Written Materials

Planning Law Case Update

(Part 2)

Speakers: Robin Green, Emmaline Lambert, Ben Du Feu

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(Registration details can be found HERE)

Cornerstone Barristers

020 7242 4986 | clerks@cornerstonebarristers.com

London | Birmingham | Cardiff | DX: LDE 316 Chancery Lane

cornerstonebarristers.com

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Authors: Robin Green, Emmaline Lambert, Ben Du Feu

Weight to policy, the tilted balance and five year housing land supply

1. There have continued to be cases in the Court of Appeal over the last 12 months relating to the familiar themes of weight to policy, the tilted balance and five year housing land supply:

   Peel Investments (North) Ltd v Secretary of State for Communities and Local Government [2020] EWCA Civ 1175

2. This case was appealed to the Court of Appeal from a decision of Mr Justice Dove in the High Court dated August 2019 and the Court of Appeal gave its decision in September this year.

3. The developer, Peel Investments, had applied and been refused planning permission in 2013 and 2017 for two residential developments. An appeal was heard, the matter was called in by the Secretary of State for determination and the Secretary of State upheld the local authority's refusal to grant planning permission.

4. The local authority had adopted the Salford Unitary Development Plan 2004-2016 (SUDP) in 2006, including policy EN2, which prohibited development which would fragment or detract from the openness of a strategically important "green wedge". The supporting text to policy EN2 dealt with the specific area and stated "The Worsley Greenway is a strategically important 'green wedge' within the Worsley area…The protection and enhancement of Worsley Greenway, in its entirety, is therefore of great strategic and local importance". Policy EN2 had been saved by direction prior to the policies of the UDP expiring.

5. In April 2013, the developer applied for outline planning permission of a development of up to 600 dwellings and other facilities including a marina and other recreation provision within the Worsley Greenway. The application was refused as contrary to EN2. An appeal to an inspector was dismissed, the developer successfully challenged the decision (the Council and the Secretary of State submitted to judgment) and the inquiry was reconvened. In April 2017, a further application was made for a residential scheme of up to 165 dwellings. This was also refused on the basis of conflict with EN2.

6. The secretary of state recovered the appellant's subsequent appeals for his own determination and the appeals were conjoined. At the planning inquiry in 2018, the appellant contended that policy EN2 was out-of-date, relying on NPPF 2012 which was then applicable, particularly the para.14 presumption in favour of granting permission for sustainable development where a local development plan was out-of-date, or deemed to be out-of-date where the local authority was unable to demonstrate a five-year supply of housing land. The inspector found that policy EN2 was not out-of-date and should be given substantial weight and that, in any event, the housing land supply exceeded five years, so that the tilted balance under para.14 did not apply. The inspector recommended that permission be refused.

7. In July 2018, the revised version of the NPPF was published containing the variation on NPPF 2012 para 14 in the form of paragraph 11(c) (which set out the presumption in favour of approving development proposals in accordance with an up-to-date development plan without delay) and paragraph 11(d) providing that permission should be granted where the relevant policies are out-of-date unless there is a clear reason for refusing permission, or the adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

8. The Secretary of State, agreeing with the Inspector's report, found that policy EN2 was not out-of-date, remained part of the development plan and was not inconsistent with NPPF 2018. He found that the local authority could, in any event, demonstrate a housing land supply of over 13 years and that policy EN2 was not impeding delivery of the necessary number of houses. He upheld the refusal of planning permission.

9. The appellant submitted that, in dismissing its challenge at first instance, (1) the judge had erred in determining that a development plan document having exceeded its end date did not render that document and its constituent policies out-of-date for the purposes of para.11(d); (2) a plan without strategic policies should be regarded as out-of-date for the purposes of para.11(d) and the tilted balance; (3) the judge had erred in approaching the question of whether the policy was out-of-date solely by reference to its consistency with the NPPF; (4) the judge had erred in basing his decision on the inspector's erroneous and inconsistent findings on the impact of policy EN2 on the provision of housing.

10. The two main issues in the Court of Appeal were (1) the proper application of policies contained within development plan documents which are time-expired and/or where there is a lack of policy in respect of the strategic issue of housing supply and (2) the correct interpretation of the term "out-of-date" in paragraph 11(d) NPPF.

