by seeking to produce planning guidance otherwise than by way of a Local Development Document ("LDD"). Rejecting the first ground, the Court found in favour of the Parish Council on the second upon the basis that the UDF was much more than a mere Masterplan and did contain policies with development principles which were highly prescriptive. Whilst the deputy High Court Judge (Charles George QC) pointed out that an LPA can (under section 111 of the Local Government Act 1972) produce research documents and analyses, as well as good practice guides in relation to, say, trees, shop fronts and advertisements without these being produced as LDDs, and, that the weight which attaches to them will be reduced if they are not contained in LDDs he also accepted that there is, or may be, a fine line between the foregoing and the point at which these "set out the authority's policies relating to the development and use of land". In that case they can only be included in LDDs, to ensure compliance with section 17(3) of the 2004 Act. Indeed, had the UDF continued to be entitled an SPD, it could, without any greater consultation than the UDF had had, and with few other statutory procedures (including separation of policies and justification to comply with regulation 13(2) of the 2004 Regulations), have been adopted as an SPD, so as to be an LDD in compliance with section 17(3) of the 2004 Act However, because

of its confused status the Court decided to quash the UDF. However, the LPA were granted permission to appeal.

In another wind turbine related judicial review, *R. (Lancashire) v Northumberland CC* [2013] EWHC 3850 (Admin), a local resident objected to the development on grounds that included its likely impact on the surrounding landscape and ancient monuments. In this case, there was an issue as to whether a particular study was a planning document to which regard was required to be had either by statute or because the local authority had stated that it would be taken into account. In reaching his decision on the matter, Mr Justice Blake cited with approval the Court of Appeal decision in *R. (Watson) v London Borough of Richmond upon Thames* [2013] EWCA Civ 513 in which the relevant principles as to how and when a court decides that a consideration is a relevant and material one for an authority to take into account were set out by Richards LJ, when he concluded (at [28]) that:

“Any distinction between a real possibility that he would reach ‘a different conclusion if he did take that consideration into account’ and ‘a factor which, when placed in the decision maker’s scales, would tip the balance to some extent, one way or the other’ is too fine to matter...”

In concluding that the relevant study in the *Lancashire* case “did not purport to be planning policy” and did not “address the specific features” of the application, Mr Justice Blake held that this was “a case where a planning judgement had to be exercised about the impact of the development having regard to where it was to be located” (see paragraph [26]).

The thorny issues of localism and prematurity have, unsurprisingly, attracted the recent attention of the courts. The case of *Tewksbury Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 286 (Admin) is an important decision in this respect. The court rejected the misconception that the Localism Act brought about such a fundamental change in the planning system that, effectively, the role of the Secretary of State has been eliminated in determining planning applications.

The case concerned proposals for 1,000 dwellings at Bishops Cleeve. The Secretary of State had allowed two non-determination appeals upon the basis of an inadequate five year housing land supply, and, that the potential harm to the landscape was capable of being outweighed by other material considerations.

As to the fundamental change point, Males J observed that, while the Act made provision for the abolition of Regional Strategies, there was nothing in it to suggest that relevant national policies would no longer apply, or that the Secretary of State would no longer perform his function in determining planning application appeals applying the same principles and policies as before. The NPPF expressly reaffirmed such policies as the five-year housing land supply. There was no question of empowering local authorities to develop plans without regard to those national policies. The Secretary of State had stated in the decision letter that although the approach that the Act had brought about changes that would give local communities more say over developments in their areas than was previously the case but also that this greater say would depend on the expeditious preparation of local plans which made provision, including in particular a five-year housing land supply, for the future needs of that area. Accordingly, he had acted in accordance with and not in contradiction to that approach. The judge also pointed to the prematurity principle⁶ as being available to regulate the position, which had been correctly taken into account by the inspector and the Secretary of State.

In *Stratford on Avon DC v Secretary of State for Communities and Local Government* [2013] EWHC 2074 (Admin) the Council applied under section 288 to quash the grant of planning permission for a proposed development of up to 800 dwellings, a mixed use local centre, highway and green infrastructure, and various associated works near Stratford-upon-Avon, on the grounds that the decision was premature and that, by determining the application in advance of the local plan process, the Secretary of State had failed to have regard to the obligations under the Aarhus Convention to ensure

⁶ See also the decisions in *Larkfleet Ltd v SSCLG & South Kesteven DC* [2012] EWHC 3592 (Admin) and *R (Save Our Parkland Appeal) v East Devon DC & Axminster Carpets* [2013] EWHC 22 (Admin) that prematurity argument not applicable where plan not yet formally submitted for examination.

effective public participation. Rejecting that argument, Mr Justice Hickinbottom held (at [73]) that:

“The Aarhus Convention does not require a blanket stop to be put on development that, potentially, might adversely impact on future policy; nor can it be used as a weapon for those who wish to inhibit development, in the hope that planning policy will change in the future to one which is more in line with their wishes. The Convention, and the relevant national guidance, require the decision-maker in any specific planning application to balance emerging policy with other material considerations.”

Hickinbottom J also rejected the Council’s argument that the Inspector had unlawfully determined the housing requirement for the district, in advance of the Local Plan process. The Inspector was required to assess the unmet housing need in order to determine the appeal. This assessment did not preclude the Council from determining a different housing requirement as part of the local plan process in due course. The Inspector’s assessment was based on the relevant evidence placed before him and his analysis and conclusion were “unimpeachable” as a matter of law (see paragraph [44]).

i. Housing policy

The housing policies of the NPPF generated a large number of legal challenges in late 2013/2014. In *Hunston Properties Ltd v SSCLG and St Albans City and District Council*, the court addressed attempts by St Albans City and District Council to fill a policy vacuum where there is no up to date Development Plan. An Inspector had dismissed the appeal of Hunston Properties Limited (HPL) following the Council’s refusal to grant planning permission for a development comprising 116 dwellings on Green Belt land abutting St Albans.

At first instance ([2013] EWHC 2678), HHJ Pelling QC, sitting as a judge of the High Court, upheld HPL’s application and quashed the Inspector’s Decision Letter. He found that it was not open for an LPA or Inspector to reach a conclusion as to very special circumstances based on a figure which did not even purport to be the fully, objectively assessed needs for market and affordable housing applicable at the time the figure was arrived at. The NPPF represented a new start, with policies including

PPS being revoked and the first bullet of paragraph 47 did not allow for a figure to be used for the full objectively assessed needs which did not identify actual need irrespective of constraints.

In the Court of Appeal ([2013] EWCA Civ 1610), the question was whether the Inspector was entitled to adopt a constrained housing requirement in assessing the housing supply situation in the absence of an up-to-date Local Plan, having regard to the first two bullets of paragraph 47 of the NPPF which provide as follows:

- “47. To boost significantly the supply of housing, local planning authorities should:*
- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;*
 - identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements ...”*

The appellant Council contended that the Inspector was so entitled: while the first bullet referred to “the full objectively assessed needs” it also added the qualification “as far as is consistent with the policies set out in this Framework.” That, it was submitted, meant that one had to take into account such policies as those on the protection of the Green Belt.

On behalf of Hunston, it was argued that the Council’s appeal was misconceived, confusing the NPPF’s guidance on “plan-making” with that on “decision-taking”, and illegitimately sought to require an Inspector at a local planning inquiry to undertake a *quasi-* plan-making assessment in circumstances where (as here) there was no up-to-date Development Plan. Such an approach was contrary to paragraph 47 of the NPPF, the first bullet of which applied to plan-making only, which was subject to the statutory protections of the Examination in Public and compliance with the requirement of soundness.

When giving permission to appeal, Lord Justice Sullivan said that there was a compelling reason for the appeal to be heard so that there could be a “definitive answer to the proper interpretation of paragraph 47” of the Framework, and in particular the

interrelationship between the first and second bullet points in that paragraph. The definitive answer given by Sir David Keene to that question agreed with the analysis given on behalf of Hunston, as follows:

“...I accept Mr Stinchcombe QC’s submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the Section 78 appeal. I appreciate that the inspector here was indeed using the figure from the revoked East of England Plan merely as a proxy, but the government has expressly moved away from a “top-down” approach of the kind which led to the figure of 360 housing units required per annum. I have some sympathy for the inspector, who was seeking to interpret policies which were at best ambiguous when dealing with the situation which existed here, but it seems to me to have been mistaken to use a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure.”

