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Surrey Planning Day

Thursday 28 November 2019

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Developments Plans or Difficult Problems

James Findlay QC

Recent Surrey challenges

- *CPRE Surrey v Waverley BC* [2019] EWCA Civ 1826 – 31/10/19

  PLANNING JUDGEMENTS

  REASONS

- *Various v Guildford BC* [2019] EWHC ?

  SEA

  HABITATS

Affordable housing threshold

Bore v Gibbons

- Were they conflicting opinions or did the evidence support their conclusions?
- Planning judgment or Inspector's value judgement

Client Earth letter

Plan period/evidence

- Strategic policies 15 year + horizon (town centre 10)
- When is evidence up to date?

DTC and plan review - 1

A Surrey council's review of its five-year-old core strategy which concluded that an update of the document was not needed - despite its housing requirement falling short of the government's standard method - should be given "no weight" in the planning process, a QC told the Planning for Housing conference yesterday

DTC and plan review - 2

- Planning Practice Guidance (PPG) provides no process for deciding when an update is required, and there is no requirement for either planning inspector or secretary of state oversight

- DTC now an express requirement

Paragraph 73 NPPF

- Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old(Fn 37).

- FN37 Unless these strategic policies have been reviewed and found not to require updating. Where local housing need is used as the basis for assessing whether a five year supply of specific deliverable sites exists, it should be calculated using the standard method set out in national planning guidance.

5YHLS and Milton Keynes

- Land at Castlethorpe Road, Hanslope, one appeal allowed, one dismissed
- Plan adopted 20 March 2019, but shortfall found by 26 September 2019 only a 4.4 years supply

Annex 2

- **Deliverable:** To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:

Annex 2

- a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).

- b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.

Lessons

- Hearing or inquiry
- Robust evidence base
- Appropriate representation

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Prior Approval after Warren Farm

Dr Ashley Bowes


12
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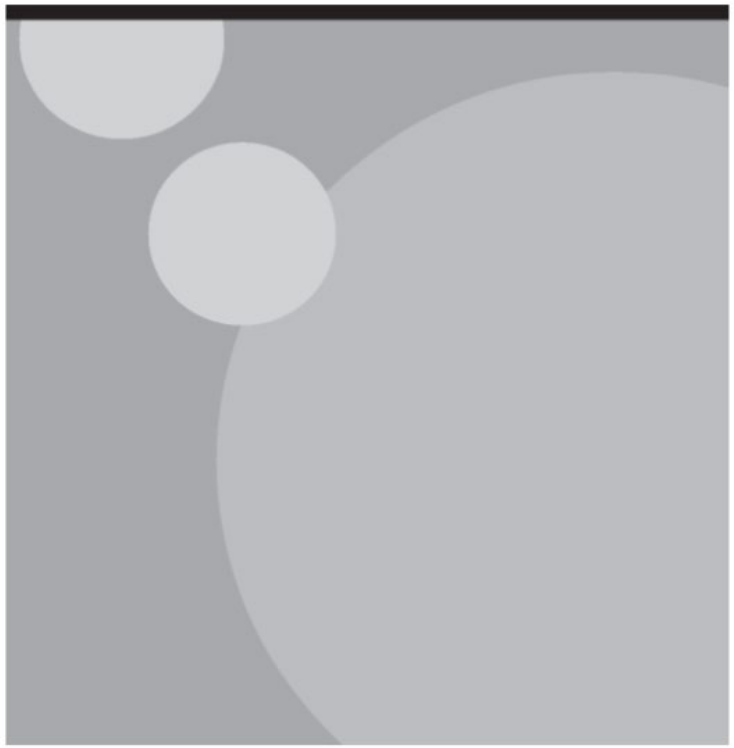
July 2012

Communities and Local Government

New opportunities for sustainable development and growth through the reuse of existing buildings

Consultation



January 2013

COMMUNITIES AND LOCAL GOVERNMENT

Change of Use: Promoting Regeneration

Getting redundant agricultural buildings back into use

As part of the 2011 growth review we undertook to review how change of use is handled in the planning system. We ran a consultation "New opportunities for sustainable development and growth through the reuse of existing buildings" in July 2012.