11. The first ground of appeal was in relation to the effect of the expiry of the period of the development plan. Peel Investments relied on Lord Carnwath's observation at paragraph 54 of *Hopkins Homes*: "in the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission". Lord Justice Baker accepted the arguments on behalf of the Secretary of State - the correct approach as to whether a policy is out-of-date is as expressed by Lindblom J in *Bloor Homes*, namely whether the policy has been overtaken by events that have occurred since it was adopted, including a change of national policy[1]. There is nothing in paragraph 11(d) of the 2018 NPPF, or its predecessor paragraph 14 of the 2012 Framework, to suggest that the expiry of the period of the plan automatically renders the policies in the plan out-of-date in every case. A policy was not out of date simply because it was in a time-expired plan. If the NPPF had intended to treat as out of date all saved but time-expired policies it would not have used the phrase "out-of-date". Rather, it would have used the language of time-expired policies or policies in a time-expired plan[2].

[1] Para 66
[2] Para 65

12. The key to interpreting para.11(d) is to be found at para.55: that whether a policy becomes out-of-date and, if so, with what consequences are matters of pure planning judgement, not dependent on issues of legal interpretation[3].

13. Peel Investments also argued that a plan without strategic policies (such as policies for housing supply) should be regarded as out-of-date for the purposes of paragraph 11(d) and the tilted balance. It was contended that section 19(1B) and (1C) of the Planning and Compulsory Purchase Act 2004 require a development plan document to have strategic policies and paras 17 and 20 NPPF specify what the strategic policies should encompass. On behalf of the Secretary of State it was submitted that it would be perverse to determine whether the policies were out-of-date by asking whether the whole plan would retrospectively pass the current statutory and policy tests for the adoption of a new plan. The court agreed and found it was incorrect to characterise policy EN2 as a "freestanding" policy when it was one of 104 policies in the UDP saved. It was obvious that many policies would not expire with the plan but would survive beyond the plan period[4] and the following was said:

> *"The policy under consideration here, which addresses environmental protection, clearly has a life beyond the expiry of the plan….[the] characterisation of Green Belt policy in the NPPF is wholly inconsistent with the notion that environmental policies lapse automatically when the plan period comes to an end or when there are no strategic housing policies in the plan*[5]*."*

14. A further ground of appeal stated that the judge had erred in law in concluding that the Secretary of State correctly interpreted paragraph 11(d) by reference to paragraph 213 NPPF. The suggestion was that that the Secretary of State approached the question of whether the policy was out of date by reference only to its consistency with the NPPF and that there had been too much emphasis on consistency with the NPPF. Lord Justice Baker decided that this argument overlooked the fact that the inspector took into account a wide range of factors including those raised by the appellant[6].

[3] Paras 65, 67, 71
[4] Para 68
[5] Para 68
[6] Para 69

15. The last ground of appeal related to the impact of Policy EN2 which had been considered by the inspector in response to an argument about restricting development in the area. The court found that the inspector was entitled to conclude that the policy was not impeding delivery of housing where the Council was meeting its five-year housing land supply. This was a matter of planning judgment.

Oxton Farm v Harrogate Borough Council [2020] EWCA Civ 805 (25 June 2020)

16. Outline permission had been granted by Harrogate Borough Council for 21 houses and a village shop on land outside settlement limits in the village of Bickerton. The officer's report noted that the proposal was contrary to various policies of the development plan but recommended that permission be granted on the basis of the 'tilted balance' in NPPF para.11. The officer had recorded that the policies setting out the annual housing provision and the list of settlements were out of date as they were based on an old housing target. In July 2018, the Council published its housing land supply update which stated that, as of 30 June 2018, 669 dwellings per year were needed which was much higher than the housing requirement in the development plan. The Council stated that its housing land supply was therefore at 5.02 years. On 20 September 2018, just five days before permission was granted, the Office for National Statistics ('ONS') published its 2016-based household projections which indicated that only 383 dwellings were needed annually and therefore the Council's housing land supply was far more than 5 years.

17. Oxton Farm challenged the permission on various grounds including that the officer had wrongly advised that the tilted balance was engaged on the basis that the housing land supply position was merely marginal and that the Council had failed to take into account the effect of the 2016-based ONS projections, published days before the Committee meeting and resulted in the deliverable supply rising to 7 years. The proposal was, it was argued, contrary to the development plan.