Hunston was considered in *Gallagher Homes Ltd v Solihull Metropolitan Borough Council* [2014] EWHC 1283, which is an important case for all those involved in the plan-making process.

In *Gallagher Homes*, Hickinbottom J confirmed that the principles set out by Sir David Keene in *Hunston* as to the proper approach to interpreting paragraph 47 of the NPPF apply not only to decision-taking but also to plan-making. He emphasised that:

“in plan-making, full objectively assessed housing needs are not only a material consideration, but a consideration of particular standing with a particular role to play.”

The Solihull Local Plan was adopted in December 2013. As part of that Local Plan, sites owned by the Claimants were included in the Green Belt. The Claimants challenged the Local Plan on the grounds, amongst others, that it was not supported by an objectively assessed figure for housing need, within the meaning of the NPPF.

The Local Plan proposed a housing provision over the period 2006-28 of 11,000 dwellings. That figure was derived from 2009 revisions of the revoked West Midlands Regional Spatial Strategy and these revised figures had been formulated in the old policy context of PPS3. The Local Plan did not therefore identify a figure for the “objectively assessed need”.

The Council argued that there was no requirement to identify such a figure. The RSS-derived housing figure had taken into account evidence of housing need as well as constraining policy factors. There had been no significant change in demographic trends or policy. Consequently, the requirements of the NPPF were satisfied.

The Court rejected that argument. Hickinbottom J held that the Inspector fell into error, due to “a failure to grapple with the issue of full objectively assessed housing need, with which the NPPF required him, in some way, to deal”. While housing data from an earlier regional strategy exercise can be used in preparing a local plan, by virtue of §218 of the NPPF, he warned that:

“where, as in this case, the plan-maker uses a policy on figure from an earlier regional strategy, even as a starting point, he can only do so with extreme caution – because of the radical policy change in respect of housing provision effected by the NPPF.” [98]

Hickinbottom J held that the NPPF departed from PPS3 in two important ways: firstly, by abandoning the “regional, top down” approach in favour of localism, with a duty to cooperate with neighbouring authorities and, secondly, by placing considerable emphasis on the policy imperative of increasing the supply of housing. Under paragraph 47 of the NPPF, housing needs are “not just a material consideration, but a consideration of particular standing”. In addition, at the Court emphasised the “major policy changes in relation to housing supply brought into play by the NPPF”:

“Unlike its predecessor (which required a balancing exercise involving all material considerations, including need, demand and relevant policy factors), the NPPF requires plan-makers to focus on full objectively assessed need for housing, and to meet that need unless (and only to the extent that) other policy factors within the NPPF dictate otherwise. That, too, requires a balancing exercise – to see whether other policy factors significantly and demonstrably outweigh the benefits of such housing provision – but that is a very different exercise than that required pre-NPPF.” [97]

For the purposes of paragraph 47 of the NPPF, it is not enough for all material considerations (including need, demand and other relevant policies) simply to be weighed together. Instead:

“Paragraph 47 requires full housing needs to be objectively assessed, and then a distinct assessment made as to whether (and, if so, to what extent) other policies dictate or justify constraint. Here, numbers matter; because the larger the need, the more pressure will or might be applied to infringe on other inconsistent policies. The balancing exercise required by paragraph 47 cannot be performed without being informed by the actual full housing need.” [94]

Councils should therefore think very carefully before preparing local plans which rely on pre-NPPF housing figures. The requirements of the NPPF cannot be met by transposing the PPS3 approach, because the NPPF requires plan-makers to take the preliminary step of identifying the objectively assessed housing need. While earlier figures from regional strategies can form a relevant starting point, they must be regarded with “extreme caution”.

Clearly, the ability to meet even revised housing targets requires the plan-making authority to look both within and without its administrative boundaries. Indeed, the duty to co-operate under the Localism Act 2010 has already proved to be a major stumbling block for a number of emerging plans at examination. The decision in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin) confirmed that the duty to co-operate does not apply retrospectively; so where, as with the North Somerset Core Strategy, the plan was still in preparation at the time when sections 110 and 112 of the Localism Act 2011 came into force, it was not legally unsound for want of this requirement. The University had argued that as the examination inspector’s report had not been published until March 2012 the new tests applied to all plans adopted after January 2012. This ground was rejected on the basis that the inspector’s consideration was restricted to the preparation stage of the plan which, in this case, pre-dated the implementation of section 110 on 15 November 2011. However, the challenge was allowed on the basis that the inspector had provided inadequate or intelligible reasons that the plan’s housing figure made sufficient allowance for latent

demand and differing population characteristics between the West of England and North Somerset.

Back in October 2013, Mrs Justice Lang dismissed the claim in a topical section 288 application in *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin). The case concerned the interpretation of planning policy and, in particular, the issue of a five-year supply of deliverable housing sites. The Claimants submitted that the policy in issue was no longer relevant, up-to-date or consistent with the NPPF and referred to *Tewkesbury Borough Council v Secretary of State for Communities and Local Government and Others* [2013] EWHC 286 (Admin) (*see further below*) in which Males J said, at [13], that a “plan which is based on outdated information ... is likely to command relatively little weight”. At paragraph [39] of *William Davis*, however, it was held that the Inspector and the Secretary of State made a “legitimate planning judgment” in the circumstances of the present case when they concluded that the policy “remained relevant and was not out-of-date”. Of particular relevance was evidence indicating that Green Wedge policies had long been part of local planning policy in the area and the Regional Plan that acknowledged their useful function (see paragraph [41]).

Furthermore, it was also held that the Inspector and the Secretary of State “understood and acknowledged the tension between the NPPF’s policy in favour of delivering housing, and its policy in favour of protecting green spaces”. Having referred to Lord Reed’s speech at paragraph [19] of *Tesco v Dundee*, Mrs Justice Lang recognised at [46] that:

“Planning policies often contain broad statements of policy, many of which may be mutually irreconcilable, so in a particular case, one must give way to another. The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision-maker. Such planning judgments will only be subject to review by this court on very limited grounds.”

The key decision of practical significance for practitioners was the Judge’s conclusion that a very narrow interpretation should be placed upon paragraph 49 of the Framework, by which “relevant [development plan] policies for the supply of housing” are effectively deemed to be “out of date” - and thereby deserving of little weight -

where an authority does not have a five year supply of deliverable housing sites. If, as here, the site was “unsustainable” then the presumption in paragraph 14 of the NPPF was not engaged⁷.

The meaning of “persistent under delivery of housing” in paragraph 47 of the NPPF was considered in a challenge brought by a local authority in *R. (Cotswold DC) v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin). Applying *Tesco v Dundee*, Mr Justice Lewis noted that paragraph 47 was to be “interpreted, and applied, having regard to its purpose and context”. Following detailed consideration of the inspector’s decision, it was held that “the claim that the Defendant erred in his interpretation of persistent under delivery” was not “made out” for four reasons. First, there was clear evidence of under delivery over a significant period of time. As such, the decision-maker was “entitled to characterise that as a record of persistent under delivery”. Second, the Defendant assessed delivery against the Structure Plan requirements and it was entitled to take into account both the figures contained in that Plan and also its finding that those figures understated the housing requirement, thereby exacerbating the under delivery. Third, the decision-maker was entitled to test the relevant figures over a reasonable time period such as the period of the Structure Plan. Finally, there was “no basis for concluding that the decision-maker disregarded the economic difficulties of the last five years” in reaching the relevant decision as to under delivery (see paragraph [50] and [51]).

The *Cotswold* case also considered whether the failure to consider the reasoning of an inspector in another appeal not drawn to the present inspector’s attention could rightly be characterised as a failure to have regard to a material consideration. Mr Justice Lewis referred to *Grantchester Retail Parks Plc v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 92 (Admin) in suggesting that “in general terms...the Secretary of State (or an inspector) is not obliged to take into account previous planning decision if they are not drawn to his attention” (see paragraph [61]).

