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PLANNING CASE LAW UPDATE

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Planning Case Law Update

Key Cases from the last 12 months or so, covering:

- Section 215 notices
- Consistency in decision-making
- Interpretation of the NPPF
- Presumption in favour of sustainable development
- Meaning of “deliverable”
- Meaning of “isolated dwelling”
- Extent of housing shortfall
- Heritage
- Duties of LPAs
- Air Quality

Section 215 Notices

R (Lisle-Mainwaring) v Kensington & Chelsea RLBC [2017] EWHC 904 (Admin)



Section 215 Notices

- s.215 notice that the area's amenity had been adversely affected by the condition of her land, and requiring the house be painted white within 28 days.
- Quashing the notice, per Gilbert J:
 - 'condition of land' in s.215 can include appearance.
 - BUT, only concerning the maintenance or repair element of appearance and not the aesthetic value of the land.

Consistency in Decision Making

Moulton PC v SSCLG [2017] EWHC 1047 (Admin)

How inconsistent is inconsistent?

SoS refused two similar housing applications a few years apart.

- The first found safe in traffic terms but refused on a prematurity ground.
- The smaller second application was in the same area of the first and affected the same roads but generated two-thirds less traffic. Refused on the basis that it was unsafe in traffic terms.

Consistency in Decision Making

Moulton PC v SSCLG [2017] EWHC 1047 (Admin)

Per Gilbert J, quashing the decision:

- Where there is a stark inconsistency, it must be addressed by the decision maker.
- Where an inconsistency is “*stark and fundamental*” an explanation must be given as to why the decision maker is not arriving at the same conclusion, and cannot just be left to the reader to infer

Interpretation of the NPPF - Presumption in Favour of Sustainable Development



**Barwood Strategic Land II LLP v East Staffordshire
BC [2017] EWCA Civ 893**

What is the scope of the presumption?

Applies to NPPF 2

Prior to this case, two conflicting approaches:

- Wide scope – **Wychavon DC**
- Narrow scope – **Cheshire East BC**

Presumption in Favour of Sustainable Development

Lindblom LJ:

- Starting point is the development plan – section 38(6) PCPA.
- The presumption in the NPPF is not a statutory presumption as in s.38(6).
- The presumption is not irrebuttable.
- Can benefit from the presumption and get refused; or not benefit from the presumption and get permission

Meaning of “deliverable”

St Modwen Development v SSCLG [2017] EWCA Civ 1643

- Council had included in their five year supply a number of developments with no permission but included draft allocation for ELP. This approach was upheld by the Inspector.
- Developer argued this was unlawful because the Inspector had focussed on the deliverability of the sites. Instead the Inspector should have focussed on delivery because it was delivery that was at the heart of the NPPF.

Meaning of “deliverable”

Lindblom LJ at [35]:

“Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessary will be.”

Meaning of “deliverable”

Lindblom LJ at [39]:

“This does not mean that for a site properly to be regarded as “deliverable” it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years.”

“deliverable” in NPPF 2

“Sites with outline planning permission, permission in principle, allocated in the development plan or identified on a brownfield register should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.”

What amounts to clear evidence?

What is the yield from the site in 5 years.

Extent of Shortfall

Hallam Land v. SoS [2018] EWCA Civ 1808

What is the true supply position of the LPA?

LPA said 4.5YS

Appellant said considerably less than 4.5.

The Inspector said he did not need to decide on a final figure. There was no error of law.

Extent of Shortfall

Lindblom LJ at [48]:

“Relevant authority in this court, and at first instance, does not support the proposition that, for the purposes of the appropriate balancing exercise under the policy in paragraph 14 of the NPPF, the decision-maker's weighting of restrictive local plan policies, or of the proposal's conflict with such policies, will always require an exact quantification of the shortfall in the supply of housing land. This is not surprising.”

Extent of Shortfall

Lindblom LJ at [52]:

- Need to gauge the scale of the shortfall in broad terms.
- Extent of shortfall impacts on the weight to harms and benefits.
- Failure to do that would be to disapply *Suffolk Coastal*.

Precautionary Approach

Cheshire East Council v SOSHCLG [2018] EWHC 2906 (Admin)

Inspector relied on two previous decisions in the LPA on the HLS:

- At best 5.07 or 5.01.
- At worst 4.96 or 4.93

All the Inspectors concluded no 5YS and ‘tilted balance’ applies.