18. The Court of Appeal rehearsed that, apart from considering the development plan, the local planning authority must also have regard to material considerations which may

justify a departure from the development plan. Material considerations fall into two categories: those which the decision-maker may take into account (but need not) and those which the decision-maker must take into account. The Court of Appeal said[7]:

> *The point was neatly encapsulated by Holgate J in R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin) at [99]:*
>
> > *"In R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221 the Supreme Court endorsed the legal tests in Derbyshire Dales District Council [2010] 1 P & CR 19 and CREEDNZ Inc v Governor General [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account." (Original emphasis)*

19. The case then turned on whether the NPPF, a material consideration to which a local planning authority must have regard, had been interpreted correctly.

20. The claim failed at first instance and before the Court of Appeal which held that:

    i. The officer had not advised the committee that the tilted balance was triggered on the basis that the supply was marginal but rather had advised the committee that the tilted balance was triggered because the

[7] Para 8

most important policies for determining the application were out of date. The officer clearly stated that the tilted balance was "not automatically triggered on that particular basis"[8]. Furthermore, she gave two reasons why the development limits were out of date: firstly, greenfield sites were needed to maintain supply and secondly, the relevant policies were based on a housing requirement that was out of date[9].

ii. Weight given to policies was a matter for the decision-maker[10]: *Secretary of State for Communities and Local Government v Hopkins Homes Ltd* [2016] EWCA Civ 168. Following *Eastleigh Borough Council v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1862 (Admin), there is no basis for saying that a decision-maker should increase the weight to policy due to the existence/surplus of a five year housing land supply[11].

iii. The NPPF allowed the Council options for its housing land supply position – it was entitled to rely on its proposed housing requirement in the emerging Local Plan and was not required to use the standard method.

iv. There was no statutory duty for the local planning authority to give reasons for its decision[12]. The argument that there was a duty under common law failed as, unlike *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, the committee agreed with the officer's report. The proper inference was that the committee had granted planning consent for the reasons given in the report and it was under no duty to provide additional reasons addressing points made at the meeting regarding the effect of the 2016-based predictions[13].

[8] Para 35
[9] Para 39
[10] Para 52
[11] Para 54
[12] Para 56
[13] Paras 57-58

21. Cornwall Council's planning committee had permitted an application for the extension of a caravan park for holiday lodges within a designated area of great landscape value (AGLV) on the recommendation of a planning officer. At the time of the decision, the development plan consisted of the Cornwall Local Plan together with saved policies from older plans including the Restormel Local Plan. Policy 14 of the Local Plan stated that development that would harm an AGLV would not be permitted and there were no exceptions. Policy 23 of the Cornwall Local Plan was a landscape protection policy. Policy 5 of the Core Strategy promoted tourism and supported new tourist facilities. The Council had found that the proposal caused limited harm to the AGLV contrary to Policy 14 but that the proposal was in accordance with the development plan.

22. The High Court quashed the decision and held that the planning application should have been refused as the proposal was contrary to Policy 14 causing harm to the AGLV. It was also found that the reasoning of the Council was inadequate.

23. The Court of Appeal set out that Development Plans contained broad statements of policy and it was not unusual for relevant policies to pull in different directions and referred to the comments of Sullivan J (as he then was) in *R v Rochdale Metropolitan Borough Council, ex parte Milne* [2000] EWHC 650 (Admin)[14]:

> *"49. In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be "in accordance with the plan". Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive landscapes etc., it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a*

[14] Para 28

few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

50. For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.

51. … I accept that the terms of the policy – how firmly it favours or sets its face against … the proposed development [–] is a relevant factor, so too are the relative importance of the policy to the overall objectives of the development plan and the extent of the breach. These are essentially matters for the judgement of the local planning authority. A legalistic approach to the interpretation of development plan policies is to be avoided … ."

24. The planning authority had to exercise its judgment to determine whether a proposal accorded with the plan as a whole, bearing in mind the relative importance of the policies at play and the extent of the compliance or breach. Interpreting the relevant policies depended on a sensible reading of their language, both in their context and together. A challenge could only be on the grounds of irrationality or perversity.