⁷ See also *Hopkin Development Ltd v SSCLG and South Somerset DC* [2013] EWHC 1783 (Admin) where the claimant’s challenged the Inspector’s finding in this regard as being unfair. The Court of Appeal hearing is scheduled for 17/18 March 2014.

Finally, and significantly for practitioners, Mr Justice Lewis adopted a broad interpretation of paragraph 49 of the Framework, directly contrary to that adopted by the Court in *William Davis* (see above) - which does not appear to have been cited by Counsel nor considered by the Court.

A further issue, in the context of NPPF paragraph 49⁸, is whether or not the appellant must adequately demonstrate a realistic prospect of “delivery” if it is seeking to benefit from the lack of an adequate five year housing land supply. In *Barrow-upon-Soar Parish Council v Secretary of State for Communities and Local Government & Jelson Limited* [2014] EWHC 274 the Parish Council argued that because Jelson had failed to produce sufficient evidence as to how known sewerage capacity problems were to be overcome, to the extent of not even contacting Severn Trent Water, the Secretary of State had erred in relying on his Inspector’s robust assessment that this was not of real concern and, in effect, relying on Jelson’s capabilities as a housebuilder to overcome the problem, and, a *Grampian* type negative condition .

Collins J held, however, that the imposition of a planning condition, at the request of the Environment Agency, restricting the development from starting until the issue had been addressed was an adequate safeguard. Consequently, this did not warrant the outline permission being quashed.

This year, South Northampton Council also brought a series of challenges to Inspector decisions on housing appeals that are worthy of mention. Two judgments were handed down on the same day by Mr Justice Ouseley: *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Homes Limited* [2014] EWHC 570 (Admin) and *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land and Estates Limited* [2014] EWHC 573 (Admin). These cases followed on from, and *Barwood Land and Estates* expressly agreed with, the decision of Mr Justice Lewis in *South Northamptonshire Council v Secretary of State for Communities and Local Government and Robert Plummer* [2013] EWHC 4377 (Admin). All of these concerned

⁸ Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites

the determination of the objectively assessed housing need by Planning Inspectors on appeal in the absence of an adopted development plan figure.

In the absence of an adopted figure, planning authorities and Inspectors on appeal have to do the best which they can from the material available, which can include the evidence base from now revoked regional strategies. These decisions illustrate that the Court will treat this as a matter of planning judgment and will give quite a bit of leeway to the decision maker to reach their own view. Since any legal challenger, whether a local planning authority, developer or third party, has a hurdle to show that the decision-maker's approach was adopted unlawfully they need to be able to point to their contrary approach as being legally sound. It would seem that, if the challenger's method of calculating the housing need has kept changing or not been clearly explained, then the Court is more likely to consider that the decision maker was doing their best in a difficult situation and acted lawfully.

ii. Heritage

There have also been a number of important recent decisions concerning the application of the heritage policies of the NPPF and their interrelationship with the statutory duties imposed by section 66(1) and section 72(1) Planning (Listed Building and Conservation Areas) Act 1990⁹.

The most important of these is the Court of Appeal's decision in *Barnwell Manor Wind Energy Ltd v. East Northants DC, English Heritage and National Trust* [2014] EWCA Civ 137, where the court clarified what decision-makers have to do to meet the "special regard" duty under s66 of the 1990 Act. The appeal concerned an inspector's decision granting planning permission for a 4-turbine wind farm which affected the setting of a number of high-value heritage assets in Northamptonshire, including the internationally significant Elizabethan complex at Lyveden New Bield.

⁹ For those interested in conservation and heritage issues and the law see Richard Harwood QC's book "Historic Environment Law", published by the Institute of Art and Law.

The inspector found some, but “less than substantial” harm to the setting of the assets, and held that this harm was outweighed by the “significant” weight which should attach to the renewable energy benefits of the scheme. Lang J quashed the grant of permission.

Upholding Lang J’s decision, the Court of Appeal held as follows:

- The assessment of harm is a matter of planning judgment. However, once the decision-maker finds some harm to a heritage asset, the effect of s. 66(1) is that the harm must be given “considerable weight” in the balance, creating a “strong presumption” against the grant of planning permission.
- In striking the balance, it is not enough simply to ask whether the advantages of the scheme outweigh the harm in a loose or general sense, but whether they sufficiently outweigh the harm to rebut that strong presumption.
- The courts will need to see a clear indication on the face of the decision that the section has been approached in that way. Even where harm is properly assessed as less than substantial, “it does not follow that the ‘strong presumption’ against the grant of planning permission has been entirely removed” (paragraphs 28 and 29).
- The Inspector in that case had misapplied policy on heritage assets in what was then PPS5 (now incorporated into the NPPF), undermining his assessment of the harm as “less than substantial”. He had failed to properly examine the contribution the setting of the assets made to their significance, with the result that his assessment of the harm caused by the introduction of the turbines to that setting was flawed.

This decision is significant in that it (i) clarifies the weight to be given to harm to heritage assets when applying the policies of the NPPF, including the balancing exercise under paragraph 134 (“considerable weight”) and (ii) acts as a reminder that the policies of the NPPF do not override the relevant statutory duties. However the

Court of Appeal's decision does not change/ increase the weight to be given to harm to heritage assets in determining planning applications. That weight is established by the statutory tests. Instead the decision clarifies the relationship between those statutory tests and the relevant provisions of the NPPF.

Barnwell Manor did not mention two recent High Court decisions which must now be viewed with caution. The first decision is *Bedford BC v Secretary of State for Communities and Local Government* [2013] EWHC 2847 (Admin), in which the original application related to the erection of three wind turbines and, at the inquiry, the inspector had found that "substantial harm" needed to be "something approaching demolition or destruction". Mr Justice Jay held that "what the inspector was saying was that for harm to be substantial, the impact on significance was required to be serious such that very much, if not all, of the significance was drained away" (see paragraph [24]). Furthermore, ""substantial" and "serious" may be regarded as interchangeable adjectives in this context" but the phrase "something approaching demolition or destruction" did not necessarily add "a further layer of seriousness". All would "depend on how the inspector had interpreted and applied the adjectival phrase "something approaching" which was "somewhat flexible" (see paragraph [26]). Mr Justice Jay was not persuaded that the inspector had erred in that respect.

The second decision not mentioned in *Barnwell Manor* is *Colman v. Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin) in which special regard was said to have been achieved by a careful and detailed assessment of the impact although the Court also left open the possibility of applying special weight to the impact (at paragraph 68). It did assert that if special weight was attached to the impact then 'the overall negative effects were limited and could not outweigh the benefits of the development'.

Of further note is the judgment of Mr Justice Lindblom in *Forest of Dean District Council v Secretary of State for Communities and Local Government* [2013] EWHC 4052 (Admin) which, whilst a decision shortly before *Barnwell Manor*, remains consistent with it.

In *Forge Field* [2014] EWHC 1895 (Admin), the Forge Field Society, represented by

James Strachan QC, won a judicial review of Sevenoaks District Council's decision to grant planning permission for six affordable homes on two acres of green space south-west of Penshurst, a historic village in the High Weald Area of Outstanding Natural Beauty which has more than 30 listed buildings as well as being a tourist attraction. In *Forge Field*, the local authority had balanced the harm to heritage assets against the benefit of providing affordable housing and granted permission on the basis that the harm was not overriding. That was a false approach: its effect had been to reverse the statutory presumption against approval. That basic error was held to be fatal to the planning permission. Furthermore, the local authority's assessment of alternative sites had also been deficient, which was an error of law that compounded its failure to apply the strong presumption against granting planning permission harming a listed building's setting or a conservation area's character.

iii. Green Belt

2014's "hot topic" has to be the continuing relevance and efficacy of Green Belt policy. Current Green Belt policy (as it applies to development management decisions) can be summarised thus:

- (i) Is the development inappropriate in the Green Belt?
- (ii) If so, are there very special circumstances which clearly outweigh the harm by reason of inappropriateness and any other harm?

