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Cornerstone Barristers

Planning Day 2023

6 November 2023

Planning Day

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Foreword

Planning at a Crossroads

We warmly welcome you all to Planning Day 2023, the flagship planning event from Cornerstone Barristers.

Between now and our next Planning Day, it is very likely we will have had a General Election. With all of the main parties offering vastly different visions for the planning system in England – and with housebuilding targets set to be a key political battleground – it's appropriate that our theme for this year's conference is "Planning at a Crossroads". A significant part of our programme reflects planning's role in responding to the climate and biodiversity emergencies and meeting our Net-Zero commitments. Not only is planning at a crossroads, our planet is too.

Since our last conference, we have launched Cornerstone Climate, a new cross disciplinary centre of excellence for climate litigation and advice; leading environmental barrister Nina Pindham has joined Chambers, and no less than five of our barristers appeared in the landmark Supreme Court case Finch v Surrey County Council, regarding downstream greenhouse gas emissions.

Planning Day provides an opportunity not only to engage with you on the most topical issues in planning and environmental law, but also to catch-up on everything planning (and non-planning) related in a relaxed setting.

We are particularly delighted to be joined by Johanna Boyd, Chief Executive of Planning Aid Scotland. Her keynote speech will share recent developments north of the border that we can learn from, including their approach to climate change.

Cornerstone is at the forefront of planning law and practice. Our members appear in many of the leading planning cases before the Supreme Court, High Court and Court of Appeal. We act for all parties involved in nationally important infrastructure projects, and we appear at numerous Local Plan examinations and public inquiries across the country. We also provide advice to central government on planning policy and legislative reform.

However, without you – our clients – none of this would be possible. We continue to be extremely grateful for your ongoing support.

We hope that you enjoy the day, participate in our panel discussion and, once the presentations are complete, that you will stay to join us for drinks and canapés.

Matt Lewin, Rowan Clapp and Olivia Davies
Organising Committee, Cornerstone Planning Day 2023

6 November 2023

Matt Lewin

Rowan Clapp

Olivia Davies

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Key changes to planning appeals system in recent years: A practice guide

by Ed Grant and Clare Parry

Introduction

1. In this paper, we focus on a number of changes that have taken place recently to planning appeals procedures. We first discuss the process for determining which procedure an appeal will follow, including the criteria that the Planning Inspectorate ("PINS") apply in making this decision. We offer practical advice for stakeholders as they navigate these systems. This section also highlights data showing the average success rates for planning appeals under each process.

2. Next, we analyse timescales for the different procedures in the wake of the Rosewell Review, which, following implementation of many of its recommendations, made fundamental changes to the planning inquiry process. We consider the extent to which these reforms have been effective in light of PINS statistical data.

3. Finally, we consider several key practical changes in recent years, including the use of online inquiries and hearings following the Covid-19 pandemic. We also discuss the greater use of case management conferences and recent trends in costs applications.

Mode of Determination of Appeal

4. Section 319A of the Town and Country Planning Act 1990 ("TCPA 1990") vests in PINS the power to decide whether an appeal should be determined by written representations, by hearing, or by inquiry.

5. Recent PINS evidence shows the extent to which appeals are determined by the different modes:

	August 2022 to July 2023[1]		August 2021 to July 2022[2]		August 2020 to July 2021[3]	
	Total	Percentage[4]	Total	Percentage	Total	Percentage
Written representations	16,407	92%	16,169	94%	17,200	95%
Hearing	903	5%	635	4%	588	3%
Inquiry	535	3%	455	3%	335	2%
Total	17,845		17,259		18,123	

6. This can be compared with the longer-term trends by interrogating PINS datasets (although it is unclear whether those datasets are 100% complete). The longer-term picture is as follows.

	Last five years		Five to ten years ago	
Written representations	86,172	93%	85,246	91%
Hearing	3,710	4%	5,156	6%
Inquiry	2,172	2%	2,786	3%
Total	92,054		93,188	

7. The parties are provided the opportunity to indicate which procedure they regard as appropriate, and the decision is made by reference to criteria published by PINS. Those criteria were formerly annexed to the PINS Procedural Guide but are now contained in a self-contained document most recently dated 21st April 2022. The criteria will be familiar to many of you, but the key considerations for Inquiry are whether there is a clearly explained need for the evidence to be tested through formal questioning by an advocate, the issues are complex, or there is substantial local interest. The criteria are expressed as alternatives, so for instance to warrant an inquiry only one of these criteria need be met.

8. The Rosewell Report offered little support for those who take the view that too often cases which appear to meet the inquiry criteria are determined by hearing. Rosewell concluded on this topic:

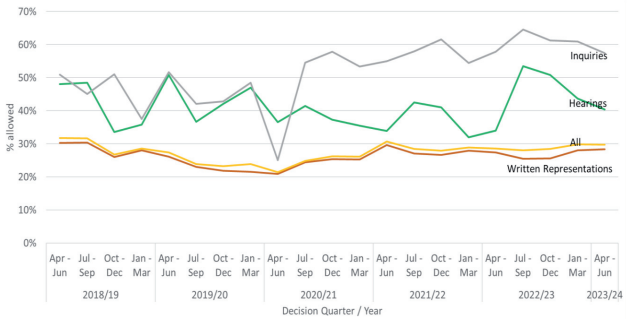
- Only a small proportion of appeals need to be the subject

1. The Planning Inspectorate, *Official Statistics 24th August 2023*. Page 6.
2. The Planning Inspectorate, *Official Statistics 18th August 2022*. Page 6.
3. The Planning Inspectorate, *Official Statistics 19th August 2021*. Page 8.
4. Rounded to the nearest whole number – may not add up to 100%.

of an inquiry. In the vast majority of cases an appeal can be dealt with more efficiently and equally effectively through written representations or a hearing.

- There is no basis to recommend amending the criteria.

9. Recent data, however, shows that appellant success rates in appeals decided by inquiry are significantly higher than in appeals decided by hearing or written representations:[5]



10. The difference in success rates on appeal has been marked since roughly the start of the pandemic. It shows no signs of abating. From April to June 2023, for example, appellants were successful in 57% of planning inquiries, while, for hearings, the figure is 40%.[6] For the written representations procedure, appellants were successful in 30% of cases in that time frame. As the graph above shows, success rates for both hearings and inquiries have fallen since a peak in July-September 2022. It is reasonable to infer from these numbers, we suggest, that the choice of procedure is significant.

11. Many of you will have found yourselves in a situation, particularly where you are representing the appellant, where you have robustly set out why your appeal meets the inquiry criteria, only for PINS to decide that a hearing is appropriate. In those circumstances, you may wish to consider two options:

- In the PINS Procedural Guide (most recent version published 13th June 2023) there is a specific acknowledgement that a review can be requested (paragraph 6.2.5). If such a review is requested it should be accompanied by clear analysis against the criteria, and may be assisted by references to other appeals where the circumstances were very similar but where the matter was heard by inquiry. Consistency from PINS is important. Consider in the request for review proposing a hybrid approach, identifying that some topics are suitable for a roundtable hearing approach whereas some topics require evidence to be formally given and tested. PINS will sometimes change their original position, but getting them to do so is an uphill struggle.
- If the matter is to be determined by hearing, whether or not the decision has been reviewed, bear in mind the provisions of the Town and Country Planning (Hearings Procedure) (England) Rules 2000. Should you wish to rely on any of the provisions below, as a matter of good practice it would be prudent to advise PINS in good time:
  - Regulation 11(2) recognises that cross-examination may be permitted within a hearing, at the Inspector's discretion;
  - Regulation 11(6) provides that a party may call evidence at a hearing, again subject to the Inspector's discretion.

  There is no reason why a party cannot request an opportunity for closing submissions to be made in a hearing. Some Inspectors (depending on the case of course) will agree to this, they may even find them helpful.

12. There is of course a third option, which is to challenge the decision of PINS by judicial review within 6 weeks of that decision. However, success through this route will be very difficult given the margins for judgment which the court will give the decision-maker, and we are not aware of any successful legal challenge to a s319A decision.

13. It is important to remember that PINS must keep the procedure under review, as recognised in the Procedural Guide at 6.2.6. If circumstances in the case change, the introduction of a new issue for example, there is no reason why a further request for review cannot be made, on the basis that there is now a new reason why the criteria for inquiry are met.

14. If the matter is to proceed by hearing where one or other party had sought an inquiry, in order to allay concerns that the issues will not be ventilated at the hearing, it is a good idea to attempt to draft a detailed topic-based agenda, if possible with the agreement of the other party, and to forward it to PINS for the Inspector's consideration. This may give more peace of mind that the issues will be covered and in sufficient detail.

15. Given the number of appeals where the appellant seeks an inquiry but PINS decide to determine by a hearing, there is one other matter to bear in mind. Typically an appellant in anticipation of an appeal being determined by inquiry, will serve a statement of case with the appeal, expecting to amplify arguments in proofs from expert witnesses in due course. However, if PINS then say that the matter will be determined by hearing, PINS will usually allow some time for a more detailed statement of case to be served (but note their flexibility on this tends to be tied to how long remains of the six-month period in which an appeal can be brought), but this may be less time than would have been available were the evidence being served in accordance with an inquiry timetable (i.e, 28 days before the inquiry). The high risk of ending up with a hearing in a case where an inquiry was sought for this reason gives rise to three matters of practical advice:

- It provides a reason why it may be prudent (all other things being equal) to appeal early within the 6 month period, to ensure more time will be available to serve a fuller statement of case;

5. The Planning Inspectorate. *Official Statistics 20th July 2023*. Pages 16; 22-23
6. *Id.* Page 23.

- It is prudent to make the statement of case as thorough as possible in the first instance;
- Expert witnesses should be lined up to provide reports/ statements in short time in case PINS direct a hearing (these can then be appended to the final expanded statement of case).

Timeframes for Planning Appeals: 5 years since the Rosewell Review

16. The Rosewell Review was instituted in large part due to a perception that s78 inquiries and inquiries following called-in applications had become unnecessarily protracted. These took, on average, 47 weeks from receipt of an appeal to the Inspector's decision in 2017-2018.[7] A key task for the Rosewell Review was therefore to *"...make recommendations for improvements, in particular what it would take to halve current end to end inquiry procedure times..."*.[8] The executive summary[9] of the Rosewell Report included the following table showing existing and recommended timescales:

	Inquiry Appeal (inspector decision) Stage Length (weeks)			
	Receipt to start letter	**Start letter to start of inquiry**	**Start of inquiry to decision**	**Receipt to decision**
Average timescales achieved 2017-18	7	29	11	47
Recommended timescales	1	up to 16	90% up to 7 10% up to 9	90% up to 24 weeks 10% up to 26

17. The Report made numerous recommendations and, importantly, proposed a comprehensive schedule for s78 inquiries and inquiries following called-in applications. The government has implemented this schedule in what it now calls "the Rosewell Process", which includes firm deadlines for submissions of documents and key events in the inquiry process.[10] A large majority of planning inquiries now follow this process.[11] Roughly five years after the publication of the Report, the question is whether these reforms are working.

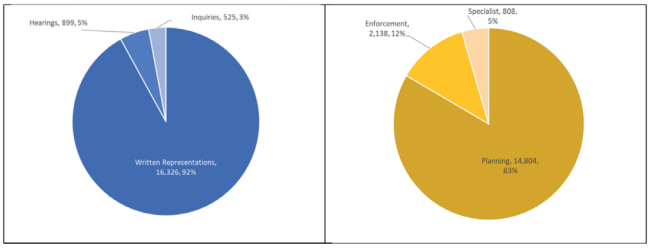
18. In 2022-2023, the results are, generally, encouraging. PINS' Statistical Release in July 2023 included the following table, which shows timescales from validation to decision for planning inquiries under the Rosewell Process[12]:

Measure	Jul-22	Aug-22	Sep-22	Oct-22	Nov-22	Dec-22	Jan-23	Feb-23	Mar-23	Apr-23	May-23	Jun-23	Total
Decisions	13	18	11	22	19	38	22	15	18	9	20	16	221
Median (weeks)	23.3	26.0	28.6	25.9	29.4	38.6	28.6	31.7	29.4	24.9	28.6	29.9	29.4
Mean (weeks)	23.9	30.9	29.5	29.1	38.0	36.9	31.0	40.2	33.5	34.9	30.5	34.0	33.1
St. Dev. (weeks)	4.6	14.0	9.4	11.0	20.8	6.5	10.3	29.2	13.4	20.2	8.9	26.6	15.9

19. As the table shows, from July 2022 to June 2023, the average inquiry under the Rosewell Process took 33.1 weeks.[13] This is obviously a significant improvement on the 47-week average in the 12 months preceding the Rosewell Review. It is, however, still some way off the 24-week target set by the Report. When advising clients, practitioners should also note the relatively high standard deviation, indicating high variability in individual cases. Furthermore, if the inquiry includes an associated enforcement case, the Rosewell Process will not apply, and timescales are generally longer.

20. The current figure of 33.1 weeks is also encouraging because it represents steady improvement over the previous two years. From July 2021 to June 2022, for example, the average planning inquiry under the Rosewell Process took 36.6 weeks.[14] From July 2020 to June 2021, this was 40.1 weeks.[15] Therefore, while the average duration of planning inquiries under the Rosewell Process remains about 9 weeks longer that the Report's recommendations, the situation has clearly improved.

21. We next deal with appeals decided under the other procedures - written representations and hearings. Planning inquiries, the focus of the Rosewell Report, often generate more attention than appeals decided by these procedures. This is understandable, as inquiries are designed for the most complex and impactful proposals. For example, in 2017-2018, residential units approved by planning inquiry amounted to roughly 5.4% of the total units approved that year.[16] Nonetheless, decisions following inquiries make up a small fraction of the total number of decisions made by PINS:[17]



22. For many planning practitioners, therefore, timescales for appeals following the written representations or hearing procedures remain extremely important. In the 2022-2023 period, results have been mixed. For example, in the last 12 months, planning appeals decided by hearing have taken roughly 49 weeks on average from validation to decision.[18] This far exceeds the figure for planning inquiries, which is surprising, given that the most complex cases are allocated, in theory, to the inquiry procedure. Even more surprising, the 49-week timescale for hearings represents an *improvement* over the previous year's

7. Ministry of Housing, Communities & Local Government, *Independent Review of Planning Appeal Inquiries: Report*, December 2018. Page 9.
8. *Id.* at page 5.
9. Ministry of Housing, Communities & Local Government, *Independent Review of Planning Appeal Inquiries: Executive Summary*, December 2018. Page 11.
10. For a visual representation of the key deadlines, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/847699/Inquiry_appeal_overview_diagram.pdf.
11. "Planning inquiries", in this context, includes s.78 planning appeals, householder appeals, commercial appeals, listed building consent appeals, advertisement appeals, s.106 planning obligation appeals and called in planning applications.
12. The Planning Inspectorate, *Official Statistics 20th July 2023*. Pages 6; 11.
13. One caveat to these figures is that they show the time from *validation* to decision, whereas the Rosewell Review measured the duration from *receipt of appeal* to decision. The Report noted that PINS does not record the time from receipt to validation. In its July 20th 2023 Statistical Release, however, PINS states that any delay in validating appeals would be included in its statistics on timeliness. This is slightly different to its statements in releases from July 2021 and 2022. In any case, in its statistical releases for July 2021 and 2022, PINS stated that the majority of appeals were validated within one week from receipt. One would therefore hope that delays at this stage, even if not included in these figures, would not significantly affect current timeliness statistics.
14. The Planning Inspectorate, *Official Statistics 21st July 2022*. Page 11.
15. The Planning Inspectorate, *Official Statistics 22nd July 2021*. Page 12.
16. Ministry of Housing, Communities & Local Government, Independent Review of Planning Appeal Inquiries: Executive Summary, December 2018. Page 7.
17. The Planning Inspectorate, *Official Statistics 20th July 2023*. Page 7.
18. *Id.* at page 17.

figure. On average, in 2021-2022, these took about 59 weeks from validation to decision.[19]

23. Finally, planning appeals decided by the written representations procedure, predictably, require the shortest amount of time from validation to decision. They also account for the vast majority of PINS decisions.[20] In 2022-2023, the average planning case decided by written representations took about 30 weeks.[21] While this figure appears reasonable in comparison to timescales for the other procedures, it has been increasing steadily since July 2020. From July 2020 to June 2021, the average timescale was about 24 weeks.[22] From July 2021 to June 2022, the average time was about 26 weeks.[23]

24. To conclude, while the Rosewell Report identified serious issues in the planning inquiry process, many of these were remediable. For planning inquiries following the Rosewell Process, the implementation of many of the Report's recommendations appears to have been effective. But there is still work to be done. We remain some distance from the key recommendation that 90% of planning appeal inquiries should resolve by 24 weeks, and the remainder by 26 weeks. Nonetheless, the progress in recent years has been significant and is very welcome.

25. For planning appeal hearings, however, the average decision times remain far too high. The peak in recent years at roughly 59 weeks on average for this type of decision was clearly unsustainable, and the reduction in the previous 12 months is positive. Nonetheless, given the current procedural framework, it is concerning that planning hearings generally require significantly more time to conclude than planning inquiries.

26. Finally, while the comparatively short timescales for resolving planning appeals by written representations is a strength of the system, PINS should monitor the modest – but steady – upticks in average time in recent years. Most appeal decisions follow the written representations procedure, and, thus, steady increases in average time from validation to decision could impact a large number of stakeholders.

Online versus In Person

27. During the lockdowns associated with the Covid-19 pandemic most people will be aware that virtually all inquiries and hearings were run virtually. Following the ending of restrictions PINS handed back the practical running of events to LPAs.[24] When handing back control of the running of events to LPAs PINS announced:

One of the key questions we will need to decide on, following research and engagement, is what the balance should be between physical and virtual within and across different case types. The events being run by local authorities from 13 September will provide us with valuable evidence to help shape our thinking. We expect to be able to share more on the future operating model for events in early 2022.

28. While considering what the future operating model should be, PINS published evidence in the form of a survey of 300 PINS staff and 600 external respondents. At that stage PINS noted that the survey showed a strong case for virtual events having a permanent role. The findings from 300 PINS staff revealed:

- unanimous agreement that both physical and virtual events had a role to play in the future.
- agreement that some aspects of virtual events worked as well virtually as physically (e.g. the case management conference, technical and procedural discussions, final submissions).
- over 8 in 10 inspectors believed that the formal process of taking the oath and giving evidence under oath should be in person.
- staff recognise the benefits virtual events provide in terms of flexibility and organisational resilience if further mobility restrictions were imposed in future.

The survey of 600 external 'stakeholders' revealed:

- overall virtual events had been a major success, whilst there were some challenges with the adoption of virtual events these have been minor and could be addressed.
- holding hearings and inquiries virtually improves accessibility and encourages public participation.
- there is an appetite to have virtual events as the default method.
- the format of the event should be decided on a case-by-case basis with the Inspector consulting the parties to decide on the best format.
- feedback from legal professionals indicated that virtual proceedings did not impact the effectiveness of cross examination (other than the testing of evidence on oath) and whilst they did identify some issues with virtual events, they acknowledged their overall success.

29. At that stage PINS stated they were going to carry out an environmental assessment of different scenarios to inform their recommendations which they said would be published in 'early' and then 'spring' 2022. So far as we have been able to find those recommendations were never ultimately published. *The Guidance for Local Planning Authorities* and others hosting virtual events for the Planning Inspectorate (updated December 2022) states.[25]

Events may be held face to face, virtually or, in exceptional circumstances, blended (i.e., a combination of both face to face and virtual). The preference will be for a face-to-face event with a virtual meeting set up as a backup, or a full virtual event. The format will be decided by the Inspector. However, where there is a strong preference for a particular event format, the Case Officer should be alerted as soon as possible with a short explanation.

19. The Planning Inspectorate, *Official Statistics 21st July 2022*. Page 17.
20. The Planning Inspectorate, *Official Statistics 20th July 2023*. Page 6.
21. *Id*. at page 17.
22. The Planning Inspectorate, *Official Statistics 22nd July 2021*. Page 21.
23. The Planning Inspectorate, *Official Statistics 21st July 2022*. Page 17.
24. From 13 September 2021 https://www.gov.uk/government/news/plans-to-resume-in-person-events.
25. The Planning Inspectorate, *Guidance for Local Planning Authorities and others hosting virtual events for the Planning Inspectorate*, 21st December 2022.

30. The same guidance states that *"For face-to-face events, it would be highly beneficial to provide a virtual backup option to cater for illness or other incidents affecting key attendees who would otherwise be unable to attend."* It also provides that events may be live streamed or recorded if any party wishes although the case officer must be told in advance, and the Inspector will agree the retention period. Recordings must not remain for any longer than absolutely necessary.

31. PINS does not appear to produce any statistics about how many events (if any) are held virtually and how many are livestreamed.

Running of Inquiry

32. The Rosewell Report made some recommendations about the running of an inquiry. Recommendation 9 stated:

"The inspector should decide at the pre-inquiry stage how best to examine the evidence at the inquiry and should notify the parties of the mechanism by which each topic or area of evidence will be examined, whether by topic organization, oral evidence and cross examination, roundtable discussions or written statements."

33. Since that time evidence is virtually always given in a topic-based approach. Anecdotally there appears to be much greater use of topic-based round table discussions.

CMCs

34. One recent change has been the much greater use of CMCs. Rosewell's recommendation 8 was:

"(a) In every inquiry appeal case, there should be case management engagement between the inspector, the main parties, Rule 6 parties and any other parties invited by the inspector, not later than 7 weeks after the start letter.
(b) Following the case management engagement, the inspector should issue clear directions to the parties about the final stages of preparation and how evidence will be examined no later than 8 weeks after the start letter."

35. This recommendation appears to have been completely implemented, with the possible exception of cases when appeals get 'upgraded' to an inquiry. They are almost always held virtually.

Costs

36. Although now contained in the PPG the guidance on costs has remained generally consistent with the guidance previously contained in Circular 03/2009.

37. The Planning Inspectorate produce data on each case they have dealt with over the last five years.[26] Interrogating that data shows that costs were applied for in 3,811 out of 92,513 appeals (4%). This statistic is relatively consistent whether looking at inquiries (where 84 out of 2,172 appeals (4%) contained an application for costs), or hearings (where 239 out of 3,710 appeals (6%) contained an application for costs), or written representations (where 3,488 of 86,172 (4%) of appeals contained an application for costs).

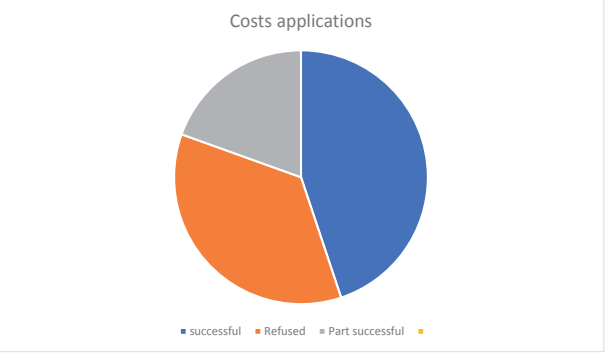
38. The same evidence for cases decided five to ten years ago[27] shows that costs applications were made in 5,709 of 93,509 appeals (6%). In relation to inquiries costs applications were made in 240 (8%) out of 2,786 appeals. Conversely in respect of hearings costs applications were made in 606 out of 5,156 appeals (11%). In written representations applications were made in 4,863 out of 85,246 appeals (6%).

39. Interestingly when Circular 03/2009 was written the Planning Inspectorate statistics showed that costs applications were made in about 20 per cent of hearing cases, 25 per cent of inquiry cases and 4% of written cases, and that awards were made in about 40% of those cases overall.

40. If the PINS dataset is generally accurate in respect of costs applications it does suggest that there is a general downward trend in the percentage of costs applications being made at both hearings and inquiries, while the percentage of costs applications being made at written representations appeals seems generally consistent.

41. PINS do not publish statistics on the extent to which those costs applications are successful. However interrogating costs applications as summarised on Compass for the last year gives us the following:

42. There were 205 cases where it could be identified that a costs application had been made. Of those it appears that 92 were successful, 73 were refused, and 40 were successful in part:



26. https://www.gov.uk/government/publications/planning-inspectorate-appeals-database.
27. https://www.gov.uk/government/publications/planning-inspectorate-appeals-database.

43. 192 applications were by appellants, 3 involved applications by both of the main parties, 8 were applications by the LPA and 1 application was made by a rule 6 party.

44. We would tentatively suggest that it appears that fewer costs applications are being made (particularly at inquiries and hearings) but more costs applications are successful. This may suggest that parties have got the message about not making costs applications with no prospect of success. Perhaps also that the prospect of a potential costs award is having a disciplining effect on parties' behaviour. The fact that virtually all costs applications are made against LPAs may reflect some of the difficulties LPAs face with inexperienced staff and pressure of work.

45. Since 2013 inspectors and the Secretary of State have gained the powers to initiate costs awards. So far as it is possible to tell from Compass there are no examples of either actually utilising those powers. In 22 Grosvenor Way, LONDON, E5 9ND APP/U5360/C/21/3288647 the appellant failed to provide any evidence or turn up to the site visit. The Council applied for a partial grant of costs and the Inspector granted full costs.

The Future?

46. To conclude, we suggest some changes to the planning appeal process which, in our view, would be beneficial:

47. First, there should be some limited flexibility on Inquiry dates, so long as they remain within Rosewell timescales, e.g., parties should be able to propose an agreed date within the 13-16 week period, subject to the availability of the Inspector.

48. Second, PINS should issue clearer guidance on numerous matters. These include:

- the circumstances in which appeals may be determined virtually;
- transparency and consistency in how the inquiry/hearing/WR criteria are applied. We understand PINS uses a matrix but there appears to be no public statement in relation to the content of that matrix;
- fair and reasonable deadlines for the statement of case when pins reject request for inquiry.

49. Third, there should be a clearer process when PINS changes the mode of determination part-way through the process (e.g., an appeal initially starts as an inquiry but is then changed to a hearing).

50. Fourth, with regard to rebuttals, PINS should add clear guidance to the Procedural Guide to ensure these really are rebuttals, rather than line-for-line critiques of other side's proofs and the repetition of a party's case.

51. Fifth, PINS should add to the Procedural Guide that parties will be invited to agree an agenda for topics to be heard by roundtable discussions, and, if they fail to do so, the Inspector will issue that agenda.


Ed Grant


Clare Parry

cornerstone barristers

Annual Planning Day, Cornerstone Barristers | November 2023

Case Law Update 2022-2023[1]

by Jack Barber and Verity Bell

Introduction

1. This case law update aims to reflect some of the more interesting planning cases decided since the last Cornerstone Barristers' Planning Day.[2] We do not intend to touch on every case that has been decided since then. This paper seeks to avoid duplicating colleagues' papers where possible.[3] It has been prepared in three sections. Section 1 concerns planning decisions in the Supreme Court and the Court of Appeal. Section 2 concerns decisions in the High Court (set out in four themes: EIA/Habitats; Infrastructure; Planning Obligations and CIL; and Heritage). Section 3 looks ahead to next year.

I. The Appellate Courts

Planning in the Supreme Court

2. What's the point of planning law? In *Fearn & Ors v Board of Trustees of the Tate Modern* [2023] UKSC 4, the Supreme Court considered whether the claimants – who owned flats with mostly glass walls neighbouring one of the country's most popular galleries – were entitled to a remedy in the tort of private nuisance by reason of the Tate Modern's use of the top floor of its extension as a viewing platform. In February 2023, the Supreme Court (by a majority of 3:2) allowed the appeal, and the court agreed that visual intrusion can constitute an actionable private nuisance. Lord Leggatt, for the majority, provided a pithy summary of the purposes of the planning system: "*… the planning system does not have as its object preventing or compensating violations of private rights in the use of land. Its purpose is to control the development of land in the public interest*.": [109-110]. Lord Sales, for the minority, did not demur from that approach: [201]. The case is a reminder about the importance of design in minimising neighbourhood friction: [250].

Conditions and interpretation

3. *DB Symmetry v Swindon BC* [2022] UKSC 33 concerned the meaning of a condition attached to the grant of planning permission for a development site outside Swindon.[4]

4. The proposed development included two roads. The developer subsequently applied for a certificate under s.192 TCPA 1990 to confirm that the formation and use of private access roads within the development would be lawful. Swindon refused to issue the certificate. The Secretary of State's inspector allowed the developer's appeal against the council's refusal of the certificate. The High Court allowed the council's application for a statutory review of the inspector's decision. The developer successfully appealed to the Court of Appeal. In unanimously dismissing the council's appeal, the Supreme Court considered two issues.

5. First, whether it is lawful for a planning authority, in granting planning permission for a development, to impose a planning condition that the developer will dedicate land within the development site to be a public highway. The statutory provisions relating to planning conditions in TCPA 1990 do not exist in a vacuum and fall to be interpreted in the context of the Act as a whole, including the provisions relating to compulsory purchase and planning obligations: [36]. There is authority for the fact that a planning authority may not lawfully require a landowner by means of a planning condition to dedicate land as a public highway.[5] A planning condition which purports to require a landowner to dedicate roads on its development site as public highways would be unlawful: [65]. It was not disputed that the council could have achieved the dedication of the access roads as highways by means of a planning obligation under s.106 TCPA 1990, and the court emphasised that there is a "*fundamental conceptual difference between a unilaterally imposed planning condition and a planning obligation*".[6]

1. Judgment in all the cases considered in this paper were handed down between 14 November 2022 and 20th September 2023. Several of the cases referenced have appeals outstanding. Where possible we have sought to make this clear.
2. We are grateful for the Justices of the Supreme Court's courtesy in releasing their decision in *Hillside* on 2nd November 2022, such that its implications were addressed in detail at last year's conference.
3. For example, our colleagues Rob Williams and Ruchi Parekh will consider a string of decisions relating to s.73 TCPA 1990: *Armstrong v SSLUHC* [2023] EWHC 176 (Admin); *R (Atwell v New Forest National Park Authority & Ors* [2023] EWHC 625 (Admin); *R (Fiske) v Test Valley BC* [2023] EWHC 2221 (Admin).
4. Swindon Borough Council's planning committee had granted outline permission subject to a number of conditions, including the material one for the Supreme Court's purposes: "*The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use. Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety.*"
5. Considering *Hall & Co v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240, at [44].
6. What could the Council do in this case? Absent the s.106 agreement securing dedication of the access roads, the Supreme Court considered that the options for the planning authority, which wants to require the dedication of roads within a development site as public highways, are to negotiate an agreement with the landowner or to exercise powers of compulsory acquisition (at [63]).

6. Second, whether, properly interpreted, the relevant condition had the effect of dedicating land within the development site to a public highway. The Supreme Court reiterated the objective approach to interpretation of planning conditions: the court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and the planning consent as a whole: [66]. The relevant condition was a valid planning condition which did not purport to require the dedication of the access roads as public highways: [75]. Lord Hodge's six-fold reasoning as to the interpretation of the condition logically set out why the court considered the condition to be clear, and notably included placing significance on the contextual location of the condition within the wider permission: [73].

Statutory trusts

7. *R (Day) v Shropshire Council* [2023] UKSC 8 concerned the sale of land by a council, and the material considerations in the context of a subsequent planning application.

8. On 4 October 2017, Shrewsbury Town Council sold a parcel of land to CSE Developments (Shropshire) Limited. Before the sale, the land was subject to a statutory trust[7] for the benefit of residents of the area. In selling the site, Shrewsbury Town Council failed to comply with the statutory requirements to advertise the land for two consecutive weeks in a local newspaper and subsequently consider any objections, contrary to s.123(2A) and (2B), Local Government Act 1972. Section 128(2)(a) provides that a disposal of land which was subject to the consultation shall not be invalid by the reason that the requirement has not been complied with. Section 128(2)(b) states that the purchaser of the land "*shall not be concerned to see or enquire*" whether any such requirement has been complied with. The purchaser was unaware of the statutory trust. Following the sale, on 8 November 2018, Shropshire Council granted planning permission to CSE to build 15 houses on the site.

9. The claimant brought a judicial review challenging the grant of planning permission. The claim was allowed in part at first instance, but the High Court refused any remedy on the basis it was highly likely the outcome would not have been substantially different if the conduct complained of had not occurred. Dr Day's appeal to the Court of Appeal was dismissed. The Court of Appeal held that the statutory trust was extinguished on the sale of the land.

10. In the Supreme Court, Shropshire Council had argued that s.128(2) extinguished the rights enjoyed by the public under the statutory trust, or at least that the rights of the public to access the land did not survive so as to give rise to a material consideration that the planning committee needed to consider when deciding whether to grant planning permission. The Supreme Court unanimously allowed the appeal. The transfer into private ownership was not enough to extinguish the trust, and section 128(2) Local Government Act 1972 does not extinguish the rights enjoyed by the public under the statutory trust unless the local authority complies with the bespoke consultation requirements set out in s.123 Local Government Act 1972: [91]. Parliament used clear words in s.123(3) when setting out what the council needed to do to dispose of land in a way which extinguishes the public's rights under the statutory trust: [101-102]. The continuing existence of the statutory trust is an important factor when considering a planning application, and since this was not considered, the grant of consent had to be quashed: [115].