Precautionary Approach

Per Justine Thornton QC at [46]:

*46. In my judgement, there is no error of law in the inspector's application of the policy framework. He has considered the evidence and applied his judgment. His precautionary approach to the evidence before him is not, as Mr Taylor contended, an impermissible additional test but an application of his judgment to answer the central question of whether the Council had demonstrated a five year supply, within the context of a policy imperative to significantly boost the supply of housing. Mr Taylor's submissions subject the decision letter to the kind of hypercritical scrutiny that the Court should reject (**St Modwen Housing v Secretary of State for Communities and Local Government**).*"

Called-in Applications

R (Save Britain's Heritage) v SoSCLG [2018] EWCA Civ 2137

- The site was next to Paddington station in London. The proposed development was controversial and widely opposed.
- The appellant asked the secretary of state to call in the application under the Town and Country Planning Act 1990 s.77, but he refused.

Called in Applications

- The appellant argues SoS had a duty to give reasons for his decision not to call in.
- Relied on a green paper issued by the Secretary of State for Transport, Local Government and the Regions in 2001, which promised that he would give reasons for not calling in individual cases.
- The change had been announced in the House of Commons and the House of Lords, and was repeated in a review which took place in March 2010.
- The policy criteria for calling in applications was amended in 2012 in a written ministerial statement.
- In 2014 someone within the secretary of state's department decided that it would be more prudent for reasons not to be given, and the template letter was altered.

Called in Applications

- no express requirement in s.77 for reasons to be given, and there was no authority for the proposition that reasons were required under s.77. Indeed, all of the authorities were to the opposite effect. This part of the appeal dismissed.
- Some disagreement between Coulson LJ and Singh LJ on whether the common law. Singh LJ says should be judged on a case by case basis, not that it never applies.

Called in Applications

- Appeal allowed on legitimate expectation.
- LE could arise either by an express promise or by a practice. Promise made to the world sufficient.
- This was a promise in the 2001 green paper, reiterated in 2010 and not withdrawn/modified in 2012 WMS. Never withdrawn.
- Per Coulson LJ at [44] – *“it is a recipe for administrative chaos if a legitimate expectation can be generated by an unequivocal ministerial promise , only for it then to be lost as a result of an unadvertised change of practice . Even at its highest, the SoS' case stops short of the suggestion that the alleged change of practice was advertised as such when it occurred in 2014. Ms Lieven QC properly accepted that it was not a change that could be said to have been 'published' at all.”*

Planning Case Law Update

Monday, 26th November



PLANNING CASE LAW UPDATE

John Barrett and Philip Robson

Introduction

1. This paper considers the developments in case law that have occurred over the last 12 months or so. Where possible the cases have been structured into broad topics with stand-alone cases addressed at the end of this paper.
2. The following areas will be discussed:

Section 215 Notices

Consistency in Decision Making

Interpretation of the NPPF

Extent of Housing Shortfall

Heritage

Duties of a Local Planning Authority

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Air Quality

Miscellaneous Cases

Section 215 Notices

4. **R (Lisle-Mainwaring) v Kensington & Chelsea RLBC** [2017] EWHC 904 (Admin) gained media attention due to the unusual facts of the case. Ms Lisle-Mainwaring, in a fit of pique against her neighbour's opposition to her proposed planning application, painted her house in red and white strips.



5. In response the Council issued a TCPA s.215 notice stating that the area's amenity had been adversely affected by the condition of her land, and required the house be painted white within 28 days.
6. Gilbart J found that it was improper of the Council to use a s.215 notice in this manner. The 'condition of land' relevant for a s.215 notice could include appearance, but only concerning the maintenance or repair element of appearance and not the aesthetic value of the land. It was also important to note that the painting of a house was permitted development under the GPDO 2015, and if the Council wanted to deal with this they could have done so with an Article 4 direction.

North Wiltshire Re-Visited

7. There has been a long line of cases starting with **North Wiltshire DC v SSE** [1993] 65 P. & C.R. 137 CA that have set out the importance of consistency in decision making. In **Moulton PC v SSCLG** [2017] EWHC 1047 (Admin), Gilbart J looked at how Courts should handle inconsistency in planning decisions. But the question was how high this bar should be set? Should it just be that like cases are treated alike, or that inconsistency must be more explicitly addressed?
8. Here the Secretary of State had refused two similar housing applications a few years apart. The first had been found safe in traffic terms but refused on a prematurity ground. The smaller second application was in the same area of the first and affected the same roads but generated two-thirds less traffic. However it was refused on the basis that it was unsafe in traffic terms.
9. Gilbart J found that this was a stark inconsistency that had to be addressed by the Decision Maker. However he found at 161:

“The more Mr Moules and Mr Elvin sought to persuade me that the previous decision either had been addressed implicitly, or could be distinguished, or did not require a reference, the more obvious it became that the SSCLG had simply not addressed it.”
10. Out of the **North Wiltshire DC** strand of cases Gilbart J found the test set out in **J J Gallagher v SSE** [2002] 4 P.L.R 32 decisive. Where an inconsistency is “*stark and fundamental*” an explanation must be given as to why the decision maker is not arriving at the same conclusion, and cannot just be left to the reader to infer. If the previous decision had been addressed then it could well have made a difference to the decision [162-165]. On these grounds the decision was quashed.