Further to the cases relating to the Green Belt as discussed above in the context of housing policy, there have been numerous cases that have emphasised the limited categories of development which are not inappropriate.

For the purposes of placing such cases into their proper context, it is necessary to cast our minds back to last year and *Fordent Holdings Ltd v SSCLG and Cheshire West and Chester Council* [2013] EWHC 2844, in which the Claimant developer sought planning permission for change of use of some fields in the Green Belt from agricultural use to a caravan and camping site. Planning permission was refused by the Local Planning Authority on the day before the NPPF was published. On appeal,

the Inspector concluded that, having regard to the provisions of paragraph 90 of the NPPF¹⁰, all material changes of use were by definition “inappropriate development” and thus ought not to be permitted except in very special circumstances. The appeal was refused and the developer appealed to the High Court.

The judge held that the approach of the NPPF differed from PPG2 in that the former seeks to define development which is “not inappropriate” as opposed to the approach in PPG2, which was to define the types of development which were inappropriate. The effect of this is that all development is inappropriate unless it is specifically identified in the NPPF as one of the categories which is potentially not inappropriate. The judge differed from the inspector in that he found that if the change of use falls within one of the categories set out in paragraph 90 of the NPPF then it is capable of being appropriate development. Otherwise, the change of use will be inappropriate and an assessment will have to be made as to whether very special circumstances exist which outweigh the harm to the Green Belt.

Justine Thornton successfully defended a challenge to government policy on development in the green belt in *Copas v Secretary of State for Communities and Local Government* [2014] EWHC 2634. Justine acted for the Secretary of State for Communities and Local Government in a challenge to a ministerial statement clarifying the Government's approach to unmet need and development in the Green Belt.

The Claimants had applied for permission to build the 23 affordable housing units on green belt land. The Claimants sought to argue that the ministerial statement changed government policy and a Planning Inspector had acted unfairly in not giving them an opportunity to comment on the statement at an appeal hearing. The inspector had

¹⁰ “Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

- Mineral extraction;
- Engineering operations;
- Local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- The re-use of buildings provided that the buildings are of permanent and substantial construction; and
- Development brought forward under a Community Right to Build Order.”

found that the development would cause substantial harm due to its impact on the area's character and the visual amenities of the green belt land, and that the conflict with development plan policies added further weight against it. In reaching her conclusion, she referred to a written ministerial statement of July 1, 2013, providing that "the single issue of unmet demand, whether for Traveller sites or for conventional housing, is unlikely to outweigh harm to the green belt and other harm to constitute the "very special circumstances" justifying inappropriate development in the green belt".

Mr Justice Supperstone in the Planning Court found that the ministerial statement simply clarified government policy and accordingly, there was no unfairness in the Inspector's use of the statement. It was held that the weight to be given to material considerations, such as unmet need, was a matter of planning judgment. Furthermore, the ministerial statement of July 1, 2013, made clear that, of itself, unmet demand would not constitute the very special circumstances necessary to justify green belt development. Rather than being a variation or extension of pre-existing planning policy, the statement provided clarification of the NPPF. The Claimants' contention that there was procedural unfairness in not referring the statement to them for their comment therefore fell away. An inspector had correctly applied the statement as a material consideration in her decision to uphold the refusal of planning permission for affordable housing in the green belt. The statement had influenced the inspector's balancing of the various considerations once she had established their significance to the case. It had not affected C's ability to present the facts or evidence underlying their case. The decision also reiterated the need to read decision letters fairly and as a whole.

Paragraph 88 of the NPPF is in similar terms to PPG2 and advises:

"When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

The Court of Appeal quashed the grant of planning permission for a 66 metre wind turbine at Woodborough in Nottinghamshire in *R (Holder) v Gedling Borough Council* [2014] EWCA Civ 599. Overturning the High Court, Maurice Kay LJ held

that the Council had acted unlawfully in considering that precedent, alternatives and the efficiency of the turbine were not material in deciding whether very special circumstances existed to outweigh the harm to the Green Belt and other harm. The judges also rejected the developers' argument that the permission should not be quashed because the turbine had been erected during the course of the court proceedings.

In particular, *Holder* considered the factors relevant to whether inappropriate development should be approved in the Green Belt. On a wind turbine application members had been advised that on and off-site alternatives, the precedent effect of approving the scheme, and the energy generation and efficiency of the proposed turbine were not material considerations. The High Court upheld the decision but this was overturned by the Court of Appeal. On precedent, Maurice Kay LJ said that it is significant that the features said to constitute "very special circumstances" were essentially generic features (the benefits of renewable energy generation and income for a farm) which could be claimed in relation to comparable sites [15]. Alternatives, in particular less intrusive forms of renewable energy provision, were also relevant [17]. The Council were [22]:

"simply wrong in [their] submission that, having regard to the full range of applicable policy, matters such as volume and efficiency are irrelevant and can be left to the working of the market. I do not accept that the Green Belt has been sold out to the market in this way. The position remains that the proposed development is, by definition, inappropriate development which can be justified only in very special circumstances. Any consideration of such circumstances must necessarily embrace assessment of the benefit which is likely to ensue. It cannot be the case that a very large but unproductive and inefficient installation ranks equally with a small but extremely efficient one when it comes to evaluating "very special circumstances". Size, efficiency and ability to meet need are all considerations relevant to the issue of "very special circumstances"."

The issue in *Redhill Aerodrome Limited v Secretary of State for Communities and Local Government* [2014] EWHC 2476 (Admin) was whether 'any other harm' in paragraph 88 of the NPPF was confined to harm to the Green Belt in addition to harm by reason of inappropriateness or included any other harm from the proposal. In

River Club v Secretary of State for Communities and Local Government [2009] EWHC 2674, Frances Patterson QC held that any other harm within paragraph 3.2 of PPG2 included any harm caused by the proposal, whether it was to the Green Belt or other interests. On its face, the text of paragraph 88 of the NPPF is not materially different from that in paragraph 3.2 of PPG2. However in *Redhill Aerodrome* the same judge (now Mrs Justice Patterson) considered that the NPPF led to a different result. Essentially she considered that the NPPF set particular thresholds for refusal on particular issues, such as noise. If those impacts did not reach the refusal thresholds then they could not be considered in any other harm for the purpose of the Green Belt judgment. Sub-threshold harm could not be considered on a cumulative basis, as the learned judge said at paragraph 57:

“to permit a combination of cumulative adverse impacts at a lesser level than prescribed for individual impacts to go into the evaluation of harm of a Green Belt proposal seems to me to be the antithesis of the current policy. It would re-introduce a possibility of cumulative harm which the NPPF does not provide for”

It is notable that the *Redhill Aerodrome* judgment did not address the 2013 Ministerial Statement which explicitly says that other harm includes non-Green Belt harm: ‘outweigh harm to the green belt and other harm to constitute the ‘very special circumstances’.

Permission to appeal has been granted and it is understood that the appeal is to be heard in early October 2014.

R (Timmins) v Gedling Borough Council [2014] EWHC 654 (Admin) dealt with cemeteries under the NPPF policy. Paragraph 89 was held to be concerned with new buildings in cemeteries not being inappropriate, if they met they did not conflict with openness and purposes, not with treating a use as not inappropriate. Consequently a cemetery itself is inappropriate development (at paragraph 23) and so a new cemetery can only be approved in very special circumstances. An appeal is pending in *Timmins*.

Newlyn Dean v Secretary of State for Communities and Local Government [2014] EWCA Civ 193 concerned livery and paintballing uses in the Bournemouth Green Belt. The Court of Appeal held that the former wording in paragraph 3.4 of PPG2 did not

deem outdoor sport and recreation or cemeteries to be outside the categories of inappropriate development [22].

The Court of Appeal have upheld the decision of Ouseley J that oil and gas exploration and appraisal is part of mineral extraction for the purposes of paragraph 90 of the NPPF: *Europa Oil and Gas Limited v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825 upholding [2014] J.P.L. 21 at 35. Consequently such operations are not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt.