11. *Day* indicated that public rights cannot ordinarily be overridden by general or vague statutory provisions. This left a messy situation, and the court implored local authorities to ensure proper governance procedures to avoid oversights about the legal status of land prior to sale: [117-118]. For developers, the case underlines the need for thorough due diligence in circumstances where councils might not have satisfied the relevant statutory requirements prior to a sale.

Compulsory purchase

12. Those concerned with compulsory purchase will likely be familiar with the recent decision in *Secretary of State for Transport v Curzon Park & Ors* [2023] UKSC 30, where the issue before the court was whether, in determining an application for a "certificate of appropriate alternative development" (CAAD)[8] for a particular parcel of land, the decision-maker may take into account applications or decisions relating to other land arising from the compulsory acquisition of land for the same underlying scheme. The Supreme Court unanimously[9] allowed the appeal to a limited extent, holding that the declaration made by the Upper Tribunal should be restored: [100]. The court agreed with the Upper Tribunal and the Court of Appeal that applications for, or grants of, CAAD should not be treated as notional planning applications for, or grants of, planning permission, or as material planning considerations: [77-78].

Planning in the Court of Appeal

Statutory interpretation – GPDO

13. In *CAB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities & Anor* [2023] EWCA Civ 194, the Court of Appeal considered an appeal arising from a s.288 TCPA 1990 challenge involving the question of how a local planning authority should approach an application for prior approval under Class AA of Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO), which provides for permitted development rights to enlarge dwelling houses by the construction of additional storeys. The claimant

7. Either under s.164 Public Health Act 1875 or s.10 Open Spaces Act 1906.
8. Section 17, Land Compensation Act 1961.
9. Lord Sales and Lord Hamblen gave the judgment, with which all the other members of the court agree.

appealed against the order of Holgate J (the first instance decision was considered in last year's case summary). The single ground of appeal asserted that the judge erred in misinterpreting Class AA of Part 1 of Schedule 2 of the GPDO.

14. The Court of Appeal dismissed the appeal and held that the inspector's decision was not flawed, and the judge was right to reject the challenge to it: [57]. Construing elements of the legislation for planning is not, in essence, a different exercise from the interpretation of other statutes and statutory instruments; the court's essential function is to ascertain the meaning of the words in the legislation having regard to the purpose of the provisions in question: [22]. The subject matter in *CAB Housing* was not planning policy, but legislation which operates as part of the statutory code for the control of development, and the court must apply itself to an exercise of statutory interpretation, albeit with a degree of suitable pragmatism: [36-37]. The Court of Appeal also noted that the extent of the necessary exercise of planning judgment is limited by the legislation, properly construed, and that the prior approval process is a considerably less demanding one than that involved in the determination of an application for planning permission: [56].

Environmental Impact Assessment

15. In *R (Ashchurch Rural Parish Council) v Tewkesbury BC* [2023] EWCA 101, the Court of Appeal considered an appeal against the decision of Mr Justice Lane to dismiss the claimant parish council's claim for judicial review of the council's decision to grant planning permission for a road bridge proposed to unlock land for a wider masterplan.[10] In determining, for the purposes of EIA screening (i.e. whether the project was likely to have a significant effect on the environment), the council had disregarded any future development and considered the bridge on its own.

16. There were three grounds of challenge. The claimant's Ground 3 was that Mr Justice Lane erred in his consideration of whether the defendant unlawfully considered that the "project" for the purposes of the EIA Regulations[11] was the subject-matter of the planning application, i.e., the bridge, looked at in isolation. The claimant argued that the Judge failed to address its argument that the defendant applied the incorrect legal test and erred in finding that the development of the bridge and its supporting infrastructure for which permission was sought and granted was a single project for the purpose of the EIA Regulations, given that the bridge had no purpose of its own but was to be built solely to serve future development.

17. The Court of Appeal accepted the claimant's case. The contents of the application are not conclusive of the "project": [101]. The court rejected the defendant's argument based on the fact that wider development was insufficiently certain, and uncertainty does not mean that there is no wider project: [88-89], [92-95]. A lack of nefarious intent is irrelevant to the identification of a project: [95]. The defendant did not consider, as it was obliged to, whether the bridge application was an integral part of a larger project: [96]. The Court of Appeal allowed the appeal on all three grounds, quashed the decision of the planning committee, and remitted the application for reconsideration: [105].

18. *Ashchurch* also serves as a useful reminder to those acting for Local Planning Authorities that matters expressly excluded from the scope of an Officer's Report have the potential to unlawfully fetter the discretion of the planning committee later taking the decision under appeal.

Reasons – statutory consultees

19. In *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] EWCA Civ 359, the central question was whether an inspector who allowed an appeal against the refusal of planning permission for a large development of housing and commercial uses in Newcastle-upon-Tyne erred in law when considering the likely effect of heritage assets.[12] The LPA had successfully applied for statutory review.[13] In its statutory appeal, the Council had relied on several decisions that where a statutory consultee has given its advice on a proposal, the decision-maker should ordinarily give great weight to that opinion, or in departing from that position, give cogent and compelling reasons for doing so.[14] Mr Justice Holgate had doubted whether the case law provided authority for the principle relied upon. The central question was whether the inspector's reasons were legally defective because they were not "intelligible and adequate". The court must consider whether there is "substantial doubt" that the inspector's assessment of the likely harm to the heritage asset was lawful.

20. Sir Keith Lindblom SPT, giving the leading judgment in the Court of Appeal, agreed with Mr Justice Holgate's assessment that there was such doubt, and dismissed the appeal: [52-53]. Although the Court of Appeal did not expressly consider the *Akester/ Shadwell* line of authorities, Sir Keith Lindblom SPT remarked that he was "*not suggesting that the relevant standard to apply in assessing the adequacy of [the inspector's] reasons is other than the usual standard*".[15] Since East Quayside, Mr Justice Holgate has reiterated that it is inappropriate to rely upon statements in the Akester line of authority as a mantra, rather than looking properly at the materials in any given case in context.[16]

Community Infrastructure Levy

21. In *R (Braithwaite) v East Suffolk Council* [2022] EWCA Civ 1716, the Court of Appeal had the good fortune to further consider the Community Infrastructure Regulations 2010. In 2017, permission had been granted to Mr Braithwaite in respect of a housing and office development in Melton, Suffolk and a CIL

10. "Development of a road bridge over the Bristol to Birmingham mainline railway north of Ashchurch, Tewkesbury. The proposal includes temporary haul roads for construction vehicles, site compounds, security fencing, surface water drainage channels and attenuation points."
11. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.
12. In particular, the setting of St Ann's Church, a grade 1 listed building.
13. Under s.288 TCPA 1990.
14. See *R (Akester) v DEFRA* [2010] Env LR 33 at [112]; *Shadwell Estates Limited v Breckland DC* [2013] EWHC 12 (Admin) at [72] etc.
15. I.e., in *Save Britain's Heritage* and *South Bucks District Council v Porter (No. 2)*.
16. In *R (Together Against Sizewell C) v SSESNZ* [2023] EWHC 1526 (Admin) (which appears elsewhere in this paper), at [106] onwards.

liability notice was issued and served. A second permission had beengranted under s.73 TCPA 1990 in 2018 and the CIL payable was unchanged; no further liability notice was issued. A second s.73 permission was granted in 2019 and the amount payable reduced. No liability notice was issued in relation to the second s.73 permission. Development commenced in August 2019. In June 2020, the defendant council had issued a CIL liability notice in respect of the second s.73 permission, with a demand notice. Mr Braithwaite appealed against the imposition of a surcharge and contended that the 2020 liability notice had not been issued as soon as practicable, as required. The appeal was allowed. The notice did not comply with service requirements.[17] In September 2021, very soon after the appeal decision was issued, the local authority issued a revised liability notice.[18]

22. The claimants brought a claim for judicial review on two grounds. The first ground was that it was not a revised liability notice under regulation 65(5), but a liability notice served two years and seven months after the relevant planning permission had been granted and in breach of regulation 65(1) because the 2020 liability notice was not itself a valid foundation for it, being a "nullity" because of defects in its issuing. The second ground was that in any event the effect of regulation 65(8) was to render the 2020 liability notice ineffective when the 2021 liability notice was issued, so that the grounds for challenge arose only at that stage. The High Court refused permission. Lewison LJ granted permission to appeal on the same grounds.

23. The Court of Appeal carried out an extensive survey and application of the relevant principles relating to delay in judicial review: [44-63]. The true target of the judicial review claim was the original liability notice, not the revised notice: [51-52]. No timely judicial review proceedings had been brought to quash or declare the original liability notice invalid: [52-53]. The claimants were commercial developers with access to professional advice and could reasonably have been expected to obtain legal advice sooner than they did: [60]. The application for permission to bring a claim for judicial review was rightly refused at first instance on the grounds of delay: [98]. The 2020 liability notice remained in existence until it was superseded by the 2021 liability notice. The fact that a collecting authority had failed to issue a CIL liability notice in accordance with the express requirements in reg.65(1) and (3) of the Community Infrastructure Levy Regulations 2010 did not automatically render the notice a nullity and of no legal effect from the outset. Rather, the question whether such a notice was invalid and fell to be quashed in each case was a discretionary decision to be determined by the court in accordance with ordinary principles of judicial review: [91]. The revised liability notice was lawful under reg.65(5) and did not depend for its own validity on the original notice being lawful and valid: [95]. Having concluded that the 2020 liability notice was valid when issued, the Court of Appeal was satisfied that the grounds for a claim for judicial review arose with the issuing of that notice, and not when the 2021 liability notice was issued. The 2020 liability notice had never been quashed by the court, nor had it at any stage been the subject of direct attack in a claim for judicial review, and any such challenge would have been hopelessly late: [97]. The true effect of regulation 65(8) of CIL Regulations 2010 is that a revised liability notice suspends the legal effect of any earlier liability notice for the same chargeable development which has not been quashed by the court, and in doing so, supersedes that earlier notice. The earlier notice would become effective again, however, if the revised notice was itself quashed: [97].

Enforcement

24. *In Braintree District Council v Secretary of State for the Home Department & Ors* [2023] EWCA Civ 727, the Court of Appeal confirmed that an application for an injunction under s.187B was "a step taken for the purposes of enforcement" within the scope of s.296A(4) TCPA 1990 and that the first instance judge correctly struck out the claim as the claimant did not have the consent of the appropriate authority and the relevant land was Crown land: [53].[19] The decision followed a string of High Court proceedings in late 2022 where councils sought to use s.187B to prevent the use of hotels for accommodating asylum seekers (with exception, most attempts were unsuccessful).[20] Three claims for judicial review of the use of former military sites have permission for a substantive hearing, due to be heard in October/November 2023.

II. Decisions in the High Court

EIA and Habitats

25. *Harris v Environment Agency* [2023] EWHC 2264 (Admin) was a judicial review concerning the decision of the Environment Agency's (EA) refusal to expand the scope of an investigation that it conducted into the effect of 240 licences for water abstraction that concerned the effect of abstraction on three Sites of Special Scientific Interest (SSSIs). There were four issues: (i) the ambit of the obligation under Reg.9(3) of the Habitats Regulations[21] to "have regard" to the requirements of the Habitats Directive,[22] including whether that mandates compliance with Art. 6(2) of the Habitats Directive; (ii) whether Art. 6(2) of the Habitats Directive imposes an obligation of a kind recognised by the Court of Justice of the European Union or any court in the UK in a case decided before 2021; (iii) whether the EA had breached Art. 6(2) of the Habitats Directive by limiting its investigation of water abstraction to the three SSSIs; and (iv) whether the EA acted irrationally by so limiting its investigation. On (i), the court considered the ambit of a duty to "have regard" in the specific statutory context: "*the Environment Agency must take those requirements into account, and, insofar as it is (in a particular context) the relevant public body with responsibility for fulfilling those requirements, then it must discharge*

17. Reg. 65(1), to be served "as soon as practicable" after the day on which the planning permission first permitted development, and on the relevant person for the purposes of reg.65(3)(a) of the 2010 regs.
18. In accordance with reg.65(5) of the 2010 regs.
19. [2023] EWHC 1076 (KB).
20. *Ipswich BC & Ors v Fairview Hotels & Ors* [2022] EWHC 2868 (KB) (injunction refused); *Fenland DC v CBPRP Ltd & Ors* [2022] EWHC 3132 (KB) (injunction refused); *Great Yarmouth v Al-Abdin & Ors* [2022] EWHC 3476 (KB) (injunction granted).
21. Reg 9(3) Conservation of Habitats and Species Regulations 2017 requires the EA to "have regard" to the Habitats Directive.
22. EU Habitats Directive 92/43/EEC.

those requirements. In other words, the scope for departure that is ordinarily inherent in the words "have regard to" is considerably narrowed": [87]. The court also held that Art. 6(2) continued to be recognised and available in domestic law and must be enforced accordingly: [94]. A generalised risk from abstraction was sufficient to trigger the Art. 6(2) duty, requiring appropriate steps to be taken: [100].[23]

26. *C G Fry & Son Ltd v SSLUHC* [2023] EWHC 1622 (Admin) saw the issue of nutrient neutrality return to court. It concerned the potential adverse effects on the Somerset Levels and Moors Ramsar Site from the claimant's proposed housing-led development. Outline permission had been granted and all reserved matters approved without an appropriate assessment having been required or conducted. Natural England published its advice to Somerset authorities.[24] The council, and then an inspector, had refused to discharge certain conditions because there had not been an appropriate assessment. The claimant developer brought a s.288 challenge, arguing that the effect on protected water habitats of the additional phosphates resulting from the proposed development was not a material consideration at the relevant permission stage; the assessment sought was beyond what the outline permission and reserved matters approval had left over for consideration under the pre-commencement conditions, and there was no connection between the release of phosphates and the planning conditions. Cranston J disagreed: "*Application of the Habitats Directive and a purposive approach to the interpretation of the Habitats Regulations 2017 require the application of the assessment provisions to the discharge of conditions. The strict precautionary approach required would be undermined if they were limited to the initial - the permission - stage of a multi-stage process*": [64]. There was also a nod to the wider controversy: "*It is on legal grounds that the case was argued and must be decided. It is for others to resolve the significant public policy issues underlying this claim* […]": [36]. The claimant has been granted permission to appeal.

27. In *R (The Llandaff North Residents' Association) v Cardiff Council* [2023] EWHC 1731 (Admin), HHJ Jarman KC (sitting as a High Court Judge), considered the meaning of "project" for the purposes of EIA. The council had concluded that a pumping station and associated improvements to the foul sewerage network was a separate project to a major urban extension of some 6,000 homes. This contrasted with the approach taken by consultants for Dwr Cymru (Welsh Water), whose screening request had treated the works as an extension of the urban scheme. On the council's approach, the pumping station did not meet the thresholds for Schedule 2 development and so did not constitute EIA development. The claim for judicial review was dismissed. The council was entitled to reach the conclusion that the pumping station was a separate project to the urban scheme, and to conclude that the schemes were not functionally interdependent (considering Mr Justice Holgate's point in *TASC*).[25] The pumping station would serve the foul sewerage needs of other developments, and the high threshold of irrationality in the council's approach had not been surmounted: [34].

28. In *R (Together Against Sizewell C) v SSESNZ* [2023] EWHC 1526 (Admin), the campaign group claimant sought to challenge the defendant's decision to grant development consent to the interested party ("SZC") for a new nuclear power station on the Suffolk coast.[26] The panel of inspectors who conducted the examination of the proposal produced a report which recommended in favour of granting consent but for one issue: the source of a permanent supply of potable water for the power station had not yet been identified and the cumulative environmental impacts of Sizewell C and that supply should be assessed before determining the application for consent. The defendant had sought and received further information and disagreed with the panel, concluding that uncertainty over a permanent supply of potable water did not prevent the grant of development consent.

29. The claimant advanced seven grounds of challenge which were considered (and each dismissed) in a rolled-up hearing.[27] Grounds 1, 2, 3 (addressed above) and 5 concerned water supply. Ground 4 concerned alternative solutions. Ground 6 concerned storage of nuclear fuel and defences against flooding. Ground 7 concerned greenhouse gas emissions.

30. On Ground 1, the claimant argued that the defendant had failed to assess the environmental impacts of the "project" because he had wrongly excluded from that project the permanent potable water supply solution without which the project is incomplete and cannot function.[28] Mr Justice Holgate's detailed discussion surveys the now-extensive case-law on the issue (see [69-93]), but perhaps the most enlightening aspect of Mr Justice Holgate's treatment of Ground 1 was his consideration of the wider implications. "*The need for the supply of utilities such as water is common to many, if not all, forms of development. A utility company's need to make additional provision so as to be able to supply existing and new customers in the future does not mean that that provision (or its method of delivery) is to be treated as forming part of each new development which will depend upon that supply. The consequence would be that where a new supply has yet to be identified by the relevant utility company, decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal. That approach would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid*": [91].

31. On Ground 2, *TASC* argued that contrary to Reg.63(1), the defendant had failed to assess the cumulative impacts of the nuclear power station and the permanent potable water supply solution. Although the development consent has been granted in the knowledge that the power station is dependent on the future provision of a water supply, (a) it is not dependent on the provision of any particular form of supply and that is currently unknown and (b) the cumulative impact will have to be assessed properly

23. Johnson J remarked that a court will be "slow to question the Environment Agency's expert assessment as to the steps that should be taken": [101].
24. That greater scrutiny was required of plans and projects resulting in increased nutrient loads which may have effect on SPAs, SACs and RAMSAR sites.
25. That interdependence would normally mean that each part of the development is dependent on the other.
26. Via judicial review under s.118(1) Planning Act 2008.
27. It is important to note that although Mr Justice Holgate dismissed all grounds as unarguable, Lord Justice Coulson has granted the claimant permission to appeal to the Court of Appeal on Grounds 1 and 2.
28. Contrary to Reg. 63(1) of the Habitats Regulations.

in accordance with the legislation without any bias or distortion: [103].

32. On Ground 4, *TASC* argued that the defendant had failed to consider "alternative solutions" to the nuclear power station prior to concluding that there were imperative reasons of overriding public interest justifying the relevant environmental harm. It was for the decision-maker to determine the relevant objectives that needed to be met and which alternative solutions would or would not meet that need, subject to irrationality: [126]. TASC did not meet that threshold. Mr Justice Holgate considered "*there is nothing artificial or unlawfully limiting about a Government policy which identifies as core objectives the need to provide a mix of new electricity generation technologies, comprising solar, wind and nuclear power.*": [131].

33. It is important to note that although Mr Justice Holgate considered the matter in a rolled-up hearing and dismissed all grounds as unarguable, Lord Justice Coulson has granted the claimant permission to appeal to the Court of Appeal on Grounds 1 and 2.

Infrastructure

34. *Bristol Airport Action Network Co-ordinating Committee v SSLUHC* [2023] EWHC 171 (Admin) was a statutory review of the Secretary of State's decision to allow an expansion of Bristol Airport, brought on six grounds, engaging climate and habitats issues. At its core, the challenge concerned "*whether and to what extent aviation emissions should play a role in deciding whether permission should be granted* [under the TCPA 1990]": [7]. The judgment runs to some 258 paragraphs and concerns the interpretation of local plan policies in relation to aviation emissions, the panel's approach to the Government's Making Best Use policy regarding existing runway capacity, the application of ¶188 NPPF, aviation and the role of IEMA guidance on local carbon budgets, the treatment of non-CO2 aviation emissions, and the difference between mitigation and compensation in Habitats Regulations Assessments. In headline terms, Mr Justice Lane maintained the wide discretion afforded to decision-makers when considering the impact of emissions. The Court of Appeal refused the claimant permission to appeal.

35. In *R (Boswell) v SST* [2023] EWHC 1710 (Admin), the claimant challenged three decisions of the Secretary of State for Transport to grant consent for three road schemes designated as nationally significant infrastructure projects along the A47 in Broadland, Norfolk. The "thrust" of the claimant's challenge was that the Secretary of State is under a legal duty[29] to assess the cumulation of environmental effects with other existing and/or approved projects, and he acted unlawfully in failing to meaningfully assess the combined carbon emissions from the three road schemes. The Hon. Mrs Justice Thornton emphasised that an evaluative judgment is required of the decision-maker about the adequacy of an environmental assessment, and the question of what impacts should be addressed cumulatively; how the cumulative impacts might occur; whether the effects are likely to be significant and if so, how they should be assessed are all matters of evaluative judgment: [43, 77]. Among other points, the fact that there may be other approaches to the assessment of cumulative impacts, does not take the Secretary of State's approach outside the range of reasonable responses available to him as the decision maker, or mean that it was based on flawed reasoning: [89].

36. There has been a flurry of solar farm s.78 appeal decisions in the past year. In *R (Durham County Council & Hartlepool Borough Council) v SSLUHC & Ors* [2023] EWHC 1394 (Admin), Mr Justice Chamberlain considered a judicial review claim by Durham County Council and Hartlepool Borough Council in relation to six planning applications concerning two solar farms each with a generating capacity of 49.9MW, associated (including connecting) infrastructure, an electricity substation. The local planning authorities sought to challenge the jurisdiction of an inspector to determine solar farm appeals which they alleged comprised a Nationally Significant Infrastructure Project (even though the councils had validated and determined the applications). The defendant Secretary of State argued that the inspector had jurisdiction irrespective of whether the proposals were an NSIP. In addition, the defendant argued that the Court should not consider whether the development constituted an NSIP as Parliament had allocated that function to the Secretary of State. Mr Justice Chamberlain refused the claim. He found that Parliament had not allocated the question of whether a development constitutes an NSIP solely to the Secretary of State, and that it was entitled to determine the question for itself even if it meant the court had to make planning judgments: [28-39]. The court considered the development underlying the appeals did not constitute an NSIP: [39-48]. For example, the sharing of cabling and a common substation between two solar farms that were one mile apart were insufficient to mean that they constituted a single generating station. The court also considered that the inspector had jurisdiction to determine the appeals even if they did constitute an NSIP: [49-54].[30]

37. On the remaining grounds, *TASC*[31] raised the following key points with wider relevance to other infrastructure cases:

(i) Under Ground 5, Mr Justice Holgate held that there was no legal reason why the defendant could not consider the contribution which Sizewell C is expected to make to reducing the shortfall in electricity generation in 2035 (or to the target for reducing greenhouse gases): [150].

(ii) Under Ground 6, Mr Justice Holgate remarked that it is "*well-established than an enhanced margin of appreciation is to be afforded to a decision-maker relying on scientific, technical or*

29. Including under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
30. See at [54]: "*the facts of the present case are a good example of a situation in which the planning permissions sought would be far from useless even if – contrary to my conclusion – the two solar farms, taken together, were an NSIP. In that case, parts of the permissions could be lawfully implemented, provided that the generating capacity of the whole did not exceed 50 MW.*"
31. *R (Together Against Sizewell C) v SSESNZ* [2023] EWHC 1526 (Admin).

predictive assessments", and a decision-maker deciding whether to grant development consent for such a project "*does so in the context of a range of statutory regimes which address changes in circumstance (and predictions) as they occur during the remainder of this century and well into the next. Those regimes are obviously material considerations*": [157]. Dismissing the ground, "*on any fair reading of the Panel's Report and the decision letter*, [the uncertainty of how far into the next century spent fuel will need to remain at Sizewell C] *was recognised*": [174].

(iii) Under Ground 7 (which involved consideration of whether the defendant had erred in concluding that Sizewell C's operational greenhouse gas emissions would not have a significant effect on the UK's ability to meet its carbon budget commitments or the Government's ability to meet obligations under the Paris Agreement), there were no grounds for legally criticising the summary prepared by officials in the context of ministerial decision-making: [186].

38. *R (Suffolk Energy Action Solutions SPV Ltd) v SSESNZ* [2023] EWHC 1796 (Admin) was a judicial review under the Planning Act 2008 against the decision of SSBEIS[32] to make two offshore wind farm development consent orders.[33] Mr Justice Holgate dismissed the claim,[34] gave a considered formulation of the *Tameside* duty of inquiry in planning contexts[35], warned of the need for procedural rigour in public law matters and reiterated the limits of judicial review for challenging political, social or economic choices.[36]

Planning obligations and CIL

39. *Link Park Heathrow LLP v SSLUHC* [2023] EWHC 1356 (Admin) was an appeal before Mr Justice Waksman against an inspector's decision to refuse the application for planning permission made by the claimant, which arose out of the claimant's appeal against the non-determination by the two relevant local planning authorities of the original application.[37] The s.288 appeal was upheld on all three grounds of challenge.

40. Principally, the inspector had erred in law as to the effect of a condition and/or did not take it into account. At the inquiry hearing, one of the councils had raised a question as to whether the s.106 undertaking was enforceable given that some of the site consisted of leasehold land pursuant to leases granted by the claimant or in respect of which it is not a lessor, but where the lessees themselves were not party to the undertaking. The claimant had offered an "Arsenal" condition.[38] The judgment sets out the inspector's treatment of the proposed condition: [21-23]. The court agreed with the claimant that either the Inspector misunderstood the effect of this condition, which was an error of law, or if he did understand it, he did not take it into account in reaching his conclusion, which was that he was not prepared to remedy the problem of the unenforceable undertaking before him while it was a material consideration in that regard.

41. Although not strictly necessary,[39] the court also considered the meaning of "*encroachment into the countryside*" and distinguished between two relevant concepts at play: (i) the effect of openness on the Green Belt and (ii) the preservation of the countryside from encroachment. Mr Justice Waksman said that "*I am not sure that encroachment really does connote visual intrusion unaccompanied by any physical intrusion since I consider the latter to be the true meaning of encroachment* […] *On any view, if the development is outside of instead of being in the midst of the relevant countryside, as it were, I cannot see how its own appearance can be capable of encroaching on or into the adjacent countryside of which it does not form part*": [50].

42. *R (University Hospitals of Leicester NHS Trust) v Harborough District Council* [2023] EWHC 263 (Admin) concerned planning contributions sought by NHS trusts. The claimant NHS trust sought judicial review of Harborough District Council's decision to grant planning permission for mixed use development without requiring a financial contribution towards its hospitals. The claimant alleged that the council had proceeded on the fallacious basis that the claimant's funding system meant that a mitigating contribution did not meet the requirements of the Community Infrastructure Levy Regulations 2010. The judgment provides a detailed description of the legal basis on which financial contributions were sought [31-42], and the statutory framework for funding NHS services as of 17 May 2022: [43-74]. A focal point was whether the claimant had established that there was a funding gap which meant that the additional pressure from the development would not be funded in the first year of occupation by new residents, and the claim was dismissed because the claimant had failed to demonstrate that population growth would not be taken into account in the annual negotiations with the Integrated Care Board: [131-138]. Mr Justice Holgate made clear that the case does not decide that there would be no legal objection to a contribution of the kind sought and went on to make several observations about the principle of a contribution to an NHS trust from a new housing development: [37, 147-150].

43. In *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills District Council & Ors* [2023] EWHC 1995 (Admin), Mr Justice Holgate again considered the legality of the handling by the authorities of the claimant's request for a s.106 contribution from the development in respect of its services. After a rolled-up hearing the claimant's renewed application for permission for judicial review was refused on all remaining grounds.

44. In *R (Whiteside) v London Borough of Croydon* [2023] EWHC 3318 (Admin), HHJ Jarman KC sitting as a judge of the High Court considered both s.106 obligations and Reg. 122 of the Community Infrastructure Levy Regulations 2010. Reg.122(2) sets out when a

32. Characteristically, the relevant functions of SSBEIS transferred to SSESNZ between the making of the development consent orders and the legal challenge.
33. SI 2022 No. 432 and SI 2022 No. 433.
34. The central issue was whether SSBEIS acted unlawfully in dealing with a complaint from SEAS that the interested parties "stifled" or "neutralised" the ability of landowners facing possible compulsory purchase to present objections to and information about the scheme.
35. The Tameside duty being that imposed on a decision-maker to take reasonable steps to acquaint themselves with the relevant information to enable themselves to answer it correctly, and "[…] *no complaint can be made about a failure to investigate under the Tameside duty a matter which the relevant legislation does not treat as a mandatory consideration unless the court considers that the matter was an "obviously material consideration"[…] If the court decides that in the circumstances of the case the matter was not an obviously material consideration, then it is of no legal significance that the decision-maker did not consider whether to exercise his discretion to take it into account and/or to pursue lines of inquiry about it.*" [69]
36. The claimant was heavily criticised for failing "*to respect the need for procedural rigour in judicial review, the importance of which the courts have repeatedly emphasised in recent years, particularly with regard to the pleading of the grounds of challenge*" (at 26, and at 33-39). The court reiterated that the role of judicial review is concerned with resolving questions of law; the court is not responsible for making political, social, or economic choices, and those decisions and choices are ones that Parliament has entrusted to ministers and other public bodies (at 39, citing *R (Rights: Community: Action) v SSHCLG*).
37. Buckinghamshire Council and Hillingdon Borough Council (the site lay mostly in Buckinghamshire but partly in Hillingdon). The councils took no part in the hearing of the appeal.
38. A negative condition whereby a permitted development cannot commence until a planning obligation or other agreement has been entered into.
39. Since the claim had been upheld on Ground 2.

planning obligation can lawfully be considered in granting planning permission.

45. In February 2022, the council granted planning permission to the first interested party's predecessor for two three-storey buildings comprising seven residential units. To encourage sustainable methods of transport, the council made the permission subject to a s.106 agreement to secure a financial contribution[40] for sustainable improvements and enhancements.

46. The claimant sought judicial review of the permission on two grounds. The first ground was that because the agreement failed to secure the free membership of a car scheme, the grant of permission did not fall within the scope of delegation of the decision and/or the committee was materially misled on this point. The court accepted the council's argument that it was unnecessary for the s.106 agreement to secure three years free membership of the scheme since the officer's report was not incorporated into the resolution of the Committee, which was the instrument of delegation. If the intention was that the agreement should contain the provision of free membership of a car share scheme, it would have been easy for the members to make that clear or to require the draft agreement to come back before them before it was signed. Members resolved to grant permission based on the recommendation of the officer, inclusive of the additional conditions proposed. That recommendation did not expressly include that the section 106 agreement should include the free membership of a car share scheme. There was no relevant policy requirement. Ground 1 was not made out and had anyway been rendered academic: [23-26].

47. The second ground was that there was inadequate evidence as to how the figure of £1,500 was calculated or how the £10,500 was to be spent, and thus a failure to comply with regulation 122 of the Community Infrastructure Levy Regulations 2010. The court accepted the council's arguments that it was not necessary for the committee to be told how the contribution was calculated or to be given further details of the type of measures it could fund: [32]. The issues arising under Ground 1 serve to indicate the importance of careful drafting of resolutions to grant. On Ground 2, and of more general relevance, the court observed that had the contribution proposed been a very large or very small sum, the committee "*might have needed further information about its calculation before being satisfied that it fairly related to the scale and kind of the development*": [33].

Heritage

48. *Future High Street Living (Staines) Limited v Spelthorne Borough Council* [2023] EWHC 688 (Admin) was a judicial review claim of the council's decision to extend the Staines Conservation Area to include the former Debenhams department store on the high street and other buildings. The claimant wished to demolish the former store and redevelop the site as residential accommodation, and its application for planning permission had coincided with the council consulting upon, and then deciding to extend, the conservation area to include the relevant building.

49. A judicial review claim was brought on four grounds. The court upheld Grounds 2 and 4 together: the council failed to consider representations made by the claimant in response to the consultation exercise; and the exercise undertaken by the council in relation to the later supplementary report was unlawful. The council had failed to take account of the claimant's representations in response to consultation at the proper time; and had not subsequently legally done so with a supplementary review: [87]. Ground 3 - that the officers' reports of the council were seriously misleading and omitted material considerations
was also upheld. There was a clear need to provide members with a fair and balanced analysis of the architectural worth of the building, and on the facts, the officers' reports did not suffice: [92].[41] Ground 1 – that the council acted illegally and for an improper purpose in deciding to extend the SCA – did not succeed because the court considered that the evidence did not show more than that the desire to prevent the demolition of a building was "*an* impetus" rather than "*the* impetus" for the relevant extensions of the conservation area: [108].

50. Notwithstanding its conclusion, the court accepted the council's submission that the duty under s.69(1) LBCA Act to review the past exercise of its duty to determine what, if any, parts of an authority's area should be conservation areas is both broad and ongoing, and is not to be equated to a situation where an authority has decided to refuse planning permission, in which case the authority is *functus officio*: [64].

III. A look ahead

51. The future is coal. In December 2022, the Secretary of State approved the granting of permission for the development of a new coal mine at Whitehaven, West Cumbria. The claimants' statutory challenge is due to be considered in a rolled-up hearing which has been stayed pending the Supreme Court's decision in *R (Finch on behalf of Weald Action Group) v Surrey County Council and others*. In brief, Finch concerns the correct interpretation of 'indirect effect' of the 'project' for the purpose of a lawful assessment of the environmental effects of a crude oil extraction project, and in particular, the 'downstream' greenhouse gas emissions associated with the eventual use of the extracted oil.