Interpretation of the NPPF

12. This year there have been a number of cases that have looked at how certain parts of the NPPF should be interpreted. For our purposes a rich vein of litigation and test cases is likely to arise with the publication of NPPF2 in July 2018. So many of these cases have now to be treated with some circumspection.

Presumption in Favour of Sustainable Development

Barwood Strategic Land II LLP v East Staffordshire BC [2017] EWCA Civ 893

13. There has been much discussion over the ‘Suffolk Coastal’ decision which we will not look to repeat here, instead looking at a more recent case that applied the principles set out in that judgment: **Barwood Strategic Land**. Though not quoted here the five bullet points set out at [22] of the judgment are a useful guide as to the principles of Suffolk Coastal. The facts of this case are less relevant than the conflict of law that it was deciding on the application of NPPF para 14. The principles here in **Barwood Strategic Land** we consider extend to paragraph 11 of NPPF2
14. Previously the scope of the presumption of favour of sustainable development had been addressed in two conflicting cases. In **Wychavon District Council v SSCLG** [2016] EWHC 592 (Admin) Coulson J had found that presumption had a wider scope than simple paragraph 14 and ran through the NPPF like a ‘golden thread’. However Jay J in **Cheshire East Borough Council v SSCLG** [2016] EWHC 571 (Admin) found that the presumption had a narrow scope limited to paragraph 14.
15. Lindblom LJ in **Barwood Land** favoured the latter interpretation of paragraph 14, and stated that it had to be placed in the wider context of the statutory framework for decision making [13]. The starting point is the statutory presumption in favour of the development plan, found at s.38(6) of the Planning and Compulsory Purchase Act 2004, unless material considerations indicate otherwise. Within this exercise the paragraph 14 presumption is a factor, but not always a decisive one. The tilted balance

can be rebutted with significant adverse effects, and an application without the presumption is capable of being granted permission. Crucially this is a matter of planning judgment and not law (see [31-35]).

“Deliverable”

St Modwen Development v SSCLG [2017] EWCA Civ 1643

16. Following the introduction of NPPF2 and the changes made to the definition of ‘Deliverable’ this case is largely of interest in the distinction made between “delivery” and “deliverable”. In this case the Council had included in their five year supply a number of developments that did not yet have planning permission but which were in their draft allocation for the emerging local plan. This approach was upheld by the Inspector. But the developer argued that this was unlawful because the Inspector had focussed on the deliverability of the sites. Instead the Inspector should have focussed on delivery because it was delivery that was at the heart of the NPPF.

17. In the Court of Appeal Lindblom LJ found that the Appellant’s argument missed the essential distinction between deliverability as used in old para 47, and the concept of an “*expected rate of delivery*”. As he set out at 35:

“Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessary will be.”

18. Crucially it was deliverability and not delivery that policies on five year supply (NPPF1 47 and 49) were concerned. Deliverability was defined in footnote 11, and carried the low threshold of a ‘realistic prospect’ of coming forward that does not even need planning permission to be considered deliverable [39]:

“This does not mean that for a site properly to be regarded as “deliverable” it must necessarily be certain or probable that housing will in fact be

delivered upon it, or delivered to the fullest extent possible, within five years.”

19. Many LPA's relied upon this case as a basis for identifying a lower threshold in identifying a 5 YS. However, NPPF2 has now set a high bar of what is “deliverable”:

“Sites with outline planning permission, permission in principle, allocated in the development plan or identified on a brownfield register should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.”

20. What amounts to “clear evidence” is now the subject of much debate at planning inquiries and should be a fact specific exercise. Expect some guidance from appeal decisions and litigation to follow in the near future. But what is important are the words “*will begin on site*” because it emphasises that which amounts to actual delivery or at least the commencement of actual delivery.

21. The battleground for inquiries on this point will be what amounts to clear evidence and what the actual yield will be from a site during the 5 year period.