25. None of the policies had primacy over the others. There was no order of priority indicated. The main factors on either side of the argument were the benefits of the development in furthering Policy 5 and the extent and significance of the breaches of CLP23 and RLP14. An appropriate balance had been struck.

26. It is worth noting that Lindblom LJ did clearly consider that a breach of a single policy could give rise to a breach of the development plan as a whole[15].

27. The Appellant also called into question the adequacy of the officer's report to committee. The Court of Appeal said[16]:

…the court does not expect to find a flawless discussion of every planning issue. The principles are well known (see Mansell, at paragraph 42 in my judgment and

[15] Para 42
[16] Para 49

paragraph 63 in the judgment of the Chancellor of the High Court). The court must ask itself whether the officer's advice is "significantly or seriously misleading – misleading in a material way", such as "where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law". Only if there is "some distinct and material defect" in that advice will the court intervene (paragraph 42(3)).

28. Noting the high hurdle of the report "misleading" the committee, no fault was found.

R. (on the application of East Bergholt Parish Council) v Babergh DC [2019] EWCA Civ 2200

29. This case focuses on the meaning of what is 'deliverable'. Although the facts of the case are relevant to NPPF 2012 and paras 14 and 47, the conclusions are still valid.

30. The Parish Council challenged three grants of planning permission for 229 houses on the basis that the local planning authority had incorrectly calculated its five year housing land supply and had relied on a less favourable supply. It argued that the Council had misapplied NPPF policy and had included only sites on which it was "certain" or "absolutely certain" that housing would be delivered within five years. In particular, sites without planning permission were only considered deliverable if the Council had resolved to grant planning permission with a planning obligation. It argued that 14 planning applications had been discounted from the supply pipeline which, if included, would result in a five year housing land supply.

31. The change in the Council's approach concerned the Appellant as in 2013-2014 the Council's AMR stated that it had a 7.1 year supply (with a 5 % buffer), the 2014-15 AMR stated that it had a 6.3 year supply (with a 5 % buffer), the 2015-16 AMR stated that it had a 5.7 year supply (with a 20 % buffer). In April 2017, after considering a report prepared by external consultants for a housing developer, the Council issued an interim statement acknowledging that the housing land supply, with a 20% buffer, was 3.4 years.

32. A meeting was held with the Council and was attended by parish councillors. A contemporaneous note recorded that the "interim AMR was prepared because of challenge by developers" and when pressed regarding certain sites being excluded, the response was that "there was no certainty that they would be built"[17] and there was reference to some sites being excluded because of a JR challenge to planning permissions which had been granted based on a misunderstanding of development plan policy.

33. When considering the planning applications, the local authority had concluded that they were not in accordance with the development plan but the planning committee accepted the conclusion that there was no five year housing land supply and that the tilted balance was triggered.

34. At first instance, the case was dismissed and the appeal to the Court of Appeal was also dismissed. It was found that sites that were not "certain" to be delivered could be included in a five year housing land supply. But the whole issue of assessing "deliverability" was "replete with planning judgment and must always be sensitive to the facts"[18] and, in what has become very familiar, warned:

> *The court will not intrude into the territory of planning judgment, which is the exclusive domain of the decision-maker, nor will it subject the decision-maker's own exercise of planning judgment to review beyond the range of public law*[19].

35. The Court of Appeal was also careful to point out that "the court's interpretation of planning policy does not generate new legal principles of tests to replace or reinforce the policy principles or tests it has construed….That is not what the court was doing in St Modwen Developments Ltd…"[20]. The local planning authority in its Annual Monitoring Report had correctly considered all four elements in para 47 NPPF 2012 in assessing deliverability ie available, suitable, achievable and viable. That approach was not a misinterpretation and was not irrational.