52. Beyond Whitehaven, issues arising from the further extraction of British coal have recently been considered elsewhere. *R (Coal Action Network) v Welsh Ministers & Ors* [2023] EWHC 1194 (Admin) was a claim for judicial review concerning the authorisation of coal-mining operations in the Vale of Neath. The Coal Industry Act 1994 provides a comprehensive statutory scheme for the licensing and management of coal mining in the United Kingdom.[42]

40. Of £10,500, based on £1,500 per unit.
41. This included informing members of the outcome of an approach made to Historic England regarding possible statutory listing.
42. *Abbey Mine Ltd. v Coal Authority* [2008] EWCA Civ 353, Laws LJ, at [2].

Energybuild holds a licence issued in 1996 and subsequently varied. In respect of the area that is the subject of the claim, the licence is conditional and coal-mining operations have not taken place. In 2020, Energybuild applied to the Coal Authority for the grant of an underground coal mining operation by means of the deconditionalisation of an existing licence in respect of an area of 1,131 hectares.

53. The claimant sought judicial review of two decisions: (1) the decision of the Welsh Ministers that it did not have the power pursuant to s.26A of the 1994 Act to approve (or reuse) the authorisation of the coal-mining operations that are the subject of Energybuild's application; and (2) the decision of the Coal Authority to approve Energybuild's application.

54. The challenge gave rise to two main issues. The first issue was whether s.26A of the 1994 Act applied. The court concluded that the Welsh Ministers correctly decided that they had no power pursuant to s.26A to make a determination on Energybuild's application, and so Ground 1 was dismissed.

55. The second issue was whether the Coal Authority unlawfully fettered its discretion and/or failed to consider material considerations. The Court of Appeal rejected the claimant's contention that the Coal Authority had misinterpreted its powers and fettered its discretion; and agreed with the Coal Authority that the three matters relied upon by the claimant were not material to the Coal Authority's task. Pivotally, the Court held that it would be inconsistent with the provisions of the 1994 Act for the Coal Authority "*to treat an application for a determination that conditions imposed in a licence have been satisfied as a fresh opportunity to determine whether, or on what conditions, coal-mining operations should be authorised*": [129].

56. The Supreme Court hearings in *Finch* took place in July and at the time of writing, judgment is eagerly anticipated. Subsequently, the Whitehaven statutory challenge will surely be one of the highest-profile hearings of the next 12 months. The Coal Action Network have also been granted permission to appeal to the Court of Appeal in relation to Ground 1 of the Energybuild judicial review.[43] Clearly, the courts will continue to grapple with wider issues about the appropriate response to the climate emergency. For example, the M&S appeal, which raised issues relating to embedded carbon, is destined for a statutory challenge.

57. Inevitably, the legal and policy questions pertaining to Britain's transition to net zero will remain top of the agenda as we head into 2024 and the highly politicised context of a looming General Election.[44]

43. It is listed for hearing at the beginning of February 2024.
44. The redrawing of Parliamentary constituency boundaries means that the town of Whitehaven will no longer fall within the soon-to-be abolished seat of Copeland and will form part of the new Whitehaven and Workington seat from the next General Election – one to watch on election night!

Jack Barber

Verity Bell

cornerstone barristers

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Section 73: Why do we (or the Courts) keep getting it wrong?

by Robert Williams and Ruchi Parekh

Introduction

1. In recent years there has been a flurry of decisions[1] concerning the proper scope of s.73 of the Town and Country Planning Act 1990 ("TCPA 1990"), the statutory provision which enables amendments to planning permissions to be made by way of variations to conditions.

2. As described in Circular 19/86[2] the provision was introduced to: (i) provide applicants with an alternative to appealing against the original permission; and (ii) enable applicants or any subsequent owners to obtain relief from conditions without the need to submit a full new application. It is therefore unsurprising that developers routinely turn to s.73 to make amendments to their schemes. What perhaps is surprising, however, is how susceptible to challenge such decisions may be – and that there is continued uncertainty over when and how s.73 may be lawfully deployed.

3. In this paper, we attempt to make sense of two recent s.73 cases – *Armstrong* and *Fiske* – which have arguably given rise to more questions than answers for decisionmakers and developers alike; as well as providing some practical advice on avoiding the s.73 potential pitfalls.

The statutory provision

4. S.73 TCPA 1990 enables developers to develop land without compliance with conditions previously attached to an existing planning permission. It directs that on such an application the local planning authority ("LPA") shall consider "*only the question of the conditions subject to which planning permission should be granted*" (s.73(2)). The LPA is entitled to grant planning permission either with conditions that differ from those attached to the original permission or unconditionally. There are no other express limits on the power of the LPA, save in respect of certain issues relating to timing and implementation (ss.73(4)-(5)).

5. While the plain words of the provision require focus only on the question of conditions, it is also well-established that a successful s.73 application results in a new planning permission.

The Finney solution

6. Notwithstanding the relatively clear terms of s.73, for some time there has been uncertainty over the extent to which it may be deployed to vary conditions.

7. Readers will no doubt be familiar with *Finney v Welsh Ministers* [2019] EWCA Civ 1868, which sought to resolve the debate over whether a s.73 application may be used to vary the description – or the so-called 'operative part' – of the original planning permission. This was a case in which the original permission was for wind turbines "with a tip height of up to 100 metres", while the new condition under the s.73 application required compliance with plans showing a tip height of 125 metres. Permission was granted on appeal, with the inspector imposing a new condition permitting tip heights of up to 125 meters and varying the description of development to remove any reference to tip heights.

8. The Court of Appeal held that s.73 could not be used in such cases because it involved a variation of the description of development, which was outside the power conferred by the statutory provision (§42).

Post-Finney problems

9. The Court of Appeal decision in *Finney* seemingly left the planning world with a clear-cut rule on whether something falls within or outside the scope of s.73. However, the case law that has followed – especially in the last 12 months – suggests that the debate on s.73 is far from over.

1. Including *Finney v Welsh Ministers* [2019] EWCA Civ 1868; *R (on the application of Parkview Homes Ltd) v Chichester DC* [2021] EWHC 59 (Admin); *Reid v Secretary of State for Levelling up, Housing and Communities* [2022] EWHC 3116 (Admin); *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] P.T.S.R. 1148; *Atwill v New Forest National Park Authority* [2023] P.T.S.R. 1471; and *R. (on the application of Fiske) v Test Valley BC* [2023] EWHC 2221 (Admin). The Supreme Court also tangentially touched upon section 73 in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] 1 W.L.R. 5077, a case which was addressed at last year's Planning Day.
2. https://www.gov.wales/sites/default/files/publications/.

Armstrong v SSLUHC [2023] EWHC 142 (KB)

10. *Armstrong* was a s.288 TCPA 1990 claim involving no *Finney* conflict. The claim focussed instead on whether s.73 could be used in cases involving a fundamental variation of the permission, even if there was no conflict with the description of development. The short answer: no.

11. The original planning permission in this case was for the "construction of one dwelling". The s.73 application sought to substitute new plans for the design of the single dwelling. The LPA refused the application on the basis that the revised design completely altered the nature of the development, which was located on a highly prominent and sensitive coastal plot. An appeal against the Council's refusal was dismissed by the inspector, who framed the main issue in terms of whether the proposal could be considered a "minor material amendment" – in reliance on the PPG which was then in force. The inspector concluded that the new proposal was fundamentally different, bearing no resemblance to the approved building, and that it therefore went beyond the parameters of a minor material amendment and s.73.

12. James Strachan KC (sitting as a Deputy Judge of the High Court) allowed the appeal. By the time of the hearing, the Secretary of State had conceded that the PPG on "minor material amendment" was not in accordance with the statute – a conclusion with which the Judge agreed (§§80, 94). As to the key issue between the parties, the Judge held that there were no further limits on the scope of s.73 beyond that identified in *Finney* (§§73-89). Among other reasons, he noted that conditions should only be imposed where it is necessary for the development in question to be acceptable in planning terms, and in that sense, most conditions were "fundamental" to the planning permission. Accordingly, "*[a] test that limited the scope of section 73 to what a decision-maker considered to be a non-fundamental variation would potentially make a significant inroad into that scope which is difficult to understand*" (§87).

13. By disavowing the "fundamental variation" test, the Judge appears to be sweeping away what had been understood to be the *Arrowcroft* principle[3] – namely that s.73 could not be used to modify the development if it constituted a fundamental alteration to the original grant. In *Armstrong*, the Judge considered that because the facts of *Arrowcroft* involved a conflict with the description of development, that was the context in which Sullivan J had made reference to the fundamental alteration principle (§81).

R. (on the application of Fiske) v Test Valley BC [2023] EWHC 2221 (Admin)

14. *Fiske* concerned a variation of the *Finney* conflict. Permission had originally been granted for a "…solar park to include ancillary equipment, inverters, *substation*, perimeter fencing, cctv camera, access tracks and associated landscaping" (emphasis added). Following a separate grant of planning permission for a different substation ("the substation permission") which was designed to connect the solar park to the grid, a s.73 permission was granted to vary the conditions of the original permission so as to omit from the approved plans any reference to the substation in that permission. The intention was to ensure that the substation permission and the section 73 solar park permission could operate in tandem and to avoid any physical incompatibility between the two.

15. The claimant argued that the s.73 permission was *ultra vires* since, by removing the substation permitted by the original permission, the LPA had granted a permission that (i) conflicted with the operative wording of the original permission (contrary to "Restriction 1") and, in any event, (ii) which had fundamentally altered the development permitted under the original permission (contrary to "Restriction 2"). They contended that both were impermissible, being separate and independent restrictions on the scope of s.73.

16. Mr Justice Morris, while recognising that the cases on the scope of the s.73 power *"do not present an entirely clear picture and are not always easy to reconcile"* (§121), concluded that the *"balance of the case authorities"* established that:

i. under s.73 there is no power to introduce a condition which creates a conflict or an inconsistency with the *operative wording* of the existing condition;

ii. the restriction is not limited to a case where the conflict or inconsistency with the operative wording is fundamental; it suffices that there is *any* conflict;

iii. earlier cases in which conditions that "cut down" development had been found to be lawful were distinguishable on the basis that they concerned proposed development (under s.70) and not an *existing grant* of permission (under s.73) (§124).

17. The Judge held that the grant of the s.73 permission was contrary to Restriction 1 and therefore unlawful.

18. Furthermore, and notwithstanding the conclusions in *Armstrong* (and subsequently in *Reid*), Mr Justice Morris also proceeded on the basis that there was a second, wider, restriction: that, even absent a conflict with the operative wording, it was unlawful to use section 73 to make fundamental alterations to the permission as a whole (§126). He did so on the basis that the Court of Appeal in *Finney* had suggested that there is such a restriction. Finding that the omission of the substation from the original permission amounted to a fundamental alteration (§132), Morris J concluded that the s.73 permission was also unlawful on this basis.

3. *R v Coventry CC ex p Arrowcroft Group Plc* [2001] PLCR 7. In that case Sullivan J had relied on the following proposition from the *Encyclopaedia of Planning Law* which he considered to be a "useful starting point": *"A condition may have the effect of modifying the development proposed by the application provided that it does not constitute a fundamental alteration in the proposal"* (§29).

Legal Implications and Uncertainties

19. In some respects, the scope of the s.73 power following *Finney*, *Armstrong* and *Fiske* is clear. Three key propositions can be derived from these trio of cases:

i. Section 73 cannot be used to make amendments to the description of development (*Finney*);

ii. Section 73 cannot be used to impose or vary conditions in a way which causes there to be any conflict with the description of development (*Fiske*); and

iii. So long as there is no conflict with the description of development, s.73 can be used to make fundamental alterations (*Armstrong*, albeit doubted in *Fiske*).

20. In the view of the authors of this paper, however, if these propositions are correct it leaves the law in an unprincipled and unsatisfactory position.

21. It means, on the one hand, that very minor alterations to a scheme cannot be made using section 73[4] if doing so causes there to be any conflict between conditions and the description of development. Suppose, for instance, that the solar farm developer in *Fiske* had discovered a superior form of surveillance and wanted to omit from the scheme the CCTV cameras which were referred to in the description of development. On the principles established in *Fiske* this could not be achieved by way of section 73. A condition securing plans which omitted the CCTV cameras would be inconsistent with the description and therefore unlawful. And yet, on the other hand, so long as the amended conditions do not lead there to be conflict with the operative wording, variations can be achieved which completely alter the nature of the permission. Suppose, for instance, that in *Fiske* the same application had been made, but the description of development simply stated "renewable energy installation" and the details of that installation were controlled entirely by condition. On the principles established by *Finney*, *Armstrong* and *Fiske*, in theory at least, an application under section 73 could be made to substitute the solar park originally consented with a wind farm.

22. This is, as far as the authors of this paper are concerned, an unsatisfactory triumph of form over substance. Why should pre-eminence be given to the "operative part" of the permission, when the form of the grant of planning permission is not prescribed in legislation[5], and when it is well-established that planning permissions must be construed as a whole? The conditions are an intrinsic part of a planning permission: what is permitted is defined not only by the words of grant but also by the conditions. And why does it matter if there if there is a degree of inconsistency between the conditions and the description of development, so long as, when read as a whole, the permission remains rationale and intelligible?

23. Notwithstanding our misgivings, the *Finney* principle is now unassailable. However, we consider that the principle identified in *Fiske* is on much shakier legal ground.

24. At the heart of the Mr Justice Morris' reasoning was the proposition, derived from *Cadogan v Secretary of State for the Environment* (1992) 65 P&CR 410, and taken as the agreed position in *Finney* (§15), that a condition on a planning permission *"will not be valid if it alters the extent or indeed the nature of the development permitted."* Morris J was of the view that the *"test in Cadogan applies to any alteration (in nature or extent) and is not confined to a 'fundamental' alteration"* (§127). But the *Cadogan* formulation simply begs the question: when will a condition impermissibly "alter the extent or nature" of the development permitted? All conditions by definition qualify, limit or regulate what would otherwise be an unconstrained permission. In this respect all conditions, at least to some degree, alter the nature or extent of the development permitted[6]. The key question is, when does this become impermissible?

25. The authors of this paper would suggest that the answer – whether in relation to s.70 or s.73 - is *not* that a condition is invalid whenever there is *any* inconsistency with the description of development. There is nothing in the statutory scheme[7] which prevents a condition from cutting down[8] the scope of a permission. Nor does it necessarily offend against the Newbury criteria[9].

26. This is further supported by authorities which for over 40 years established that it was permissible to impose a condition reducing the scope of the permission granted. Thus, in *Kent County Council v Secretary of State for the Environment* (1977) 33 P& CR 70, the Court held that a condition, which had the effect of removing an access road (which formed part of the development proposed) from the planning permission for an oil refinery, was not invalid. The case of *Kevin Stevens v Blaenau Gwent County Borough Council* [2015] EWHC 1606 (Admin) is a far more recent example of a case in which the Court held that a condition could lawfully cut down the scope of the permission, notwithstanding the "inconsistency" between the condition and the description of development in

4. It may be possible to make such amendments via Section 96A TCPA 1990, but only if the amendments are considered to be non-material.
5. The only requirements are imposed on planning decision notices by art 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015, which so far as material states:
"(1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters—
(a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—
(i) for each condition imposed; and
(ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition".
6. By way of example, an agricultural occupancy condition – which restricts the occupation of a dwelling to those employed in agriculture, and which is regularly applied to dwellings in the countryside – arguably alters the nature of a permission to construct and occupy a dwelling. It cannot be correct, therefore, that a condition which alters the nature and extent of a permission to any degree is *necessarily* invalid.
7. The power to impose conditions on the grant of planning permission under s.73(2)(a) is broadly expressed. It is no less broad than the power to impose conditions under s.70(1)(a) in the case of an original permission. Given the purpose of s.73, one would expect the scope of the condition powers to be co-extensive.
8. Different considerations may well apply to a condition which purports to expand the scope of the permission beyond that identified in the grant. There may be difficulties in using a condition, which is inherently restrictive in nature, to extend the permission beyond that which is in the grant. But the same logic does not prevent conditions cutting down that which is in the grant.
9. To be lawful a condition: (i) must be for a planning purpose and not for any ulterior one; (ii) must fairly and reasonably relate to the development permitted; and (iii) must not be so unreasonable that no reasonable planning authority could have imposed it. These are commonly called the Newbury criteria after *Newbury District Council v Secretary of State for the Environment* [1981] AC 578): see, e.g., *DB Symmetry Ltd v Swindon BC* [2022] UKSC 33, [2023] 1 WLR 198, §36-38, 51, 60.

the "operative wording". In that case the operative wording in a permission for a solar farm included "excavation of a cable trench to the south for grid connection" and the condition in question removed that cable trenching from the grant of permission. There was no question of irrationality: the substance of the permission for a solar farm was retained, with a separate permission simply being needed to make the grid connection to the south. As Patterson J confirmed (§41), despite the apparent inconsistency, the approach was *"clear and not confusing"* and the *"reasonable reader … [was] left in no doubt as to what happened and why"*. And, as it allowed for development to come forwards which, save for the cabling trench, was acceptable in planning terms, attaching such a condition furthered the public interest.

27. Mr Justice Morris' basis for distinguishing *Kent CC* and *Kevin Stevens* – that there is a "*difference in principle between modifying a proposal (before permission is granted) by a condition imposed under section 70 (by cutting down or altering, as long as the change is not fundamental) and changing a condition to an existing grant under section 73*" (at J§124(6), original emphasis) – does not, with respect, withstanding scrutiny.

28. The s.70 cases (*Kent CC* and *Stevens*) were not concerned with the question of whether, or to what extent, the operative part of the permission applied for could be amended by the local planning authority *before permission was granted*. They were concerned with whether, and the extent to which, conditions could legitimately cut down that which *had been included* within the operative part of the permission granted (i.e. without amending the initial application or altering the description of development). There is no principled reason why the approach should differ between permissions granted under section 70 or 73.

29. In our view, the answer to the question 'when will a condition impermissibly "alter the extent or nature" of the development permitted?' is given by Sir Douglas Frank in *Kent CC*: namely when "*the condition is such as to take away the substance of the permission*" (at p79). Forbes J in *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1982) 43 P&CR 233 recognised the same limitation, holding that "*a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which development was applied for*" (at p289). And this limitation applies equally to grants of permission under s.73 as it does under s.70.

30. This is because a condition which removes the substance of the grant is necessarily irrational. One is left with an unintelligible, worthless permission. By contrast, as *Stevens* demonstrates, the same is not true of a condition which merely cuts down the permission, but where the substance of the grant remains.

31. This represents no more than an application of the *Newbury* criteria, in particular the third criterion requiring that a condition *"must not be so unreasonable that no reasonable planning authority could have imposed it."* And as such it has jurisprudential basis which, with respect, the first restriction identified in *Fiske* lacks.

32. This brings us to *Armstrong*. We respectfully agree with the Judge's analysis (i) that the previous reference in the PPG to section 73 permitting "minor material amendments" was *"liable to confuse"* ((§93) – indeed, we consider that the guidance was outright misleading; and (ii) there is no basis in the statutory language for restricting amendments by way of section 73 to those which are non-fundamental (§93). However, this does not mean that there are no restrictions on the validity of conditions imposed under s.73. This would be to ignore the *Newbury* criteria and, in particular, the limitations identified in *Kent CC* and *Wheatcroft*.

33. There remains, therefore, significant uncertainty about the scope of the power to impose conditions under s.73 TCPA 1990 (and allied to that, the scope of the power under section 70). These are matters which are ripe for consideration by the higher courts.

Practical Implications

34. Of course, until the higher courts provide clarity on these matters, practitioners are left to advise clients wishing to rely on s.73 to alter their schemes. There are a number of practical implications that arise from *Armstrong* and *Fiske*.

35. First, the long-running debate around the "minor material amendment" guidance has finally been put to bed. LPAs and Inspectors often relied on the PPG to refuse to entertain applications which were seen to involve more than minor, or substantial, alterations to conditions. This is no doubt a welcome clarification for those seeking to use the s.73 route in a pragmatic way to achieve changes to the conditions. The decision in *Armstrong* is now also reflected in the updated PPG,[10] although there is still one stray (and incorrect) reference to the minor material amendment principle, which should be ignored in light of *Armstrong*.

36. Second, while the upshot of *Armstrong* appeared to be that developers can now rely on s.73 to achieve fundamental variations of the original permission (provided there is no *Finney* conflict), this may, depending on the facts of the case, involve some degree of risk. This is because, in light of *Arrowcroft* and especially given the fact that it was not followed in *Fiske*, there may be an appetite for a further challenge to whether *Armstrong* correctly interpreted the relevant line of authorities. Depending on the context, developers may also wish to consider their options under s.70 TCPA 1990.

37. Third, while *Armstrong* and to some extent *Fiske*, favour an

10. https://www.gov.uk/guidance/flexible-options-for-planning-permissions para.13.

expansive view of s.73, it does not mean that this will necessarily lead to an increase in *successful* application. It is still open to decisionmakers to refuse proposals on their planning merits. In our experience, the cases in which LPAs refused to entertain the s.73 application were often those cases in which they considered the proposals to be unacceptable. The ability to refuse such applications in the usual way, on their meris, was one of the reasons given in *Armstrong* as to why there was no need to read further restrictions into the statutory language (§§78-79).

38. Fourth, even assuming *Finney* is now the only restriction on using s.73, developers will want to ensure that the description of development is sufficiently broad to allow a range of amendments at a later stage, so as not to be caught out by the *Finney* principle. This is particularly important given that *Fiske* has now held that any conflict between a condition and description of development will render the s.73 permission unlawful.

39. Fifth, the Levelling-up and Regeneration Bill is set to introduce a new s.73B to deal with applications for permissions "not substantially different" from the original permission. The provision is intended to work around the *Finney* restriction. However, it is unlikely to fully address the current uncertainties and may well give rise to its own further litigation.

40. Overall, as is clear from what we have set out above, the legal debate on s.73 is far from over. But until we have an appellate ruling on the issue, the jury is still out on whether we (or the Courts) keep getting it wrong.[11]

11. The authors appeared in the two cases dealt with in the paper. Ruchi Parekh appeared in *Armstrong* for the SSLUHC; Robert Williams appeared (with Robin Green) in *Fiske* for the LPA.

Robert Williams

Ruchi Parekh

cornerstone barristers

Annual Planning Day, Cornerstone Barristers | November 2023

An environmental smorgasbord: From BNG to ESG

by Estelle Dehon KC and Ryan Kohli

Introduction

1. Environmental matters are increasingly taking centre stage in planning decision-making, as planning policy changes to take account of the climate and biodiversity crises, and as environmental and social governance (*"ESG"*) obligations give a greater commercial impetus to sustainability, shifting the approach of some large developers, financing and procurement, and in the supply chain.

2. This paper reviews four important topics in this arena, moving from a change yet to be implemented and a proposed change to the drivers of current and future change:
a. Mandatory biodiversity net gain (*"BNG"*) introduced in the Environment Act 2021 (*"EA 2021"*);
b. Proposed planning change through the introduction of a requirement to have "special regard" to net zero;
c. A significant current and future challenge: nutrient neutrality; and
d. ESG as it applies to the built environment.

1. Mandatory BNG - The "Baby Elephant" and its late arrival

3. In a rare show of humour and candour, on 20 July 2023 the Department for Environment, Food and Rural Affairs (*"DEFRA"*) BNG team disclosed that they have "likened BNG to a baby elephant! It's big, complex and needs a herd to nurture it to adulthood."[1] They described BNG as giving "the development industry an opportunity to work with the planning system to make sure development improves and protects our precious biodiversity, rather than further eroding it. It also has the potential to boost green jobs, innovation in habitat mapping and make green space more accessible to the public."

4. The first section of this paper describes the "baby elephant" and touches on some of the issues that "the herd" needs to tackle.

A Disturbing Overview

5. The issue of further erosion of the UK's biodiversity was brought into stark relief by the 2023 UK State of Nature report, released on 27 September 2023.[2] A result of the combined efforts of 66 organisations, and using the latest and best data from biological monitoring and recording schemes, it is a comprehensive survey of the UK, its Crown Dependencies, and Overseas Territories.

6. The findings are distressing. Since 1970, species studied in the UK have, on average, declined by 19%. Specific categories fare even worse, with bird populations down by 43%, amphibians and reptiles by 31%, and fungi and lichen by a concerning 28%. Alarmingly, nearly one in six of the over 10,000 species surveyed faces the risk of disappearing from Great Britain altogether.

7. This chimes with the statements made by the Environment Agency (*"EA"*) in July 2022 on the publication of its *Working with Nature* report:[3] Sir James Bevan, EA Chief Executive, warned, bluntly, that the biodiversity crisis, like the climate crisis, is "an existential risk to our survival".[4] He called on nature-based solutions to be a major part of our response to protect the essentials while rebuilding our natural world. The *State of Nature* report builds on this, emphasising that we have never had a better understanding of the situation and what is needed to fix it. However, the size of the response and investment does not yet match the scale and pace required given the immediacy and extent of the crisis.

The Current Biodiversity Landscape

8. Prior to the EA 2021, amendments to section 40 of the Natural Environment and Rural Communities Act 2006 (*"the NERC Act"*) require that every public authority "must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving

1. https://defralanduse.blog.gov.uk/2023/07/20/bng-whats-happened-and-whats-coming-next/.
2. https://stateofnature.org.uk/.
3. https://www.gov.uk/government/publications/working-with-nature.
4. https://www.theplanner.co.uk/news/biodiversity-crisis-is-an-existential-risk-to-human-survival.

biodiversity." This requires that all public bodies and statutory undertakers, when carrying out their regular duties, need to consider the conservation of biodiversity. The purpose is to ensure that the conservation of biodiversity becomes an integral part of policy and decision-making throughout the public sector.

9. Furthermore, the National Planning Policy Framework (*"NPPF"*) in paragraph 174 and 179 provide protection for biodiversity in plan making and decision-taking, including requiring decisions to "contribute to and enhance the local environment" by "minimizing impacts on and providing for net gains for biodiversity". While this has led to some requirements to enhance biodiversity, it has also been interpreted as having a low threshold, especially where there is no local development plan policy requiring a minimum percentage of net gain.[5] The precipitous decline in biodiversity has also continued despite the NERC Act and NPPF requirements.

10. Enter mandatory BNG, described by Natural England as "a significant step in setting out clear targets and direction in environmental legislation for nature recovery" and defined as an "approach to terrestrial development and/or land management that aims to leave the natural environment in a measurably better state."

The Statutory Basis of BNG

11. The EA 2021 Schedule 14 amends the Town and Country Planning Act 1990 to insert new provisions providing for mandatory BNG. These define the "biodiversity gain objective" as being met "in relation to development for which planning permission is granted if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage". The "relevant percentage" currently stands at 10%, but is adjustable by regulations set by the Secretary of State. This minimum 10% gain is required to be calculated using the Biodiversity Metric and approval of a biodiversity gain plan (both discussed below). The habitat must be secured for at least 30 years via planning obligations or conservation covenants. BNG can be delivered onsite, offsite, or via a new statutory biodiversity credits scheme.

12. The way in which Schedule 14 operates means that the BNG provisions in the EA 2021 apply only to England. In Wales, two pieces of legislation are intended to work together to protect biodiversity, in particular during the design phase, without relying on a specific metric: the Environment (Wales) Act 2016 and the Well-being of Future Generations Act 2015. The 2016 Act brought in a new duty requiring all public authorities, when carrying out their functions in Wales, to seek to "maintain and enhance biodiversity" where it is within the proper exercise of their functions. In doing so, public authorities must also seek to "promote the resilience of ecosystems". The duty is referenced throughout the national planning policy guidance, Planning Policy Wales. In 2019, Welsh Government's Chief Planner issued a letter to the Heads of Planning12 to set out how biodiversity enhancements13 should be secured as part of a development proposal. The letter states that development applications which do not propose biodiversity enhancements will be refused unless they include other significant material considerations.

13. In Scotland, the Planning (Scotland) Act 2019 amended the Town and Country Planning (Scotland) Act 1997 to require enumerated "outcomes" to be achieved, including "securing positive effects for biodiversity".[6] The Scottish Government has promoted a similar approach to BNG to that taken in England, with the use of a metric to assess BNG and applying a mitigation hierarchy,[7] drawing on guidance developed jointly by CIEEM, CIRA and IEM which sets out 10 key principles to follow when seeking to achieve BNG.[8]

General Condition of Planning Permission and Biodiversity Gain Plans

14. Key to the implementation of BNG is a new standard pre-commencement condition relating to biodiversity gain: the "General condition of planning permission". Every planning permission granted for development of land in England, save for exceptions, shall be deemed to have been granted subject to the condition. It will require a "biodiversity gain plan" to be submitted for approval, and such approval can only be given if the local planning authority (*"LPA"*) is satisfied that certain requirements, including that the post-development biodiversity value of the onsite habitat is at least the value specified in the plan and that the biodiversity gain objective is met.

15. Part 2 of Schedule 14 sets out the matters to which Biodiversity Gain Plan must refer:

a. Both pre and post-development biodiversity value of onsite habitat:
b. Measures taken to minimise adverse impacts;
c. The biodiversity value of any offsite habitat provided in relation to the development;
d. Any statutory biodiversity credits purchased; and
e. Any further requirements that might arise from secondary legislation.

It will be crucial for developers to be transparent in the BNG Plans, to avoid legal challenge to the development down the line.

16. In line with the mitigation hierarchy, offsite mitigation should only be used where impacts cannot be avoided, minimised or where onsite gains cannot be achieved. Offsite provision will be encouraged to be local. This is expected to be achieved via policies and guidance. There will be further guidance on decision making for onsite and local offsite mitigation and in what circumstances developers would be able to look outside the local area.

5. *"Paragraph 174 of the Framework simply seeks a net gain in biodiversity. It does not specify a specific percentage…. A 'net gain', of any percentage, is all that is therefore required"* APP/M2270/W/21/3273022.
6. https://www.transformingplanning.scot/media/2131/securing-positive-effects-for-biodiversity.pdf.
7. https://www.gov.scot/publications/research-approaches-measuring-biodiversity-scotland/pages/8/.
8. https://cieem.net/resource/biodiversity-net-gain-good-practice-principles-for-development.

17. In order to avoid unreasonable delays between the ecological impact and the biodiversity gains being delivered, the Government is considering whether to require that no more than 12 months should be allowed after discharge of the mandatory pre-commencement condition for the gains to be delivered. Further guidance is promised, but there may be some sort of rebuttable presumption with delivery within 12 months as the starting point, but developers able to present a case as to why that is not practicable on a site-by-site basis.[9]

Exemptions from Mandatory BNG

18. The EA 2021 provides for a number of exemptions from mandatory BNG, such as for permitted development and urgent crown development. The biodiversity metric (on which more below, and which is subject to its own consultation) allows for temporary impacts that can be restored within two years to be excluded from calculations and gives existing sealed surfaces a zero score, meaning they are effectively exempt.

19. The Government has also indicated that it intends to use regulations to make exemptions for:

a. biodiversity gain sites (where habitats are being enhanced for wildlife);
b. householder applications;
c. small scale self-build and custom housebuilding; and
d. development impacting habitat of an area below a de minimis threshold of 25m^2 (DEFRA confirmed in August that this is 5m x 5m), or 5m for linear habitats such as hedgerows and watercourses[10] – that applies to the area or length of habitat within a development, not the total development footprint.

Protecting Irreplaceable Habitat

20. It is agreed that there are some habitats are pretty much impossible to recreate or take such a long time to develop and mature that they are considered to be "irreplaceable". If such habitats are damages by development, BNG cannot be achieved within any reasonable timeframe and so the loss of such habitat cannot be addressed by BNG, meaning that any project affecting irreplaceable habitat will not, as a whole, be able to achieve BNG.

21. Accordingly, the EA 2021 Schedule 7A Part 2 para 18 makes provision for modifying or excluding the application of mandatory BNG to any development for which planning permission is granted where onsite habitat is irreplaceable. Such habitat will be subject to "bespoke" protection, which "must make provision requiring, in relation to any such development, the making of arrangements for the purpose of minimising the adverse effect of the development on the biodiversity of the onsite habitat."

22. It will therefore be key how "irreplaceable habitat" is defined. At present, it is not. DEFRA stated as follows in the 2023 BNG Consultation Response:

"We will use secondary legislation to set out a clear definition of irreplaceable habitat and list of habitat types to be considered irreplaceable. We will be consulting on this definition and seeking views on the proposed list. The definition statement will be published for transparency, but it is not intended for direct use in decisions on whether habitats are considered irreplaceable. Those trying to establish whether a habitat is irreplaceable should refer to the list of habitats instead."[11]

23. Secondary legislation will disapply the 10% net gain requirement for irreplaceable habitat and apply separate requirements to be used by the LPA when determining planning applications which will affect such habitat.

Application of Mandatory BNG

24. There are a number of types of development which give rise to particular quirks when applying mandatory BNG.

Small Sites

25. Small sites are included within the scope of BNG with specific definitions provided for both residential and non-residential developments:

a. For residential: where the number of dwellings to be provided is between one and nine inclusive on a site having an area of less than one hectare, or where the number of dwellings to be provided is not known, a site area of less than 0.5 hectares.
b. For non-residential: where the floor space to be created is less than 1,000 square metres OR where the site area is less than one hectare.