Following that consultation, I can confirm that in order to help promote rural prosperity and job creation, agricultural buildings will be able to convert to a range of other uses, but excluding residential dwellings. There will be a size restriction and for conversions above a set size a prior approval process will be put in place to guard against unacceptable impacts, such as transport and noise.

May 2013

STATUTORY INSTRUMENTS

2013 No. 1101

TOWN AND COUNTRY PLANNING, ENGLAND

The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013

Made - - - -	*7th May 2013*
Laid before Parliament	*9th May 2013*
Coming into force - -	*30th May 2013*

The Secretary of State, in exercise of the powers conferred by sections 59, 60, 61 and 333(7) of the Town and Country Planning Act 1990(**a**), makes the following Order:

2015 GPDO

- Part 3 GPDO – Some changes of use are PD
- Including Class Q - Agri to Resi use
- Subject to requirement to seek determination whether prior approval required
- Part 3, Class V deals with Prior Approvals

Part 3, Class V, Para. W(11)

(11) The development must not begin before the occurrence of one of the following—

(a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or

(c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.

Article 7

7. Prior approval applications: time periods for decision

Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority—

(a) within the period specified in the relevant provision of Schedule 2,

(b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or

(c) within such longer period as may be agreed by the applicant and the authority in writing.

Enter Warren Farm …

Facts

- Warren Farm made application under Part 3
- Council requested more time to determine whether prior approval required
- Warren Farm agreed (reluctantly)
- Refused prior approval after 56 days

Warren Farm challenges decision …

Warren Farm [2019] EWHC 2007 (Admin)

- Concluded LPA had no power to refuse permission after 56 day period
- Deemed grant of planning permission arose on expiry of 56th day
- Article 3 deems permission where all conditions are met

Lessons

- No power to extend time under Part 3 GPDO
- Article 7(c) only applies where GPDO does not specify a time for determination
- Refuse prior approval promptly – no need to wait for a site notice to expire

Part 3 vs Part 6?

- Remember different rules apply for different Parts of the PD Order
- Under Part 3 – can refuse if does not meet PD requirements (e.g. not in agri use)
- Under Part 6 – cannot do so (Marshall [2018] EWHC 226 (Admin))

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Any Questions?

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Permissions in Principle and Habitats Development

Michael Bedford QC

Key points of the PiP regime

- Amendments to the TCPA 1990 (s.58A, s.59A, s.70(2), s.70(2ZZA))
- TCP (Permission in Principle) Order 2017 (especially Reg.5B)
- Housing-led development
- But exemptions:
  - Not major development
  - Not householder development
  - NOT HABITATS DEVELOPMENT (as defined by Reg.5B(5))

Key points of the Appropriate Assessment Regime

- Habitats Directive (92/43/EEC): Article 6
- Conservation of Habitats & Species Regulations 2017 (Regs 63 and 64)
- European sites (SPAs, SACs, proposed sites)
- Competent authorities (LPAs and SoS)
- Threshold question (screening): LSE = need for AA (and ‘likely’ means ‘possible’)
- AA means only consent if sufficient certainty of no adverse effect on integrity (or derogation tests applied)

CJEU case law (where to start?)

- People Over Wind (2018, C-323/17): no mitigation at screening stage
- Grace & Sweetman (2018, C-164/17): no reasonable scientific doubt as to the absence of adverse effects on integrity
- Holohan (2018, C-461/17): AA needs to take holistic approach, inside and outside the European site
- Dutch Nitrogens (2018, C-297/17): questions efficacy of future mitigation measures

Proper scope of planning obligations

- S.106 TCPA 1990
- No need for a planning application/permission
- Obligation valid even if not material consideration
- Reg. 122 CIL Regulations 2010 tests
- Reg. 123 has gone (hooray!!)
- BUT R (Wright) v Resilient Energy [2019] UKSC 53??
- AA is different to planning decision?