Applying *Gallagher Homes*, it was held in *IM Properties v Lichfield* [2014] EWHC 2440 (Admin) that it was clear that exceptional circumstances had to be demonstrated for revisions to the green belt to be made. Whether they had been was a matter of planning judgment in a local plan exercise ultimately for the inspector. There was no reference in *Gallagher* to a doctrine that a revision proposed to reduce a green belt could not arise unless the fundamental basis on which the land was originally included was subsequently falsified, or that release of green belt land had to be a last resort. In the instant case, the council members were aware of the test to be applied and were entitled to take into account the genesis of the plan and the inspector's findings in concluding that there were exceptional circumstances for a green belt revision.

Also of potentially broad relevance was *Connors v Secretary of State for Communities and Local Government* [2014] EWHC 2358 (Admin), in which it was held that the secretary of state's policy for determining appeals in cases involving traveller and gypsy sites in the Green Belt himself rather than by an inspector was not discriminatory and was therefore compatible with the European Convention on Human Rights 1950 articles 6 and 14.

iv. Development plan

The issues which need to be considered in a development plan will depend upon its position in the planning policy framework. In *Gladman Development Limited v*

Wokingham Borough Council [2014] EWHC 2320 (Admin) Mr Justice Lewis held that an inspector assessing the soundness of a development plan document dealing with the allocation of sites for a quantity of housing which was needed was not required to consider whether an objective assessment of housing need would disclose a need for additional housing. Furthermore, although a local planning authority dealing with question of the amount of housing needed for its area would need to have regard to paragraph 47 of the Framework, the Framework did not require a development plan document to address the question of whether further housing provision would need to be made. Rather than examining a development plan document assessing housing provision; the Inspector was examining a plan which proposed site allocations for housing which, as a minimum, would contribute towards the agreed housing need of the area (*Gallagher Homes Ltd v Solihull MBC* [2014] EWHC 1283 (Admin) above considered). Accordingly, the Wokingham Managing Development Delivery Local Plan did not need to identify the objectively assessed need for housing in the area. This particular document was intended simply to allocate sites to meet a requirement which had already been set out in the adopted Core Strategy [60-69].

In *R(Cherkley Campaign Ltd) v Mole Valley District Council* [2013] EWHC 2582 (Admin), [2014] 1 P. & C.R. 12 the Secretary of State's direction saving a policy in a 2000 local plan also saved the reasoned justification associated with that policy [79-87]. The Court also held that it was not possible to challenge the reasoned justification of a local plan on the basis that it was policy, not reasoned justification, after the end of the six week challenge period [62].

Richards LJ in the Court of Appeal in *Cherkley Campaign* [2014] EWCA Civ 567 held in respect of a pre-2004 style development plan [at 16]

“in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies for the development and use of land in the area. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the

plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented.”

However he agreed with the High Court that the reasoned justification was saved as [18]:

“To blue-pencil the supporting text would risk altering the meaning of the policy, which cannot have been the legislative intention. It seems to me that the true effect of the statutory provisions was to save not just the bare words of the policy but also any supporting text relevant to the interpretation of the policy, so that the policy would continue with unchanged meaning and effect until replaced by a new policy.”

IM Properties v Lichfield (mentioned above) is also of relevance in that it was recognised that once a document becomes a development plan document within the meaning of section 113 the statutory language is clear that it must not be questioned in any legal proceedings except as provided. Sub-section (11)(c) made it clear that for the purposes of a development plan document, or a revision of it, the date when it was adopted by the local authority was the relevant date from when time ran within which to bring a statutory challenge. A document became a development plan document once it had been submitted for examination, (*Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 considered). In *IM Properties*, the proposed modifications which were to be the subject of examination were potentially part of that development plan document. It was held that any other interpretation would be to give a licence to satellite litigation at an advanced stage of the development plan process.

v. **Neighbourhood plans**

R. (Daws Hill Neighbourhood Forum & Ors) v Wycombe District Council, Secretary of State for Communities and Local Government & Taylor Wimpey UK Limited [2013] EWHC 513 (Admin) concerned a dispute by rival residents associations to be designated as a neighbourhood forum under section 61G of the TCPA 1990 (as amended by the Localism Act 2011) in a neighbourhood area which was smaller than that for which the Claimant had applied and which excluded two major development

sites. It submitted that by excluding the two sites the LPA had failed to take into account the purpose of the 2011 Act, namely, to give new rights and powers to enable local communities to participate in the planning process within their local area through neighbourhood planning. The LPA argued that it had been entitled to have regard to the planning context, including the objections by the landowners of the two sites.

Dismissing the application, Supperstone J. held that section 61G(5) of the TCPA 1990 had given the LPA a broad discretion when considering whether the specified area was an appropriate area to be designated as a neighbourhood area. The Council was entitled to consider if any useful purpose would be served by the proposed neighbourhood area, given that the sites would be under development before the process was concluded

The Court of Appeal upheld the decision of Supperstone J. Sullivan LJ, giving the leading judgment, rejected the narrow approach to construction and held that the exclusion of the two sites did not undermine the statutory purpose. He concluded that the Council had been entitled to exercise its discretion to designate a smaller area and to have regard to the planning context in reaching a view as to what was an 'appropriate' area for designation.

Challenges are beginning to be made against proposed neighbourhood development plans. See, for examples, both *BDW Trading Ltd (trading as Barratt Homes) v Cheshire West and Chester Borough Council* [2014] EWHC 1470 (Admin), (in which the High Court considered that the Strategic Environmental Assessment of the draft Tattenhall Neighbourhood Plan was adequate) and *R (Crownhall Estates Limited) v Chichester District Council*.

vi. **Retail development**

Paragraph 24 of the NPPF provides for “*applications for main town centre uses to be located in town centres, then in edge of centre locations*”. Only if “*suitable*” sites “*are not available should out of centre sites be considered*”. Paragraph 27 further provides that an

application should be refused where it “*fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the above factors*”.

In *R on the Application of Warners Retail (Moreton) Limited v Cotswold District Council* [2014] EWHC 2504 (Admin), Warners Retail (Moreton) Ltd, which owns a Budgens store at the north end of the High Street had claimed that it could meet the town's needs for additional food retail space through an expansion for which it has already been granted planning permission. As a result, it claimed that the district council was wrong not to take this into account as a "sequentially preferable" solution when considering an application to build a rival food store further away from the town centre at Fosse Way Farm, Stow Road. At the same time as approving that scheme last September, the planning committee had rejected an alternative proposal for a retirement community at the Stow Road site, and refused Sainsbury's planning permission for its own supermarket on the opposite side of Stow Road. It took the view that to approve two new foodstores would harm the vitality and viability of the town centre. Warners claimed that the committee failed in its application if the sequential test under government policy that aims to site retail development closer to town centres and argued that the town can only accommodate one food store, and it should be an extended Budgens.

Mr Justice Supperstone ruled that the committee was "entitled to form its own judgment" and take the view that the town could accommodate an additional food store as well as the larger Budgens, for which permission had already been granted. Warners had argued that the rival development will preclude its extension plans and harm the town centre by luring shoppers away, but the judge said that it had “failed to make out that the council's approach to town centre vitality and viability was erroneous”. He said that its planning officer had considered that a store on the Fosse Way Farm site is likely to encourage shoppers to stay in the town rather than go elsewhere and added that the council was entitled to exercise its own judgment on the issue, and that there was no basis for interfering with its decision.

Further to the above, and whilst a ‘mere’ appeal decision, it may also be of interest to note that Eric Pickles recently backed a council's approval of plans for a retail and leisure park on the edge of Rushden in Northamptonshire (*Rushden Lakes*)

despite neighbouring Kettering Borough Council, Northampton Borough Council and Corby Borough Council opposing the plans on the grounds that the project would cause "irreparable harm" to other town centres in the area. The project, includes proposals for retail units, restaurants and a lakeside visitor centre, along with a hotel, leisure club and boat house. Whilst noting that the secretary of state agreed that the plans would "not wholly accord" with local planning policy, "the failure to accord with the development plan as a whole would not significantly and demonstrably outweigh the benefits of the scheme when assessed against the policies of the [NPPF] taken as a whole". The key policies and provisions in the development plan were also found to be out-of-date and therefore the NPPF's presumption in favour of sustainable development applied. Furthermore, the decision letter nevertheless found that "the effect on Corby, Kettering and Northampton town centres would not be significant", the scheme "could not realistically be moved to another location; and that there is no suitable and available sequentially superior site".