26. Options are being explored to reduce the burden of BNG for development on small sites. For example, a simplified metric for smaller sites (Natural England released a version earlier this year[12]) and also ensuring the biodiversity unit allocation and statutory biodiversity credit sales mechanisms can be used for small volumes.

Outline and Phased Permissions

27. Additional biodiversity gain information that sets out how biodiversity gain will be achieved across the whole site on a phase-by-phase basis will be required for outline planning permissions and phased development. Such development will also be required to be subject to a condition which requires approval of a biodiversity gain plan prior to commencement of each phase. It is clear that the preference, or expectation, will be that BNG works will be required for each phase, to avoid any inflexible 'front-loading' requirements for the bulk of biodiversity works in early phases, but LPAs will be

9. https://gowlingwlg.com/en/insights-resources/articles/2023/biodiversity-net-gain-critical-guidance/.
10. This is a true "or" – if there is less than 25m^2 of non-priority habitat but 5m or more of linear habitat, or vice versa, then the exemption does not apply.
11. https://www.gov.uk/government/consultations/consultation-on-biodiversity-net-gain-regulations-and-implementation/outcome/government-response-and-summary-of-responses.
12. https://publications.naturalengland.org.uk/publication/6047259574927360.

given discretion in this respect. Guidance is awaited as to how the time period within which BNG will be required to be delivered will work for phased development (or, indeed, at all).

28. Reserved matters will not be required to fulfil mandatory BNG if the outline approval was given prior to the mandatory BNG requirements coming into force.

Variations of Planning Permission

29. Variation of planning permissions will be subject to mandatory BNG requirements only if the original permission was granted after the BNG mandate comes into force. Where that is the case, the section 73 application resulting in a change to the post-development biodiversity value will require an updated biodiversity gain plan, with the original pre-development baseline applying again.

Progress Towards Secondary Legislation – A New 2024 Deadline

30. We had hoped that, by this point (early October 2022), the new BNG regulations would either have been out for consultation or, perhaps, even made. It was not to be. Late on 27 September 2023, DEFRA published a new timetable:[13]

a. January 2024 for the requirement that planning permissions for "new housing, industrial or commercial developments " to be subject to a 'standard' condition that applications must be accompanied by a 'biodiversity gain plan' setting out the measures proposed to achieve the 10% minimum gain (a delay from the original timeframe of November 2023);

b. April 2024 for small sites being in scope;

c. 2025 for other types of authorisation, including NSIPs;

d. End of November 2023 for the Metric; the draft BNG plan template; the Habitat Management and Monitoring Plan template and "a package of Biodiversity Net Gain guidance".

Local Plans Can Demand More

31. While this timetable may have slipped, LPAs have been pushing ahead with BNG policy. A fascinating piece of research by Carter Jonas in April 2022 (updated in Spring 2023) surveyed all local authorities in England to determine how many had incorporated BNG measures into local plans and what was coming in emerging plans.[14] As of April 2022, only 5.3% of local authorities had adopted a BNG policy; by Q4 of 2022 that rose to 8.7%, with 31.7% having emerging policies. Interestingly, those authorities who have declared a climate emergency are appreciably more likely to have an adopted or emerging BNG policy than those who have not.

32. A crucial aspect of these policies is whether they require the statutory minimum 10% for exceedance of the pre-development biodiversity value of the onsite habitat. Given the severe state of nature decline, is 10% net gain enough? When DEFRA consulted on the proposals in May 2022, the Office for Environmental Protection (*"OEP"*) responded with the clear view that it was not.[15] While welcoming the ambition to achieve biodiversity net gain through the planning system, the OEP called on DEFRA to reconsider the figure, stating that the Government's own impact assessment suggested that 10% BNG would more likely achieve no net loss, rather than driving the requisite enhancement of biodiversity. The OEP recommended that a higher percentage be required, referring to the case study of Lichfield District Council, which requires 25% BNG.

33. The OEP's recommendation was not followed. But, as the Lichfield DC example shows, it is open to LPAs, through their local plans, to require that developers deliver BNG over 10%. There has been a jump in the number of authorities proposing a greater level of net gain: two have adopted such a policy[16] and 14 authorities are progressing policies requiring more than 10%. The Kent Nature Partnership net gain group has published a county-wide strategic viability assessment to understand the implications of a 20% BNG approach for Kent.[17] Interestingly, this finds that greatest cost in most cases is to get to the mandatory minimum of 10%, and the cost of increasing to 15%-20% is generally small/negligible. The Planning Advisory Service had a detailed webpage of resources for local authorities developing and progressing BNG policies, including resources for greater than the mandatory minimum.[18]

34. Another area in which local plan policy could differ from national policy is exemptions. While local plan policy will likely be guided by the statutory exemptions to mandatory BNG, it is open to local authorities to put forward policies that require BNG in relation to sites or development which are exempt under the statutory scheme, so long as the LPA has the requisite evidence base, responsive to local circumstances.

35. Finally, we address below the BNG Metric and the way it incentivises delivery of net gain onsite or close to the site, rather than offsite far away. However, this incentivisation approach relies to a great extent on land values and on those pursuing development opting for the least expensive BNG option. That may not be sufficient, particularly where land values are high or in areas where certain types of valuable development are concentrated – there may be a perverse outcome where biodiversity is reduced even further in certain parts of the country, while it is being increased through offsets provided far away in other parts. Local policy may need to step in to add a further layer of protection to ensure that in all but the rarest of cases BNG delivered onsite or very locally; some authorities are already thinking about prioritising onsite and hyper-local BNG (although a blunt requirement of only onsite BNG would be unlikely to be sound).

13. https://www.gov.uk/government/news/biodiversity-net-gain-moves-step-closer-with-timetable-set-out.
14. https://www.carterjonas.co.uk/research-and-insight/biodiversity-net-gain-local-plans-spring-2023-update.
15. Lichfield DC (which in fact provides for a 20% "habitat replacement ratio" rather than using the BNG metric) and Guildford Borough Council, whose Local Plan: Development Management Policies (part 2 of the Local Plan) was adopted on 22 March 2023 with **Policy P7: Biodiversity in New Developments** requiring 20% BNG once BNG becomes mandatory. The main evidence to support 20% net gain in this case was Surrey Nature Partnership's recommendation for 20% BNG and the policy was also tested through the Viability Assessment, available on Guildford Borough Council's Submitted documents webpage.
16. https://kentnature.org.uk/nature-recovery/biodiversity-net-gain/.
17. https://www.local.gov.uk/pas/topics/environment/biodiversity-net-gain-local-authorities/journey-biodiversity-net-gain.
18. https://www.theoep.org.uk/report/oep-advice-response-biodiversity-net-gain-consultation.

36. As Carter Jonas point out, those areas where BNG policies are emerging at a faster pace or at more than the mandatory minimum may signal where demand for BNG solutions will grow more quickly, particularly as many developers will be required to look for offsite credits and are likely to be competing for such. Landowners could also benefit from the early introduction of BNG policy and determine their strategy accordingly.

BNG Calculation & The Metric

37. The EA 2021 introduced the BNG metric, a tool designed to ensure that developments produce a positive impact on biodiversity.[19] If BNG is a baby elephant, then one hesitates to think what aspect of the metaphor adequately represents the BNG Metric! Given a separate paper could be written on the Metric, this will only give a high-level overview.

38. There are essentially four steps to the calculation performed through the Metric:

1. Establishing the Pre-Development Biodiversity Value

Before any development takes place, the first step is to evaluate the existing biodiversity value of the site. This includes a comprehensive assessment of the current habitats, species, and ecological features. Such evaluations often involve field surveys, historical data analysis, and consultation with local ecological databases. The goal is to get a clear and detailed picture of the site's biodiversity richness before any change is made.

2. Assessing the Post-Development Biodiversity Value

Once the development is complete, or even at the planning phase, the expected biodiversity value of the site is assessed. This value considers the design, construction, and potential future land use of the development. It aims to project the ecological landscape of the site after all proposed activities are completed. This forecast will include any mitigation or enhancement measures proposed, such as habitat restorations, green roofs, or wildlife corridors.

3. Biodiversity Units

The Metric uses habitats and "biodiversity units" as a proxy to describe biodiversity. These biodiversity units are the 'currency' of the Metric. There are three types of biodiversity units, which are calculated in three separate 'modules' of the Metric:

i. **Area Units:** These relate to the overall surface area of habitats, such as woodlands, grasslands, or wetlands, present before and after the development.

ii. **Hedgerow Units**: Hedgerows are unique habitats that act as wildlife corridors, barriers, and biodiversity hotspots. Their length, type, and quality are factored into the BNG metric.

iii. **Watercourse Units**: Watercourses, including rivers, streams, and brooks, are evaluated based on their length, width, quality, and associated riparian habitats. These units assess the aquatic and semi-aquatic habitats and their potential biodiversity value.

4. The Key Calculation

The essential point is that the post-development biodiversity value (Step 02) must show at least a 10% improvement compared to the pre-development biodiversity value (Step 01). This stipulation is aimed at ensuring that developments are not just neutral but actively contribute to biodiversity enhancement (but see above the OEP's concern with the 10% value).

Pre-Development Biodiversity Value and the "Relevant Date"

39. The timing of the calculation of pre-development biodiversity value is critical for the integrity and accuracy of the assessment. Schedule 14 Part 1 para 5 of the EA 2021 requires the "relevant date" to be the benchmark for assessment. This is defined as:

a. **The application date**: where planning permission is granted on application;

b. **The planning permission date**: in any other case, particularly, where there is no application date;

c. **Earlier, by agreement**: in certain circumstances, the landowner and the LPA may agree upon an earlier date for evaluation, in order to prevent discouraging landowners from increasing the biodiversity of their land immediately and thereby making it more difficult to achieve BNG;

d. **30 January 2020**: this date serves as a special benchmark under particular conditions

40. **The 30 January 2020**, which was the date the Environment Bill was introduced into Parliament (and so the date everyone is taken to have known BNG might be coming), is a safeguard against intentional degradation where unscrupulous landowners or developers spoil or degrade the land to reduce the pre-development biodiversity value score, to make it easier to achieve BNG. Schedule 14 Part 1 para 6 allows an earlier date, possibly as far back as 30 January 2020, to be used if a person carries on "activities on land" on or after 30 January 2020, otherwise than in accordance with planning permission or any other permission specified by regulations, and as a result of the activities the biodiversity value of the onsite habitat is lower on the relevant date than it would otherwise have been. In those circumstances, the pre-development biodiversity value of the onsite habitat is to be taken to be its biodiversity value immediately before the carrying on of the activities.

41. This provision does not include, for example, developers

19. DEFRA has released guidance on the Metric: https://www.gov.uk/guidance/biodiversity-metric-calculate-the-biodiversity-net-gain-of-a-project-or-development.

maintaining their land, i.e. keeping grass well maintained and trimming trees where necessary, particularly as such activities, if done properly, ought not to materially lower biodiversity. It is notable, however, that there is no 'intention' in the provisions: they are focused on *the activity* and are triggered if (a) some activity is carried out post 30/1/20 and (b) that activity reduces the biodiversity value. So landowners or developers could "innocently" be caught if they undertook activity on the land which had the biodiversity reducing result. In this way, the provisions are outcome focused, to ensure that net gain is achieved, no matter the intentions behind activity which degrades biodiversity.

The Metric's Hierarchy of Value: the Onsite v Offsite Issue

42. Biodiversity Metric 4.0 promotes a clear hierarchy in terms of biodiversity value, by incentivising habitat delivery on or close to the development site through a 'Spatial Risk Multiplier'. This reduces the biodiversity value of habitats delivered further away from the development. The hierarchy is as follows:

a. **Onsite Improvements**: These are given the highest value. Measures taken directly on the development site, like habitat restoration, introducing native plants, or creating water features, are seen as the most impactful. These measures ensure direct benefits to the local ecology and immediate surroundings.

b. **Offsite and Local**: If it's not feasible to achieve the required biodiversity gain onsite, the next best option is to implement improvements offsite but within the local vicinity. This could involve enhancing a nearby woodland, restoring a local meadow, or creating a new habitat adjacent to the development site.

c. **Offsite and Further Away**: If local solutions are not viable, developers are encouraged to seek biodiversity gains further afield. While this is not the most preferred option, it ensures that a net gain is achieved somewhere within the region or country.

d. **"Credits" – Last Resort**: If all the above methods are impractical or insufficient to meet the 10% gain, developers can buy biodiversity "credits". These credits support conservation projects elsewhere and are considered the least preferable option, primarily because they might not directly compensate for the local biodiversity loss.

43. The Local Government Association has described this as embedding "a fundamental principle for spatial hierarchy of habitat development".[20] The EA 2021 Schedule 14 Part 2 para 14 requires that the biodiversity gain plan provide "information about the steps taken or to be taken to minimise the adverse effect of the development on the biodiversity of the onsite habitat and any other habitat", which also gives local authorities a certain amount of control over proper prioritisation according to the hierarchy – it may be open to authorities not to approve the biodiversity gain plan if the information provided about minimising onsite impacts is unconvincing.

44. That said, the crucial question will be how local authorities can assess when onsite or very local provision is 'not possible'. We have seen section 106 agreements which require 10% BNG to be provided near the site of "if not possible" in the district, and if that is "not possible", in the county, and if that "not possible", nationally. Such widely worded agreements will likely not help anyone: the LPA will face difficulties assessing what is "not possible" and those seeking to comply with the section 106 obligation are given little guidance as to what they should do.

Offsite Delivery via Habitat Banks

45. Off-site biodiversity units can be sold, and it is anticipated that a market in these units will develop. One of the key ways in which offsite delivery of BNG will be achieved is through Habitat Banks, or Habitat Land Banks. The Environment Bank, which emerged as a main body acting as a broker between developers and those looking to create or manage conservation sites, raised £200 million to put a habitat bank piece of land in every local authority area. It defines a "Habitat Bank" as a parcel of land where a significant uplift in biodiversity can be created, typically upwards of 20 hectares in size, which can incorporate multiple smaller parcels of land across one site.[21] In particular, the Environment Bank has been partnering with farmers and landowners to establish habitat banks on their land through its privately funded management scheme that guarantees an income for 30 years. There are a number of others entering the market. an early example is the Berkshire, Buckinghamshire and Oxfordshire Wildlife Trust "Habitat Banking Investment Model", which gained funding from the Government's Natural Environment Investment Readiness Fund in July 2021 to create three pilot habitat banks; another is the Future Parks Accelerator (a collaboration between the National Lottery Heritage Fund, the National Trust and DLUHC) which is facilitating habitat banking.

46. Local authorities can also establish habitat banks, and have started to do so. They can create a Habitat Banking Vehicle (*"HBV"*) that holds the leasehold property interests of the authority's spare land that is unsuitable for development (or other purposes) and uses that spare land to create off-site biodiversity units for sale to developers. Creating an HBV will ensure that at least some of the private investment unleashed by mandatory BNG can be directed into sites under local authority control, securing local BNG and benefitting local residents in the process. There are no limits on how much or how little land local authorities could put forward to deliver off-site biodiversity units. The only constraints would be the ecological suitability of the land for the creation or enhancement of off-site biodiversity units.

20. https://www.local.gov.uk/pas/topics/environment/biodiversity-net-gain-local-authorities/biodiversity-net-gain-faqs. This is an excellent resource with detailed responses on a wide range of BNG topics.
21. https://environmentbank.com/habitat-bank-creation/habitat-bank-q-a/what-is-a-habitat-bank.

47. Key considerations will be:
a. Whether the land is encumbered by restrictive covenants or easements which would frustrate its ability to be used to create or enhance biodiversity units in accordance with the requirements of the BNG Metric; and
b. That the land will need to be managed for over the 30 year period in a way necessary to deliver BNG.

48. The best option for local authorities may be to create a company that will act as a HBV for the land which can be leased to that company.[22] The newly formed company would become responsible for the creation and maintenance of the off-site biodiversity units created on the land. By creating a separate HBV, the local authority would ensure a degree of separation between it and the entity responsible for the delivery of the off-site biodiversity units – a key area of "conflict of interest" concern, given that, in most instances, local authorities will be responsible for enforcing the section106 obligations that will legally underpin the off-site biodiversity units sold and managed by the HBV.

49. The government's February 2023 consultation response on BNG stated that local authorities could provide biodiversity units "but they cannot direct buyers towards their land in preference over other suppliers to the market unless there are clear ecological justifications for doing so". Therefore, while local authorities cannot preferentially require their own HBVs to be used, by making additional biodiversity units available they are giving developers more options.

50. The DEFRA Guidance in July 2023 confirmed that there will be no time limit on how long biodiversity units can be banked before they are allocated to development sites. It has been observed that this will be good news to the habitat bank market, as is the confirmation that only once sold to a developer will the relevant parcel of land within the habitat bank need to be legally secured and registered.[23]

"Excess Gain" and the sale of BNG Units above 10% - a missed opportunity?

51. Currently, developers who provide more than 10% biodiversity gains onsite will be able to sell the 'excess' units to the market (unless, of course, local policy requires more than 10% gain – then the 'excess' would be whatever is achieved above the high percentage required). This will disappoint some, who had hoped that developers would be encourage to over-comply on their sites, given the lack of ambition of an 'overall' 10% gain across England.

52. It may also throw up some practical problems. For example, in the recent Stapleford Retirement Village appeal in South Cambridgeshire,[24] permission was granted where one of the main benefits justifying very special circumstances for development in the green belt was a 234% BNG through creating a very large Countryside Park on a degraded habitat. This over-delivery was a key part of the justification for planning permission, but that would be affected if the developer were then to go on and sell any of the excess units (which may, depending on the market, be a very attractive proposition). Careful consideration needs in such circumstances to be given to the section 106 agreement, which could be used to prevent the sale of BNG units where over-provision has formed part of the planning benefits package.

Stacking

53. DEFRA guidance confirms the same sites can be used to provide multiple environmental benefits re land management:[25] for example, BNG and nutrient neutrality (on which more below), also potentially for the provision of public goods under the agricultural Environmental Land Management Scheme. It is envisaged that stacked sites will be popular.

54. The Guidance make clear that carbon credits cannot be "stacked" with the other benefits, unless any habitat is enhanced "more" (quite a vague word!) and this enhancement does not affect the carbon value.

55. Stacking will require some care. If BNG and nutrient mitigations are stacked, the land owner or developer would need to consider the different timescales of the schemes: the BNG commitment is at least 30 years; nutrient mitigation is up to 125 years. That allows for the prospect of a single long-term nutrient agreement being in place but the biodiversity units being sold twice over that period, providing the level of nutrient mitigation is maintained and further enhancement of the existing habitats after the end of the 30-year period could be shown.

The Biodiversity Gain Site Register

56. The final important aspect of the BNG market is the Biodiversity Gain Site Register, which will be established and maintained by Natural England and will record allocations of off-site biodiversity gains to developments and make this information publicly available. Both private and LPA biodiversity units will need to be registered. The register will not act as a marketplace platform for buying or selling units, nor will it assess the ecological suitability or additionality of proposals, but it will allow for some public monitoring of whether BNG is in fact being delivered at the rate proposed on those offsite sites. The 2022 BNG consultation stated that a publicly available register of off-site gains would allow local communities to view an up-to-date record of biodiversity gains across the country and access information on the delivery and monitoring of habitat sites.

57. The information which will be required from developers is yet to be settled (though some detail is suggested in the 2022 BNG Consultation), and it is likely that there will need to be

22. https://www.freeths.co.uk/2023/05/19/local-authorities-role-in-habitat-banking-to-deliver-biodiversity-net-gain/.
23. https://gowlingwlg.com/en/insights-resources/articles/2023/biodiversity-net-gain-critical-guidance/.
24. APP/W0530/W/21/3280395.
25. https://www.gov.uk/guidance/combining-environmental-payments-biodiversity-net-gain-bng-and-nutrient-mitigation.

some verification of the net gains to ensure they are legitimate, accountable and transparent. There is also expected to be a fee to process register applications. Natural England is currently developing the digital Biodiversity Gain Site Register and its BNG digital services blog[26] provides updates on this work and the digital credit sales service.

58. There has been concern about the omission of onsite gains, which at this point are proposed to be recorded in data held by the LPA. The Government is cognisant of the utility of having all site information in one central place and there may be further developments in this respect when further consultation/ publication takes place at the end of 2023.

BNG Credits

59. Not to be confused with "biodiversity units", which are at the heart of the Metric, "biodiversity credits" are at the bottom of the BNG hierarchy, the last resort for providing BNG or making up a shortfall where only partial BNG can be provided onsite. The Government is establishing a statutory credit scheme. It is notable that funds in the national scheme cannot be earmarked for use in a particular region, so it is unclear where the Government will deliver the requisite BNG. The credits will be sold at a higher price than any biodiversity units.

60. In July 2023, DEFRA published its indicative prices for statutory biodiversity credits,[27] which were *high* (and significantly higher than the market is offering for BNG units). For example, the indicative price for one low level habitat credit is £42,000; for one hedgerow credit is £44,000; for one high distinctiveness credit is £125,000; for one watercourse credit (rivers and streams) is £230,000 and for one lake credit is £650,000.

61. Furthermore, the spatial risk multiplier has not been accounted for in the indicative prices, so the actual starting point for any credits is likely to be at least double what is currently listed for any given habitat.

Securing BNG – conditions, s106 and conservation covenants

62. BNG will be secured either via conditions or section 106, or a combination. The Planning Advisory Service (*"PAS"*) has developed a number of resources, including a best practice BNG process flow and examples of planning conditions and section 106 obligations used by LPAs to secure BNG.[28] Offsite BNG will likely have to be secured by section 106 agreement or through a conservation covenant.

63. Conservation covenants are private voluntary legal agreements, made in writing, between a "Responsible Body" (such as a local authority, a public body or charity where at least some of its main purposes or functions relate to conservation, or a body other than a public body or charity, where at least some of its main activities relate to conservation) and a landowner, which establish that land will be used for a conservation purpose.[29] Once established, a conservation covenant binds not just the current landowner but also future landowners. This ensures that the conservation objectives of the covenant continue even after the land changes hands. Conservation covenants can be made for a specific term, perpetually, or for an unspecified period which might be linked to the achievement of a specific conservation objective.

64. In July 2023 the Government published guidance on how to apply to become a Responsible Body, including how DEFRA will check the organisation has adequate internal fiscal and administrative control for long term financial viability and how DEFRA will ensure the organisation can manage and enforce conservation covenant.[30]

65. The Government's response to the BNG consultation stated "the planning enforcement regime will be the principal way of enforcing delivery of BNG". Further guidance on enforcement is expected at the end of November 2023.

Conclusion: Embracing BNG's Potential for Positive Change

66. The introduction BNG presents not just a requirement but potentially an exciting frontier for those engaged in planning, urban development, and place-making. The UK, despite its rich natural heritage, ranks among the most nature-deprived nations globally and BNG offers an opportunity to reverse the decline.

67. For professionals in planning and development, BNG is an invitation to think creatively, to envision urban landscapes that not only coexist with nature but actively nurture and enhance it. It offers an opportunity to design communities where natural spaces are integral, not incidental. These are spaces that enhance the well-being of both their human residents and the myriad species with which we share our environment.

68. Beyond the environmental imperatives, there lies a compelling commercial narrative. A commitment to BNG can be an influential differentiator in a market increasingly attentive to sustainability and environmental responsibility. Projects that champion biodiversity can attract not only eco-conscious buyers but also foster greater community appreciation and higher property values. Moreover, in an age where corporate social responsibility is paramount, developers and businesses that embed ambitious BNG into their projects can amplify their brand reputation and stakeholder trust.

69. It is undeniable that there will be challenges in implementing BNG, foremost among them being the lack of money, staff and expertise in LPAs. A survey of RTPI members on 7 September

26. https://bng-digital.herokuapp.com/.
27. https://www.gov.uk/guidance/statutory-biodiversity-credit-prices#:~:text=Buying%20statutory%20biodiversity%20credits%20is,available%20once%20BNG%20becomes%20mandatory.
28. https://www.local.gov.uk/pas/topics/environment/biodiversity-net-gain-local-authorities/biodiversity-net-gain-development.
29. https://www.local.gov.uk/pas/topics/environment/biodiversity-net-gain/biodiversity-net-gain-faqs-frequently-asked-questions#conservation-covenants.
30. https://www.gov.uk/government/publications/conservation-covenants-apply-to-become-a-responsible-body?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=844b4eba-48a8-499e-8713-55222be2bc93&utm_content=weekly.

2023 (ie shortly before mandatory BNG was anticipated to be required) found:
a. 61% of public sector planners could not confirm they would have dedicated BNG resource and ecological expertise in-house in place by November
b. 54% of planners across the public and private sector believe that BNG practice would be improved by giving 'case studies of best practice';
c. Public and private sector planners reported having extremely low levels of confidence in the practical requirements of BNG, including core aspects of the scheme like 'identifying BNG receptor sites', 'interpreting the robustness of ecological reports and BNG proposals', 'using the biodiversity metric' and 'negotiating with landowners over site provision'.[31]

70. The slippage in mandatory BNG gives some further time to address these concerns, many of which will hopefully be met by the anticipated suite of guidance and the new regulations. More worrying is the need for proper resourcing of local authorities. The Government has committed to funding all new burdens on local authorities arising from the Environment Act and announced in February 2023 that it would provide up to £16.71 million of funding for LPAs to prepare for mandatory net gain up to November 2023. The PAS has also been funded by DEFRA to provide guidance and training for LPAs to enable them to be 'day 1 ready for mandatory BNG'. Further new burdens funding was to follow commencement of the requirement in November 2023. It is hoped that will still be provided, so that the BNG baby elephant can successfully be herded into its increasingly biodiverse rich habitat.

2. The proposed requirement to have "Special Regard" to net zero

Introduction

71. As is well-known, in 2019, the UK government amended the Climate Change Act 2008, committing the UK to reaching net zero greenhouse gas emissions by 2050, from the 1990 baseline. This transformed the UK's earlier target of an 80% reduction in emissions by 2050.

72. The concept of "net zero" emissions refers to the goal of achieving a balance between the amount of greenhouse gas emissions produced annually and the amount removed from the atmosphere through, for example, natural carbon sinks like trees or seagrass or peatlands (or, more controversially, greenhouse gas removal technology[32]). This concept has been central to international discussions on combating climate change, particularly since the Paris Agreement set out to limit global warming to well below 2°C and pursue efforts to limit the temperature increase to 1.5°C.

73. If the United Kingdom is to achieve net zero by 2050, radical changes to the status quo are required. One such change must be in the planning sphere where there is currently no *universal requirement* on decision makers, when assessing a planning application, to take account of the net zero target let alone give that target any specific wight in the planning balance.

The Current Position

74. Of course, Section 19(1A) of the Planning and Compulsory Purchase Act 2004 requires local development documents to "*contribute to the mitigation of and adaptation to, climate change*". However, there is no definition of "*mitigation of and adaptation to, climate change*" such that Local Development Documents do not specifically have to take account of achieving the 2050 net zero target imposed by s. 1 of the Climate Change Act 2008.

75. When determining individual planning applications, LPAs are entitled (*but not specifically obliged)* to take account of the need to mitigate against and adapt to climate change. If development plan policies mandate those matters to be taken into account then plainly decision makers must do so pursuant to s. 38(6) of the Planning and Compulsory Purchase Act 2004. However, no special weight is afforded to those considerations when placed in the planning balance.

76. Material considerations such as the NPPF also assist but do not mandate net zero considerations in all decision making. Paragraph 157 provides,

"157. In determining planning applications, LPAs should expect new development to:

a) comply with any development plan policies on local requirements for decentralised energy supply unless it can be demonstrated by the applicant, having regard to the type of development involved and its design, that this is not feasible or viable; and

b) take account of landform, layout, building orientation, massing and landscaping to minimise energy consumption."

77. The combined effect of the climate change provisions within the NPPF and s. 19(1A) if the 2004 Act were considered by Lane J in R *(on the application of McLennan) v Medway Council* [2020] Env L.R. 5 at Paragraph 36 in which he held,

"What emerges from s. 19(1A) and the NPPF is that mitigation of climate change is a legitimate planning consideration. The fact that both s. 19 of the NPPF speak in broad terms (as they plainly must) cannot mean their message vanishes at the very point where consideration has to be given to a specific proposal. Such an approach would render the provisions a dead letter…If the issue of climate change is regarded as having a material planning baring on particular

31. https://www.rtpi.org.uk/news/2023/september/rtpi-publishes-worrying-new-data-ahead-of-biodiversity-net-gain-implementation-deadline/#:~:text=The%20measures%2C%20introduced%20under%20the,minor%20applications%20from%20April%202024%C2%A0pdf.
32. https://www.science.org/doi/10.1126/science.aah4567.

proposed development, it is illogical to regard that issue as suddenly becoming immaterial once the development had taken place."

78. It is beyond doubt that the mitigation of and adaptation to climate change are capable of being material considerations in planning decisions. However, in order for net zero considerations to be mandatory, that responsibility is currently self-imposed through the content of local plan policies. Few, save for the London Plan, are particularly radical in that regard and given the length of time that local plans take to come forward, that position is unlikely to change with the rapidity necessary to ensure that decision-making is net zero focused.

79. Even where local plan policies mandate net zero considerations, decision makers are not required to afford those considerations any specific weight. The recent decision[33] by the Secretary of State to refuse the application by Marks and Spencer to redevelop their Oxford Street flagship store analysed the current net-zero cardon requirements in the London Local Plan and the City of Westminster Plan. Policy 36 of the Westminster City Plan provides,

"A. The council will promote zero carbon development and expects all development to reduce onsite energy demand and maximise the use of low carbon energy sources to minimise the effects of climate change.

Carbon Reduction

B. All development proposals should follow the principles of the Mayor of London's energy hierarchy. Major development should be net zero carbon and demonstrate through an energy strategy how this target can be achieved.

C. Where it is clearly demonstrated that it is not financially or technically viable to achieve net zero carbon onsite any shortfall in carbon reduction targets should be addressed via offsite measures or through the provision of a carbon offset payment secured by legal agreement."

80. The manner in which the Secretary of State dealt with the net-zero issue in the Marks and Spencer's decision is indicative of the way decision makers currently approach such matters. He determined at Paragraph 41,

"Policy 36 of the Westminster City Plan deals with energy. The Secretary of State agrees that a substantial amount of embodied carbon would go into the construction (IR13.32) and this development is clearly not net-zero carbon. He considers therefore that 36(B), which relates to carbon reduction, is not met; however, the policy makes provision for this scenario at 36(C). The Secretary of State notes that a carbon offset payment has been secured via the s. 106 Agreement (IR12.1). Policy SI 2(D) of the London Plan requires boroughs to establish and administer a carbon offset fund, and states that offset fund payments must be ring-fenced to implement projects that deliver carbon reductions. A carbon offset fund has been established by WCC and is in operation. The carbon offset payments secured via the s. 106 agreement will therefore be used to deliver carbon reductions. The Secretary of State further notes that an Energy Strategy has been provided. Notwithstanding that it has not been demonstrated that the reductions arising from the carbon offset fund would fully offset the embodied carbon arising from the proposal, the Secretary of State considers that the requirements of 36(C) have been met, and there is overall compliance with policy 36."

81. To re-cap, the Marks and Spencer decision demonstrates that the role of net-zero in current decision making is not as central as it could be. Whilst LPAs have the power to adopt ambitious local plan policies (such as the London Plan) to which development must accord, the reality is that local plans are not coming forward quickly enough or in substantial numbers. Further, the provision of weight to achieving net zero is wholly at the discretion of the decision-maker with no statutory requirement that achieving net zero should attract a specific level of weight in the planning balance.

The Proposal

82. There is an exciting proposal which, if adopted, is likely to have a positive and lasting impact on all planning decisions. Its provenance is from the unlikeliest of sources: the great-grandson of Oswald Mosley[34] (Lord Ravensdale) who sits as a Crossbench hereditary peer in the House of Lords. On 4th September 2023, the House of Lords voted narrowly in favour of his proposed amendment to the Levelling-Up and Regeneration Bill (the "LURB") which would place a new duties on decision-makers in planning matters requiring them to *"have special regard"* to *"the mitigation of, and adaptation to climate change"*[35].

83. The duty would apply to a wide array of planning matters including in the preparation of local and national policy, the making of a planning decision arising from an application for planning permission and the approvement of a development order.

84. The amendment includes a non-exhaustive definition of *"the mitigation of climate change"* which includes the achievement of:

a. the target for net zero by 2050 set out in section 1 of the Climate Change Act 2008;

b. applicable carbon budgets pursuant to section 4 of the Climate Change Act 2008;

c. sections 1 to 3 of the Environment Act 2021 (environmental targets) where applicable to the mitigation of climate change.