Relevant guidance

- Planning Practice Guidance on PiPs (ID58)
  - Para 005 is sensible
  - Para 022 creates the problem:

  "Planning obligations cannot be secured at the permission in principle stage."
- Planning Practice Guidance on AA (ID65)
  - Para 009 is sensible.

Relevant decisions

- Marine House, Coombe Road, Shaldon, Devon (28 August 2019): APP/P1133/W/19/3220392
  - Single dwelling, dismissed, since no mitigation secured
- Laverton, St Georges Ave, Weybridge, Surrey (23 October 2019): APP/K3605/W/19/3229624
  - 6 flats, dismissed, even if a UU, would not be relevant
- Quarry Farm, Stancott, Chudleigh, Devon (6 November 2019): APP/P1133/W/19/3220911
  - 5-7 dwellings,dismissed, no AA carried out, UU provided but Inspector said it *"cannot be secured"* ??

Assessment of key issues

- There is no mechanism to require a UU or other planning obligation at the PiP stage
- BUT if one has been provided, no impediment to it being a material consideration under s.70(2)
- Nor to it being a relevant factor in a AA
- PINS appears to have confused what policy can require with the legal effect of a planning obligation and what it secures
- *"Secured"* has a narrow meaning
- But need to address to meet s.59A(12)

Assessment of key issues

- Make representations to PINS/MHCLG to revise the PPG to clarify the advice
- Articulate your reasoning clearly in any decisions made on AAs re mitigation
- Consider whether a ‘bog-standard’ UU can be left to the TDC stage but beware third party challenges based on sufficient certainty
- In essence, at the PiP stage:

  You cannot ask, but you can receive....

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Section 73 Applications

Richard Ground QC

Structure

1. Lambeth and conditions
2. Finney

Richard on Conditions

LAMBETH – The easier point

- The wording of the decision notice.

  “variation of condition 1 ..

  From

  “…shall be used for retailing of DIY, home and garden improvements etc…

  Proposed wording

  “The retail unit hereby permitted shall be used for the sale and display of non-food goods only”

- “Operative part is clear and unambiguous” take at face value.

LAMBETH – The tricky point

- There were two other conditions attached to the 2010 permission
  2. Details of refuse and recycling … shall be provided … and retained
  3. ..management and servicing submitted shall be submitted and approved… carried out in accordance with the approved details
- Not re-imposed on 2014 permission do they still operate?
- Provisional view of SC is yes still operate.

Lambeth practical answers

- The simple message to avoid any confusion is to restate all the conditions that the new permission should be subject to in new permission.

- See paragraph 42 of Lambeth judgment per Lord Carnwath JSC and the PPG which he endorsed.

PPG on Section 73 applications

- It is worth thus applying the words in the PPG on all section 73 notices. This is in the Use of Conditions section

  “The original planning permission will continue to exist whatever the outcome of the application under section 73. To assist with clarity, decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged.”

Finney

Finney

- Finney v Welsh Ministers [2019] EWCA 1868
- The Facts:
  - The description of development described the turbine as being “up to 100m”
  - Condition 2 required 2 wind turbines to be in accordance with plans
  - One of plans showed turbine to be 100m tall
  - A Section 73 application was made seeking it to be 125m tall

The issue

- The issue that came before the Court was whether a section 73 application could alter the operative part of the description of development. [paragraph 21]

- The High Court followed the previous decision in R (Wet Finishing Works Ltd) v Taunton Deane which posed the test that a section 73 would be allowable unless there was a ***"fundamental alteration***" of the proposal put forward

The Court of Appeal decision

- Lewison LJ held that a change to the description of development in a section 73 application was unlawful
- A Section 73 application can only alter the conditions as a matter of statutory interpretation.

Significance of Court of Appeal decision

- This has attracted much comment in Planning and in social media and can have a big impact on development strategies
- Lewison LJ says at para 45 that developers can use 96A for NMAs or reapply
- However CIL can mean reluctant to re-apply
- The effect will be
  1. Greater efforts to use NMAs
  2. Perhaps more arguments about description of development

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Legal Update

Jonathan Clay

Housing Land Supply Issues: A practical example from a Midlands planning appeal

NPPF Para 11(d)

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

(i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or

(ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole. This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1.