D. DECISION MAKING

There continue to be a number of challenges brought on the basis that officers' reports have been flawed in some respect. Mr Justice Hickinbottom helpfully summarised the "uncontroversial" principles which apply in relation to the court's approach to such criticisms in 2012, in *R (Zurich Assurance Limited) v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [15]:

"Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:

- (i) *In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.*

- (ii) *When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:*

“[A]n application for judicial review based on criticisms of the planning officer’s report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken” (Oxton Farms v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).

- (iii) *In construing reports, it has to be borne in mind that they are addressed to a “knowledgeable readership”, including council members “who, by virtue of that membership, may be expected to have a substantial local and background knowledge” (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes “a working knowledge of the statutory test” for determination of a planning application (Oxton Farms, per Pill LJ).”*

In this context, see also **R. (Hampton Bishop Council) v Herefordshire Council** [2013] EWHC 3947 (Admin), in which a number of criticisms were made of the relevant officers’ reports and Mr Justice Hickinbottom took the opportunity to repeat his guidance. The case related to a rugby club seeking planning permission for a new ground with 190 dwellings but the real issue was whether planning decision-makers can legitimately take into account “off-site” benefits of a proposed development notwithstanding the requirements of the CIL Regulations. The majority in **R (Sainsbury’s Supermarkets Limited) v Wolverhampton City Council** [2010] UKSC 20 had held that such benefits could be taken into account “provided that such benefits are related to or connected with that development in a real (as opposed to fanciful or remote) way”. In **Hampton Bishop**, Mr Justice Hickinbottom stressed that “whether there is such a relationship or connection in particular case will be fact-specific” (see paragraph [30]). In that case, it was held that the transfer of the Rugby Club’s existing

grounds to the Council for a nominal amount would secure the continued use and operation of the ground as a community amenity and was clearly “directly related to the proposed development”. As such, it was “a material consideration which the Planning Committee properly took into account in their determination of the application”.

Further to the above, also of interest are the discussions of the knowledge of the planning authority or councilors in *R (Trashorfield Limited v Bristol City Council and others* [2014] EWHC 757 (Admin) (which also emphasised the need for the report to be read fairly and as a whole at paragraph 43) and *R (McClellan) v London Borough of Lambeth* [2014] EWHC 1964 (Admin).

E. AARHUS/COSTS

In Case C-260/11 *R (Edwards) v Environment Agency and others (No 2)* [2013] 1 WLR 2914 the CJEU gave a preliminary ruling (on a reference from the Supreme Court) on the meaning of “prohibitively expensive” under Article 9.4 of the Aarhus Convention, as implemented by article 10a of Council Directive 85/337 and article 15a of Council Directive 96/61. In summary, the ECJ held that a national court could not act solely on the basis of a particular claimant's financial situation. The court also had to carry out an objective analysis of the amount of the costs, as members of the public and associations were required to play an active role in protecting the environment. Therefore, the cost of the proceedings had neither to exceed the financial resources of the claimant, nor to appear to be objectively unreasonable. The court could also take into account the situation of the parties concerned; whether the claimant had a reasonable prospect of success; the importance of what was at stake for the claimant; the protection to the environment; the complexity of the relevant law and procedure; the potentially frivolous nature of the claim at its various stages and the existence of a national scheme or cost protection scheme. Moreover, the fact that the claimant had not been deterred in practice from asserting his claim was not in itself sufficient to establish the proceedings were not prohibitively expensive for him. Finally, the same criteria should be used for assessing whether proceedings are prohibitively expensive on appeal as at first instance. The CJEU’s judgment was applied by the Supreme Court

in [2014] 1 WLR 55.

Venn v Secretary of State for Communities and Local Government [2013] EWHC 3546 (Admin) is another important decision relating to the issue of costs. In response to the claimant's submission relating to her entitlement to costs protection, the Secretary of State submitted first, that the claimant's claim was not an Aarhus Convention claim; second, the claim fell outside the scope of the costs protection provided by CPR 45.41 because it was not an Aarhus Convention claim and it was not a claim for judicial review; third, the court's inherent jurisdiction to make a costs protection order could only be made on the criteria set out in *R. (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600, which she could not fulfil; fourth, even if her claim was under the Aarhus Convention, it should not benefit from any relaxation of the *Corner House* principles for environmental claims because it did not come within the scope of the Directives implementing the Aarhus Convention into EU or UK law; finally, and alternatively, any cap should be no lower than £5,000.

Mrs Justice Lang confirmed that the new CPR rule 45.43 is limited to judicial review proceedings only (see paragraph [27]). In distinguishing between section 288 applications and judicial review claims, it was noted that although "applications under section 288 frequently raise the same public law issues as in judicial review claims, the wording of CPR 45.41 refers to "claims" not "issues"" (also paragraph [27]). Whilst agreeing that it "seems inconsistent" to exclude section 288 claims from costs protection it was nevertheless acknowledged that "there has been no ruling in the EU or UK courts that their exclusion from CPR 45 is unlawful" and the Directives which are the subject of *Commission v. UK* were "not in play in the Claimant's case" (see paragraph [32]). Notwithstanding, Mrs Justice Lang held that the "inherent jurisdiction of the court to grant protective costs orders" and a consequential relaxation of the *Corner House* criteria in relation to environmental claims would enable the court to give effect to the requirements of the Convention. She then adopted the approach in *R. (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 and [2011] EWCA Civ 891), and "treated the public importance and public interest criteria for making a protective costs order as met" because the claim raised "environmental matters within the scope of the Convention" (paragraph [36]).

Case C-530/11 *European Commission v United Kingdom* considered PCOs in environmental claims. These were infringement proceedings related to a complaint made to the Commission by the WWF-UK in December 2005 to the effect that the UK's rules on costs protection in environmental claims did not comply with the Aarhus Convention as applied by Directive 2003/35/EC. The CJEU found that the UK had been non-compliant with Directive 2003/35/EC in failing to ensure that proceedings were not prohibitively expensive. It should be noted, however, that the case concerns the law and practice as it stood on 22 May 2010. This was long before the recent CPR changes and even before *Garner*.

In *Austin v Miller Argent* [2014] EWCA Civ 1012 it was held that private nuisance actions were in principle capable of constituting procedures which fell within the scope of the Aarhus Convention 2001 article 9(3). If the Convention applied and the claimant sought a protective costs order, the requirement in article 9(4) of the Convention that the proceedings should not be prohibitively expensive was no more than a factor to be taken into account.

F. ENVIRONMENTAL IMPACT ASSESSMENT

In *Champion v North Norfolk District Council* [2013] EWHC 1065 (Admin) the claimant attacked a planning permission granted for a lorry park and agricultural silos. The point at issue was the risk of run-off polluting a water course with European protected status. The Council had concluded that with proposed mitigating measures there was no relevant risk. However, it also imposed conditions requiring the developer to monitor water quality and to take steps to improve it should there be deterioration. Deputy High Court Judge James Dingemans QC agreed that this was mutually inconsistent and irrational and quashed the permission. The condition could only have been imposed if they were necessary. If there was no risk it would not have been necessary. Hence, EIA and AA should have been undertaken.