85. It also includes a non-exhaustive definition of *"adaptation to climate change"* which includes:

33. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1172463/23-07-20_DL_+_IR_456-472_OXFORD_STREET_LONDON_W1_-_3301508.pdf.
34. Oswald Mosley's Wikipedia page reads: *"Sir Oswald Ernald Mosley, 6th Baronet (16 November 1896 – 3 December 1980) was a British politician during the 1920s and 1930s who rose to fame when, having become disillusioned with mainstream politics, he turned to fascism. He was a member of parliament and later founded and led the British Union of Fascists (BUF)."*
35. https://bills.parliament.uk/bills/3155/stages/17727/amendments/10008291.

a. the mitigation of the risks identified in the latest climate change risk assessment conducted under section 56 of the Climate Change Act 2008, and
b. the achievement of the objectives of the latest flood and coastal erosion risk management strategy made pursuant to section 7 of the Flood and Coaster Water Management Act 2010.

86. What is the precise content of this proposed legal duty? The phrase to *"have special regard"* has been used in the context of s. 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. That provision requires, in the context of a planning application for development which affects a listed building or its setting, the decision-maker *"to have special regard to the desirability of preserving the building or its setting…"*. But what does having *"special regard"* mean? In the s. 66(1) context, the Court of Appeal determined in the *Barnwell Manor case*[36] that the use of the phrase means that decision makers are obliged to give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the planning balance exercise. In practical terms that means that if development conflicts with the object to which special regard is to be had, there is a *"strong presumption"* against the grant of planning permission.

87. The origin of the *"strong presumption"* against granting permission is, in part, from the House of Lords decision in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 in which Lord Bridge described the statutory intention in what is now s. 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. That provision requires decision-makers to pay *"special attention…to the desirability of preserving or enhancing the character"* of conservation areas. Lord Bridge held,

"There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, through, no doubt in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted in the application of or refused in the application of ordinary planning criteria."

88. It would be reasonable to infer that the drafter of the LURB amendment used the phrase to *"have special regard"* deliberately such that a Court would likely import the interpretation of that phrase in the listed building/conservation area context. As a result, assuming the higher courts adopted an analogous approach, there would be a strong presumption against any development which could be demonstrated to conflict with (i) the target of net zero by 2050; (ii) the achievement of applicable carbon budgets; and (iii) the achievement of environmental targets pursuant to section 1-3 of the Environment Act 2021.

89. The significance of the amendment is potentially huge. It would represent a necessary reform of the planning regime to afford specific weight to net zero considerations. However, the LURB must first return to the House of Commons and the amendment would have to survive the next reading of the Bill. This is looking increasingly unlikely given the Government's current approach to climate policy[37]. On 20 September 2023, the PM announced that the long trailed cessation of the sale of petrol and diesel motor cars would move to 2035 and that the ban on new fossil fuel boilers for certain households would be delayed. The direction of travel is not looking positive for achieving net zero by 2050.

Conclusion

90. In the event the amendment is accepted, there will be a new legal obligation on decision and policy makers to have "special regard" to the mitigation of, and adaptation to climate change when carrying out their functions. In essence, it will become a mandatory material consideration, to which considerable importance and weight must be given, in every planning decision and a mandatory consideration in the preparation of all local and national policy. There would be a strong presumption against granting permission or adopting policies which would conflict with the mitigation of and adaptation to climate change as defined by the Act. Such an approach would enshrine in law the contribution that the planning system will make to achieving net zero.

3. Nutrient Neutrality - the affluent and the effluent[38]

91. In July 2023, the House of Lords Environment and Climate Change Committee released its report on the challenge of meeting the UK Government's commitment at COP15 in December 2022 to protect 30% of our land and sea for nature by 2030.[39] That report recorded at §58:
"Nitrogen deposition is now the most significant and widespread pollutant and has led to significant habitat changes and impacts on associated dependent species in England. Over 97 per cent of sensitive habitat areas and 89 per cent of SSSIs are predicted to exceed critical nitrogen deposition thresholds, impacting biodiversity objectives."

92. Nutrient neutrality is an approach which aims to mitigate against excess phosphates and nitrates (ie nutrients) leaching into protected watercourses (in particular rivers and estuaries),

36. *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 137.
37. https://www.gov.uk/government/news/pm-recommits-uk-to-net-zero-by-2050-and-pledges-a-fairer-path-to-achieving-target-to-ease-the-financial-burden-on-british-families.
38. Acknowledging the Industry and Regulators Committee of the House of Lords 1st Report of Session 2022-23 for this turn of phrase.
39. https://committees.parliament.uk/publications/41074/documents/200340/default/.

and they cause diffuse water pollution. While most pollution comes from agricultural run-off and antiquated, ineffective water infrastructure, waste water (particularly foul water) from residential development also plays a part. In effect, the impact of new development undoubtedly exacerbates the problem – new development contributes additional nitrates and phosphates to the already high levels of diffuse water pollution, ecologically harming the protected interest features of riverine and coastal European sites.

The *Dutch Nitrogen* Cases

93. A key reason this is a problem (apart from the obvious adverse impact on nature and biodiversity) is the ruling in the so-called "Dutch Nitrogen" joined cases of *Coöperatie Mobilisation for the Environment UA and Others v College van gedeputeerde staten van Limburg* (C-293/17 & C-294/17) [2019] Env LR 27, in which the CJEU considered the Dutch Government's general authorisation scheme for agricultural activities which caused nitrogen deposits in sites protected by the Habitats Directive. The Court held that appropriate assessment could not be avoided for individual projects through the use of a programmatic approach and that, if the expected benefits of mitigation measures are "uncertain" at the time of the assessment, either because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified and quantified with certainty, then they cannot be taken into account (§130).

94. This had significant and immediate effects in relation to development proposals which have the potential to impact water quality through causing nitrogen and phosphates releases. Where adverse nutrient impacts on designated habitat sites cannot be ruled out, mitigation measures which are certain are needed; but in relation to diffuse water pollution and nutrient impact, few such solutions existed. Natural England responded, issuing various pieces of advice, updated as more protected sites became adversely affected by nutrient pollution. Then, in March 2022, Natural England published a general letter of "Advice for development proposals with the potential to affect water quality resulting in adverse nutrient impacts on habitats sites". This advised local planning authorities with particularly sensitive catchment areas to block new residential development unless it can be demonstrated, through an 'appropriate assessment' under the Habitats Regulations 2017, that a particular scheme can be made 'nutrient neutral'.[40] The letter included a map showing the areas of the country affected by diffuse water pollution.

95. The result was that 74 local planning authorities were impacted by nutrient neutrality rules.[41]

96. Natural England then published the Nutrient Neutrality Principles (August 2022, updated July 2023), requiring that nutrient-mitigation schemes should include long-term measures to remove nutrients for 80-125 years. The approach has been controversial, with some developers signing up to expensive mitigation schemes and others finding that otherwise permitted schemes have stalled at the reserved matters stage, because nutrient neutrality cannot be guaranteed.

97. In July 2022, the Government acknowledged that nutrient pollution is an "urgent problem for freshwater habitats and estuaries which provide a home to wetland birds, fish and insects" and referred to the Natural England advice to 74 local planning authorities "on the nutrient impacts of new plans and projects on protected sites where those protected sites are in unfavourable condition due to excess nutrients".[42] The Government's response was to announce a new legal duty on water companies in England to upgrade wastewater treatment works by 2030 in nutrient neutrality areas "to the highest achievable technological levels" and to provide funding for a new accredited Nutrient Mitigation Scheme, established by Natural England.

Nutrient Neutrality in the UK Courts

98. Nutrient neutrality came under the domestic legal spotlight in the case of *CG Fry & Son Ltd v SSLUHC* [2023] EWHC 1622. Sir Ross Cranston set out the meaning and effect of nutrient neutrality at §2:

"In broad terms, this issue relates to the phosphate loading of protected water habitats, leading to eutrophication. This is caused by reasons including agricultural practices and under-investment in water infrastructure. There is a risk of the problem being exacerbated by water generated by new developments which contain phosphates, principally from foul water. The Home Builders Federation states that, due to the unavailability of mitigation options, this issue is holding up the building of no fewer than 44,000 homes in England which already have planning permission."

99. The background to the case is that, in 2015, outline planning permission had been granted for up to 650 homes at Jurston Farm, Wellington. In June 2020, reserved matters approval was given for a number of aspects of that scheme, subject to further conditions. However, in August 2020, Natural England published an advice note to the Somerset councils concerning the risk of water discharge from new development increasing nutrient loads, causing an adverse effect on the Somerset Levels and Moors Ramsar site.

100. When the developer sought to discharge the conditions (all bar one of which were disconnected to water discharge), the Council considered that because likely significant effects of the entire project could not be ruled-out, an appropriate assessment of the entire project was required. It is notable that the affected area was a Ramsar Site (under the 1979 Ramsar Convention) rather than an EU protected site, so the legal obligation to assess

40. https://www.copeland.gov.uk/sites/default/files/attachments/ne_nutrient_neutrality_advice_.pdf.
41. https://www.endsreport.com/article/1750067/mapped-74-authorities-affected-natural-england-nutrient-neutrality-advice.
42. https://www.gov.uk/government/news/government-sets-out-plan-to-reduce-water-pollution

did not flow directly from Conservation of Habitats and Species Regulations 2017 (*"the Habitats Regulations"*), but from national policy in NPPF paragraph 81 that Ramsar Sites should be treated the same.

101. The Inspector agreed with the Council, with his reasoning being informed by his interpretation of the Habitats Regulations. He refused to discharge any of the conditions. The Inspector's decision that gave rise to the claim, the main issues in which were:
a. whether, at the point a condition on a reserved matters approval is to be discharged, an appropriate assessment is required; and
b. if it is to be required, is it the scope of the entire project which falls for assessment or simply the effects of the condition under consideration.

102. The challenge was dismissed. The Judge held that Article 6(3) of the Habitats Directive (which still has effect in in domestic law post-Brexit as a result of section 4(2)(b) of the European Union (Withdrawal) Act 2018) – requires that an appropriate assessment is undertaken at the discharge of conditions stage, even though outline permission has already been obtained. Although regulation 70 of the Conservation of Habitats and Species Regulations 2017, read alongside regulation 63, do not explicitly require appropriate assessment of plans and projects at the reserved matters and discharge of conditions stage, read purposively with the Habitats Directive, they so impose such a requirement.

103. The practical result is that not only are new development proposal caught by the nutrient neutrality rules, but also those with outline or full permission where reserved matters or discharge of conditions involve potential adverse nutrient impacts.

104. Initially, the High Court granted permission for a "leapfrog" appeal, bypassing the Court of Appeal and going straight to the Supreme Court. However, the Supreme Court refused permission to appeal on the basis that the appeal was not suitable for a leapfrog. The appeal has therefore been kicked back to the Court of Appeal and will be heard by 6 November 2023.

The Levelling-Up and Regeneration Bill ("LURB") Proposal [43]

105. On 29 August 2023, Baroness Scott, on behalf of the Government, tabled an amendment to the LURB which proposed to alter the wording of the Conservation of Habitats and Species Regulations 2017 (SI 2017/490). The main provision of the amendments was:
'When making the relevant decision, the competent authority must assume that nutrients in urban waste water from the potential development, whether alone or in combination with other factors, will not adversely affect the relevant site.'

106. Taken alone, this portion of the amendment might not have caused quite such a backlash. Planners and planning decision-makers are, after all, used to dealing with presumptions, which can be rebutted where circumstances dictate they should be. Had the rest of the amendment made provision for this initial assumption of nutrient neutrality to be challenged, by Natural England or others, it might have been accepted as a proportionate response to the current planning logjams in affected areas.

107. However the amendment as proposed would not only have altered the starting point for decision-makers but would compel them to make an assumption of nutrient neutrality, even *against* the advice of Natural England or in the face of evidence to the contrary. It was not clear whether it was also designed to prevent planning authorities from taking nutrient neutrality into account as a material planning consideration.

108. Effectively, the proposed LURB amendment would have constituted a programmatic approach to nutrient-based adverse effects, shifting the problem from planning onto the Environment Agency and waste-water treatment works to address the wider issues sufficiently quickly to justify confidence that urban wastewater would not, now, adversely affect relevant European sites because of various standards which should be met by sewerage undertakers by 2030.

109. The proposed amendments would also have thrown up a variety of questions.[44] It focused on "urban wastewater-derived nutrients", but nutrients come from other sources, such as surface water – for example, Natural England's nutrient calculator suggests that surface water drainage from developments on greenfield sites would generate greater phosphorous runoff then pre-development agricultural use. Appropriate assessment of the adverse impacts from these sources would likely still have been required, and nutrient offsets also required to be purchased.

110. The proposed LURB amendments also, according to the OEP, constituted a clear regression in environmental law terms.[45]

111. The proposed amendments burned brightly, but were short-lived. Cross-party peers in the House of Lords successfully blocked the Government's amendment and, given the way the amendment had been introduced, that put paid to the enterprise of using LURB to address the issue.

A New Standalone Bill?

112. The issue has, however, most definitely not gone away. Reports have emerged that Downing Street is drawing up plans for a new bill that would allow ministers to end nutrient neutrality

43. My thanks to Lois Lane for assisting with this section, via her piece on LexisNexis "Something in the water: What does the new nutrient neutrality amendment mean for planners?".
44. See Freeth's excellent webinar "Nutrient Neutrality: A Legal Update" (7 September 2023) https://www.youtube.com/watch?v=K6FdKMvDV0E.
45. https://www.theoep.org.uk/report/proposed-changes-laws-developments-will-weaken-environmental-protections-warns-oep.
46. https://www.telegraph.co.uk/news/2023/09/23/rishi-sunak-majority-140k-homes-labour-nutrient-neutrality/.

rules. The Government is reported planning to "rip up green rules to build 140,000 new homes" and "to scrap EU derived regulations that are blocking construction",[46] through a new act in the King's Speech for the next session of Parliament, on 7 November 2023. It will be interesting to see how this new legislation will overcome the declaration required by the EA 2021 which must be made which prevents environmental regression.

A Proper Solution is Needed

113. The paroxysms around the nutrient neutrality problem have caused a significant amount of uncertainty and impacted negatively on the potential market-based solutions available. Nature-based approaches to meet the Natural England nutrient-mitigation requirements include creating wetlands, managing drainage ditches, mimicking beaver dams, creating riparian buffers and fallowing agricultural land (with fallowing or wetland creation the most popular). The nutrients that schemes mitigate can be traded as nutrient credits in nutrient-mitigation markets. Several schemes have already delivered credits to those markets and new schemes were being proposed all the time. Research indicated that England had a pipeline of schemes to mitigate nutrients to 72,000 proposed homes.[47] The proposed LURB amendment and rumoured Bill have caused those market-based solutions to stutter.

114. It is undeniable that a solution is needed; but not one that "tears up" protections for the most important habitats and violates the precautionary principle. Rather, an option within the Habitats Regulations 2017 would be for the Government to trigger the derogation system in regulations 64 and 68.[48] These allow plans and projects to proceed, even where there is an adverse effect on integrity on a European site through nutrient impacts, where three tests are met: there are no alternative solutions (*"NAS"*); there are imperative reasons of overriding public interest (*"IROPI"*) and the Secretary of State secures any necessary compensatory measures to ensure the overall coherence of the Natura 2000 site network is protected. The Government could give clear guidance as to when the NAS and IROPI tests could be regarded as met for housing applications and could develop a national strategic compensatory scheme to be relied on by developers (similar to the BNG credit scheme) to meet compensatory habitat requirements.

115. The Government could also stimulate the natural capital market, possibly through funding mechanisms such as a levy on new development to create catchment-level funds that to finance bigger and more ambitious nutrient-mitigation schemes. The Government has previously indicated it is supportive of the development of natural capital markets and has issued guidance, Enabling a Natural Capital Approach.[49] Whether this type of market-based approach, within current environmental rules, can cut through the miasma around nutrient neutrality, remains very much an open question.

4. Environmental and Social Governance

Introduction

116. Environmental and Social Governance (*"ESG"*) is rapidly becoming a vital concept in the world of planning. It is a broad concept but, in essence, it is the mechanism through which truly sustainable development can be achieved. Increasingly, developers are discovering that funding is only available for projects and operators with excellent ESG credentials. Investors, keen to secure long term asset value, will seek to identify how ESG principles can be demonstrated in a specific development. End users (owners, occupiers and tenants of homes or buildings) are also seeking assurances about the ESG credentials of development. Eventually, it will be a concept which will need to be considered at every stage of proposed development.

What Is ESG?

117. ESG is a set of emerging standards by which commercial entities (including developers and their developments) are assessed both by decision-makers and investors. Environmental considerations are focused on how a development safeguards the environment by, for example, seeking to mitigate or adapt to climate change. Social considerations are focused on how developers manage relationships with the communities in which they operate as well as with their employees, suppliers and customers. Governance concerns a developer's leadership, audits, internal controls and shareholder's rights.

What are the Requirements of ESG?

118. Concrete requirements are still emerging. There are several sources of ESG good practice as well as certain binding requirements (currently only applicable to specific entities). Good practice tends to come from international "soft sources" of law which include:

(i) the 2011 UN Guiding Principles on Business and Human Rights[50];
(ii) the OECD Guidelines for Multinational Enterprises (adopted 1976 and revised on 8 June 2023)[51]; and

(iii) the OECD Due Diligence Guidance for Responsible Business Conduct[52].

119. However, binding requirements make ESG more understandable for business and developers. These requirements largely derive from ESG focused local plan policies in the town and country planning sphere. For example, the current London Plan, adopted in 2021, requires (i) 100% of major developments to meet net-zero carbon status; (ii) 52,000 new homes per year, 50% of

47. https://www.ciwem.org/the-environment/nutrient-neutrality-rules-are-an-opportunity-not-a-barrier.
48. As has been proposed by Freeths: https://www.freeths.co.uk/2023/08/01/nutrient-neutrality-freeths-ideas-to-solve-the-habitats-regulations-assessment/.
49. https://www.gov.uk/government/publications/enabling-a-natural-capital-approach-enca-guidance/enabling-a-natural-capital-approach-guidance.
50. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.
51. https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en.
52. https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

which must be genuinely affordable and 10% of which must meet the highest standards of accessibility; (iii) 95% of construction and demolition waste to be reused, recycled and recovered; (iv) 80% of trips to be taken by walking, cycling and public transport by 2041 and (v) a 400m exclusion zone for new hot food takeaways near schools. These are ambitious and challenging policies for developers to comply and it is thought that other local plans will adopt similar approaches.

120. ESG also comes forward through statutory initiatives, discussed earlier in this paper, such as the requirement to deliver 10% of Biodiversity Net Gain from January 2024 which will be imposed on developers building new housing.

121. Larger companies undertaking development should also be aware of requirements arising from the Task Force on Climate-related Financial Disclosures ("TFCD")[53]. The 2022 regulations amend sections 414C, 414CA and 414CB of the Companies Act 2006 to place requirements on certain publicly quoted companies and large private companies to incorporate TCFD-aligned climate disclosures in their annual reports. Companies and LLPs within the scope of the legislation are required to include disclosures on climate change-related risks and opportunities. The disclosures ought to cover how climate change is addressed in corporate governance; the impacts on strategy how climate-related risks and opportunities are managed; and the performance measures and targets applied in managing these issues.

122. Additionally, the Task Force on Nature-related Financial Disclosures ("TFND") produced the Nature-Related Risk and Opportunity Management and Disclosure Framework[54] in September 2023. Participation is voluntary but it should be highlighted that the TCFD was also initially voluntary and has since been made mandatory for certain entities as set out above. Early adoption of the TFND framework will help developers and other firms to support good nature related outcomes and stay ahead of the regulatory compliance framework. Whilst TCFD focuses on the financial impact of climate change, the TNFD is concerned with the financial impact of nature related changes and how to direct finances towards outcomes which are positive for nature. For example, the Borad and Management should disclose descriptions of how they oversee risks, opportunities and impacts relating to nature-related dependencies and how they materially affect the strategy, business and financial planning.

ESG Caselaw

123. Further, there have been recent attempts to establish good climate related governance through directors' duties. An environmental charity, ClientEarth, purchased shares in Shell Plc and then brought a derivative claim under Part 11 Chapter 1 of the Companies Act 2006 alleging breaches of directors' duties pursuant to s. 260(3) of the Companies Act 2006. That claim was dismissed[55] as failing to establish a prima facie case of loss prior to a substantive hearing. However, it is useful to understand the way that governance arguments are currently being mounted in the higher courts. The focus of the claim alleged that s. 172 CA 2006 imposes a duty on directors to act in the way that the director concerned considers in good faith would most likely promote the success of Shell for the benefit of its members as a whole. Additionally, s. 174 CA 2006 imposes a duty to exercise the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonable be expected of a person carrying out the functions they carry out, and the general skill and experience that director actually has. The statutory duty, therefore, has both an objective and subjective element. The duties owed by directors were said by ClientEarth to include (a) a duty to make judgements regarding climate risk that are based upon a reasonable consensus of scientific opinion; and (b) a duty to accord appropriate weight to that risk.

124. Trower J rejected ClientEarth's submissions agreed with those of Shell Plc. She held that the allegation that the directors were subject to the duties identified by ClientEarth were misconceived for three reasons: (i) the duties are inherently vague and incapable of constituting enforceable personal legal duties; (ii) they cut across the basic principle of company law that it is for the directors themselves to determine the weight to be attached to the non-exhaustive list of factors in s. 172 CA 2006 to which each director must have regard in the performance of their duty to promote the success of the company; and (iii) it is incompatible with the subjective nature of the duty under s. 172 and amount to an unnecessary and inappropriate elaboration of the statutory duty of care referred to in s. 174.

125. Whilst the ClientEarth challenge failed, it is important for developers to remain alert that there are interest groups who will scrutinise corporate governance and will not hesitate to formulate arguments to promote the importance of ESG in decision-making.

126. A further example of this type of challenge was recently considered by the Court of Appeal in *McGaughey v USS Limited* [2023] EWCA Civ 873. It was alleged, inter alia, that the directors of the University Superannuation Scheme had failed in their duties under s. 172 CA 2006 in that the Scheme continues to invest in fossil fuels without any adequate plan for divestment. Further or alternatively, it was argued that the directors failed to take into account a number of relevant considerations including the results of a members' ethical survey undertaken in November 2020 which supported an immediate plan for divestment. The Court of Appeal agreed with the first instance Judge that there was no prima facie case of loss to the Scheme and therefore the claim fell at the first hurdle. Further, it noted that it was not alleged that the directors were acting in bad faith nor had done other than act in the best

53. The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 and the Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022 apply to reporting for financial years starting on or after 6th April 2022.
54. https://tnfd.global/recommendations-of-the-tnfd/getting-started-with-tnfd/.
55. *ClientEarth v Shell Plc* [2023] EWHC 1897 (Ch).

interests of the scheme (having taken proper advice) such that there was no breach of s. 172 CA 2006. Again, whilst the challenge proved unsuccessful, environmental groups show no sign of giving up this approach and boards should be alive to the need to place ESG at the heart of their decision making to insulate themselves from challenges.

Greenwashing

127. There has been a trend, with the new emphasis on ESG, of companies spending time and money on marketing their alleged environmental credentials rather than on actually minimising environmental impact. This is a concept known as *"greenwashing"*. It can lead to serious consequences particularly when misleading or false information is used about the environmental impact of a company's operations.

128. In the United Kingdom, the Advertising Standards Authority are taking the lead at holding companies to account for their environmental claims. In a statement on their website[56], the ASA has said,

"The ASA and our partner regulator the Competition and Markets Authority (CMA) have been taking a firm approach to tackling misleading green claims. We each have ambitious programmes of work which aim to tighten compliance with our Advertising Codes and the CMA's Green Claims Code.
We're doing this because the stakes are high.
Government has set ambitious legally binding net zero targets for the UK and experts are advising that consumer behaviour change in key high carbon emitting sectors will be crucial if they are to be met. Businesses have a limited window of opportunity to demonstrate that advertising is part of the solution. Otherwise, statutory interventions in advertising may follow, as we're already seeing happen in France.... HSBC, Shell, Repsol, Petronas, Deutsche Lufthansa and Etihad all tripped up because they made claims about their green credentials and aspirations when at the same time the reality of their high carbon business models was out-of-kilter with the overall impression given in the ads.
On the other hand, we've recently seen other high carbon emitting businesses make similar claims but in ways that we think add sufficient balance to green credential messaging so that the ads don't mislead consumers. They've done so through the inclusion of straightforward, prominent copy in ads that acknowledges the less-climate-positive aspects of their activities, that indicates how early in their journey they are, or that provides summary details of their future planned activities. Such copy does not have to dominate ads, but it must not be hidden away."

129. In 2019, RyanAir ran an advertising campaign claiming it to be Europe's "lowest emissions airline". This was ruled as misleading by the ASA[57] due to the justification for the claim arising from a calculation which involved factors such as seating density that consumers needed to understand the basis of the claim.

130. In 2021, Oatly ran an advertising campaign in which they claimed that their product generated 73% less CO2 vs cow's milk. This was ruled as misleading by the ASA[58] on the basis that the evidence which supported their claim only related to whole cow's milk and was only compared with Oatley Barista Edition.

131. In 2022, Shell ran an advertising campaign in which it was claimed that 1.4 million households use 100% renewable energy from Shell, that Shell aimed to fit 50,000 electric vehicle chargers nationwide by 2025 and that Shell was working on a wind project that could power six million homes. Throughout the ad, large individual letters appeared in the background of successive scenes to spell the word "READY". The ad ended with large on-screen text "The UK is READY for Cleaner Energy" followed by the Shell logo and the hashtag #Powering Progress. The ASA ruled that the claim was misleading[59] as the cumulative effect of the claims together with the claim that the UK is "READY for Cleaner Energy" gave the impression that low-carbon energy products comprised a significant proportion of the energy products Shell invested and sold in the UK in 2022 or were likely to do so in the near future.

132. In order to support businesses, DEFRA and BIS have produced a Green Claims Code[60] which assist them with the requirements for advertising content. The ASA has produced an e-learning module for marketers[61]. Further, the Committee of Advertising Practice (which covers non broadcast advertising) has a dedicated Environmental Claims section[62] to their code. Developers would be well advised to consult these sources for guidance before advertising campaigns focusing on their green credentials.

133. Significant changes are likely coming at EU level: by 2026, the EU is looking to ban generic environmental claims such as "climate neutral" or "carbon neutral"; "eco"; "energy efficient"; "nature's friend" and "biodegradable", unless companies can prove the claim is accurate, as the bloc cracks down on greenwashing of consumer products. The proposed rules still require approval from the EU Parliament and member states. Not only is the move aimed at preventing greenwashing, it also augurs more scrutiny of carbon offsetting schemes, many of which have been shown to lack credibility. Whether the UK will follow suit will likely depend on wider political outcomes.

56. https://www.asa.org.uk/news/greenspeaking-with-confidence.html.
57. https://www.asa.org.uk/rulings/ryanair-ltd-cas-571089-p1w6b2.html.
58. https://www.asa.org.uk/rulings/oatly-uk-ltd-g21-1096286-oatly-uk-ltd.html.
59. https://www.asa.org.uk/rulings/shell-uk-ltd-g22-1170842-shell-uk-ltd.html.
60. https://greenclaims.campaign.gov.uk/.
61. https://www.asa.org.uk/course/climate-change-and-the-environment.html.
62. https://www.asa.org.uk/type/non_broadcast/code_section/11.html.

Conclusion

134. Heraclitus said that no person ever steps in the same river twice, for it is not the same river and they are not the same person. While this paper covers a number of literal reasons why it may not be the same river, it also seeks to examine the deeper point: our environment shapes us, and the way in which planning policy addresses the environment is ever-changing as we grapple to understand how to balance that interaction, for the benefit of people and planet.


Estelle Dehon KC


Ryan Kohli

cornerstone barristers

Annual Planning Day, Cornerstone Barristers | November 2023

Environmental Impact Assessment: Recent legal issues, and a taste of the future in the shape of Environmental Outcomes Reports

by Harriet Townsend[1] and Nina Pindham

Introduction

1. A year ago, members of the Cornerstone planning team considered "EIA in a Time of Climate Change: *R (Finch) v Surrey County Council* and the Government's Proposals for Reform." So, where do we find ourselves one year on? After yet another year which has seen temperature records broken around the world, we await a decision by the Supreme Court in the Finch case after the hearing in June 2023, and the timeline on the introduction of the proposed new 'Environmental Outcomes Reports' ("EOR") regime, intended to replace EIA and SEA in England, is still far from clear.

2. In the first section of this paper we take a practical and practice-oriented look at legal issues arising in EIA law over the past year. The implications of *Finch* will be considered in a supplement to this paper and/or orally, bearing in mind that at the time of writing the Supreme Court has not delivered its judgment. The authors of this paper were on opposite sides of the argument in *Finch* and look forward to sharing their different perspectives of the judgment and/or of the issues arising at Cornerstone's Planning Day on 6 November 2023. The evolving proposals for the EOR regime are set out in the second section of this paper.

3. Conscious that EIA can seem like a legal obstacle course to practitioners, it is worth reminding ourselves at the outset that the objective is relatively straightforward: to contribute to a high level of protection of the environment and human health.[2]

4. Moreover, and bearing in mind always the legal prohibition on granting planning permission or subsequent consent for EIA development without EIA (regulation 3 of the Town and County Planning (Environmental Impact Assessment) Regulations 2017) it is in both the applicant and the planning authority's interest that the requirements of EIA are met. At a time when planning authorities are short of experienced officers and time, and when objections to major projects are no less vociferous than they ever were, this is an area where a proactive applicant / developer can make a very big difference to the quality, speed, and robustness of the eventual planning decision.

[1] Legal issues arising

5. In this section, we consider what recent authorities have to say about some of the more common questions and challenges facing practitioners going through the EIA process, notably:

a. Identifying 'the project'. [3]
b. Identifying and assessing the likely significant effects of the project.

The Project

6. Given that it is the likely significant effects of the development (or project) which must be assessed in EIA, it is only common sense that a failure to appreciate the true character or extent of the development (which may be different to the description of development in the application) may result in a failure to assess the likely significant effects of the (true character or extent of) development.

7. With this in mind, planning decision makers and the courts have long been alert to the risks of 'salami slicing', referring to the artificial division of a single project into a series of applications for smaller developments which do not individually meet the threshold for EIA.

8. What is the correct legal approach to the identification of the project for (a) screening purposes, and (b) the EIA itself?

9. In our view, particular attention should be paid to the identification of the project at screening stage, with the relevant ECJ authorities in mind. This can raise complex intellectual challenges

1. With many thanks to Lois Lane of Cornerstone Barristers for her assistance.
2. Recital 1 of the Preamble to Directive 2014/52/EU of The European Parliament and of the Council of 16 April 2014 ("the EIA Directive").
3. Note that, while the EIA Directive refers to 'projects', the Town and County Planning (EIA) Regulations 2017 and the Infrastructure Planning (EIA) Regulations 2017, by which the Directive was implemented in domestic law for applications under the Town and Country Planning Act 1990 and the Planning Act 2008, use the term 'development' and 'development consent' respectively.

which need to be grappled with. The courts have recognised the complexity of the challenge, and the need to exercise judgment: the approach that the courts take to the question whether the decision maker got it right Lang J held in *R (Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin) is as follows, §63:

"The question as to what constitutes the 'project' for the purposes of the EIA Regulations is a matter of judgment for the competent authority, subject to a challenge on grounds of *Wednesbury* rationality or other public law error (*Bowen-West* at [39 - 41]; *Buckinghamshire CC* at [287]; *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 at [32 – 43])."

10. She went on to set out some of the relevant factors for decision makers to take into account when deciding on the ambit of a project at §64, albeit these are examples and not an exhaustive list (emphasis added):

"i) **Common ownership** – where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (Larkfleet at [60]);
ii) **Simultaneous determinations** – where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]);
iii) **Functional interdependence** – where one part of a development could not function without another, this may indicate that they constitute a single project (Burridge at [32], [42] and [78]);
iv) Stand-alone projects – where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24 – 25])."

11. This case has a fairly complex procedural history, as the Claimant had also challenged (in separate proceedings) the planning consent granted for residential development on two adjoining sites (referred to in the judgments as "Chislet" and "Hoplands" respectively), and did so on similar but not identical grounds. Attempts to appeal the judgment cited above (and a parallel application to appeal the Hoplands judgment) resulted in the Court of Appeal's judgment, reported as a Practice Note[4], in which guidance is given on the approach to be taken to applications for permission to appeal. More significantly for our purposes, the Court of Appeal refused the application for permission to appeal, holding that the correct identification of the project was a matter of evaluative judgement for the decision maker, and could only be challenged on conventional public law grounds [see in particular §§ 23, 35, 40, 48, and 84-85 of the Court's judgment].

12. Despite the guidance in *Wingfield* and the unambiguous decision that identification of the project is a matter of judgment with which the courts will not interfere save for public law error, there have been several recent cases concerned with defining the ambit of a 'project' for the purposes of the EIA regime.

13. *R (Ashchurch Rural Parish Council) v Tewksbury Borough Council* [2023] PRSR 1377, [2023] Env LR 25, and [2023] EWCA Civ 101, is a case in which the local planning authority did err in its identification of the project when granting permission for a road bridge over the Bristol to Birmingham railway line (ground 3 of the challenge). It had commissioned a screening report from the developer which invited assessment of the bridge in isolation while also recording the fact that "the bridge would not be used until future development came forward to make it operational." [§22] The development area was intended to provide over 800 new dwellings, and the bridge would have had no purpose without it.