Footnote 7

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

5 year Housing land supply - what is it?

- NPPF para 73.

Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old.

- NPPF para 11(d) and Footnote 7 mean that where there is no five year housing land supply, the most important policies for determining any application for planning permission will be treated as "out of date".

How do we demonstrate a 5 year HLS?

- NPPF para 74:

A five year supply of deliverable housing sites, with the appropriate buffer, can be demonstrated where it has been established in a recently adopted plan, or in a subsequent annual position statement which:

- has been produced through engagement with developers and others who have an impact on delivery, and been considered by the Secretary of State; and
- incorporates the recommendation of the Secretary of State, where the position on specific sites could not be agreed during the engagement process.

What is a recently adopted plan?

- Footnote 38
  - For the purposes of paragraphs 73b and 74 a plan adopted between 1 May and 31 October will be considered ‘recently adopted’ until 31 October of the following year; and a plan adopted between 1 November and 30 April will be considered recently adopted until 31October in the same year.

What does the PPG say?

- Plans that have been recently adopted (as defined by footnote 38 of the Framework) can benefit from confirming their 5 year housing land supply through an annual position statement, including those adopted under the 2012 Framework.

- Authorities should be aware that sites counted as part of the supply will need to be assessed under the definition of ‘deliverable’ set out in the revised National Planning Policy Framework.

- Paragraph: 011 Reference ID: 68-011-20190722

What if the recently adopted plan was made under the 2012 NPPF?

Either:

- (1) the plan still deems a five year HLS

or

- (2) The plan can only be treated as demonstrating 5yrs HLS if it is subject to review.

Argument: The plan still deems a five year HLS

- Paragraph 74 is unequivocal;
- The guidance in the PPG is ambiguous and opaque
- This would have the effect of immediate obsolescence of newly adopted plans made under the transitional approach (2012 NPPF) where 5YHLS based on AMR rather than standard method prescribed in 2019
- Local Plan Inspector will have confirmed that the plan is “sound”.

Argument: a review is necessary?

- The PPG 68-11says so [does it?]
- Did the Council make it clear that it was seeking to confirm at Reg 19 stage? (Not required under the 2012 NPPF)
- Has it applied the 10% buffer (Most transitional plans only apply 5%)
- Was the EIP Inspector required to consider the issue?

What is the status of PPG?

- ***St Modwen*** [2016] EWHC per Ouseley J (reaffirmed by CA):

- "*32. Finally, the Inspector was also referred to the Secretary of State's Planning Practice Guidance, PPG, of March 2014, a "web-based resource" published - and changeable without notice - "to bring together planning practice and guidance for England in an accessible and usable way". The Guidance was intended to assist practitioners; interpretation of legislation was for the courts but this guidance "is an indication of the Secretary of State's views".*

- *33. This is guidance not policy and is not put forward by the Secretary of State as having the same status or weight as the NPPF itself. It does not purport to contradict the NPPF, though it is possible that its language may do so."*

What does deliverable mean?

Glossary definition

- **Deliverable:** To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:

- sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).

- where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.

Can I add in sites that become deliverable after the base date or is it a closed list?

- *Woolpit* and *Woolmer* decisions say not.
- Legal principles (consider all relevant considerations) say yes.
- Reasons in Woolpit and Woolmer are flawed?

Does that mean that the list of deliverable sites at base date is a closed list?

- Appeal decisions seem to be confirming this, but does it work in practice?
- For example:
  - What if a planning permission is quashed after the base date?
  - What if outline PP at base date and reserved matters granted soon after?
  - What about completions?

Conclusions

- The new NPPF has again failed to resolve the problems which local planning authorities have in demonstrating a five year housing land supply.
- Further litigation is inevitable to clarify these issues
- Meanwhile uncertainty prevails in both plan making and decision taking.

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Questions?