[17] See para 13
[18] para 49
[19] Para 47
[20] paras 47 and 48

36. The Parish Council also argued that the local planning authority had wrongly taken into account the financial consequences of fighting appeals when assessing housing land supply. The Court of Appeal considered the officer's report to Planning Committee, minutes of three Committee meetings and the annual monitoring report found that there was no evidence to suggest an approach by the Council of avoiding the financial implications of appeals and nothing to suggest that such a consideration had influenced its assessment of housing land supply:

> *…the district council made its decisions to grant planning permission lawfully, with a true understanding of relevant policy and on the strength of land use considerations that were material; it did not resort to considerations that were immaterial*[21]*…*

> *…a robust assessment is more likely to be capable of withstanding attack in evidence and cross-examination, more likely to be supported by an inspector, and also more likely to be proof against an award of costs being made against the local planning authority. Such an assessment will be faithful to national policy in the NPPF and national guidance in the PPG, and will also therefore be an assessment that saves unnecessary burdens on the public purse…*[22]

Neighbourhood Plans

R. (on the application of Wilbur Developments Ltd) v Hart DC [2020] EWHC 227 (Admin)

37. In *Wilbur* Lang J reviewed the approach to be taken in challenges to neighbourhood development plans. The judgment helpfully sets out the relevant legal framework for the preparation of NPs at [5] – [18] and then considers the legal hurdles which apply to a challenge under section 61N(2) TCPA 1990 to a decision of the local planning authority approving recommendations for a neighbourhood plan at [63] – [67]. Lang J stressed the following points:

[21] Para 70
[22] Para 77

i. As it is a judicial review, the Claimant must establish that the Defendant misdirected itself in law, or acted irrationally, or failed to have regard to relevant considerations, or that there was some procedural impropriety;

ii. As planning judgments are for the decision makers, the Court must be alert to the risk that a legal challenge is being used as a covert way of impermissibly reviewing the planning merits;

iii. The function of the local planning authority, under paragraph 12 of Schedule 4B TCPA 1990, is to consider the Examiner's recommendations, and reasons for them, and to satisfy itself that the draft plan, as modified, meets the basic conditions, is compatible with Convention rights, and meets the specified statutory requirements.

iv. The local planning authority does not need to duplicate the work of the Examiner whose Report may provide a sufficient basis upon which an LPA could properly conclude that the plan met the basic conditions and other statutory criteria.

v. The principles applied to decision letters of Inspectors should also be applied to Examiner's Reports: they should be read fairly, as a whole, in good faith and in a straightforward manner. Further the presumption Lord Carnwath applied in *Hopkins Homes* that expert specialist planning Inspectors will have understood the policy framework correctly should also be applied to NP Examiners.

38. The above provides the framework against which similar challenges to NP are likely to be assessed. In this case, the challenge was unsuccessful.

Lochailort v Mendip DC [2020] EWCA Civ 1259 - Richard Ground QC and Ben Du Feu acted for the Appellant.

39. The case concerned the draft Norton St Philip Neighbourhood Plan. In particular, policy 5 of that plan which sought to allocate ten parcels of land in Norton St Philip as Local Green Space. Local Green Space is a term of art which is addressed in paragraphs 99 – 101 of the National Planning Policy Framework.

40. The draft plan had been examined by a neighbourhood plan examiner who was satisfied that it met the basic conditions set in paragraph 8 of Schedule 4B to the TCPA 1990 which a neighbourhood plan must be examined against. The local authority had agreed with her conclusion.

41. One of the basic conditions, condition (a), is that 'having regard to national policy' it is appropriate to make the plan. The Court of Appeal accepted the Appellant's submission, relying on *Carpets of Worth Ltd v Wyre Forest DC* (1991) 62 P & CR 334, 342; *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 at [47], that *"a statutory requirement of this kind requires a decision maker not only to take national policies into account but also to observe them and depart from them only if there are clear reasons for doing so."*

42. This is likely to be the most significant part of the judgment. It confirms that there is a statutory duty on neighbourhood plan examiners and, ultimately, on a local authority to recognise any departures from national policy and only to approve any such departures if there are clear reasons for doing so. This does not mean that departures are not permitted, but there must be clear reasons for any such departure which must be explained.

43. In this case, the departure was from paragraph 101 of the NPPF which requires that: *"Policies for managing development within a Local Green Space should be consistent with those for Green Belts."* The Court of Appeal held that the word consistent should be given its ordinary meaning and that this meant that *"national planning policy provides that policies for managing land within an LGS should be substantially the same as policies for managing development within the Green Belt."*

44. Draft policy 5 read: *"Development on Local Green Spaces will only be permitted if it enhances the original use and reasons for the designation of the space."* The Appellant's point was that the wording of the policy overly restrictive. Even though Green Belt is a very restrictive designation, the draft policy was even more restrictive because it did not allow development in *"very special circumstances"* and did not provide for the

categories of not inappropriate development which are set out in national green belt policy.