14. The judgment confirms the term "project" should be interpreted broadly and realistically [§74] and that "the identification of "the project" is based on a fact-specific inquiry" [§80]. The facts of the case did not help the Defendant: Nowhere in the documentation was the question whether the development was an integral part of a larger project even considered [§83]. The relevant authorities were not considered [§84] and the Defendant's witness statement did not elaborate on the conclusion that the bridge was not part of a larger project [§85].

15. Andrews LJ continued at §88:

"I reject the proposition that in a case in which the specific development for which permission has been sought clearly forms an integral part of an envisaged wider future development, without which the original development would never take place, there can only be a single "project" for the purposes of the Directive and the Regulations if the contemplated wider development has reached the stage where an application has been made or could be made for planning permission."

16. The Court of Appeal also held (ground 1) that the local planning authority had acted irrationally when granting planning permission for the road bridge which was part of a planned wider residential development scheme for which planning permission had not yet been sought. The committee had been advised in the officer's report to take account of the benefits of the residential development unlocked by the construction of the bridge, but that they could not assess its impacts. The error was clear because without the benefits and harms caused by the planned wider development the proposed road bridge would be a "bridge to nowhere" [§16 and §64][5].

17. In *R (Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1526 (Admin) Holgate

4. *R (Wingfield) v Canterbury City Council* [2021] 1WLR 2863 [2020] EWCA Civ 1588.
5. See also Holgate J's consideration of *Ashchurch* at §§79-87 of his judgment in *R (Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1526 (Admin).

J considered a challenge to the decision made by the Secretary of State to permit the Sizewell C Nuclear Generating Station under s.114 of the Planning Act 2008. The EIA principles for such decisions are found in different regulations but are derived from the same Directive and the case is therefore relevant in its assessment of the scope of the project. Interestingly, this was a decision on the scope of a project, not in the context of a screening (and allegedly salami-sliced decision) but in the context of an EIA development which had been subject to EIA.

18. In his judgment, Holgate J considered the claim that the Secretary of State's decision not to require assessment of the means by which a permanent potable water supply would be provided to the development was irrational. It was said the Secretary of State relied on four irrelevant considerations (identified at §78 of the judgment) when concluding that the project, properly understood, did not include the intended method of supplying water to the proposal. It was the Claimant's case that the functional interdependence of the proposals and the permanent supply of water (acknowledged by the judge at §52) meant they were part of the same project.

19. Holgate J held (as did Lang J) that the principles from *Wingfield* are not exhaustive. The weight to be given to each of them is a matter for the decision maker and depends upon the circumstances of each case. He held that there was no basis on which the defendant's evaluative judgment could be said to be irrational [§90] and went on to describe the "much wider implications of the argument" if it were right [§91]. He said at §72:

"But the Directives and jurisprudence of the European Court of Justice recognise that it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different "projects". The Directives apply in such a way as to ensure appropriate scrutiny to protect the environment, whilst avoiding undue delay in the operation of the planning control system. Undue delay would be likely if all the environmental effects of every related set of works had to be definitively examined before any of those works could be allowed to proceed. Where two or more linked sets of works are in contemplation, which are properly to be regarded as distinct "projects", the objective of environmental protection is sufficiently secured under the Directives by consideration of their cumulative effects, so far as that is reasonably possible, when permission for the first project is sought, combined with the requirement for subsequent scrutiny under the Directives for the second and each subsequent project."

20. *R (Llandaff North Residents' Association) v Cardiff Council* [2023] EWHC 1731(Admin) was a challenge to the grant of permission (in 2022) for a sewage pumping station intended to serve a major urban extension to the city ("Plasdwr", a development of some 6,000 dwellings) which had been granted planning permission in 2017. The application was subject to EIA but the EIA did not consider the pipe linking the pumping station and Plasdwr. The key consideration was whether the pumping station was functionally interdependent with Plasdwr.

21. The judgment reminds us that there may be two superficially similar but legally distinct questions for those undertaking EIA : (1) what is the project subject to assessment? and (2) what are the project's likely significant (cumulative) environmental effects?

22. On this, HHJ Jarman KC stated in his judgment [§18]:

"Although two sets of proposed works may have a cumulative effect on the environment, this does not make them a single project for these purposes. Two potential projects but with cumulative effects may need to be assessed, see *R (Larkfleet Ltd) v South Kesteven DC* [2015] EWCA Civ 887, Sales LJ (as he then was) at [36]."

23. As he went on to quote from *Larkfleet* at §38:

"The EIA Directive is intended to operate in a way which ensures that there is appropriate EIA scrutiny to protect the environment whilst avoiding undue delay in the operation of the planning control system which would be likely to follow if one were to say that all the environmental effects of every related set of works should be definitively examined before any of those sets of works could be allowed to proceed (and the disproportionate interference with the rights of landowners and developers and the public interest in allowing development to take place in appropriate cases which that would involve). Where two or more proposed linked sets of works are in contemplation, which are properly to be regarded as distinct "projects", the objective of environmental protection is sufficiently secured under the scheme of the Directive by consideration of their cumulative effects, so far as that is reasonably possible, in the EIA scrutiny applicable when permission for the first project… is sought, combined with the requirement for subsequent EIA scrutiny under the Directive for the second and each subsequent project. The adequacy and appropriateness of environmental protection by these means under the EIA Directive are further underwritten by the fact that alternatives will have been assessed at the strategic level through scrutiny of relevant development plans…"

24. The claim in that case was unsuccessful, HHJ Jarman KC holding that the planning authority was entitled to deal with the matters arising in the way that it did [§§33-34].

25. Practical implications of these cases are as follows: the courts will be astute to intervene where the artificial salami-slicing of projects results in the avoidance of EIA – but none of the above cases did. Claimants will face the usual high hurdle that

demonstrating irrationality involves if they contend that errors have been made in defining the scope of the project, and planning officers would be well advised to pay attention to the Wingfield criteria and other relevant considerations in cases of doubt.

Identifying and assessing the likely significant effects of a project

26. For (very) understandable reasons, the past year has seen particular focus in the courts on the effects of development on the climate. The case of *Finch v Surrey County Council*, in which we currently await the decision of the Supreme Court, is one example. In this case the question for the court is whether the GHG emissions inevitably occurring (albeit who knows where in the world) when the crude oil extracted from the ground is eventually combusted are necessarily an indirect significant effect of that extraction for the purposes of EIA.

27. The general position, which the Appellant in *Finch* does not seek to disturb, is that the scope and content of an Environmental Statement is a matter for the decision maker[6] subject, of course, to the specific requirements of the EIA Regulations and Directive. The Appellant in *Finch* says that the commercial extraction of hydrocarbons for fuel is such a case.

28. Moreover, it is important to keep in mind:

c. The low threshold for likelihood of effects;
d. That all effects of the development should be assessed, including: "direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative" effects which should take into account the environmental protection objectives relevant to the project [§5 of Schedule 4 to the 2017 Regulations];
e. That an important aspect of EIA is the enhanced public participation it enables;
f. That, if a scoping opinion has been adopted by the authority, the ES must be "based on" the latest scoping opinion [regulation 18].

29. Even if all the above depend on the judgment of the authority[7] , the EIA Regulations are nonetheless prescriptive when it comes to the determination of an EIA application. Regulation 26 plays a role in promoting rigour and transparency, and states:-

"(1) When determining an application or appeal in relation to which an environmental statement has been submitted, the relevant planning authority, the Secretary of State or an inspector, as the case may be, must—
(a) examine the environmental information;
(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;
(c) integrate that conclusion into the decision as to whether planning permission or subsequent consent is to be granted; and
(d) if planning permission or subsequent consent is to be granted, consider whether it is appropriate to impose monitoring measures."

30. When it comes to the assessment of cumulative effects, a wide degree of latitude is afforded to decision makers to determine whether or not an effect must be assessed cumulatively. It will depend on the nature of the project and the nature of the effect. By way of example, the case *R (on the application of Boswell) v Secretary of State for Transport* [2023] EWHC 1710 (Admin) concerned the assessment of greenhouse gas emissions from three major road schemes in Norfolk. Thornton J held that, in light of the global effect of carbon emissions and the absence of sectoral targets in the UK's national carbon budget, it had been rationally open to the Secretary of State for Transport to estimate the emissions from the three projects individually against the national carbon budget, rather than cumulatively.

31. Practical implications of the above are as follows: EIA is not intended to be a minefield, nor a legal obstacle course, but there are specific legal requirements as to the procedure which must be followed, and certain specified information must be obtained, examined, and integrated into the final decision to grant or to refuse planning permission. Public participation in the process remains an important part of the EIA regime.

32. A recent decision by a planning inspector in relation to a proposed poultry farm near Bridgnorth in Shropshire (Appeal Ref: APP/L3245/W/21/3289216) offers some useful lessons for practitioners looking to assess the significance of effects of a project on the environment. This proposed development has a rather storied history. Permission for a similar development was granted by the local planning authority in September 2017 before being quashed by the Court of Appeal in *R (Squire) v Shropshire Council* [2019] EWCA Civ 888. The Court concluded that the failure to give any consideration to the dust and odour from the spreading of chicken manure on nearby fields was a 'patent defect', which rendered the EIA unlawful.

33. When the similar proposal returned to Shropshire Council this year, officers again recommended approval but this time members of the planning committee voted to refuse permission. In his decision on 5 May 2023, Inspector Bhupinder Thandi BA (Hons) MA MRTPI upheld this refusal, concluding that the odour assessment produced by the applicant still failed to properly assess the odour impacts of the proposed development and, in particular, gave limited information regarding its input data and

6. *Blewett v Derbyshire CC* [2004] Env LR 29 recently endorsed by the Supreme Court in *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52.
7. The nature of the decision on indirect effects, i.e. is it a matter of law or judgment, is something the Supreme Court is likely to provide guidance on in Finch.

chosen methodology for calculating peak odour concentrations. Inspector Thandi also looked ahead and identified that two parcels of land to the East of the appeal site had been identified by the local planning authority as sites for future residential development, which would further exacerbate the odour impacts of the proposed development on nearby residents.

34. Lessons from this decision for those preparing environmental information: It is important to be transparent about input data, the methodology chosen requires some care, and it may be necessary to consider the future when assessing significance of effects, especially where other development proposals already in the pipeline might have a major impact on the degree of significance attributed to an effect.

35. Considering the future involves contemplation of the proposed new EOR regime set out in Part 6 of the Levelling Up and Regeneration Bill ("LURB"). This is intended to comprehensively replace both EIA and SEA in England. The Government has hailed EOR as a "once in a lifetime" opportunity to reduce legal and administrative complexity and increase environmental gains so as "to clean up the country's air, restore natural habitats, increase biodiversity and halt the decline in species by 2030".[8] We now turn to consider the legal framework the LURB will establish: is it fit for the ambitious purposes the Government has set for it?

[2] Environmental Outcomes Reports: Fit For Purpose or Purpose Without Fit?

36. At the outset it is important to note the proposed new environmental regime set out in Part 6 of LURB[9] applies to England only. This gives rise to its own set of additional complications and cross-border plans and projects in Scotland, Wales and Northern Ireland will become even more complex than they already are. The first question, however, is why EOR was considered necessary: What is the purpose of replacing EIA and SEA with a single new regime?

What do they aim to do?

37. The Explanatory Notes to LURB say the aim of the Part 6 provisions is to establish "an outcomes-based approach to assessment where anticipated environmental effects are measured against specified environmental outcomes.[10]"

38. So, the Government's aim is to make the environmental assessment and reporting system – and, crucially, the information used in and produced by this system – more targeted, cohesive, transparent and navigable by the public. Better use of data will lead to better information on the reasons for the success or failure of mitigation measures, and indeed whether there has been success or failure in the first place. It is also suggested, optimistically, in the public consultation on EOR that being able to point to evidence of more successful mitigation will lead to fewer objections from the public.

39. The Government also wants to give developers more certainty in advance of designing a scheme and submitting an application on what that development will have to achieve in order to be considered acceptable in environmental terms.

40. Another laudable set of purposes relates to form. There will be a move to shorter, simpler reports with nationally-standardised data. This then leads to the most important aspect of the new regime: this standardised data will then be recorded on a national basis and made available for future assessments, monitoring, and reporting. There will no longer be a need to repeat the extremely costly bespoke assessment process for every development on every site: over time good quality up to date baseline data should be readily available and those responsible for conserving and enhancing the environment – as well as the public and environmental NGOs - will be able to easily refer to this data to monitor progress in reversing negative environmental trends and improving the natural environment.[11]

41. It can be seen this new world of environmental assessment could be very very different, and there is scope for it to lead to better environmental outcomes.

Why not just fix what we have?

42. An obvious question is why the Government considered these purposes could not be achieved by making amendments to the existing regimes. EIA in particular is a well-established process (originating in America in the 1970s) that is understood and used worldwide. Moving away from a process and language that is understood across the world requires strong justification.

43. One stated reason is to enable better focus. EOR is to focus the reports, so rather than a catalogue of all environmental effects the document will set out clearly how the plan or consent would affect the delivery of specified environmental outcomes.[12] The procedure to achieve this focus will be subsequently defined in regulations yet to be produced under LURB.

44. The Explanatory Notes also confirm EOR will extend the focus of assessment to include assessment of measures taken to improve the delivery of specified environmental outcomes, so they must specify what positive action is being taken. They must also include an assessment of "how matters raised through assessment are monitored or secured."[13] This focus on securing, monitoring and recording mitigation results and enabling transparent public scrutiny of that data is potentially the most crucial aspect of the new regime.

45. However, both the Explanatory Notes and the public

8. Forward to public consultation on EOR opened 17 March 2023, closed 9 June 2023. Government response to consultation awaited at the time of writing.
9. See LURB's Parliamentary Bill website.
10. Explanatory Notes at §820.
11. Improving the natural environment is the stated objective of the Environment Act 2021.
12. Public consultation on EOR, Forward.
13. Explanatory Notes at §824.

consultation on EOR repeat that litigation and uncertainty are key reasons why an entirely new regime was required. That is very unlikely to be the immediate outcome. An entirely new legal regime, especially one which aims to replace regimes as complex and well-established as EIA and SEA, will inevitably lead to litigation and uncertainty, at least in the short to medium term.

46. Moreover, designing a brand new regime in one country of the United Kingdom, which is to be coordinated alongside the wide range of other new regimes, and which will have to exist alongside either the continuation of old regimes or yet different new regimes in other nations of the United Kingdom, will also lead to litigation and uncertainty. There will be gaps, and legal lacunae will inevitably be identified and filled through litigation.

47. At present it is impossible to get an eagle's eye view of how all this regulatory hyperactivity will work together. This is because nearly all the detailed implementation of the Environment Act 2021 and LURB is still to come forward by way of yet-to-be-even-published secondary legislation. There will also be supporting policy and guidance. This too is now a matter of law, insofar as it requires interpretation.[14]

48. It should also be noted that implementing EOR regulations, policy and guidance will be drafted by, at least, four separate government departments and, if the present approach is continued, will be applied and managed separately by these departments. EOR for relevant consents within the planning sector will be designed and applied by DLUHC, for the agricultural and water sector projects by Defra, for energy projects by DESNZ (or whatever this department is called in few years), and for certain transport consents by the DfT.

49. Sitting outside of all of this will be the Habitats regime. The EOR regime will not include Habitats Regulations Assessment ("HRA") or appropriate assessment under the Habitats Regulations, which are themselves presently being reconsidered by Government.

How will this come about?

50. The critical outcomes which the EOR have to focus on are unknown (although they will have to align, at least, with the interim and long-term targets under the Environment Act 2021). These are going to be set out in secondary legislation. The intention is for the indicators to be used in EOR to check whether progress is on track to satisfy the requisite statutory outcomes to be set out in guidance.[15] The guidance is intended to be iterative, updated as knowledge and techniques improve.

51. To assist with the application of best-practice in EOR there will be a permanent working group which will update the EOR guidance as best practice evolves and new science emerges on status of the environment / humanity's effect on it.[16]

Key Issue 1: Non-Regression

52. As required by the Environment Act 2021, the introduction of LURB included an "environmental statement" to Parliament. Baroness Scott of Bybrook confirmed on behalf of the Government "the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law". The commitment to non-regression in environmental protection is repeated throughout the Explanatory Notes, which the courts can use to interpret the legislation, as well as the public consultation.

Key Issue 2: Lack of Detail

53. We do not know EOR will really look like. That is because the entire regime will be set out in secondary legislation. What we do know is as follows.

54. Subsequent regulations will set out what proposals will require EOR (these are intended to fall along the lines of "category 1" and "category 2" developments; i.e. EIA Schedule 1 and 2).

55. All that can be said with any degree of certainty is that the entire EOR regime will lead back to the targets established under the Environment Act 2021. Achieving those targets (again, at least) will be the express long term destination of the EOR regime.

56. At present, the statutory text setting out what an EOR is to include (as set out in the LURB), is as follows:

"An 'environmental outcomes report', in relation to a proposed relevant consent or proposed relevant plan, means a written report which assesses—
(a) the extent to which the proposed relevant consent or proposed relevant plan would, or is likely to, impact on the delivery of specified environmental outcomes,
(b) any proposals for increasing the extent to which a specified environmental outcome is delivered,
(c) any steps [*including reasonable alternatives to these steps*] that may be proposed for the purposes of—
(i) avoiding the effects of a specified environmental outcome not being delivered to any extent;
(ii) so far as the effects of a specified environmental outcome not being delivered to any extent cannot be avoided, mitigating those effects;
(iii) so far as the effects of a specified environmental outcome not being delivered to any extent cannot be avoided or mitigated, compensating for the specified environmental outcome not being delivered, and
(d) any proposals about how—
(i) the impact of the proposed relevant consent or proposed relevant plan on the delivery of a specified environmental outcome, or

14. Following the House of Lords judgment in *Tesco Stores v Dundee City Council* [2012] PTSR 983, per Lord Reed at §§17-22 which confirmed the proper interpretation of planning policy is ultimately a matter of law for the court, whereas the application of relevant policy is for the decision-maker. Statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy constitutes a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration.
15. Public consultation on EOR at §4.3.
16. Public consultation on EOR at §4.21.

(ii) the taking of any proposed steps of the kind mentioned in paragraph (c),
should be monitored or secured."

57. The public consultation confirms the Government is keen to increase the importance of reasonable alternatives but precisely how that will be worked out is yet to be seen. The author's view is that this will show up as an express requirement to apply the mitigation hierarchy under (c) above. Thus, consultants will have to explain in the EOR or Planning Statement how they applied the mitigation hierarchy.

58. The public consultation also confirms the EOR is not intended to contain annexes or appendices. All technical reports will be freestanding so the planning authority website for EOR development will look more like development where EIA is not required, making it easier to identify the relevant environmental information at it will all be separate rather than embedded in a hundred- or thousand-page document.

Key Issue 3: Gaps

59. The Office for Environmental Protection, in their public response to LURB, have pointed out that the extant EIA requirement for environmental effects to be considered at the earliest possible stage does not seem to have been provided for, and there is no reference to the longer consultation timescales, non-technical summaries, need to provide reasons, or any review mechanism in the LURB provisions.

60. Despite the positive language on the new regime, the most apparent gap – as always – is the lack of a clear commitment to the extra funding local planning authorities will need for monitoring and enforcement (not to mention training on the new regime).

61. On top of these additional burdens, local planning authorities will have to report on their progress in meeting the statutory outcomes on an annual basis across all development in their area. It should be recalled this has to be done alongside the implementation, monitoring and enforcement of the new biodiversity net gain regime, all while the authority establishes and monitors Land Use Frameworks and Local Nature Recovery Strategies.

62. The risk of inconsistency has been anticipated. The aim is for England-wide consistency, and so the Government will prepare guidance detailing out how relevant plans and consents demonstrate they are supporting the delivery of specified environmental outcomes. This guidance will aim for consistency of assessment and reflect up-to-date science and methodologies.

63. Finally, the public consultation covers the scope of categories, but not the categories themselves. It omits human health, pollution and risk of major accident categories which are currently included in EIA regime. The failure to include these considerations in the EOR regime is a clear incident of regression and has been pointed out in the UKELA consultation response to the Government.

Key Issue 4: Duty to Take Positive Steps

64. The EOR regime goes further than EIA and SEA because there is now an onus to take positive steps to achieve a specified outcome. This will make the environmental assessment and monitoring regimes a lot more dynamic, but will also intrude on decision-making in a huge range of other spheres. Just how much the government appreciates this is unknown. Baseline data will be crucial. As such, the digitalisation and publication of environmental data, held in a central place, and accessible to the public, could be a huge step forward in terms of environmental improvement.

Key Issue 5: Screening

65. Screening is to be clarified, looking at effects instead of relying on the current thresholds such as project size. The screening process for category 2 should use, for example, the "potential effects on a particular community or species". But will this lead to need for EOR to determine the need for EOR?

Key Issue 6: Cumulative Effects

66. This aspect of EOR is interesting, because the Government says consideration of cumulative effects is rarely a helpful aspect of EIA / SEA. It wants it done once at a strategic scale. But plans are produced once every 15 years, if then (York), and given the dynamic nature of the environment and its complex interactions – especially in light of changes brought about by climate change – this timescale is unlikely to result in a useful and effective assessment of the environmental impacts of a plan, let alone project.

Key Issue 7: Enforcement

67. As the focus appears to be on the now-statutory application of the mitigation hierarchy there *should* be a reduction in the requirement for mitigation measures and associated post-implementation monitoring and enforcement.

68. LURB sets out a long list of additional sanctions that may appear in the subsequent regulations, including new criminal and civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 (in the latter case, even where there is no offence). Powers of entry, inspection, search, seizure / detention, and the use of reasonable force have also been provided for.

69. There is also this interesting provision in LURB (presently clause 160(3)):

"EOR regulations may make provision requiring action to be taken, if an assessment or monitoring … determines that is appropriate for the purposes of—
(a) increasing the extent to which a specified environmental outcome is delivered,
(b) mitigating or remedying the effects of a specified environmental outcome not being delivered to any extent, or
(c) compensating for a specified environmental outcome not being delivered to any extent."

70. Precisely what "action" means and whether there will be any further restriction beyond it being considered "appropriate" to take action have not been specified, and we must await the secondary legislation to understand what the scope of this ostensibly incredibly broad power to enforce will be.

Key Issue 8: Nature of EOR

71. Thinking about the process at a deeper level, the fundamental nature of the change is apparent. EOR looks like an interesting hybrid between EIA and HRA: EIA is a heavily regulated process with no determined outcome, whereas HRA has no defined procedural framework, but a very strictly defined – and controlled – outcome. EOR will have both a legally defined process (as in EIA), which must achieve a legally defined outcome (as in HRA). Is this the best or worst of both worlds? The provisions enabling public accessibility of transparent, standardised environmental data means information on whether or not measures are succeeding will finally be readily available. If this accountability follows through to improved implementation and is backed up by effective enforcement, then it can be said the new regime could result in significant environmental improvement in line with the objective of the Environment Act 2021.

Conclusion on EOR

72. There is no timetable for the production of the draft outcomes or guidance yet, but the Government has confirmed they will be consulted on. A transition period for the secondary legislation that will follow this second consultation is likely to be one-two years, although a transition period as short as six months was consulted on.

73. The ludicrous inefficiencies in the current EIA / SEA regimes do need to be resolved and there is an encouraging indication the Government is committed to a simpler, more accountable and easier to navigate regime. A centralised, standardised, high-quality, replicable and regularly updated database on the state of the environment is badly needed. There is reason to believe this, combined with the monitoring of outcomes, will ultimately lead to improved mitigation strategies. Public accountability is also welcome, for it will enable the use of citizen science and greater leveraging of the valuable expertise within environmental NGOs such as the Rivers and Wildlife Trusts.

74. Looking at whether the regime will be effective, the reliance on LPA action post-implementation absent a commitment to ensure capacity is wrongheaded in light of the current constraints on the bodies tasked with monitoring and enforcement, and fails to address almost every practical constraint. The constant refrain needs to be repeated: without additional resources for local planning authorities the new EOR regime is likely to be yet another system of environmental reporting and box ticking rather than management leading to actual environmental improvement on the ground.

Law correct at time of writing 2 October 2023. This paper is for educational purposes only and does not constitute legal advice. For legal advice please contact the authors.


Harriet Townsend


Nina Pindham

cornerstone barristers

Annual Planning Day, Cornerstone Barristers | November 2023

Building Beautiful: Design in the Courts and on appeal

by Richard Ground KC and Matt Lewin

Introduction

1. In April 2023, the Department for Levelling Up, Housing and Communities ("DLUHC") issued a decision notice on behalf of the Secretary of State relating to a called-in application for a 165-home scheme in the High Weald Area of Outstanding Natural Beauty in Kent.[1] The decision included this assessment of the scheme's design:

"The Secretary of State recognises that both the HWAONB Management Plan and the High Weald Housing Design Guide emphasise that housing development in the HWAONB should be landscape-led. Whilst he agrees with the Inspector that the proposed development would deliver landscape enhancements (IR826), he does not find the proposal to be of a high standard which has evolved through thoughtful regard to its context (IR723). Overall, he does not find that the scheme is sensitively designed having regard to its setting. He finds that the design of the proposal does not reflect the expectations of the High Weald Housing Design Guide, being of a generic suburban nature which does not reproduce the constituent elements of local settlements."

2. The dismissal of the scheme's design as being of a "generic suburban nature" was widely reported. In a leading article published shortly after the developer – Berkeley Homes – issued a section 288 challenge to the Secretary of State's decision, *The Times* commented:

"There are a lot of unprepossessing, not to say ugly, homes in this country, many a legacy of brutalist and insensitive development. Somehow, British architects and builders in the post-war period failed regularly to replicate what their Victorian, Edwardian and inter-war counterparts so often achieved: homes that were not only practical but pleasing on the eye. So, Michael Gove, the housing secretary, should not be mocked when he calls for more beautiful house designs, ones which chime with their surroundings and 'lift the heart'. However, there are limits to how far this insistence on aesthetic perfection should be allowed to govern housebuilding in a country chronically short of affordable homes. In his eagerness to foster an attractive built environment, Mr Gove is at risk of deterring developers from investing in schemes they fear may fall foul of his tastes.

… In going after a relatively small development, the housing secretary is signalling that none will escape his roving eye. This is micromanagement with a vengeance. Of greater concern is the fact that the housing secretary's grounds for refusal appear so subjective that no developer will be able to formulate what is and what is not 'Gove standard'." [2]

3. The case – and the controversy it sparked – highlight the difficulties in identifying acceptable design quality in a plan-led system. For all the government's emphasis on requiring high standards of design – even beauty – for new development, it remains an elusive concept. There is no universal standard of good design and attitudes towards design are influenced by a number of different factors, which vary according to context and time. Moreover, as The Times observed, housebuilding at the scale required in the UK has the potential to conflict with an "insistence on aesthetic perfection."

4. In this paper, we set out a path for developers navigating this challenging area: we consider the role design has played recently in the courts and planning policy and look ahead to two design issues in particular which could begin to feature more prominently in planning decisions in future, retrofitting and heat.

Design in the courts

Tate Modern viewing platform[3]

5. The interesting question for us planners from this Supreme Court case is whether it is for the planning system to police private

1. APP/M2270/V/21/3273015.
2. *The Times*, "The Times view on Michael Gove's fight for 'beautiful' new houses: Home Truths" (1 May 2023).
3. *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent)* [2023] UKSC 4.

rights or can that be left to private law claims.

6. The short answer to that question is that overlooking may well be relevant to both planning decisions and private law nuisance claims. However the planning system and the existence of a permission is not a defence to a private law claim in nuisance. Planning laws do not cut down private law rights. The planning system operates to control development in the public in interest and so it may give permission for something that is a private nuisance.

7. This was all explained by the majority judgment of Lord Leggatt in *Fearn and others v Board of Trustees of the Tate Gallery* [2023] UKSC 4:

109 The second matter of policy raised by the Court of Appeal was a suggestion that planning laws and regulations would be a better medium for controlling "inappropriate overlooking" than the common law of nuisance (para 83). This seems to me to overlook (if I may use the term) the fact that, while both may sometimes be relevant, planning laws and the common law of nuisance have different functions. Unlike the common law of nuisance, the planning system does not have as its object preventing or compensating violations of private rights in the use of land. Its purpose is to control the development of land in the public interest. The objectives which a planning authority may take into account in formulating policy and in deciding whether to grant permission for building on land or for a material change of use are open-ended and include a broad range of environmental, social and economic considerations. While a planning authority is likely to consider the potential effect of a new building or use of land on the amenity value of neighbouring properties, there is no obligation to give this factor any particular weight in the assessment. Quite apart from this, as Lord Neuberger observed in Lawrence v Fen Tigers Ltd [2014] UKSC 13; [2014] AC 822, para 95:

"when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights."

110 For such reasons, the Supreme Court made it clear in Lawrence that planning laws are not a substitute or alternative for the protection provided by the common law of nuisance. As Carnwath LJ said in Biffa Waste, para 46(ii), in a passage quoted with approval by Lord Neuberger in Lawrence, at para 92:

"Short of express or implied statutory authority to commit a nuisance … there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

The practical as well as legal irrelevance of planning permission in this case is apparent from the judge's finding that no consideration was given to overlooking in the planning process for the Tate extension: [2019] Ch 369, paras 58-63.

8. It is important that the dissenting judgment of Lord Sales did not disagree on this aspect of the role of the planning system. Lord Sales firstly set out the somewhat unusual factual background which meant that the planning decision had not considered the overlooking point:

148 The designs for the Blavatnik Building always included a viewing gallery in some form, although its precise extent varied through successive iterations of the design. Planning policy for the South Bank encourages the construction of viewing galleries in buildings of significant height. However, there is no planning document which indicates that overlooking by the viewing gallery in the direction of Block C was considered by the local planning authority at any stage. It is not likely that the planning authority considered the extent of overlooking. Further, while the Neo Bankside developer was aware of the plans for a viewing gallery, it did not foresee the level of intrusion which resulted. In broad terms, the design and construction of the Blavatnik Building with the viewing gallery in its final form took place in parallel with the design and construction of Neo Bankside, without the effects of the one on the other so far as visual intrusion was concerned being fully appreciated or addressed.

9. He similarly concluded that the planning system could reach a different decision on overlooking than a private law nuisance claim. A grant of planning permission could not remove private law rights:

201 At para 81 the Court of Appeal also pointed out that overlooking is frequently a ground of objection to planning applications and noted that "any recognition that the cause of action in nuisance includes overlooking raises the prospect of claims in nuisance when such a planning objection has been rejected". However, other forms of activity which can give rise to claims in nuisance, such as the generation of noise, smoke or smells, are also matters which may be addressed in objections to planning applications, so this does not give rise to any point of distinction. More fundamentally, as this court pointed out in Lawrence, at paras 77-95 per Lord Neuberger, the planning regime is concerned with issues of the public interest, not with resolving questions of individual rights. So it is not surprising, and is not a matter of particular concern, that a cause of action in nuisance may be found to exist in a case where an objection to the grant of planning permission founded on similar matters has been rejected. A grant of planning permission pursuant to the administrative processes under the planning regime cannot remove private rights which neighbouring landowners may have. See also Hunter, p 710D, per Lord Hoffmann and Lawrence, paras 156 (Lord Sumption), 165 (Lord Mance) and 193 (Lord Carnwath).

Character and appearance

10. Very recently *Planning Resource* suggested in a headline that there was a decision of the Court of Appeal which would make *"it easier for councils to resist proposals that are likely to change suburban areas"*.[4] Clearly it is a very common reason for refusal that is fought over on appeal in numerous cases whether there is an adverse effect on character and appearance. If the Courts have changed that it is an important matter. However if you are faced with such a reason for refusal and this case is referred to reading the judgment repays the time.

11. The single question that arose in the case of *Kazalbash v Secretary of State for Levelling-Up, Housing and Communities* [2023] EWCA 904 was whether "*the inspector erred in law in concluding that the proposed development would harm the character and appearance of the area*". The development proposed was the subdivision of 26 Highland Road in Hillingdon. This was a road with as the Council described "a continuous line of properties with a rigid building line and uniform plot widths".

12. What had inspired David Elvin KC (sitting as a Deputy High Court Judge) to quash the decision at first instance was that:

"*Nothing was identified .. which would change the physical form or appearance of the extension when it became a separate dwelling which would impact on the street scene.*"

On that basis he quashed the decision because the Inspector had taken into account an immaterial consideration, namely that there was an impact on the appearance.

13. However, the Court of Appeal disagreed with that and concluded that the Inspector had in fact found that there would be a change to the physical appearance. Lindblom SPT said the following:

"*But secondly he [referring to the inspector] was also in no doubt that this change to the site would be visible – as Nugee LJ put it in the course of argument, a change would be read.*"

14. This is possibly explained by the most visible element in fact being a fence which could have been put up under permitted development rights. The Inspector had reached the view that limited weight should be given to the fallback of the fence because it was unlikely to be erected absent the proposal.