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The Environment ~~Bill~~ biodiversity net gain and air quality

Harriet Townsend

White Paper – The Natural Choice 2011 Net Gain

- We want to improve the quality of our natural environment across England, moving to a net gain in the value of nature. We aim to arrest the decline in habitats and species and the degradation of landscapes. We will protect priority habitats and safeguard vulnerable non-renewable resources for future generations. We will support natural systems to function more effectively in town, in the country and at sea. We will achieve this through joined-up action at local and national levels to create an ecological network which is resilient to changing pressures.

The 25 year Environment Plan

- “Initiatives to protect and improve our natural world and cultural heritage are acts of stewardship by which we discharge our debt to it, and so are moral imperatives in themselves, but they are also economically sensible. A healthy environment supports a healthy economy. That is why this 25 Year Environment Plan builds on our Industrial Strategy and Clean Growth Strategy, to transform productivity across the country and drive green innovation.”

The 25 year Environment Plan

- “The effects on wildlife and habitats are stark. We are in danger of presiding over massive human-induced extinctions when we should instead be recognising the intrinsic value of the wildlife and plants that are our fellow inhabitants of this planet. Furthermore, human-induced climate change threatens unpredictable and potentially irreversible damage to our planet.

- “It is in everyone’s interest to be part of the solution. Over the next 25 years we must safeguard the environment for this generation and many more to come. We plant trees knowing that it will not be us, but our children and grandchildren, who get to enjoy their shade. In the same way, we should take a long view of how our stewardship today can lead to a healthier and culturally richer planet tomorrow.

The 25 year Environment Plan

By adopting this Plan we will achieve:

- 1. Clean air.
- 2. Clean and plentiful water.
- 3. Thriving plants and wildlife.
- 4. A reduced risk of harm from environmental hazards such as flooding and drought.
- 5. Using resources from nature more sustainably and efficiently.
- 6. Enhanced beauty, heritage and engagement with the natural environment.

In addition, we will manage pressures on the environment by:

- 7. Mitigating and adapting to climate change.
- 8. Minimising waste.
- 9. Managing exposure to chemicals.
- 10. Enhancing biosecurity.

The 25 year Environment Plan

Biodiversity Net Gain – policy?

- "Current policy is that the planning system should provide biodiversity net gains where possible. We will explore strengthening this requirement for planning authorities to ensure environmental net gains across their areas, and will consult on making this mandatory – including any exemptions that may be necessary. This will enable those authorities to develop locally-led strategies to enhance the natural environment, creating greater certainty and consistency and avoiding increased burdens on developers, including those pursuing small-scale developments. We would expect this should have a net positive impact on overall development. Some local authorities, major private developers and infrastructure companies have already implemented a net gain approach."

The Environment Bill

- Proposed imposition of a deemed condition on planning consent – submission and approval of biodiversity gain plan.
- 2nd Reading 28-10-19, amongst the support for the ambitions of the Bill, Caroline Lucas (Green) – concern about the detailed proposals for net gain and whether sufficiently long term; and Sue Hayman (Lab) – concern net gain less than effective in eg Australia.
- Environment Bill – now lapsed.

Sunset over the Surrey Hills

NPPF 2019

118. Planning policies and decisions should:

- a) encourage multiple benefits from both urban and rural land, including through mixed use schemes and taking opportunities to achieve net environmental gains – such as developments that would enable new habitat creation or improve public access to the countryside

nPPG – superseded guidance

- The National Planning Policy Framework is clear that pursuing sustainable development includes moving from a net loss of biodiversity to achieving net gains for nature, and that a core principle for planning is that it should contribute to conserving and enhancing the natural environment and reducing pollution. 8-007-20140306

- Biodiversity offsets are measurable conservation outcomes resulting from actions designed to compensate for residual adverse biodiversity impacts arising from a development after mitigation measures have been taken. The goal of biodiversity offsets is to achieve no net loss and preferably a net gain of biodiversity. 8-020-20140306

nPPG – current guidance

- A subsection of the nPPG is devoted specifically to “Net Gain” and provides guidance on securing genuine net gain in biodiversity and in more general environmental terms. See ID 08-020-20190721 – 08-28-20190721.