The potential implications of the *Champion* reasoning (at first instance) were relevant for the purposes of *Feeney v Secretary of State for Transport* [2013] EWHC 1238 (Admin) in which there was a challenge to a T&WA Order for development of the

Oxford-Bicester railway line. One issue was the possible effect of deposition of NO_x on the Oxford Meadows SAC. A condition was imposed requiring monitoring to establish baseline levels of deposition and then to establish levels of deposition from the railway and associated parking, the setting of thresholds or criteria to protect the habitat, and the means of mitigation (by changes in the management regime) if these were not met. It was argued that this indicated that significant effects must be likely and that it offended the principle on Gillespie. Ouseley J rejected this: on the facts it was clear that the inspector was satisfied there would not be significant effects, but it was not clear whether there would be no effects (as claimed by the promoters) or less than significant effects. The condition was a way of dealing with that uncertainty – “the residual range of uncertainty between no harm and harm which is unlikely.”

Reverting back to the *Champion* matter, the case reached the Court of Appeal shortly before Christmas with the judgments reported at [2013] EWCA Civ 1657. The appeal was allowed on what were essentially two points. First, it was held that the decision that an EIA and an AA were not required came first in a sequential decision-making process. If the Committee had not accepted that view, then the substantive debate as to whether to approve the application or not could not have proceeded. As to whether conditions were “necessary”, it was perfectly reasonable for the Committee to properly conclude that conditions were necessary as a precautionary measure for reassurance purposes even if it did not feel that there was a real likelihood that pollutants would enter the river. The Court referred to *Feeney* in finding that conditions could, in principle, be imposed in order to address a situation falling short of one that was considered to involve a likelihood of significant adverse effects. Furthermore, there had not been any failure to consider relevant matters despite the flawed screening opinion. In particular, the engagement of statutory consultees such as Natural England and the Environment Agency had ensured that mitigation measures had properly been addressed. As such, the Committee had reached “a rational and reasonable conclusion available” on the material before it.

However, we have not heard the end of the *Champion* matter given that permission to appeal has been granted by the Supreme Court.

In *R. (Thakeham Village Action Ltd) v Hosham District Council* [2014] EWHC 67 (Admin) Lindblom J upheld the lawfulness of a screening opinion for the construction of 146 houses on the site of a former mushroom farm. The Council had granted permission, despite having been advised that the residential development was contrary to the development plan. The case is also of interest as to the judge's view that the scope of enabling development was wide. In this context it was the grant of the residential permission to subsidise a mushroom business on another site. On this basis the judge rejected the allegation that this was an attempt to buy planning permission, and, that such a subsidy of a private company was not a proper planning purpose. In *R. (Mouring) v West Berkshire Council* [2014] EWHC 203 (Admin) Collins J struck down a planning permission for an 800 square metres warehouse development (with ancillary offices) in the AONB on the basis that the Council had failed to consider whether it was EIA development (i.e. falling within Sched. 2, para. 10(b) as an "urban development project").

In *R (CBRE Lionbrook (General Partners) Ltd) v Rugby Borough Council* [2014] EWHC 646 (Admin) certain adjustments to a proposal were made after a screening opinion had been issued and no further screening opinion was carried out. Lindblom J considered that the Council had been entitled to take the view that the adjustments were not such as to change the proposal in any material way, such that the outcome of any further screening would inevitably have been the same. He found that the words "where it appears to the relevant planning authority" in Regulation 7 of the 2011 Regulations provided an element of discretionary judgment for the authority including in relation to Regulation 7(b) - whether "the development in question has not been the subject of a screening opinion...". Further, he found that the concept of development having been the subject of a screening opinion is broad enough to include a previous screening process for an earlier version of a proposal. It is for the authority to judge whether any changes are such as to cast doubt on the continuing validity of the earlier screening opinion, subject only to review on Wednesbury grounds by the court. If the Council is still entitled to rely on its earlier screening opinion, the amended proposal will therefore itself have been "the subject of a screening opinion" for the purposes of Regulation 7(b) and no further screening opinion will be required.

Perhaps the most significant environmental case of the year so far is *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324. The case concerned a command paper (the DNS) issued in January 2012 by which the Government signalled its intention that HS2 should be taken forward by way of hybrid bills in Parliament. It raised weighty issues on EIA (and also SEA, on which see below). Where a project is authorised by legislative acts, it may be exempted from the general scheme of the EIA Directive, but will still need to comply with all the elements relevant to assessing environmental impacts. The question on EIA was whether the hybrid bill procedure was compliant with these requirements. Lord Reed (with whom the rest of the court agreed) held that it was *acte clair* that it would. In coming to this view, he provided a detailed analysis of the separation of powers in the United Kingdom and the parliamentary process.

In *R (on the application of Gilbert) v Secretary of State for Communities and Local Government* [2014] EWHC 1952 (Admin), the claimant local resident applied for judicial review of the first defendant secretary of state's screening direction and the second defendant local authority's grant of planning permission to the interested party. The challenge alleged errors in the screening assessment in relation to noise.

Mr Justice Supperstone held that the test for whether a development required an Environmental Impact Assessment was whether the project was likely to have significant effects on the environment, as judged by planning authorities having regard to the precautionary principle. Screening assessments are, by their nature, not as detailed as planning permission assessments (see further *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157). The secretary of state had asked the right questions, equipped himself with the relevant information and applied Wednesbury principles. The decision maker had considered the evidence, including the cumulative effects of noise emissions and traffic congestion, and had found that a significant impact was unlikely. Furthermore, the reasons for the secretary of state's conclusions were expressed in clear and precise terms, as required by the regulations, and were intelligible and adequate.

It is understood that the Claimant is appealing to the Court of Appeal.

In *R (Elmbleton Parish Council) v Northumberland County Council* [2013] EWHC 3631 (Admin), HH Judge Behrens held that whilst a screening checklist which answered many questions with simply ‘no’ would have been adequate, with other material, under the 1999 Regulations post-*Mellor* [para 103]:

“[The 2011] regulations require a written statement giving “clearly and precisely” the “full” reasons for the decision. To my mind the check list is not such a statement. It does not purport to be such a statement. It does not purport to explain the reasons for the decision. It is a check list intended to help users decide whether an EIA is required.”

However he declined to quash the decision on the basis that no prejudice was caused to the claimant as it was ‘possible to glean the reasons from the documents on the register’ and there would be no different decision if the screening opinion was made again (see paragraph 106).

G. STRATEGIC ENVIRONMENTAL ASSESSMENT

This section is drawn from a paper delivered to the PEBA Annual Conference 2014 by Stephen Tromans QC¹¹.

The *Buckinghamshire* case, referred to above in the context of EIA, is also of key importance in relation to SEA. The issues for the Supreme Court so far as SEA were concerned were whether the DNS was a “plan or programme” which “set the framework for development consent” and was “required by administrative provisions” within the meaning of articles 2 to 3 of the SEA Directive and whether article 3(2)(a) of the SEA Directive was inconsistent with article 7 of the Aarhus Convention. Lord Carnwath gave the main judgment concerning the SEA issues. He was “prepared to proceed” on the assumption that the DNS was “required by administrative provisions” for the purposes of Article 2(a) or “at least that there is a referable issue on the meaning of that part of the definition” (paragraph 22) and devoted the majority of his judgment to the question of whether the DNS “set the framework” for the purposes of Article 3. In his judgment, “influence” in the ordinary sense was not sufficient to set the framework. Rather, the influence “must be such as

¹¹ The paper (which was prepared with the assistance of Ned Helme) is available online at http://www.39essex.com/resources/news_listing.php?id=407

to constrain subsequent consideration, and to prevent appropriate account from being taken of all of the environmental effects which might otherwise be relevant” (paragraph 40). He considered that the DNS did not in any way constrain the decision-making process and so did not require SEA. He also dispatched the Aarhus point in brief terms at paragraph 52, finding that the SEA Directive must be interpreted and applied on its own terms and that, if this falls short of full compliance with the Aarhus Convention, it does not invalidate the Directive so far as it goes. It simply means that a possible breach of the Convention may have to be considered as a separate and additional issue. In the HS2 case the point was academic because no such breach was alleged.