15. The decision of the Court of Appeal does not support a refusal of a scheme on the basis of character if there is simply no change to appearance. It does, however, say that the expression "character and appearance" "*is self evidently a larger concept than appearance alone.*"

16. Perhaps unsurprisingly the Court did not offer any particular guidance on what was included in the concept of character and how that was distinguished from appearance. Lindblom SPT said of character and appearance: "*How much larger and what considerations it might embrace we do not need to determine. … distinguishing here between considerations of 'character' and those of 'appearance' is not necessary.*"

PD Prior Approvals on upwards extensions

17. The case of *CAB Housing Limited v Secretary of State Levelling-Up, Housing and Communities* [2023] EWCA 194 dealt with the scope of the prior approval process.

18. Class AA of Part 1 of Schedule 1 to the GPDO 2015 was introduced in 2020 and allowed one or two additional storeys to be built above dwellinghouses. It allows one storey if the existing dwelling has one storey and two if it is two or more storeys. In the section that deals with what is not permitted it stipulates the maximum height of the additional storeys.

19. The argument in this case all centred around the scope and interpretation of the prior approval application. The relevant part of the GPDO is Schedule 2, Part 1, Class AA2(3) which provides as follows:

The conditions in this sub-paragraph are as follows –

> *(a) before beginning the development, the developer must apply to the local planning authority for prior approval as to –*
>
> *(i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;*
>
> *(ii) the external appearance of the dwellinghouse, including the design and architectural features of –*
>
> *(aa) the principal elevation of the dwellinghouse, and*
>
> *(bb) any side elevation of the dwellinghouse that fronts a highway*

20. The argument was made that the whole purpose of this provision was to make the prior approval light touch and limited in scope and so these provisions must be construed narrowly so that these extra floors cannot be too readily turned down.

21. Lindblom SPT decided that the Inspector and Judge below were correct that the scope of the prior approval was wider than was being alleged by the appellant:

(a) the authority could consider scale and seek to control that

4. David Blackman, "Why a court ruling that an area's 'character' goes beyond appearance is important for planning suburban development" (*Planning Resource*, 24 August 2023).

under the prior approval process, and it was relevant to the impact on amenity and external appearance. Scale had not been set by the maximum provisions in the GPDO;

(b) when it used the phrase impact on the amenity of any adjoining premises this is used to mean lying close or contiguous to and not the narrower meaning of being merely contiguous;

(c) impact on amenity is not just limited to overlooking privacy and loss of light. For example impacts from increases in noise and activity can be relevant. Overshadowing or changes to outlook can be relevant; and

(d) effects on external appearances is not limited to the principal and side elevations.

22. The effect of this is that these wider design matters such as scale, effect on premises lying close, effect on amenity and effect of all the elevations can all be relevant to the prior approval process.

Design in planning policy

23. Achieving "good design" has long been an objective of national planning policy. Since 2008, development management decisions have had to be made having regard to not only to the development plan and national policy but also to the "*desirability of achieving good design*".[5] In the years since, design has slowly but surely crept up the political agenda.

24. In the original NPPF, published in 2012, design was the subject of a discrete chapter and "good design" was described as a "*key aspect of sustainable development*". Local planning authorities were advised to "*consider using design codes*" but that these should "*avoid unnecessary prescription or detail*" (paragraph 60) and were instructed to refuse planning permission "*for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions*" (paragraph 64).

25. In the 2019 NPPF, "*the creation of high quality buildings and places*" was described as "*fundamental to what the planning and development process should achieve*" (paragraph 124). Slightly more encouragement was given for the adoption of design codes (paragraph 126):

"*To provide maximum clarity about design expectations at an early stage, plans or supplementary planning documents should use visual tools such as design guides and codes. These provide a framework for creating distinctive places, with a consistent and high quality standard of design. However their level of detail and degree of prescription should be tailored to the circumstances in each place, and should allow a suitable degree of variety where this would be justified.*"

26. The use of design codes was reinforced by paragraph 130, which retained the expectation that poor quality design should result in refusal of permission, "*taking into account any local design standards or style guides in plans or supplementary planning documents*". Nonetheless, the use of design codes was not – at this stage – mandatory and, at least anecdotally, it was reported that authorities lacked both the resources and in-house expertise to develop and implement local design codes.

27. Even before the 2019 NPPF was published, the government was taking steps to promote better design as a key political objective. In late 2018, it created the Building Better, Building Beautiful Commission and tasked it with gathering evidence to inform "*practical policy solutions to ensure the design and style of new developments, including new settlements and the country's high streets, help to grow a sense of community and place, not undermine it.*" One of its specified aims was to act as "*champions and advocates for the Government's commitment to beauty in the built environment.*"

28. In October 2019, it published the National Design Guide ("NDG") which set out 10 "characteristics of beautiful, enduring and successful places" and was intended to be used as a framework for developing local design codes.

29. The Building Better, Building Beautiful Commission issued its final report – *Living with Beauty: Promoting health, well-being and sustainable growth* – in January 2020. One of its recommendations was that planning policy should "ask for beauty" and that this could be achieved by not only adding the word "beauty" throughout the NPPF but by elevating it to a "*strategic and cross-cutting [theme]*" of national planning policy. This would be achieved by, in particular, the development of "form-based codes and pattern books, as a basis for considering planning applications".

30. In August 2020, DLUHC issued an ambitious white paper – *Planning for the Future* – which proposed sweeping away much of the existing planning system, including the replacement of discretionary, case-by-case decision-making with a system of zoning. The reforms rested on three "pillars", of which the second was "planning for beautiful and sustainable places". It stated an intention to develop a National Model Design Code ("NMDC") to supplement the NDG, setting out more detailed parameters for development in different types of location. It also outlined a proposal to encourage the adoption of local design codes "wherever possible", whether by inclusion in a local plan or neighbourhood plan by or developer-led masterplanning specific sites or areas.

31. The government responded to the Commission's report (in January 2021) with much fanfare, trumpeting the fact that the word "beauty" would be specifically included in planning rules

5. Section 39(2A) of the Planning and Compulsory Purchase Act 2004.

for the first time since 1947. The majority of the Commission's recommendations were accepted, which resulted in the publication of the National Model Design Code ("NMDC") which was intended to supplement the NDG. The NMDC provides more detailed guidance on the production of design codes, guides and policies to promote successful design.

32. The next development was the revision of the NPPF in 2021. As promised, this introduced reference to beauty: "*The creation of high quality, beautiful and sustainable buildings and places is fundamental to what the planning and development process should achieve*" (paragraph 126). Emphasising the values of certainty and predictability, paragraph 128 required local planning authorities to:

"*prepare design guides or codes consistent with the principles set out in the National Design Guide and the National Model Design Code, and which reflect local character and design preferences. Design guides and codes provide a local framework for creating beautiful and distinctive places with a consistent and high quality standard of design. Their geographic coverage, level of detail and degree of prescription should be tailored to the circumstances and scale of change in each place, and should allow a suitable degree of variety*."

33. Reducing uncertainty and dispute had been a key concern of the Building Better, Building Beautiful Commission:

"*We have one of the most adversarial and litigious planning systems and one of the most concentrated development markets in the world. We need a clearer approach to reduce planning risk and to permit a greater range of small firms, self-build, custom-build, community land trusts and other market entrants and innovators to act as developers. In this way our planning system will better respond to the preferences of people as a whole, within a more predictable framework.*"

34. The final piece of the jigsaw will be the Levelling-up and Regeneration Act. The Act, once it completes its passage through Parliament, will go one step further by introducing a statutory duty on authorities to adopt a local design code.[6] Importantly, the design code – which applies at the spatial scale of the whole of the authority's area – will form part of the statutory development plan, either as part of the local plan itself or in a (new) "supplementary plan". At least in principle, the effect will be that detailed design requirements should now assume greater importance in the planning process, particularly given the greater emphasis which will be placed on the development plan as a result[7] of other amendments to be made by the Act.

35. However, for all the political attention devoted to the topic of design, there remain reasons to question how much of a change this will make in practice. The statutory duty to adopt a design code is clear that: (a) the code will apply to "every part of [the authority's] area and (b) it does not need to specify requirements "*for every description of development for every part of [the authority's] area*" or "*in relation to every aspect of design*."

36. Recent experience from DLUHC's pilot programmes to test the application of the National Model Design Code ("NMDC") suggests that authority-wide level documents tend to skew towards more generic statements of guidance than detailed prescriptions.

37. One of the authors of the NMDC argued that the whole purpose of a design code is to minimise discretion:

"*Our current planning system is discretionary, policies are worded in general terms and planning applications are negotiated between architects and their clients, and planning officers and their committees – who have a great deal of leeway. A system based on coding, in theory, removes much of the discretion; architects may feel hidebound by the provisions of a code but so are planners.*

The whole point of a code is that it is clear and binary. It uses words like 'must' and 'shall' and includes figures and parameters. There is no 'shall seeks' or 'where appropriates' or 'high quality designs'. This is understood and set out very clearly in guidance for coding being prepared by the Office for Place."[8]

38. However, a review of phase one of the pilot programme found that, in practice, most of the pilot authorities had passed over the more prescriptive aspects of the NMDC, particularly the option to code for "area types", noting that authority-wide codes tended to deal with "generic principles".[9] However, a design code that provides general or flexible principles is not a code at all; it is a guide. The great advantage of a prescriptive design code is to promote certainty and reduce areas of dispute.

39. Nonetheless, the review did find that authorities tended to favour a more prescriptive approach to certain design issues which are more amenable to being expressed as target metrics, including density ranges, movement targets, land use mixes, street patterns, boundary treatments and energy use. Perhaps tellingly, the academic who led the review noted that "*[a]lmost all the pilots struggled with the notion of beauty and few found it useful in either their analysis, engagement or coding*."[10] Instead, pilots attempted to identify more tangible issues that contributed to an area's character, such as landscape, density, height and building line.

40. One additional point that emerged from the phase one pilot worth highlighting was on the importance of engaging with developers at an early stage of developing a design code. For all the importance attached to community engagement, clearly the end result is dependent on commercial realities. The review acknowledged that viability represents a major constraint on design choices and therefore input from local developers to establish what can realistically be achieved in terms of design outputs is essential.

6. At the time of writing, the Levelling-up and Regeneration Bill had passed its third reading in the House of Lords.
7. New section 38(5B) of the Planning and Compulsory Purchase Act 2004 will provide that planning applications should be determined in accordance with the development plan and any national development management policies, taken together, "unless material considerations strongly indicate otherwise.
8. David Rudlin, "What will design codes in local plans mean for you?" (RIBA Journal, 17 January 2023).
9. DLUHC, "National Model Design Code (NMDC) Pilot Programme Phase 1: Monitoring & evaluation – executive summary" (20 June 2022).
10. Matthew Carmona, "88. Testing Design Codes in England – 21 Lessons" (matthew-carmona.com, 22 June 2022). This sentiment was omitted from the official version of the review published by DLUHC.

Future design issues

41. Despite the government's celebration of "beauty" as an aspiration for our planning system, perhaps the more important changes brought about by this recent flurry of policy development arise from the increased emphasis on sustainable design choices. Throughout the document, the NDG refers to the impact of climate and environmental change on our built environment.

42. Although the planning system has long recognised its role in mitigating and adapting to climate change,[11] in the last few years this has become an increasingly urgent imperative. In its most recent progress report to Parliament, the Climate Change Committee complained that national planning policy was misaligned with the government's statutory Net Zero obligations and recommended "*an overarching requirement that all planning decisions must be taken giving full regard to the imperative of Net Zero*".[12] A late amendment to the Levelling-Up and Regeneration Bill narrowly passed by the House of Lords during the Bill's third reading in September 2023 would have required planning decision-makers to have "special regard" to the mitigation of, and adaptation to, climate change. However, at the time of writing, it looked likely that the amendment would be rejected by the House of Commons.

43. Regardless of whether that statutory duty makes its way into law, two aspects of sustainable design which could well begin to feature more prominently in planning decision-making in the near future are retrofitting – contributing to climate change mitigation – and designing for heat – part of climate change adaptation.

Retrofitting

44. One of the more significant decisions of 2023 was the Secretary of State's called-in decision regarding the proposed demolition and replacement of the Marks and Spencer department store on Oxford Street in the West End of London.[13]

45. The M&S store on Oxford Street occupies three separate buildings: a 1930s former office block and two 1970s extensions. The Inspector found these buildings in a sorry state, describing "a squeaky escalator, a lack of air conditioning to the upper levels, scuffed floor coverings, stained ceiling tiles, one of the cafés operating reduced hours, unused retail areas, and a sense of unloved displays especially on the upper floors with few visitors" on a site visit – which he attributed to a lack of investment [IR 2.5]. M&S itself described the store as "failing" and pointed to a proliferation of low-grade "*American candy stores*" which were depressing the retail offering on Oxford Street.

46. M&S' proposal was to demolish and remove all buildings on site, excavate a two-storey basement and redevelop the site for a mixed retail-office-leisure use. Key to the new scheme was the proposition that a refurbishment of the existing buildings was neither viable nor deliverable [IR 5.6-5.7]. The original building had not been designed for retail use whereas the new scheme had been designed specifically for M&S.

47. For present purposes, what is of particular interest is the debate at the inquiry about the sustainability credentials of the proposed redevelopment. Paragraph 152 of the NPPF states that:

"*The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.*"

48. The debate on this issue focussed on the concept of "embodied emissions". Embodied emissions refer to the "non-operational" emissions of a building, i.e. those associated with raw material extraction, manufacture and transport of building materials; construction; maintenance, repair and replacement; and demolition and disposal. A growing consensus is emerging that focussing only on "operational emissions" (i.e. those associated with heating, cooling and other building services) fails to provide a true picture of a building's environmental impact.

49. This point was helpfully illustrated by the M&S case. It was common ground at the inquiry that the new development's operational environmental performance would be fully optimised: it would use the latest techniques for energy efficiency and could achieve a BREEAM rating of outstanding. However, as the Inspector observed, the process of realising that building would be associated with substantial carbon emissions:

"*The proposals would demolish and remove relatively recent and structurally sound buildings for a larger new development. This would include two levels of basement, when only one exists at the moment (and the floor plans suggest that the justification for the extent of the second is tenuous) and further floors of offices above the current roof level. Every step of this process would involve the use of energy, currently provided by fossil fuels, and so exacerbate climate change. The scheme would not achieve net-zero but would rely on a financial contribution to comply with policy. The amount of embodied energy, that is the energy that would go into construction, would be substantial. … On the face of it, the scheme should be roundly condemned, as it has been by SAVE [Britain's Heritage] and many other participants and commentators." [IR 13.32]*

50. The means of assessing the total carbon emissions resulting from the construction, use and demolition of a building over its entire life is referred to as "Whole Life-Cycle Carbon" ("WLC")

11. Section 19(1A) of the Planning and Compulsory Purchase Act 2004.
12. Climate Change Committee, *Progress in reducing UK emissions: 2023 Report to Parliament* (June 2023).
13. APP/X5990/V/22/3301508.

assessment. The purpose of a WLC is to demonstrate – at the design stage – what the carbon emissions performance of the building will be over its lifetime, and therefore to inform decisions about reducing those emissions. Where a WLC assessment is required by local planning policy, it will typically need to show that actions have been and will be taken to reduce WLC emissions.

51. It is important to note that reducing emissions is not only an environmental imperative; there are compelling commercial reasons for doing so. As the RICS has noted, a reduction in carbon cost is strongly associated with a reduction in financial costs because both reductions rely on an efficient use of resources.[14]

52. Nonetheless, despite WLC assessments having been in circulation for many years, it remains a developing area. Notwithstanding paragraph 152 of the NPPF, there is no national planning policy requiring WLC assessment for any form of development and only a small handful of local plans currently mandate it (the London Plan being a notable example) – and even then typically only for limited categories of development. Moreover, despite the existence of a British Standard[15] and professional guidance[16] , the approach to calculating WLC emissions remains a developing area.

53. This point was well-illustrated by the M&S case, in which the main parties were in dispute about whether, over the 60-year period typically assessed in a WLC assessment, a refurbishment was more carbon-efficient than a complete replacement. The scheme promoters argued that, given the age and design of the building, retaining the existing structure would require ongoing maintenance and result in poor operational energy performance. Those opposed to the scheme argued that M&S' WLC assessment was flawed because it had chosen inappropriate and unfair alternative schemes to compare against its proposed scheme. Neither the Inspector nor the Secretary of State came to a definitive conclusion on this dispute, with the Secretary of State noting that "*the understanding of WLC assessment and the tools available for calculations are still developing, and therefore it is no surprise that there was disagreement over the lifetime carbon usage for the proposals and, more particularly, for a refurbishment*." [DL21]

54. The reason why this case is of wider significance is because of the way the Secretary of State approached the application of paragraph 152 of the NPPF. The Inspector had described paragraph 152 as "generally [creating] a strong presumption in favour of repurposing and reusing buildings". [IR 13.43] The Secretary of State agreed with that general statement of principle, adding that "*[i]n the circumstances of the present case, where the buildings in question are structurally sound and are in a location with the highest accessibility levels, he considers that a strong reason would be needed to justify demolition and rebuilding." [DL24]*

55. On the facts of the M&S case – at least in the assessment of the Secretary of State, who disagreed with the Inspector on this point – M&S were unable to overcome the presumption of repurposing and reusing the existing buildings: it had "*not demonstrated that refurbishment would not be deliverable or viable and nor has [it] satisfied the Secretary of State that options for retaining the buildings have been fully explored, or that there is compelling justification for demolition and rebuilding*." [DL 32]

56. What lessons, then, does this case[17] provide for developers promoting comprehensive redevelopment of brownfield sites?

57. Firstly, it would appear that despite not being a requirement in national planning policy, a WLC assessment is now an essential tool for rebutting the presumption in paragraph 152 of the NPPF that buildings should generally be retained rather than demolished and replaced.[18]

58. Secondly, alternative schemes should be considered at the early stages of design; a clear audit trail demonstrating how and why alternatives have been rejected will be an important part of justifying a replacement scheme.

59. Thirdly, when comparing complete replacement against alternatives, it will be important to make sure that comparison is robust: the alternatives selected for assessment should be reasonable and the assumptions made in the assessment should be fair (i.e. not excessively optimistic or pessimistic).

60. Finally, the case emphasises the value of skilled architects and designers. As the Secretary of State noted in the decision letter, inevitably repurpose and reuse of existing buildings presents more challenges than starting with a blank canvas. However, "*such problems are not uncommon and … architects are used to facing and overcoming such difficulties through skilled design*." [DL30]

61. It should be noted that the NDG does not appear to provide as strong an endorsement of re-use than the Secretary of State's approach in the M&S case. The NDG takes a more nuanced approach, advising that "*re-use and adaptation of existing buildings reduces the consumption of resources and contributes to local character and context*" (paragraph 145) while also recognising that "*new construction techniques … offer the potential to reduce whole life costs*" (paragraph 146). In other words, as was debated (but not definitively resolved in the M&S case), when viewed from a long-term perspective, re-use of an old, inefficient building may more carbon-intensive than starting again from scratch.

Designing for heat

62. In the summer of 2022, the UK (along with many parts of the world) experienced a prolonged heatwave which broke numerous temperature records. Most notably, the UK recorded air temperatures in excess of 40C for the first time ever, which the

14. Simon Sturgis, "The RICS Whole life carbon assessment for the built environment: how, why and what next?" RICS Construction Journal (9 June 2020).
15. BS EN 15978.
16. For example: RICS Professional Statement: Whole Life Carbon assessment for the built environment (1st edition, 2017); London Plan Guidance: Whole-Life Cycle Carbon Assessments (March 2022).
17. At the time of writing, a section 288 challenge to the Secretary of State's decision – which M S' CEO Stuart Machin described in a public statement as "pathetic" – was ongoing.
18. Making WLC assessment mandatory was recommended by the Climate Change Committee in its 2023 Progress report to Parliament.

Met Office described as something "virtually impossible" without the effects of anthropogenic climate change. While the highest temperatures were recorded in England, temperature records were also broken in Scotland and Wales.[19]

63. The excessive heat caused disruption throughout the country. Schools and other public services closed, workers were advised to stay away from offices, trains were either cancelled or suffered serious delays due to reduced speed limits and Luton Airport was forced to close briefly after the heat caused a defect in the runway. The north of England experienced faults with the power network while in the south of England there was low water pressure and interrupted supply. Perhaps most alarming of all were wildfires in various parts of England, including east London, Lincolnshire and Leicestershire.

64. It has been widely reported that the UK has some of the oldest housing stock in Europe, much of which is poorly insulated and that huge levels of investment will be required to improve the efficiency with which UK homes are heated. However, perhaps less attention has been paid to the importance of cooling homes and other buildings in the UK. In a 2021 report to the (then) Department for Business, Energy and Industrial Strategy, researchers identified as a key challenge to the government's net-zero duty that "*summer demand for cooling in buildings is expected to rise as a result of warming from climate change and the need to deliver an indoor environment that is healthy and provides a productive workplace.*"[20] The report also noted that although the current demand for cooling is dominated by non-domestic buildings, by 2100 it is estimated that the domestic stock will require 75-75% of the cooling energy consumption.

65. The Met Office has forecast that heatwaves are likely to be a permanent feature of UK summers. Although the UK has not experienced the persistent extreme temperatures which continental Europe and other parts of the world have endured in recent years, the fact remains that UK infrastructure – from its housing stock and non-domestic buildings to its transport network – has not been designed to tolerate sustained high temperatures, as was amply demonstrated during the 2022 heatwave.

66. What will be the response of the planning system? Many plans contain policies designed to mitigate against the risk of overheating, typically in the context of residential or user amenity. Presumptions against single-aspect dwellings, which are more difficult to naturally ventilate, especially with south-facing orientations, are a common feature of such policies.

67. Some plans include policies which seek to combat overheating beyond the level of individual buildings, acknowledging the "urban heat island" effect. The urban heat island effect is well-known, having been identified as early as the 19th century. It refers to the phenomenon whereby urban areas experience higher air temperatures than the surrounding areas. It is associated with all urban areas, regardless of size and climate. It is caused by the displacement of natural surfaces, which help to moderate air temperatures, with man-made surfaces, many of which tend to absorb and re-emit heat, resulting in their surroundings becoming warmer. Although the heat is primarily generated by sunlight, human activities (e.g. power generation and vehicle use) are also contributing factors. The urban heat island effect is a significant risk to public health and climate change, not least because it tends to intensify energy consumption worsening both air pollution and carbon emissions.

68. Perhaps unsurprisingly given its status as the UK's largest urban area, the London Plan (2021) includes a specific policy dedicated to "managing heat risk" (SI4). It requires all development proposals to minimise adverse impacts on the urban heat island effect through design, layout, orientation, materials and green infrastructure and mandates a "cooling hierarchy" for major development:

(1) reduce the amount of heat entering a building through orientation, shading, high albedo materials,[21] fenestration, insulation and the provision of green infrastructure;
(2) minimise internal heat generation through energy efficient design;
(3) manage the heat within the building through exposed internal thermal mass and high ceilings;
(4) provide passive ventilation;
(5) provide mechanical ventilation; and
(6) provide active cooling systems.

69. This is similar in approach to the energy hierarchy set out in the NDG:

138. Well-designed places and buildings follow the energy hierarchy of:

- *reducing the need for energy through passive measures including form, orientation and fabric;*
- *using energy efficient mechanical and electrical systems, including heat pumps, heat recovery and LED lights; and*
- *maximising renewable energy especially through decentralised sources, including on-site generation and community-led initiatives.*

70. As the UK's climate warms, and heatwaves become a more common hazard of living in our urban areas, it can be expected that planning authorities elsewhere in the country will begin to develop more detailed measures for combatting the urban heat island effect. The 2021 BEIS report helpfully identified 10 broad categories of cooling measures which are likely to feature in such policies:

(1) External shading: overhangs, shutters and other external

19. BBC News Online, "Climate change: Summer 2022 smashed dozens of UK records" (14 October 2022).
20. BEIS, *Cooling in the UK* (2021/050, August 2021).
21. "Albedo" refers to the measure of solar reflectivity and absorption; high-albedo materials are materials with a high level of solar reflectivity and low levels of solar absorption.

features can provide passive protection against solar radiation. These affect the external appearance of buildings and therefore may be something that comes to be addressed in local design codes.

(2) Internal shading: generally lower cost but less effective than external shading.

(3) Ventilation: both natural and mechanical. Generally an effective approach to cooling in the UK where the external air temperature is typically lower than internally. It is therefore less effective during heatwaves in which case it can increase the demand for cooling.

(4) Thermal mass: high thermal mass buildings can mitigate peaks in internal temperatures by absorbing heat and allowing it to dissipate later. Note that high levels of thermal mass in bedrooms (and other rooms occupied at night) are unhelpful because heat is dissipated at night.

(5) Green and blue infrastructure: vegetation and water can provide cooling effects through evapotranspiration and evaporation respectively (e.g. green roofs, tree planting, ponds) as well as improving biodiversity and amenity.

(6) Reflective materials: materials with high reflectivity (albedo) levels can reduce the warming effect of solar radiation (e.g. using white or other light colours for walls, roofs and paving).

(7) Active technologies: air conditioners and, increasingly, heat pumps which are based on the refrigeration cycle.

(8) Cooling emitters: supplying chilled fluid to rooms in a building.

(9) Building form: designing the building form to provide shade to key areas and enabling ventilation. Obviously this must be balanced against a number of potentially competing planning considerations, such as achieving adequate internal daylight levels, space standards and overshadowing neighbouring buildings.

(10) Cultural factors: these include working patterns which are largely beyond the control of the planning system.

71. The NDG makes similar recommendations in paragraphs 147-150.

72. It is clear that the planning system acknowledges the risks of excessive heat and that many planning policies require mitigation measures. As the UK's climate continues to warm, and heatwaves become a more common hazard of living in our urban areas, it will be essential that new development incorporates measures such as these to ensure that our towns and cities continue to function as liveable, workable places.

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How to get planning permission for your residential scheme in the Green Belt

by Josef Cannon and Emma Dring

Introduction

1. The persistence of the housing crisis, and the National Planning Policy Framework (NPPF) imperative to boost the supply of housing in response, has led to a series of recent appeal decisions concerning schemes for residential development on Green Belt sites.

2. Residential development in the Green Belt will be "*inappropriate development*" (unless the scheme can be brought within the provisions of §149(f)[1] or (g)[2] NPPF), and therefore such schemes have to show that 'very special circumstances' arise in order to achieve planning permission.

3. This brings into focus the essential tension, in dealing with such proposals, between the national policy priority of protecting the Green Belt from inappropriate development, and the national policy priority of delivering more housing to meet needs arising. In local authorities which have a large proportion of Green Belt land, this is not an easy tension to resolve.

4. This paper does not seek to address the *political* question of whether the protection of the Green Belt from inappropriate development *should* be the national priority that it unarguably presently is; or to seek to resolve the similarly political question of which of the two national policy priorities should take precedence. Instead, it proceeds on the basis that the tension presently exists, and seeks to explore how planning permission for residential schemes might be achieved notwithstanding the tension.

Overview of recent decisions

5. In the last 12 months or so there have been a number of appeal decisions concerning residential development in the Green Belt. The following is a non-comprehensive sample, intended to give a flavour of the evolving way in which such proposals appear to be faring on appeal, and to draw out some emerging themes.

(a) Stapleford Retirement Village – December 2021 – APP/W0530/W/21/3280395

6. This decision, to outline grant planning permission for a 'retirement village' on the edge of a village in South Cambridgeshire, rested on a series of factors which, taken together, were considered to amount to the necessary very special circumstances required to justify the harm to the Green Belt.

7. The proposals were for around four hectares of open land to be developed (described as a 'substantial' area of open Green Belt land) with a further very much larger area of agricultural land to be transformed into a countryside park of restored chalk downland, in line with various published strategies, and giving rise to a 234% biodiversity net gain.

8. The harm identified – beyond the 'in principle' harm – was in terms of visual loss of openness, and some harm to the character and appearance of the area (albeit not to the character of the adjacent village). There was also 'negligible' harm to a scheduled ancient monument.

9. The local authority had a critical shortage of specialist housing for older people, which would be addressed in part by the proposals; as well as a housing land supply shortage, which would be aided by the 'release' of a number of market houses by reason of downsizing. The biodiversity gain and creation of enhanced habitat attracted very substantial weight, while the proposed countryside park also offered secondary recreational benefits. These points – when added to the 'standard' benefits of an economic boost through construction and other jobs – amounted to the very special circumstances sufficient to outweigh the identified harm.

10. One obvious observation would be that this was far from an 'ordinary' set of proposals, and did comprise something unusual:

1. *"limited affordable housing for local community needs under policies set out in the development plan (including policies for rural exception sites)".*
2. *"limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings) …".*

the Inspector did not seem to have any difficulty describing this as amounting to very special circumstances.

(b) Roundhouse Farm, Colney Heath – June 2021 – APP/B1930/W/20/3265925

11. This decision caused a bit of a social media stir when it was delivered: partly because social media megastar Zack Simons represented the successful Appellant, and partly because Chris Young KC wished everyone to know that he had advised the same Appellant in the early days, before handing over to Zack.

12. The interest in this decision was legitimate, though: this was a set of proposals which did not boast a huge biodiversity net gain, or anything particularly unusual. It was a proposal for 100 houses (straddling two local authority boundaries - of which neither had a five-year housing land supply); and neither LPA had a recent local plan.

13. Along with definitional harm, the proposals would cause some ("limited") landscape and visual harm to this edge of settlement (rather than rural) site; and (somewhat surprisingly) would not conflict with *any* of the five purposes for including land in the Green Belt.[3] The inspector found no harm to the designated heritage asset concerned (despite common ground that it *would* be harmed); and that the site was in a sustainable location.

14. In granting planning permission, the decision is clear that what clinched it for the Appellant here was the 'bleak' housing land supply position of each authority (2.58 and 2.4 years, respectively): the contribution 100 homes would make to those shortfalls; and the 45 affordable homes in circumstances of an 'extremely acute' shortfall in both boroughs (together with 10 self-build homes). There was nothing 'unusual' about the scheme, and nothing akin to the countryside park in Stapleford.

15. The Written Ministerial Statement of December 2015, concerning whether housing need can, by itself, outweigh Green Belt harm (see below) was dismissed as outdated, and given little weight.

16. As Zack said in his blog[4], at the time:

"*There was no allocation. No proposed allocation. No element of previously developed land. No enabling development. Nothing, really. None of the extra special sauce which has characterised the Green Belt decisions [to this point]*"

17. To paraphrase, the only 'special' thing about this site, and those proposals, was the housing (and affordable) land supply situation. That the Inspector was nonetheless persuaded to find 'very special circumstances' was understandably big news for those aspiring to deliver homes on Green Belt land in areas of housing shortage.

(c) Harris Lane, Shenley – May 2023 – APP/N1920/W/3311193

18. This proposal was much more modest: 37 houses on a relatively small site on the edge of the village of Shenley. The reduction in openness would be visible from a range of views, and the proposal would encroach on the countryside contrary to that so-called 'purpose'. The scheme would also cause moderate harm to character and appearance.

19. However, this was in Hertsmere: with a housing land supply position of somewhere between 1.58 and 2.25 years (i.e., worse than in the Colney Heath case) and a local plan which had been 'set aside' with 'no timeline for [the] advancement or the adoption of an alternative plan'.

20. This case, however, threw up a different issue: it was only 37 homes. The contribution to that housing land supply deficit "*would not be significant in overall scale and represents a relatively modest number of new houses*". The same approach was taken to affordable housing: an acute shortfall, but the proposals were for only 15 new such units. Both contributions attracted significant weight, but were *not* sufficient – when taken together with the economic benefits of new development, and a 10% biodiversity net gain - to outweigh the harm to the Green Belt here. Planning permission was refused.

(d) Brookmans Park – July 2023 – APP/C1950/W/22/3307844

21. This most recent decision – which is presently the subject of an application for permission to appeal from the disappointed developer – is a reminder that, because the 'very special circumstances' test is *itself* a matter of planning judgment, sometimes you can offer significant benefits, in an authority with a difficult housing and supply position and no local plan, and still end up losing.

22. This was a scheme for 125 dwellings, a new care home and a replacement scout hut for the one on site which was nearing the end of its life. The LPA had an emerging Local Plan, for which the appeal site had at one stage been recommended for inclusion as an allocation, but had ultimately not made the cut.

23. The housing land supply position was not good: either 1.86 years or 2.64 years, and on either assessment, a significant shortfall. Unsurprisingly, the affordable housing position was also acute. On this basis, the contribution of 125 new homes attracted very substantial weight; the same was true of the contribution of 56 new affordable homes; and the provision of 10 new self-build plots attracted substantial weight. There was a need for a new care home locally.

3. For our part this conclusion appears difficult to understand, particularly in the context of the 'purpose' concerned with safeguarding the countryside from encroachment.
4. https://www.planoraks.com/

24. In terms of harm, the Inspector found (contrary to the case presented to her by the Appellant) significant harm to openness over and above the definitional harm, and also harm to the character and appearance of the area.

25. Turning to the planning balance, the Inspector considered whether the benefits, taken together, would *clearly* outweigh the harms: whether the overall balance favoured the Appellant's case "*not just marginally, but decisively*". They did not.