Extent of Shortfall

22. The Court of Appeal in **Hallam Land v. SoS** [2018] EWCA Civ 1808 had to address the issue that frequently arises in housing appeals: what is the true supply position of the LPA. In this case the LPA conceded its supply was 4.5YS whereas the Appellant assessed it to be considerably less than 4.5. The Inspector expressed the view that he need not go into the actual supply. There was no error of law. Lindblom LJ at Paragraph 48:

“Relevant authority in this court, and at first instance, does not support the proposition that, for the purposes of the appropriate balancing exercise

under the policy in paragraph 14 of the NPPF, the decision-maker's weighting of restrictive local plan policies, or of the proposal's conflict with such policies, will always require an exact quantification of the shortfall in the supply of housing land. This is not surprising."

23. Although he added:

"Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant "non-housing policies" in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in Hopkins Homes Ltd. It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land."

24. So judging the extent of the shortfall where that is a controversial issue, whilst it is not required to be calculated with absolute precision, is a matter that the decision maker is required to grapple with and come to a judgment as to the "broad magnitude".

Precautionary Approach

25. In a recent case, **Cheshire East Council v SOSHCLG** [2018] EWHC 2906 (Admin), the court considered the scope of any discretion open to an Inspector when the 5YS was marginal.
26. The Claimant sought to quash a decision of an Inspector to grant outline planning permission for 29 dwellings. The Inspector relied on two recent appeal decisions in the authority area where both Inspectors had found the 5YS to be marginal. In the appeals relied upon, the Inspectors found that the Councils 5YS was at best 5.07 or 5.01 years, and at worst 4.96 or 4.93 years, concluding that it was marginal.
27. Ultimately, both Inspectors concluded that the housing supply policies could not be considered up-to-date pursuant to the National Planning Policy Framework para.49, thereby triggering the presumption in favour of granting permission for sustainable development in para.14.
28. On the key question as to whether or not the 'precautionary approach' was an error of law, Justine Thornton QC found as follows in her judgment (at [43] and [46]):

"43. In applying the policy framework, the key question for the inspectors to answer was whether the Council had demonstrated a 5 year supply of housing with a realistic prospect of being delivered. I do not accept Mr Taylor's submission that the Willaston and White Moss inspectors concluded that the Council had demonstrated a five year supply. It is clear that they concluded that the Council had not demonstrated the necessary supply.

46. In my judgement, there is no error of law in the inspector's application of the policy framework. He has considered the evidence and applied his judgment. His precautionary approach to the evidence before him is not, as Mr Taylor contended, an impermissible additional test but an application of his judgment to answer the central question of whether the Council had

demonstrated a five year supply, within the context of a policy imperative to significantly boost the supply of housing. Mr Taylor's submissions subject the decision letter to the kind of hypercritical scrutiny that the Court should reject (St Modwen Housing v Secretary of State for Communities and Local Government)."

"Isolated Dwellings"



Braintree District Council v SCLG [2018] EWCA Civ 556

29. In **Braintree District Council** the Court of Appeal looked at the interpretation of para 55 of the NPPF1. As NPPF2 uses the same terminology at paragraph 79 we believe the case would also be followed in the interpretation of the NPPF2. Para 55 had set out that local authorities should avoid new isolated homes in the countryside unless there are certain listed special circumstances. Here the local authority had refused planning permission for two new dwellings because it found that they would be isolated. However on appeal both the Inspector and the High Court found that as the dwellings would be situated near other dwellings, they could not be considered isolated. However the Council argued that the key element to the term 'isolated' was whether

the dwellings would be near to services and facilities. It was on this point that the case turned, is isolation relative to other houses or to services and facilities.

30. The Court of Appeal found that because the policy was expressed in general and prescriptive terms it allowed for a broad approach to be taken ([28]). There was no specific criteria or test that the NPPF set out that had to be applied to identifying isolated. It was a matter of planning judgment. In that context it was entirely accurate for the Planning Inspector to give 'isolated' a common sense meaning as being away from other dwellings, rather than specifically to be isolated from services and facilities.

Heritage

31. Heritage continues to provide fertile ground for dispute and litigation.

32. There have been two conflicting cases on how the Courts should approach the duty in s.66 of the Planning (Listed Building and Conservation Areas) Act 1990 which sets out that local authorities should have special regard to the desirability of preserving a listed building or its setting.

33. In **R (Williams) v Powys CC** [2017] EWHC Civ 427 the Court of Appeal looked specifically at how the setting of a listed building should be defined. Although Lindblom LJ recognised that a Court should not set down universal principles for defining setting he did set out some guiding factors at [56]. The keystone to whether a development was in the setting of a listed building was that:

“...there must be a distinct visual relationship of some kind between the two— a visual relationship which is more than remote or ephemeral, and which in some way bears on one's experience of the listed building in its surrounding landscape or townscape.”