More recently, Lindblom J considered a second judicial review claim brought by the HS2 Action Alliance Ltd, arguing that safeguarding directions for the proposed route of Phase 1 of HS2 ought to have been assessed under the regime for strategic environmental assessment (*R (HS2 Action Alliance Ltd & LB Hillingdon) v SoS for Transport* [2014] EWHC 2759 (Admin)). It was argued that such directions, unlike the Command Paper, operated as a legal constraint on development consent for various projects, including EIA development. In rejecting that submission, Lindblom J characterised such directions as “safeguards” taking their shape from project which had already been found by the Supreme Court not to constitute a plan or project setting the framework for future development consent. It was again critical that they did not constrain the discretion of the decision-maker considering the development consent in due course.

SEA has sometimes been viewed an obstacle course with tripwires lurking for the unwary. Early cases such as *Heard v Broadland DC* [2012] EWHC 344 (Admin) and *Save Historic Newmarket Ltd v Forest Heath DC* [2011] EWHC 606 (Admin) well illustrate this. However, it is not the case that errors will necessarily prove fatal, as illustrated by the flexible approach of the High Court in *Cogent Land LLP v Rochford DC* [2012] EWHC 2542 (Admin); [2013] 1 P. & C.R. 2. 43. This sort of flexible approach was also applied in the recent case of *No Adastral New Town Ltd v Suffolk Coastal DC* [2014] EWHC 223 (Admin) in which a failure to conduct environmental assessment in the first 4 years of the plan process was found not to vitiate the entire SEA process.

The limited role of the courts in assessing the adequacy of environmental reports is evident in the case of *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin) which concerned a challenge to the Thetford Area Action Plan based on criticisms of a “highly detailed nature” concerning evidence relating to stone curlews. Beatson J gave a useful summary of the authorities relating to the limited role of the court at paragraphs 71-77 of his judgment and rejected the challenge in robust terms. A similarly robust view is evident in *Performance Retail Ltd Partnership v Eastbourne BC* [2014] EWHC 102 (Admin) in which Mr CMG Ockelton (sitting as a deputy) refused to accept that an SA/SEA was vitiated by the lack of assessment of a minor modification recommended by the Inspector at Examination in Public. The approach of a reasonably limited role for the courts is also evident in two recent judgments of Sales J, in both of which he emphasised the wide discretion enjoyed by planning authorities in planning judgments concerning SEA (see *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government* [2014] EWHC 406 (Admin) and *Zurich Assurance Ltd v Winchester City Council* [2014] EWHC 758 (Admin)).

The final SEA case to note is *West Kensington Estate Tenants and Residents Association v Hammersmith and Fulham LBC* [2013] EWHC 2834 (Admin) in which Lindblom J applied the (obiter) approach to discretion in environmental cases of Lord Carnwath in *Walton v Scottish Ministers* [2012] UKSC 44. Despite finding a breach of Article 9(1) of the SEA Directive and Regulation 16 of the SEA Regulations, Lindblom J declined to quash the SPD at issue. The *West Kensington* case is therefore part of the trend of rowing back from the rigours of *Berkeley v Secretary of State for the Environment (No 1)* [2001] 2 AC 603.

H. NUISANCE/WASTE

In *Coventry and others v Lawrence* [2014] UKSC 13 the Supreme Court reviewed the law of private nuisance in the context of a claim brought by the owners of a house purchased in 2006 in the vicinity of a Speedway racing stadium. Used for this purpose with planning permission since 1975. In judgments spanning 68 pages, the Supreme Court held, inter alia, that it was possible to obtain a right by 20 years’

prescription to commit a private nuisance but that it continued to be no defence that a claimant came to the nuisance. Further, the Supreme Court declined to find that what amounted to a private nuisance could be defended either on the basis that it informed the “character” of the area, or by reference to a grant of planning permission. In giving the majority judgment, Lord Neuberger further observed that a claimant remained entitled to expect a defendant would take all reasonable steps to ensure that noise was kept to a minimum (*supra*, paragraph 76). The grant of planning permission could, Lord Neuberger considered, be advanced in support of a submission that damages should be awarded instead of an injunction. He further advocated a “much more flexible” approach to the question of whether to award damages only.

Stephen Tromans QC and Catherine Dobson recently appeared representing the Canal and River Trust (formerly British Waterways) in the Supreme Court case of *Manchester Ship Canal Company Ltd v United Utilities Water plc* [2014] UKSC 40, in which the appellant statutory sewerage undertaker appealed against a decision ([2013] EWCA Civ 40) that the right of discharge onto third party property of the respondent owner of a private watercourse had not been transferred to private water companies as part of the privatisation process.

The Court held that sewerage companies do not enjoy an implied right under the provisions of the Water Industry Act 1991 to discharge sewage from outfalls created after 1991 into private canals or onto private land. They do, however, continue to have an implied right of discharge from pre-privatisation outfalls subject to the safeguards contained in the 1991 Act about foul sewage and interference with the assets of canal and other statutory undertakers, and payment of full compensation for damage caused.

In *Walker & Son (Hauliers) Ltd v Environment Agency* [2014] EWCA Crim 100; [2014] P.T.S.R. 929, the appellant had been convicted knowingly permitting the operation of a regulated facility without a licence contrary to regulation 38(1)(a) the Environmental Permitting (England Wales) Regulations 2007. It argued that the prosecution had prove not merely that a defendant knowingly permitted the particular waste operation, but also that he knew the operation was not in

accordance with an environmental permit. In ruling against the defendant, the Court of Appeal noted that a due diligence defence had been removed from the 2007 Regulations in order to secure higher environmental standards. It followed that lack of knowledge of non-compliance operated as no defence.

I. CONSERVATION, WILD BIRDS AND HABITATS

The two most recent cases in this field concern badgers and seagulls. In *R (Badger Trust) v SoS for Environment* [2014] EWHC 2909 (Admin) the Claimant, an organization devoted to the conservation and welfare of badgers, challenged the Secretary of State's decision to continue, for a second season, the culling of badgers by controlled shooting in two pilot areas. Kate Grange acted as Junior Counsel for the Secretary of State. The single ground of challenge was that the SoS had given an unequivocal assurance that, as long as she had in real contemplation the rolling out of the cull to other geographic areas, she would keep in place an Independent Expert Panel. Having carefully reviewed the policy documents relied upon by the Claimants, Mr Justice Kenneth Parker saw no warrant for the claimed assurances. The decision contains a helpful survey of the current learning on substantive legitimate expectation, and the requirement for a representation which is "clear, unambiguous and devoid of relevant qualification".

In a further recent action for judicial review, the Royal Society for the Protection of Birds challenged the decision of the Secretary of State to direct Natural England to give consent for the culling of 552 pairs of Lesser Black-backed Gull and, as well as further operations to maintain population levels of Herring Gull at a reduced level along the left bank of the Ribble Estuary (*RSPB v SoS for Environment* [2014] EWHC 1645). On the right bank of the estuary is Warton Aerodrome, where British Aerospace operates the principal UK facility for developing, manufacturing and testing military aircraft. It was with a view to mitigating the risk of aircraft damage and crashes through ingestion of large, thermalling birds that British Aerospace sought a consent for a cull of a limited number of breeding pairs..

At the heart of this case is the suggestion by the Royal Society for the Protection of Birds that the Wild Birds Directive should be construed as prohibiting any non-natural intervention, or cull, of a designated species below its present stable population level within a special protection area. In rejecting that submission, Mr Justice Mitting held that the specification of population levels was but a feature of the national application of more general requirements set out in Article 6(3).

He went on to observe that, in so far as Directive 2009/147EC had sought to codify the Wild Birds Directive “in the interests of clarity and rationality”, the European legislator had failed to achieve that aim.

By Article 6(3) of the Council Directive 92/43 (“the Habitats Directive”) it was clear, however, that the determinative question was the impact of the plan consented to upon the integrity of the special protection area. This involved an exercise of judgment on the Secretary of State’s part. He had regard to the exponential increase in numbers of breeding pairs of these large gulls since the 1970s. It was self-evident that the habitat of the gulls would not be interfered with, except temporarily. The Secretary of State had been entitled to conclude that the long-term viability of the designated species on this site would not be impaired, nor would the integrity of the site be affected.

The Secretary of State is represented by Stephen Tromans QC and Colin Thomann. The case is currently proceeding to the Court of Appeal.

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