45. The Court accepted these submissions concluding that there was "a gaping whole" in the examiner's reasoning in this regard and quashed the local authority's decision.

46. Two other matters are worth mentioning about this case: (1) the Appellant obtained an interim injunction to prevent a referendum on the neighbourhood plan being held before the judicial review had been disposed of – see [2019] EWHC 2633 (QB); and (2) it is the first planning case which has been heard remotely both in the High Court and the Court of Appeal.

Planning Conditions

DB Symmetry Limited v Swindon Borough Council [2020] EWCA Civ 1331

47. The issue on this appeal was whether a condition attached to the grant of planning permission for employment development of various kinds lawfully required the public to have rights of passage over roads to be constructed as part of the development. A planning inspector said "no" but the High Court had said "yes". The Court of Appeal agreed with the planning inspector.

48. The planning application in question concerned part of an area referred to in the local development plan as the New Eastern Villages. This is a strategic allocation to deliver economic and housing growth on the outskirts of Swindon, including the provision of 8000 homes and 40 hectares of employment land with associated facilities. The application was the first part of the proposed development in the NEV to be determined.

49. Attached to the grant of outline planning permission were some 50 conditions. The appeal turned on condition 39. This reads:

> ""*Roads*

> *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."*

50. At paragraph 15 of the judgment Lewison LJ summarised the dispute between the parties as follows:

> "The dispute between the parties is whether that condition required the developer to dedicate the roads as public highways (as Swindon contends) or whether it merely regulates the physical attributes of the roads (as the developer, supported by the Secretary of State) contends)."

51. The developer had, on appeal, successfully obtained a certificate of lawfulness pursuant to s.192 of the Town and Country Planning Act 1990 that the formation and use of the access roads as private access roads, without dedicating those roads as public highways, would be lawful. This appeal concerned a challenge by the local planning authority to that grant of that certificate.

52. At [22] – [27] Lewison LJ summarised the relevant law in relation to highways. In ordinary legal usage a highway is a way over which the public have rights of passage (whether, for example, on foot or with animals or vehicles). The way in which a highway comes into existence is through dedication and acceptance by the public. Dedication may be express or inferred from public use. Depending on the circumstances, a highway may be repairable at public expense, repairable by a landowner or there may be no liability to repair it.

53. Under the provisions of s.38 and 278 of the Highways Act a highway authority may arrange for the construction of a road at a developer's expense, followed by the dedication of that road as a highway repairable at public expense. Alternatively, the carrying out of the works prior to adoption may be carried out by the developer; commonly under a section 106 agreement. Section 263 of the Highways Act 1980

provides for the vesting of highways in the highway authority. But that section only applies to highways "maintainable at the public expense". If a highway is not maintainable at public expense, it remains vested in the owner of the soil, subject to public rights of passage.

54. Relying on the case of *Hall & Co Ltd v Shoreham by Sea Urban DC* [1964] 1 WLR 240 and subsequent developments in the law including the introduction of s.106 of the TCPA 1990 and 278 of the HA 1980 the Court of Appeal explained that there is a recognised difference between what can be achieved by conditions on the one hand; and what can be achieved by planning agreements (or planning obligations) on the other. It was explained that the direction of travel in the planning legislation has been to encourage a wider use of planning agreements and obligations, while leaving the scope of the power to impose conditions untouched. A reason for this difference is that, unlike conditions, planning obligations cannot be unilaterally imposed on a developer by a local planning authority – they require the consent of the developer. Absent such consent, the local planning authority may refuse permission.

55. The Court of Appeal was satisfied that *Hall* remained good authority for the proposition that a condition that requires a developer to dedicate land which he owns as a public highway without compensation would be an unlawful condition. It did not matter whether the unlawfulness was characterised as the condition being outside the scope of the power because it requires the grant of rights over land rather than merely regulating the use of land; or whether it is a misuse of a power to achieve an objective that the power was not designed to secure; whether it is irrational in the public law sense, or whether it is disproportionate.