34. Physical proximity was not held to be essential. The case set out the distinction between 'inter-visibility' and 'co-visibility'. The former being where the listed building

and (in this case) the wind turbine could see each other, the latter being where the two could be seen together from a third view. It was not just inter-visibility that had to be engaged with under s.66 but also co-visibility; and two buildings could be physically far apart but share co-visibility.

35. It was because of this co-visibility that the Court of Appeal allowed the appeal and quashed the planning permission.

36. However the water is muddied considerably by the fact that a few days after this judgment the High Court handed down judgment in **Steer v SSCLG** [2017] EWHC 1456. This concerned two planning permissions for developments in the setting of Grade 1 listed Kedleston Hall.



37. Here it was said that the Inspector had found that setting should be defined on a narrow basis as requiring a visual connection. However this was overturned by Lang J on the basis that the Inspector had placed too much emphasis on the requirement for a visual connection, and had ignored the existing historic, cultural and economic connections that existed between the locations. At [64]:

“Whilst a physical or visual connection between a heritage asset and its setting will often exist, it is not essential or determinative. The term

setting is not defined in purely visual terms in the NPPF which refers to the "surroundings in which a heritage asset is experienced". The word "experienced" has a broad meaning, which is capable of extending beyond the purely visual."

38. There was a clear discrepancy between this and **Williams**. While **Williams** in its definition of setting gave a very broad definition to what a visual relationship can be, it still found that there must be some sort of visual relationship.

39. In the Court of Appeal in **Catesby Estates Ltd v. Steer** [2018] EWCA Civ 1697 the appeal was allowed albeit on the narrow basis that Lang J assessment of the Inspector's DL was wrong and that the Inspector had correctly identified the correct legal and policy tests. Specifically in relation to visual connection at paragraph 27

*"It has also been accepted in this court that the effect of development on the setting of a listed building is not necessarily confined to visual or physical impact. As Lewison L.J. said in **R. (on the application of Palmer) v Herefordshire Council** [2016] EWCA Civ 2016 (in paragraph 5 of his judgment), "[although] the most obvious way in which the setting of a listed building might be harmed is by encroachment or visual intrusion, it is common ground that, in principle, the setting of a listed building may be harmed by noise or smell". In that case the potential harm to the setting of the listed building was by noise and odour from four poultry broiler units."*

40. It also usefully added three points to bear in mind whenever setting and harm to setting arises as an issue

"Three general points emerge. First, the section 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is – even if its extent is difficult or impossible to delineate exactly – and whether the site of the proposed development will be within it or in some way related to it ...

Secondly, ... none of the relevant policy, guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. ... Under current national planning policy and guidance in England, in the NPPF and the PPG, the decision-maker has to concentrate on the "surroundings in which [the heritage] asset is experienced", keeping in mind that those "surroundings" may change over time, and also that the way in which a heritage asset can be "experienced" is not limited only to the sense of sight. The "surroundings" of the heritage asset are its physical surroundings, and the relevant "experience", whatever it is, will be of the heritage asset itself in that physical place.

Thirdly, the effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance – are all matters for the planning decision-maker" ...

41. Bear in mind that Historical England make it clear that “setting” is not an asset in its own right and a change to setting may be unimportant unless the result is some harm to significance to the heritage asset.

Spectrum of Harm

Shimbles v Bradford MBC [2018] EWHC 195 (Admin).

42. This case concerned the interpretation of NPPF1 and the proposition that within the context of “less than substantial harm” there was a spectrum that a decision maker had to identify and make a judgment on where within the spectrum the harm to the heritage asset lay. No material difference arises following the introduction of NPPF2. Kerr J summarises the Claimant’s case as follows [67]:

“As I understood his case, Mr Sinclair submitted that unless the LPA introduces the concept of a “spectrum” of harm requiring an assessment of the significance of the asset or its setting, on the one hand, and the impact on the proposal on it, on the other, the LPA will not properly perform its duty under section 66(1) of the 1990 Act and under paragraph 132 of the NPPF, to give “great weight” to the conservation of the heritage asset.”

43. It was quickly dismissed by the Judge [87-89]:

“Having set out the parties' rival contentions in some detail, I can deal with assessment of them relatively briefly. The first point to consider is the contention of Mr Sinclair that the LPA was obliged to place the harm in this case somewhere on a spectrum. I do not accept this contention and I agree with Mr Barrett that it is not supported by the language of either section 66(1) of the 1990 Act or paragraphs 132-5 of the NPPF. Nor do I agree that is a requirement that has emerged from the case law cited by Mr Sinclair.