- Some eight examples of routes to “net gain” are listed in para 21. The mechanism? Not surprisingly, “the Plan”:

  “Plans, and particularly those containing strategic policies, can be used to set out a suitable approach to both biodiversity and wider environmental net gain, how it will be achieved, and which areas present the best opportunities to deliver gains.”

- Amongst those things “it is useful to consider” are the commitments within the 25-year Environment Plan (para 10).

People over Wind

People Over Wind v Coillte Teoranta (C-323/17) ECJ.
“11. The Irish subspecies of the freshwater pearl mussel (margaritifera durrovensis) (the Nore pearl mussel), which is included in Annex II to the Habitats Directive. The extant adult population of this pearl mussel is, according to the estimates mentioned by the referring court, as low as 300 individuals, having been as high as 20,000 individuals in 1991. The life span of each individual is said to be between 70 and 100 years, but the Nore pearl mussel is said not to have reproduced itself since 1970.”

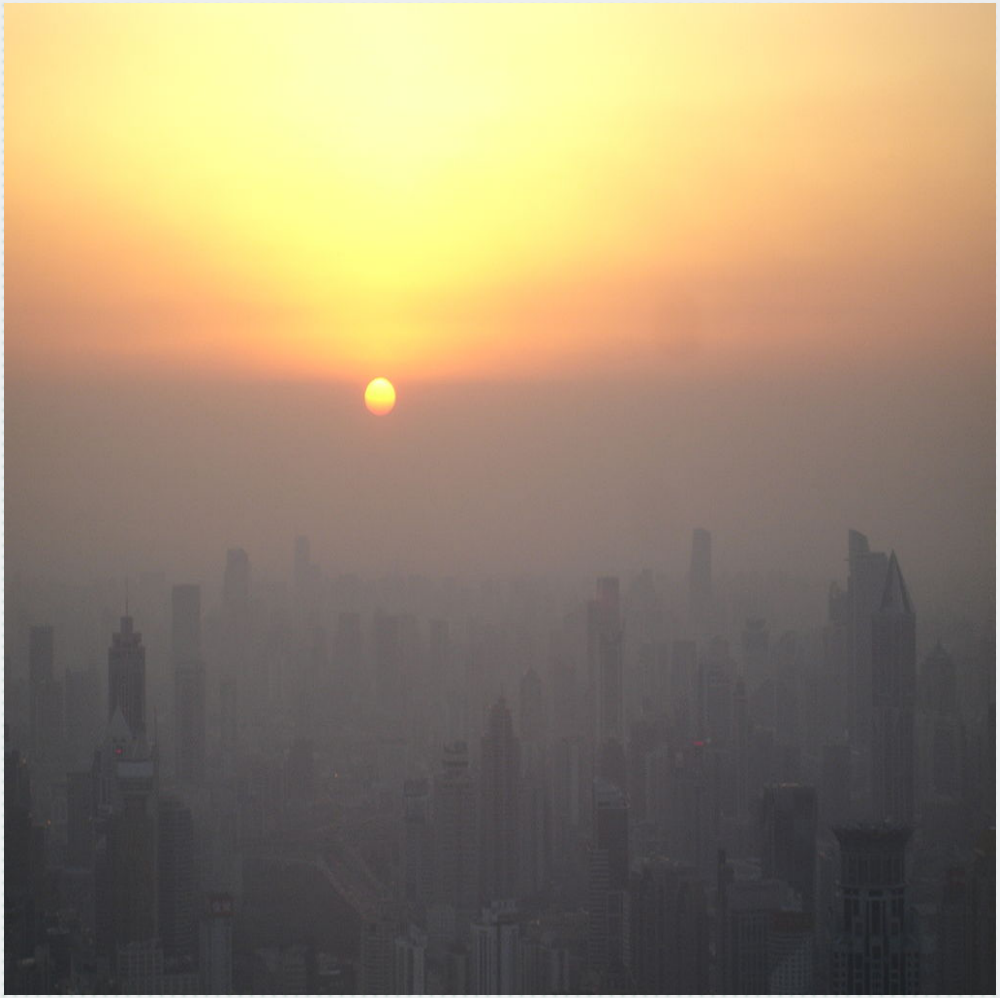
Canterbury v SSHCLG

Canterbury City Council v Secretary of State for Housing, Communities and Local Government [2019] 1211 (Admin), [65]-[77]