56. The consequence of that would mean, that if that were the proper interpretation of the condition, unless the condition could be severed from the planning permission, the planning permission could not stand.

57. The Court therefore considered whether this was the proper interpretation of the planning condition by asking itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court has regard to the natural and ordinary meaning of the relevant words, the overall purpose of the

consent, any other conditions which cast light on the purpose of the relevant words, and common sense.

58. In undertaking this exercise, the Court of Appeal saw no reason to exclude from the interpretation of a planning permission the application of the validation principle. This is a principle which applies to the interpretation of other documents and means that the court will prefer an interpretation which results in the clause or contract being valid as opposed to void. It is an approach which is triggered when the court is faced with two realistic interpretations.

59. The Court of Appeal was satisfied that the Inspector's interpretation of the condition was, at least, realistic. She had found:

> *"Whilst the term "highway" usually means a road over which the general public have the right to pass and repass, the phrase "fully functional highway" cannot be divorced from the beginning of the sub-clause which states "shall be constructed in such a manner as to ensure…". In my view, Condition 39 simply imposes a requirement concerning the manner of construction of the access roads and requires them to be capable of functioning as a highway along which traffic could pass whether private or public. It does not require the constructed access roads to be made available for use by the general public. I believe that a reasonable reader would adopt the Appellant's understanding of the term "highway" as used in the context of the condition with the clear reference to the construction of the roads as opposed to their use or legal status. The distinct inclusion of the term "public highway" in the reason for imposing Condition 39 reinforces my view on that point."*

60. At [77] – [87] the Court of Appeal made eleven points in support of this analysis and therefore allowed the appeal. This included an analysis of the wording of the condition which did not expressly require dedication (a necessary prerequisite of the creation of a highway) nor make clear the extent of any such dedication if such a requirement was to be implied. The drafters of the planning permission had appeared to distinguish between a" highway" and a "public highway" and the condition appears to relate to the construction of roads. The purpose of these access roads, and the reason for imposing the condition was to ensure that the development had access to the public highways

via the proposed access roads suggesting that the highway does not form part of the development.

61. The Court was also concerned that the power to impose conditions on the grant of planning permission should not be interpreted as derogating from the rights of the owner to exercise his property rights, in the absence of clear words. The right in issue in this case is the right to forbid access to the land to anyone who enters it without the owner's permission. This is not a right which is dependent on the construction of roads but is a right inherent in the ownership (or perhaps more accurately the possession) of land. The court was concerned that if condition 39 means what the Council said it meant, the landowner will have lost that right so far as it extends to the access roads. The Court also noted that the planning permission does not say anything about repair of the roadways once constructed and whilst it is legally possible to create a newly constructed highway which no one is liable to repair, in modern times that is unusual.

62. The Court was also satisfied that the reasonable reader would be disposed to understand that in imposing conditions on the grant of planning permission, the local planning authority had complied with long-standing government policy and case law which forms part of the relevant legal context. The reasonable reader could not suppose that the local authority intended to grant a planning permission subject to an invalid condition, let alone to grant an invalid planning permission. The reasonable reader would also note that there is a readily available statutory mechanism for securing the adoption of a way as a highway; namely by agreement under section 38 of the Highways Act 1980. A section 106 agreement could have required the carrying out of works to bring the roads to adoption standards. Neither of these familiar mechanisms were used. They also form part of the statutory context in which the planning permission must be interpreted.

63. Finally the court gave some weight to the expertise of an experienced and specialist planning inspector applying the principle of undue intervention by the courts in policy judgments within their areas of specialist competence in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865 to the facts of this case. The Court noted that whilst this was said in the context of the interpretation and application of national policy it also applies (though perhaps to a lesser extent) to the interpretation of a planning permission.

cornerstone barristers

Authors

Robin Green
rgreen@cornerstonebarristers.com

Emmaline Lambert
elambert@cornerstonebarristers.com

Ben Du Feu
bend@cornerstonebarristers.com

Cornerstone Barristers

020 7242 4986 | clerks@cornerstonebarristers.com

London | Birmingham | Cardiff | DX: LDE 316 Chancery Lane

cornerstonebarristers.com