If Mr Sinclair were correct, the LPA would be obliged, first, to make a finding on the issue how significant East Riddlesden Hall is. Obviously, its significance is at the high end of the scale, not the low end of the scale. That is answered by its classification as a grade I listed building, enjoyed by the élite 2.5 per cent of listed buildings. There is, therefore, no need for the LPA to revisit that question.

The effect of that classification is determined by the language of paragraph 132 of the NPPF, which differentiates between grade I and grade II listed buildings. It is a binary classification. I see no need for the LPA to make a further finding whether it is a “high grade I” on the spectrum, a “low grade I”, or somewhere in between. That would introduce unnecessary complexity.”

Duties of a Local Planning Authority

44. A few recent cases have explored and clarified the various duties that local authorities have.

Duty to Co-Operate

45. **R (St Albans City and District Council) v SSCLG** [2017] EWHC 1751 emphasised how wide reaching the duty to co-operate was under s.33 of the Planning and Compulsory Purchase Act 2004.

46. This case involved a Council judicially reviewing an Inspector's finding that they had failed to meet their duty to co-operate with neighbouring planning authorities over their local plan. They had co-operated on the majority of cross-boundary issues but had reached an impasse over the housing market assessment. The Council had refused to enter into a joint strategic housing market assessment with neighbouring authorities and instead defined their own housing market area.

47. The Council put forward the argument that the Inspector's approach had been incorrect because he had allowed one area of disagreement to displace all the areas of co-operation. Instead the Inspector should have looked at the totality of the conduct to see if they had met the duty.

48. The Court found that the Inspector's approach had been correct. There are two important points that come from the judgment. The first is that while it was a matter of planning judgment for the Inspector, he was not required to carry out a balancing exercise (between areas of cooperation and disagreement) to determine if the duty had been met.

49. More importantly for local authorities the Court found that a Council could not hide behind the fact that discussions have reached an impasse to then give up and claim the duty of co-operate has been met. As Cranston J set out (at [51]):

*“I accept the Secretary of State's submission that once there is disagreement, I would add even fundamental disagreement, that is not an end of the duty to cooperate, especially in an area such as housing markets and housing need which involve as much art as science, and in which no two experts seem to agree. As Paterson J underlined in **R (on the application of Central Bedfordshire Council) v Secretary of State for Communities and Local Government** [2015] EWHC 2167 (Admin), the duty to cooperate is active and on-going, and that to my mind means active and on-going even when discussions seem to have hit the buffers.”*

Duty to Give Reasons

50. The Supreme Court clarified this year the duty of a Council to give reasons in **Dover District Council v Campaign to Protect Rural England Kent** [2017] UKSC 79. This was a case involving the grant of planning permission (against Officer recommendation) for major development in an AONB. It is important to note that although this was a EIA case, the Court used the opportunity to explore the duty to give reasons more generally, and the decision should not be taken to be limited to EIA developments alone.

51. Historically the Courts have maintained that there is no common law duty to give reasons. This was originally set out in **R (ex parte Chaplin) v Aylesbury Vale District Council** [1998] 76 P & CR 207, and has been confirmed recently in **Oakley v South Cambridgeshire District Council** [2017] 2 P & CR 4. Importantly the **Dover District Council** case confirmed that there was technically still no broad common law duty to give reasons. However it stated that there would be circumstances where fairness would demand that reasons are given.

52. While not wanting to be prescriptive Lord Carnwath gave guidance as to circumstances when fairness would require reasons to be given (at [59]):

“Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the “specific policies” identified in the NPPF—para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.”

53. The Supreme Court also took the opportunity to re-state the standard that reasons (if required) must meet. There had been some discussion in front of the Court about whether the standard of reasons changed depending on the decision maker (Inspector or Local Authority) or the status of the application (for example if it was an EIA development).

54. Here the Court found that the starting point remained the well-known guidance provided by Lord Brown in **South Buckinghamshire DC v Porter (No.2)** [2004] 1 WLR 1953 at [36]. This was not displaced by the more express duties under the EIA Regulations ([39]), nor amended for different decision makers with their procedural differences ([41]). If there is room for genuine doubt as to what has been decided and why, then an adequate explanation of the ultimate decision was required.

Air Quality



55. This year has seen two cases that have looked to use air quality concerns (especially following the ClientEarth litigation) to prevent developments coming forward in Air Quality Management Areas. One successfully and one unsuccessfully
56. In September 2017, Dove J heard the case of **Shirley v SSCLG** [2017] EWHC 2306 (Admin). This was a challenge to the failure of the Secretary of State to call in a planning application of 4000 dwellings to the south-east of Canterbury. This would occur within an Air Quality Management Area (AQMA).
57. Part of the challenge concerned the fact that the Secretary of State for Communities and Local Government was the designated competent authority under EU Directive 2008/50. This obliged him to achieve a specified threshold of air quality values. In failing to call in an application that would affect an AQMA the Council argued that the Secretary of State had failed in their obligations.