Two statutory reviews, heard/decided together

- Dove J at 77: "In cases where there may be implications for effects upon European sites it is now necessary to follow the approach set out in *People Over Wind*, and to **disregard any mitigation measures when considering the effects of the proposal on the European site at the screening stage**." [emphasis added]
- The SoS admitted the error of law in both cases;
- Result: score draw? Dove J quashed one but not the other [100, 114-115]

Mitigation or Integral features of the project? [PINS Note 5/2018]



Gladman v SSHCLG and Swale and CPRE Kent [2019] EWCA Civ 1543

- Gladman lost appeal – Insp found against it on impact on air quality particularly in 2 AQMAs.
- The Insp was sceptical of predictions by G that air quality would improve – was this unlawful bearing in mind the Gov's duty as outlined in the *Clientearth* litigation?
- No – Lindblom LJ at para 41.

Gladman, Lindblom LJ, para 41

- It was not within the inspector's duty as decision-maker to resolve the "tension", as Mr Kimblin put it, between the Government's responsibility to comply swiftly with the limit values for air pollutants and the remaining uncertainty over the means by which, and when, the relevant targets would be met. In different circumstances, and on different evidence, an inspector might be able to assess the impact of a particular development on local air quality by taking into account the content of a national air quality plan, compliant with the Air Quality Directive, which puts specific measures in place and thus enables a clear conclusion to be reached on the effect of those measures. But that was not so here. This was a submission made by Mr Moules, and in my view it is right.

Gladman

- As for the challenge to the Inspector's understanding of NPPF para 122 (now 183), the Air Quality Directive was "not a parallel consenting regime to which paragraph 122 is directed". There was "no separate licensing or permitting decision that will address the specific air quality impacts of [Gladman's] proposed development" – para 122 was not engaged – paras 43-45.

- The financial contribution offered by way of mitigation was rejected by the Insp in a classic eg. of planning judgment – paras 49-53.

Shirley v SSHCLG and Canterbury City Council [2019] EWCA Civ 22

- An application for judicial review of the SoS's decision not to call in an application for planning permission.
- Lindblom LJ : the Air Quality Directive does not require the SoS's call-in power to be exercised where development may exacerbate a breach of its requirements.

Kenyon v SSHCLG and Wakefield Council [2018] EWHC 3485 (Admin)

- Judicial review of screening direction – residential development proposed near AQMA and SoS ought to have considered air quality in the context of the long standing failure to meet the requirements of the Air Quality Directive, and the findings as to impact on health referred to by Garnham J in para 5 of his judgment in *Client Earth [2018]*.

- Dismissed by Lang J: the judgment as to likely significant impact was for the SoS.

nPPG – current (revision 1-11-19)

More detailed guidance eg. at ID: 32-005-20191101

- “Where air quality is a relevant consideration the local planning authority may need to establish:
  - the ‘baseline’ local air quality, including what would happen to air quality in the absence of the development;
  - whether the proposed development could significantly change air quality during the construction and operational phases (and the consequences of this for public health and biodiversity); and
  - whether occupiers or users of the development could experience poor living conditions or health due to poor air quality.”

- [The nPPG refers to a flow diagram similar to the previous version.]
- Early engagement by applicants with the lpa and environmental health departments is “important”.

Points to take away

1. The Environment Bill is dead for now (at least) but the 25 year Environment Plan may be relevant to the assessment of proposals with biodiversity and other environmental impact.

2. Since July 2019 there has been a more explicit “how to” deliver biodiversity net gain within nPPG. If/when reviewing a development Plan, this will be an important matter to grapple with.

3. If screening under the Habitats Regulations, omit mitigation from any consideration. However, features “integral to the project” may be assessed at the screening stage.

4. The fact the UK’s response to the Air Quality Directive has been inadequate does not alter the approach taken by the courts in cases involving a planning judgment or discretion. As ever, matters of judgment are left to the decision maker unless clearly irrational.

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