26. It is notable that, at the Appellant's request, the Inspector visited the site at Colney Heath (above). Her visit showed that the two sites were not directly comparable, and she attached no weight to a direct comparison between that scheme and the one before her: a reminder that *par excellence*, Green Belt decisions about very special circumstances will stand or fall on their own particular facts.

Minimising the harms

27. The NPPF is clear that (i) substantial weight must be given to any harm to the Green Belt, and (ii) VSCs need to be demonstrated in order to clearly outweigh that harm "*and any other harm resulting from the proposal*": see §148. Clearly an applicant will want to reduce both Green Belt and non-Green Belt harms as far as possible.

Green Belt harm

28. It is common practice to divide Green Belt harm into three categories for analysis: harm by reason of inappropriateness ("*definitional harm*"), harm to the openness of the Green Belt, and harm to the purposes of designating land as Green Belt.[5]

29. For market-led residential schemes there is clearly no scope for minimising harm by reason of inappropriateness. This arises automatically through the combination of the location of the site in the Green Belt and the type of development proposed.

30. Similarly, the extent of the effect of development on openness is also fixed to a significant extent. Openness is often taken to refer to the absence of built development, and therefore, there will inevitably be loss of openness in spatial terms as a direct result of the size and scale of the proposed housing development and the amount of land that it will occupy. It can be worthwhile putting this area in the context of the amount of Green Belt land in the local authority area, particularly where it is heavily constrained – even a large site will occupy a tiny percentage of the district-wide Green Belt.

31. The courts have confirmed that the concept of openness can also encompass consideration of visual impacts (see eg. *Turner*[6] and *Samuel Smith*[7]), whilst (unhelpfully) confirming that it is a matter of planning judgement whether this factor will be relevant in any given case. In practice, both dimensions will ordinarily be considered and addressed by decision makers. In practice this issue is likely to be addressed through landscape/visual impact evidence. Landscape and Visual Impact Assessment (LVIA) is specifically concerned with (i) the character of the landscape as a resource, and (ii) the effect on views/visual amenity for particular receptors in terms of the degree of change to the view. Therefore, it will be sensible to separately address visual effects on openness, even where the evidence is drawn from the LVIA, in order to focus more clearly and directly on the visual effects of development on the role of the Green Belt and the ability to perceive its open quality.

32. The purposes served by the Green Belt are set out in §138 NPPF. A residential scheme in the Green Belt will almost certainly be inconsistent with the purposes of "safeguarding the countryside from encroachment" and is likely to also infringe one or more other Green Belt purposes. A certain amount of harm to Green Belt purposes is therefore 'baked in'. Nevertheless, it is worth advancing arguments to minimise the extent of the inconsistency as far as possible. For example – if the site is located in an area of land between two settlements, does it actually perform a material role in maintaining separation between them? Is it in the narrowest part of any gap? Would the perception of separation appreciably change? Is there an adequate supply of "derelict and other urban land" which could be regenerated, which would be discouraged by Green Belt development?

33. In Green Belt-constrained areas where local plans are under preparation, or have recently been prepared, there are likely to be useful evidence-base documents which can help to build arguments aimed at minimising Green Belt harm. The SHLAA may contain useful commentary/analysis of Green Belt performance although it is usually at a relatively high level and limited in terms of detail. Sustainability Appraisals/SEA may also contain useful information.

34. In addition, the local authority is likely to have had to assess and justify the extent and possible locations for releasing land from the Green Belt for housing. In Calverton the High Court said that, in assessing whether there were "exceptional circumstances" for releasing Green Belt land for allocation in a local plan, those involved with making and examining plans should ideally grapple with:

"(i) the acuteness/intensity of the objectively assessed need (matters of degree may be important); (ii) the inherent constraints on supply/availability of land prima facie suitable for sustainable development; (iii) (on the facts of this case) the consequent difficulties in achieving sustainable development without

5. There is an argument to say that this involves a degree of double counting, since development in the Green Belt is inappropriate precisely because of the harm to openness – the fundamental aim of Green Belt policy being to keep land permanently open. There is a further question around whether the Green Belt purposes are intended to be a development management tool.
6. *Turner v SSCLG* [2016] EWCA Civ 466.
7. *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC* [2020] UKSC 3.

impinging on the Green Belt; (iv) the nature and extent of the harm to *this* Green Belt (or those parts of it which would be lost if the boundaries were reviewed); and (v) the extent to which the consequent impacts on the purposes of the Green Belt may be ameliorated or reduced to the lowest reasonably practicable extent".

35. In order to carry out this exercise it will be necessary to analyse the relative quality and performance of the Green Belt within the district and show how the various factors have been balanced to reduce the impact on Green Belt purposes as far as possible.

36. Often this is done through analysing parcels (which may be at a relatively large scale and thus less useful for site-specific analysis) and also specific housing sites. Such assessments may be particularly useful where the application site has been considered for allocation (even if not ultimately taken forward). A recent example can be seen in an appeal concerning a housing and employment scheme in Castle Point.[8] The site was at one stage a draft allocation and was assessed through a Green Belt review process, although it was later removed from the draft plan. The Inspector noted that:

"of the fifteen sites evaluated, five were assessed as causing lesser degrees of harm, two the same as SH17 and seven as more degrees of harm. Twelve of the fifteen assessed sites were taken forward as housing allocations in the (now withdrawn) [Local Plan] … From this and the other considerations of purposes, I deduce that the degree of harm to the purposes of the Green Belt which would result from the inappropriate development of this appeal site is not great".

37. A further angle to consider in terms of minimising Green Belt harms is the principle of consistency of decision making, which requires decision makers to have regard to, and give reasons for departing from, previous decisions. So far as the public law duty is concerned, the principle strictly only bites where the previous decision is "indistinguishable",[9] and this is highly unlikely to be the case (save perhaps in respect of previous decisions involving the same site). However, other decisions made by the local authority may reveal an inconsistency of approach/assessment of Green Belt harm which may help to support the case. In an appeal scenario this is most likely to prove useful as material for cross examination and potentially to extract concessions, as Inspectors tend not to attach much weight to other previous decisions unless the degree of similarity is very high.

"Any other harm"

38. In *Redhill Aerodrome*[10] the Court of Appeal confirmed that the reference to "*any other harm*" in what is now NPPF §138 "*means any harm, not only harm to the Green Belt*". The upshot of this is that, in a Green Belt case, Green Belt and non-green belt harms are added together and the totality of that harm needs to be clearly outweighed by VSC.

39. This makes it all the more important to minimise non-Green Belt harm as far as possible, since the more harm (of any sort) that the scheme causes, the harder the VSC need to work.

40. For residential schemes in the Green Belt the main non-Green Belt harm is likely to be harm to landscape character/visual amenity. Naturally the extent of such harm will depend to large degree on the location of the site. The existence of at least localised adverse effects cannot realistically be avoided and is unlikely to add significant negative weight for that very reason (it is an inevitable consequence of developing a greenfield site). However, clearly it is important to develop site layout and landscaping proposals sensitively to reduce any wider effects to the maximum degree possible. It may be that this requires a less intensive form of development, to allow more space for landscape mitigation, than might otherwise be desirable (although there is an obvious tension with the message below about 'going big' to maximise benefits…).

41. Conflict with the adopted spatial strategy for development may be regarded by Inspectors as a form of harm in itself, particularly in cases where there is a neighbourhood plan, by virtue of the emphasis the NPPF places on the plan-led process (see §15) and the role of neighbourhood planning in particular (as illustrated by §14). Recent examples can be seen in decisions at Lower Weybourne Lane (Waverley)[11] and Chalgrove (South Oxfordshire)[12]- both of which have been subject to High Court challenge.[13] A case for development is more credible where the applicant is realistic about the policy position; nevertheless look for opportunities to minimise the weight to be given to non-compliance. Is a breach of the policy inevitable if housing needs are to be met? Is the policy out of date and to what extent? Is there compliance with some aspects of the policy even though overall there is breach?

42. Finally, given the approach to "*any other harm*" it is obvious that any technical reasons for refusal (eg. highways, drainage) should be resolved if possible. The Castle Point appeal referred to earlier is a chastening example – the Inspector was apparently prepared to accept VSCs through "*housing supply in the face of a very poor performance on delivery"* combined with *"the provision of employment land and regeneration of the [adjacent trading estate*]". However permission was refused because it had "*not been demonstrated that noise reduction would be possible on a sufficient extent of the site to accommodate the 68 residential units proposed*". As a result, the totality of the harms were not "*clearly outweighed*" by the various benefits.

8. APP/M1520/W/22/3310794 – Land East of Manor Trading Estate, Benfleet.
9. *North Wiltshire DC v SSE* [1993] 65 P & CR 137.
10. *SSCLG v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386[2014] EWCA Civ 1386.
11. APP/R3650/W/22/3310793.
12. APP/Q3115/W/22/3309622.
13. Permission refused in respect of the Chalgrove case on 14 September 2023.

Maximising the opportunities

43. VSCs are not defined in the NPPF (nor ever have been in national policy) save that we are told that VSCs will not exist, if those circumstances do not clearly outweigh the harm to the Green Belt and any other harm.[14]

44. The Courts have steered clear of defining what is meant by "very special circumstances", beyond saying it must be *"something which exceeds or excels or something which is exceptional in character, quality or degree"*, see: *Chelmsford* [2003] EWHC 2978 (Admin) at [55]-[56].

45. However, from the case law, we can identify some boundaries of the concept of VSCs:

a. VSCs do not need to be uncommon to be special, however rarity may be relevant, see: *Wychavon* [2008] EWCA Civ 692 at [21].

b. A number of factors, none very special in themselves, may amount collectively to VSCs, see: *Basildon* [2004] EWHC 2759 (Admin) at [18].

c. Mere compliance with ordinary development control policies is unlikely to amount to very special circumstances but something which "*go[es] beyond satisfaction of the normal development control policies*" may well be, see: *Lee Valley* [2015] EWHC 185 (Admin) at [71].

d. There is often confusion about Regulation 122 Community Infrastructure Levy Regulations 2010. Going beyond the satisfaction of the normal policies (i.e. by providing more than the policy element of affordable housing) can meet the legal test at Regulation 122. That is because it may be "*necessary*" because it provides a "*countervailing benefit to set against* [the] *disadvantage*" (i.e. the disadvantage represented by inappropriate development in the Green Belt), see: *Working Title Films* [2016] EWHC 1855 (Admin) at [25].

46. For a residential scheme, the principal benefit is likely to be the contribution to a housing land supply shortfall. As a matter of principal, the contribution of a scheme to an unmet need, specially a housing need, has always been accepted by the Courts as a consideration legally capable of forming part of a VSC case, see: *Lee Valley* [2015] EWHC 185 (Admin) at [68].

47. However, as a matter of policy it was (at least at one point in time) the position that the government did not consider contribution to an unmet need alone would ever be likely to outweigh the harm to the Green Belt.[15] In 2017, the Secretary of State himself re-affirmed that "*it is national policy that (subject to the best interest of the child) personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances*" and there has been "*a change from guidance to policy*" regarding relevant statement on the issue.[16]

48. In 2018, the re-organisation of the PPG saw the relevant section on housing need and the Green Belt removed. Whilst the 2015 WMS (and subsequent WMSs to the same effect) have not been withdrawn, a number of Inspectors have concluded that it is no longer current government policy.[17]

49. Since 2018, there have been a number of instances where Inspectors have been prepared to grant permission for straightforward market housing schemes, principally on the basis of a contribution to an unmet need alone, see e.g.:

- Colney Heath (APP/B1930/W/20/3265925) (14 June 2021) – 100 dwellings.

- Codicote (APP/X1925/W/21/3273701) (28 September 2021) – 167 dwellings.

- Warlingham (APP/M3645/W/22/3309334) (11 April 2023) – 100 dwellings.

50. However, there have been failures, see e.g. Shenley (APP/N1920/W/22/3311193) (25 May 2023) - 37 dwellings.

51. The Warlingham and Shenley decisions provide a useful comparison. Both are from 2023 and both were effectively normal market housing proposals on Green Belt sites in the countryside.

52. The critical findings in Warlingham were as follows:

- 100 units was an undisputed "*significant contribution*" to boosting the supply of homes locally (DL,64).

- The 40% provision of AH was 6% over the policy requirement for "*up to 34%*" but in the context of an average delivery of 68 affordable homes a year against a need of 310-391, "*the significance of this particular appeal scheme's level of contribution*" was not disputed (DL,70).

- The scheme did provide an enhanced re-provision of sporting facilities, which carried moderate weight (DL,77).

- The other economic and social benefits carried moderate weight (DL,80-81).

- There was a low-moderate level of harm to openness and a conflict with two of the five purposes (DL,93).

14. NPPF, para.148.
15. See WMS 31 August 2015 "Green Belt Protection and Intentional Unauthorised Development". Also reflected in the Planning Practice Guidance "In decision taking, can unmet need for housing outweigh Green Belt Protection?".
16. See: Land at Jotmans Lane APP/M1520/A/14/2216062 (21 April 2021) at DL,12 and 27.
17. Land at High View APP/X0414/W/20/3265964 (5 November 2021) at DL, 79.

- The site was allocated in the emerging plan, which was at examination but in respect of this allocation, the examiner had found no objection via an interim findings letter. That carried moderate weight in favour of the scheme (DL, 59).

- The benefits were "*very extensive*" and clearly outweighed the harms, so VSCs and therefore permission granted (DL,104).

53. The critical findings from Shenley were as follows:

- 35 units was a relatively "modest" contribution (DL,45).

- A 40% affordable housing contribution was a mere 5% over policy, and at 15-units was again found to be "*modest*" (DL,46).

- The 3 self-build plots was "*a small number*" and carried limited weight in light of a stated need of fewer than 10 in the Village (DL,47).

- The biodiversity net gain was smack-on the emerging legal requirement at 10% (DL,48).

- The other economic, social and POS benefits were the normal benefits associated with policy compliant housing development on any site (DL,56).

- The benefits did not clearly outweigh the harms, so by definition no VSCs (DL,58).

54. So, what are the lessons from these two recent decisions:

a. Go large! The benefit of 100 homes in Warlingham (versus the 35 in Shenley) was clearly a powerful consideration. It also was not challenged as such by the Council.

b. Not all Green Belt sites are the same. The effect on openness was low-moderate in Warlingham, whereas in Shenley the Inspector found it to be significant.

c. Timing is everything. If an interim findings letter says your site is sound but the plan has stalled for other reasons, it might be worth the gamble of a planning application. That was a very different situation in Shenley, where the site had been allocated in a draft plan, but that plan was set-aside before further consultation, and therefore the objections to the allocation were never resolved.

d. Exceed the policy requirements. As *Lee Valley* (above) illustrates, the mere satisfaction of policy is not going to be sufficient in an inappropriate development case. Therefore, consider going beyond the policy requirements for e.g. affordable housing, open space, BNG.

e. Do your homework. As in Warlingham, a small excess of a policy requirement may nonetheless carry significant weight if, in the local circumstances of the application, it represents a significant contribution.

f. Demonstrate the lack of alternatives. It is relevant to consider whether the benefits of the scheme could be delivered in a less harmful way, see: *Sainsbury's Supermarkets* [2007] EWCA Civ 1083 at [37] and *Langley Park School* [2009] EWCA Civ 734 at [42]. Whilst there is no policy requirement to consider alternative sites, demonstrating that there is no better place to deliver the benefits is likely to be a strong indicator in favour of permission.


Josef Cannon


Emma Dring

Speakers' biographies

Keynote speaker – Johanna Boyd

Johanna Boyd took up the post of Chief Executive of Planning Aid Scotland (PAS) in October 2022, bringing a wealth of experience and expertise with her as a dual-qualified English barrister and Scottish solicitor, specialising in planning law.

PAS is a charity and social enterprise that helps members of the public, community groups and business start-ups to navigate the planning system and to shape the future of their place.

Johanna was the first woman to lead Stirling Council and the youngest council leader in Scotland at that time, securing a historic City Region Deal amongst other achievements.

Prior to joining PAS, Johanna worked with the Equalities and Human Rights Commission on embedding equalities best practices into City Region Deals and worked in the Government, Regulation and Competition team at Brodies LLP.

Tom Cosgrove KC

Tom Cosgrove KC is a leading planning and public law silk and joint Head of Chambers at Cornerstone Barristers. In 2020 he was elected as a Governing Bencher of the Inner Temple and was also elected Vice-Chair of the Planning and Environment Bar Association (PEBA).

During the last 20 years, Tom has been involved in major public inquiries about housing, heritage, retail development and employment land use. More recently, he has appeared at examinations in relation to nationally significant infrastructure projects, numerous local plan examinations, and acts regularly at major high-profile inquiries for developers and local authorities relating to residential/mixed use proposals.

His work covers a broad range of areas and developments including retail, energy, heritage, commercial, employment, residential and leisure proposals, and judicial review/statutory challenges. He is regularly instructed by leading house builders, retailers, private companies, planning authorities, public bodies and interest groups throughout the country.

Tom is shortlisted for Planning/Environmental Silk of the Year in the *Chambers and Partners UK Bar Awards 2023*, the second time he has made the shortlist.

Beyond planning, Tom takes a keen interest in legal education and issues relating to diversity, recruitment and training for barristers generally. He is currently a member of the Inner Temple scholarships and outreach committee and acts as a mentor for student applicants seeking to pursue a career at the Bar.

Michael Bedford KC

Michael has an extensive planning practice with focus on larger inquiries, regeneration schemes, urban extensions, development plans, highways and other transport infrastructure, renewable energy, and waste projects.

He has a great deal of experience both challenging and defending planning decisions in the Courts, including Strategic Environmental Assessment, Habitats Regulations and related environmental matters. Michael has considerable experience relating to Developments Consent Orders under the Planning Act 2008 regime. He has acted for project promoters, host local authorities, and affected landowners.

Michael also advises on property issues associated with development projects, including covenants, easements, village greens, and public rights of way. Particular interests in settlement planning, regeneration, retail/town centre development, new roads/bridges, heritage matters, and overcoming environmental constraints.

He has promoted major infrastructure projects under the DCO regime for NSIPs in Lowestoft and Great Yarmouth, as well as acting for host authorities in energy DCOs concerning Sizewell C, offshore wind farms, Sunnica solar farm, and Grid connections in Suffolk, and for other participants in the Lower Thames Crossing.

Paul Shadarevian KC

Paul is a highly experienced planning KC, who has expertise across all areas of planning law. He is recognised in both *The Legal 500* and *Chambers and Partners* as a leading silk.

Recent directories describe him as “brilliant; a pleasure to work with” (*Chambers and Partners 2023*) and “totally dedicated, very knowledgeable” (*Chambers and Partners 2022*). His advocacy is praised for being “excellent…unhurried and authoritative” (*The Legal 500 2023*) and his cross-examination skills “succinct, superb and devastating” (*The Legal 500 2020*).

Paul has a thorough understanding of all major disciplines and regulatory considerations that affect development proposals for the public and private sectors, from project and policy formulation to advice on the formulation of development proposals and the promotion of proposals at appellate level. Paul has also led the new London Gateway LDO and the new Milton Park LDO.

Richard Ground KC

Richard Ground KC is a specialist in planning, administrative and public law. He has a particular strength in appearing in long and complicated planning inquiries and High Court challenges.

Richard has been recognised by the UK legal directories and *Planning Magazine*'s annual survey to be one of the leading practitioners for many years. Directory quotes include: "He works extremely hard and his energy, enthusiasm and drive enable a huge amount of work to get done to the highest standard in accordance with the deadlines" (*Chambers and Partners*), "Very thorough, but approachable and refreshingly informal when it's appropriate", and "He has a great understanding of the facts and interpretation of the law." (*Legal 500*)

Richard has been in some of the most substantial residential, green belt, town centre and heritage cases of the last few years. He is an elected committee member of the Planning and Environment Bar Association (PEBA).

Estelle Dehon KC

Estelle Dehon KC is a public lawyer with a wide-ranging practice, including environment and planning law with particular expertise in climate and biodiversity matters. She has acted in inquiries and court challenges concerning wind turbines, solar farms, airport expansion, fossil fuel development and the climate impacts of large housing developments. She has experience in advising on embodied carbon and how development can comply with net-zero carbon requirements.

In June 2023, she appeared before the Supreme Court in the landmark environmental case *Finch v Surrey County Council* concerning a controversial permission granted for 25 years of oil extraction in Surrey, which will establish the correct approach to considering downstream greenhouse gas emissions.

Estelle also appears for developers in local plan examinations and advises local authorities on controversial developments.

Earlier this year she founded Cornerstone Climate, the cross-disciplinary centre of excellence for climate litigation and advice, was ranked in the ENDS Report Power List and was named as a Women of Influence in Planning by *The Planner*.

Harriet Townsend

Harriet Townsend is a leading practitioner in planning and environment law, and related property matters (most notably compulsory purchase). Her practice covers a wide range of matters mainly concerned with the exercise of statutory powers and duties.

Harriet has followed the development of climate change as a legal and policy issue throughout her career and has been working with Surrey County Council on its defence in *Finch v Surrey County Council* (currently before the Supreme Court) since its decision in 2019. She has appeared in planning appeals and judicial reviews concerning proposals for renewable energy development, notably solar farm and onshore windfarm proposals; and she has led objections to significant energy related CPOs.

Her cases and advisory work raise the full range of issues arising in town and country planning, notably Environmental Impact Assessment, Habitats Regulations Assessment (and nutrient neutrality), CIL, compensation for compulsory purchase, heritage preservation, and policy interpretation.

Ed Grant

Ed Grant specialises in planning law, with particular focus on Inquiries involving substantial housing developments including high-profile and high-impact London schemes, and regularly appears in tall building inquiries. He also has a noted expertise in complex planning enforcement matters.

Ed is consistently listed in the legal directories as a leading practitioner in planning law, in which he is recently described as “a brilliant Counsel; really commercial and responsive … the manner in which he conducts himself and his work and portrays his knowledge is incredible … the level of service he has provided is absolutely first-class … a very knowledgeable and client-orientated advocate” (*Chambers and Partners 2023*), “thorough, tenacious, and precise, his advocacy is direct, he is surgical in cross-examination, and he instils clients with confidence and trust” (*Legal 500 2023*), “a remarkable ability to quickly grasp complex issues” (*Legal 500 2022*), “a superb barrister and a superb cross-examiner” (*Legal 500 2021*), and “clients appreciate his down-to-earth and easygoing manner” (*Chambers and Partners 2021*).

Wayne Beglan

Wayne is recognised as a leading junior in planning law, ranked in both *Chambers and Partners* and *Legal 500*. Wayne has particular expertise in judicial review, planning and local plans, housing, regeneration, landlord and tenant, employment, procurement and contractual work for developers, local authorities and corporations. He has appeared in various tribunals; and has extensive experience in the High Court and significant experience in the appellate courts.

Wayne has extensive experience of local plan examinations and development of strategic sites. He is regularly relied upon by local authorities in connection with their most transformative and mission critical schemes. He is frequently involved in statutory challenges of planning decisions. He advises in relation to EIA, s.106 and CIL matters; as well as all stages of local plan preparation.

Josef Cannon

Josef advises and represents all sides in town and country planning and environment matters, and is recognised as a leading planning junior in *Chambers and Partners* and *The Legal 500*.

Josef's particular expertise is in residential schemes, especially where issues of housing land supply arise, an area in which he has a particular interest, but he has appeared in hearings, inquiries, in the Planning Court and in the Court of Appeal in a range of planning disputes in recent times.

Most recently he appeared at the Court of Appeal in *Blacker v Chelmsford City Council*, a case which centered on the principle of consistency in planning decisions.

Josef is also experienced in heritage, landscape and other aspects of the planning debate, as well as enforcement matters. He also recently assisted a local authority with the examination of their local plan. He is a contributor to Cornerstone on the Planning Court (*Bloomsbury, 2nd edition 2021*).

Emmaline Lambert

Emmaline specialises in planning, environmental and public law. She has broad experience of inquiries, enforcement matters (ranging from injunctions to POCA orders), local plan examinations and High Court challenges.

Emmaline is ranked as a leading junior in planning in the latest editions of the *Chambers and Partners* and *Legal 500* directories.

Emmaline received the following commendation in *Legal 500*: "Emmaline's closing statements are the stuff of legends; they are clear and passionate, delivered in her own inimitable style".

Clare Parry

Clare Parry has a busy public law practice specialising in planning and environmental law. She regularly acts both for and against central government, local authorities and other public bodies. Clare is on the Attorney General's B Panel of Junior Counsel to the Crown.

With particular expertise in infrastructure projects, especially wind energy and transport projects, Clare is appropriately part of the legal team advising on a wide variety of aspects of the HS2 project and its impact on environment and local communities.

Clare is ranked as a leading junior in planning both by *Chambers and Partners* and *Legal 500*. She was most recently commended in *Legal 500* for her "understated excellence – no courtroom theatrics, just an intellectual force to be reckoned with."

Ryan Kohli

Ryan is a leading practitioner with particular expertise in public, planning and environmental, and property law. He has been consistently ranked as a leading practitioner by the *Chambers and Partners* and *Legal 500* directories of highly rated barristers and has been appointed by the Attorney General as Junior Counsel to the Crown (B Panel). He is a Recorder (part-time Circuit Judge) assigned to the civil jurisdiction. In 2023, he was elected as a Governing Bencher of the Inner Temple.

Ryan represents clients in significant planning cases and recently appeared on behalf of the Secretary of State in *R (on the application of Durham and Hartlepool) v SSLUHC [2023] EWHC 1394 (Admin)* which concerned the jurisdiction of planning inspectors to determine solar farm appeals which are, or might amount to, a Nationally Significant Infrastructure Project.

This year, he represented Cheltenham Borough Council in what is thought to have been the first planning appeal in which planning permission was refused for a major housing scheme solely on climate change grounds.

Robert Williams

Robert is a public law specialist, with expertise in planning and environmental law. He frequently appears in the higher courts in judicial review and statutory challenges. In addition to his court work, Robert is regularly instructed to act in planning inquiries on behalf of both private parties and local authorities.

His recent inquiries have related to a wide range of proposals including for residential developments, mixed-use proposals, windfarms, Electric Vehicle (EV) infrastructure, listed buildings, mineral extraction, education facilities and retail developments.

Earlier this year, Robert secured planning permission for an EV charging centre in the South Downs National Park, with the planning inspector concluding that each one of the National Park's seven identified special qualities would either be conserved or enhanced by the scheme.

Emma Dring

Emma has a busy public law practice focused on planning, environmental and local government matters. She regularly appears to represent clients in public inquiries and in the higher courts and is on the Attorney General's B Panel of Counsel to the Crown.

Regularly advising and representing clients in planning matters, Emma acts for local planning authorities, developers, and residents' associations. She has particular expertise in cases raising heritage issues, having represented Historic England in a number of significant cases over the years, including the September 2023 refusal by the Secretary of State to consent to a tall buildings scheme in London Bridge, due to heritage harm "of the highest significance".

Emma appears regularly in the High Court both challenging and defending the decisions of Planning Inspectors under s. 288 and 289 TCPA 1990.

Ruchi Parekh

Ruchi has a busy planning law practice, with a particular focus on energy infrastructure and the climate. She regularly appears (often unled against Silks) in planning hearings, inquiries, judicial reviews, and prosecutions – across the full range of planning, environment and highway matters. Ruchi is ranked as a leading junior in both environment and planning law by the *Legal 500*.

Ruchi has been involved in many nationally significant infrastructure projects, including: *East Anglia ONE North and TWO offshore windfarms; Sizewell C nuclear power station;* and *Sunnica solar farm*.

This year, Ruchi was recognised in *The Planner's Women of Influence in 2023* – one of only two barristers to feature on the list – and was named in the *2023 ENDS Report Power List* of the most influential environmental professionals in the UK. In addition, she is shortlisted in the Diversity and Inclusion: Future Leader category at the *Chambers UK Bar Awards 2023*.

Ruchi is a member of the Attorney General's B Panel of Counsel, promoted from the C Panel after just two years. In June 2023, she appeared at the Supreme Court in the landmark environmental case, *Finch v Surrey County Council*.

Nina Pindham

Nina joined Cornerstone in April 2023 and has a wide-ranging planning practice specialising in environmental law matters in the context of planning applications, including infrastructure, energy, controversial minerals development, hazardous substances consent, waste, EIA, SEA, agriculture, water, air quality, and nature conservation issues.

In 2022, Nina was part of the legal team that challenged the government over its Net Zero Strategy which the High Court, in a historic ruling, deemed as "unlawful", and led the government to revise its climate strategy to show how key emission reductions will be met.

In June 2023, she was one of five Cornerstone barristers instructed in the landmark Supreme Court case concerning downstream emissions (*Finch v Surrey County Council*).

Nina was awarded the Global Leadership Award in Climate Law at *COP27* for her work building the capacity of the legal sector in relation to climate change.

John Fitzsimons

Ranked in the *Legal 500* as a "rising star" at the Planning Bar, John is regularly instructed by developers, interested parties and local authorities in both planning inquiries and court proceedings, including judicial reviews, s288 challenges and planning prosecutions.

He has appeared before all levels of the higher courts including at the Supreme Court with Estelle Dehon KC in *R (Fylde Coast Farms Ltd) v Fylde Borough Council* [2021] UKSC 18, the leading case on the interpretation of the provisions in the TCPA 1990 for challenging neighbourhood development plans and orders.

Most recently, he appeared with Richard Ground KC in *Watton and Cameron v The Cornwall Council* [2023] EWHC 2436 (Admin) in which the High Court quashed the grant of planning permission for one of the largest crematoria in the country on six grounds.

John's recent advisory work has also focused on environmental matters including habitats, EIA and environmental information regulations matters, an area in which he has particular expertise because his other main area of practice is data protection and information law.

Jack Barber

Called to the Bar in 2019, Jack has a growing planning practice, and has been instructed by developers, local authorities and interested parties in relation to planning inquiries, prospective judicial review claims and planning statutory reviews and appeals, as well as advisory work.

Recent instructions include appearing before the Court of Appeal in *Braintree DC v Home Office*, a high-profile case concerning the use of RAF Wethersfield for accommodating asylum seekers, which has made national news headlines.

Verity Bell

Verity is developing a busy planning, environmental and public law practice. She has appeared in the High Court as a junior on behalf of several local planning authorities in judicial review and planning injunction proceedings. Verity has a particular interest in planning enforcement matters. She is a member of the Attorney General's Civil Panel Counsel Junior Juniors scheme.

Recent work includes advising on and drafting summary grounds of resistance on behalf of a local planning authority, successfully defending their decision to refuse to determine a planning application pursuant to section 70C of the Town and Country Planning Act 1990.

Organisers' biographies

Matt Lewin

Recognised as a "rising star" by *The Legal 500*, Matt Lewin's work includes advocacy in court and at public inquiries, investigations, reviews, training, public speaking and advisory work on a diverse range of public law issues, for clients across England and Wales. His clients include local planning authorities in England and Wales, NGOs, parish councils, developers and residents' associations.

A member of both the Attorney General's and the Equality and Human Rights Commission's C panels of counsel, Matt has been praised for his "easy but robust approach to the matters in hand [which] gives great confidence" by *Chambers and Partners*.

Earlier this year, Matt successfully defended a council in an appeal against refusal for outline planning permission for a 200-home scheme despite them having a 3.95 year supply of housing.

Rowan Clapp

Rowan is an in-demand junior regularly instructed in the full range of planning and environmental matters in which Chambers is involved, as well as within complementary areas of practice. He has recently appeared in a series of public inquiries including in the 'Whitehaven' inquiry concerning the proposal for the first deep coal mine in the UK for 30 years (led by Estelle Dehon KC).

Other recent work includes appearing before the Court of Appeal in *(Blacker) v Chelmsford City Council [2023] EWCA Civ 25*, am important case about the principle of consistency in the context of planning decisions and a successful inquiry to refuse permission for a winery building in the Kent Downs Area of Outstanding Natural Beauty.

In September 2023, he was appointed to the Attorney General's C Panel of Junior Counsel to the Crown.

Olivia Davies

Joining Cornerstone Barristers as a tenant in October 2020, Olivia is developing a broad practice in all of Chambers' specialisms.

Recent planning instructions include a three-day public inquiry concerning refusal of planning permission for a large-scale solar farm, led by Estelle Dehon KC, and representing a local authority in a six-day inquiry concerning the refusal of permission for 37 homes on Green Belt land, raising issues of Green Belt and landscape harm and 5-year housing land supply, led by Josef Cannon.

Before coming to the Bar, Olivia had both private and public sector legal experience. In the private sector, Olivia worked in the Brussels office of an international law firm. In the public sector, Olivia has worked as a Legal Intern at the Competition & Markets Authority, and as a Research Assistant at the Law Commission.

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Planning and environment team

2-3 Gray's Inn Square, London WC1R 5JH t: 020 7242 4986 / 0333 240 0591 f: 020 3282 1966
LDE 316 Chancery Lane clerks@cornerstonebarristers.com
www.cornerstonebarristers.com
Offices in London, Birmingham & Cardiff