58. However the challenge failed because Dove J found that both the wording of the Directive itself, and the relevant case law, supported a narrow interpretation of the duty. It was a specific duty concerning compliance with air quality thresholds, and also provided a specific remedy. So the Directive did not justify a broader interpretation of a freestanding wider responsibility that had to be taken into account when making development decisions ([45]).
59. However the subsequent case of **Gladman Developments Ltd v SSCLG** [2017] EWHC 2768 (Admin) has shown that air quality can still be a thorn in the side for developers.
60. In **Gladman Developments** the Claimant developer challenged an Inspector's refusal of planning permission on the grounds that the proposal would have adverse impacts on two AQMA, even taking into account (and dismissing) the developer's suggested mitigation. At the heart of the challenge was the argument that the Inspector had been too pessimistic in his approach to the effectiveness of the Directive, and in his dismissal of the suggested mitigation (without any contrary evidence or argument as to their effectiveness).
61. However, the findings of Supperstone J gives Inspectors a large amount of discretion in this area. Firstly it was found that it was wrong of the developer to rely on para 122 of the NPPF which sets out that local authorities must assume emission controls under specific regimes of pollution control are effective (i.e. such as a permitting regime for nuclear power stations). Here the Court (at [39]) found that para 122 did not apply to the Directive as it was not a parallel regime; there was no specific licencing or permitting decision that regulated air quality. Secondly, the Court found that the Inspector was entitled to test the proposed mitigation measures, and reach a judgment as to their effectiveness. This finding meant that the Inspector's approach had been lawful and the appeal was dismissed.
62. The challenge for developers therefore is to ensure that they have prepared sufficiently robust arguments as to the effectiveness of the proposed AQ mitigation.

Other Interesting Cases

Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd [2017] UKSC 66

63. This Supreme Court case gives guidance as to the outer limits of the use of s.106 requirements to pool funding necessary for infrastructure in major new development areas. While it should be noted that this was a Scottish case decided on s.75 of the Town and Country Planning (Scotland) Act 1997 this case still has relevance for English and Welsh law due to the similarity in the restrictions on s.106 agreements.

64. Here the local authority had adopted a supplementary planning document called '*Strategic Transport Fund*'. This implemented a system where developers (through planning obligations) paid a financial contribution to a pooled fund for specific infrastructure projects around Aberdeen. These contributions were calculated by a fixed sum per residential unit, and were not aimed at addressing a specific impact of a certain development on the transport network.

65. The Supreme Court found that while there was considerable logic and benefit in a scheme like this, it was unlawful as it fell foul of s.75 in two ways. Firstly, the contributions made had no more than a trivial connection to the development and so had no purpose in relation to the development [61]. Secondly, the manner in which this contribution related to the granting of permission was unlawful. The practical operation of this system meant that the Council would grant permission, but not issue permission, until the obligation was made. This meant it did not either restrict or regulate permission [62]. Together these points meant that these financial contributions could not be considered a material consideration under s.75, and were therefore unlawful.

R (Thornton Hall Hotels) v Wirral MBC [2018] EWHC 560 (Admin)

66. This case is interesting as it looks at how a Court will approach an obvious error in a planning decision, and also because it is one of the very rare examples where a sizeable extension of time was granted for bringing judicial review proceedings.

67. The issue arose over the fact that in 2011 the local authority granted planning permission for three marquees in the Green Belt. The Officer's report recommended approval but with a condition placing a five year limit on the permission. However the permission was then granted unconditionally. It was not until August 2017 that judicial review proceedings were brought long after the expiry of any five year period and with the marquees still present in the Green Belt.

68. The Court allowed for an extension of time to bring the claim even while recognising that this was unusual for a planning judicial review. The three main justifications for this were that the public interest lies with the Court having the power to rectify mistakes, the merits of the argument itself, and the marquee owners choice to remain silent about the error.

69. On the substantive issues the Court found that the fact that the Council had so clearly made an error in granting unconditional planning permission meant that there was considerable public interest in quashing the planning permission, and it would subvert the operation of the planning system if the permission remained. However, it is interesting to note that the Court also found that any legal flaws from the omission of the conditions did not have the effect of nullifying the permission. It had legal effect until it was quashed by the Court.

R (Holder) v Gedling BC [2018] EWCA Civ 214

70. Here the Court of Appeal limited the burden on a Council in how far they have to go to address local community concerns when granting permission for wind turbines.

71. On 18 June 2015 the Secretary of State made a Written Ministerial Statement ('the Statement') that set out new considerations for local authorities when dealing with planning applications for wind turbines. One new consideration was that local authorities should only grant planning permission if:

"... following consultation, it can be demonstrated that the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has their backing."

72. The Claimant applied for judicial review on the basis that the Council had not followed this guidance. This was because the Officer had not resolved all of the negative planning impacts that had been raised by the local community following consultation. Instead the Officer had concluded that the negative consultation responses had been (at the very least) addressed, and that on balance the opinion of the community was likely to be in favour of the application.

73. The Court found that the Officer had been correct in this approach (at [27]). All the Statement required was that a local authority made an assessment as to the balance of the views of the community. This should include the views not just of those who responded to the consultation but also the views of the hypothetical 'reasonable' member of the community. Even if some of the negative planning impacts were not entirely eliminated this did not necessarily mean that the balance of the views would be negative. The Court also recognised that some members of a community will never be persuaded that a development will be positive.

74. There may be some read across from this judgment to the policies one often sees in Local and Neighbourhood Plans for development in rural locations – restricting development to where there is local public support.

Lambeth LBC v SSCLG [2018] EWCA Civ 844

75. The Court of Appeal recently re-looked (following **Trump International Golf Club Scotland Ltd v Scottish Ministers** [2015] UKSC 74) at the flexibility a Court has in

interpreting planning permission (and other public documents) by either applying a corrective interpretation, or through implying terms.



76. This case involved a number of s.73 variations that were carried out on a 1985 permission for a DIY retail unit. The first s.73 variation permission in 2010 allowed for the retail of a wider range of goods but included a condition that prevented the sale of food. In 2013 a variation to allow for the sale of food was refused. But in 2014 when the permission was varied again whilst it stated that the permission was for sale of non-food goods, it did not repeat any condition limiting the sale of food.

77. The lack of condition meant that (because non-food and food were both A1 Class uses) the developer was entitled for a certificate of lawfulness under s.191 of the Town and Country Planning Act 1990. This was applied but the local authority refused on the basis that the 2014 permission should be interpreted as restricting the use to non-food retail even in the absence of any condition.

78. The Court began by summarising the test of **Trump** and focussed on what they called the ultimate question as set out by Lord Hodge (at [25]):

“... 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 will have 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."

79. However just applying the test to this case on its face did not resolve the issue. Any reasonable reader would understand that the 2014 planning permission limited the sale of goods to non-food. However in practical terms this was irrelevant because change of use from non-food to hot food did not require planning permission. So the Court then had to ask the question: could a corrective interpretation be made that restricted said change of use?

80. This could not be achieved by a simple re-arranging of the words on the face of the planning permission (as in **Chartbrook Ltd v Persimmon Homes Ltd** [2009] UKHL 38; [2009]) but would require the addition of a whole new condition which crucially changed the legal effect of the document.

81. This should not and could not be done.

82. A corrective interpretation cannot be used to supply clauses that the parties have simply forgotten to include i.e. it is not a slip rule (at [56]). This point was enforced by the fact that the inclusion of planning conditions are subject to considerable planning judgment in the application of the tests set out in NPPF para 206. It was not the Court's place to carry out these tests themselves.

83. So the question became whether the Court could imply in the condition.

84. The Court began by noting the two traditional routes for the implication of a term in contract law (at [68]):

"Either the term must be necessary to give business efficacy to the contract; or it must be so obvious that it goes without saying ... "Business efficacy" will not be achieved if, without the implied term, the contract

would lack commercial or practical coherence. It is to be noticed that in this context the relevant purpose is the purpose of the contract: not simply the purpose of one of the contracting parties.”

85. However the Court then noted that with planning documents there had to be some modification to these routes because of the public and permanent nature of planning permissions. The first route became one of considering the purpose of the document, and whether on the current wording that document failed to achieve its purpose. A document that fails to achieve its purpose cannot have practical effect. But here it was found it did (at [68]).

86. The second route was modified to be what the reasonable reader (equipped with some knowledge of planning law and practice) would think reading the permission, and whether they would find the omission of a condition so obvious as to be an error.

87. The Court found that the case failed on both of these routes. The Permission in its current form had purpose, and while a reasonable reader might think the omission of a condition strange it would not be so obvious that it would go without saying.

88. The Court found they could not assist the Council either through a corrective interpretation or by implying in a condition and so the appeal was dismissed.



89.