LAND USE

CONFERENCE 2024

LANDMARK CHAMBERS

Introduction and Opening Remarks

Rupert Warren KC

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New government, new priorities? Minister for Housing and Planning

Matthew Pennycook MP

Rupert Warren KC

Alex Goodman KC

Camilla Lamont

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Headline Session – Main Room

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Living on the High Street - repurposing properties/change of use

Katharine Holland KC, Andrew Byass, and Peter Sibley

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Living on the High Street - repurposing properties/change of use

Andrew Byass

Scope of my talk

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- How did we get here?
- How can properties be re-purposed?
- What are the (planning) issues with re-purposing?
- … then over to Katharine and Peter

How did we get here?

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- 2018 consultation paper from MHCLG
- Proposed new permitted development rights to support change from high street uses to residential use
- Sought to respond to concerns about failing high streets and the under-supply of housing

How can the high street be re-purposed?

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- The Use Classes Order 1987 allows changes between uses in the same class
- The General Permitted Development Order 2015 allows the change of use from one class to another, subject to conditions and a prior approval process
- Class MA: change of use from Class E (commercial, business and service) to Class C3 (dwellinghouses)
- Class M: launderette, betting office, pay day loan shop or hot food takeaway to Class C3
- Class N: casino or amusement arcade to Class C3

PD Class MA: allowing Use Class E to C3

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- Class E encompasses a wide range of high street uses
- Is a result of radical changes to the Use Classes Order in September 2020, which consolidated several uses into one use class
- Now includes: retail, restaurants/cafes, financial and professional services and business uses compatible with any residential area
- PD Class MA permits a change from Use Class E to C3
- Subject to limitations and conditions, including the need to obtain a determination as to whether the prior approval of the local authority is required

Class E to Class C3

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- Prior approval can be required for:
- Transport impacts, particularly to ensure safe access
- Flood risks in relation to the building
- Impacts from noise from any nearby commercial premises
- Provision of adequate natural light in all habitable rooms (i.e. rooms for sleeping or living which are not solely used for cooking purposes, but does not include bath or toilet facilities, service rooms, corridors, laundry rooms, hallways or utility rooms)
- Fire safety, where the building will contain two or more dwellings and is over 18m or seven storeys
- Impacts on conservation areas or impacts by reason of the loss of certain industrial or waste uses or services provided by a nursery or creche

Article 4 directions

- A local authority can make an Article 4 direction to exclude permitted development rights in certain areas
- Subject to the supervision of the Secretary of State
- NPPF para. 53

> ***"The use of Article 4 directions to remove national permitted development rights should: a) where they relate to change from non-residential use to residential use, be limited to situations where an Article 4 direction is necessary to avoid wholly unacceptable adverse impacts (this could include the loss of the essential core of a primary shopping area which would seriously undermine its vitality and viability, but would be very unlikely to extend to the whole of a town centre), b) …"***

Other changes

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- Changes from other uses subject to some similar and some different restrictions
- Class M: launderette, betting office, pay day loan shop or hot food takeaway to Class C3 – not permitted if the cumulative floor space changing use exceeds 150 square metres
- Class N: casino or amusement arcade to Class C3 – same 150 square metre size restriction
- Have to been in this use at a time significantly pre-dating the change (Class M – 20 March 2013; Class MA – continuous period of at least two years prior; Class N – 19 March 2014)

Issues and opportunities

- The flexibility potentially available on our high streets can assist in housing delivery; but brownfield delivery of housing is far from a complete answer
- Use class flexibility aligns with measures to re-use and re-purpose existing buildings. Though even those measures are not all one way – see the M&S case [2024] EWHC 452 (Admin)

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Living on the High Street - repurposing properties/change of use

Katharine Holland KC

Peter Sibley

Introduction

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1. Do not assume that a landlord will have to act reasonably in agreeing to any change of use.
2. Do not assume that money can be paid to the landlord in order to gain consent for a change of use.
3. Do not assume that there is any statutory ability to change the relevant user restrictions in the lease.
4. Do not assume that works can legally be undertaken to the property to reflect the change of use.
5. Do not assume that there will be the necessary ancillary rights for works to go ahead.

Do not assume that a landlord will have to act reasonably in agreeing to any change of use

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1. Absolute or qualified covenant?
2. Guardian Assurance Co v Gants Hill Holdings [1983] 2 EGLR 36 - No implied term!
3. S.19 of the Landlord and Tenant Act 1927.
4. Tollbench v Plymouth City Council [1988] 1 EGLR 79 referring to International Drilling Fluids Ltd v Louisville [1986] Ch 513.

Do not assume that money can be paid to the landlord in order to gain consent for a change of use

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1. S.19 of the Landlord and Tenant Act 1927:

"(3) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the alteration of the user of the demised premises, without licence or consent, such covenant condition or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and of any legal or other expenses incurred in connection with such licence or consent.

Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable."

2. Barclays Bank plc v Daejan Investments (Grove Hall) Ltd [1995] 1 EGLR 68.

Do not assume that there is any statutory ability to change the relevant user restrictions in the lease

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1. S.84 of the Law of Property Act 1925.
2. Positive or negative covenants?
3. Doe D The Marquis of Bute v Guest 153 ER 804.
4. Alexis Michaela Cecile Blumenthal v The Church Commissioners for England [2004] EWCA Civ 1688.

Do not assume that there is any statutory ability to change the relevant user restrictions in the lease– *Continued*

Blackhorse Investments (Borough) Limited v The Mayor and Burgesses of the London Borough of Southwark [2024] UKUT 33 (LC)

March 1966 – Lease granted.

29 May 2020 – Planning permission granted.

9 September 2021 – Application made to the Upper Tribunal.

24 February 2022 – Decision of the Upper Tribunal on the papers.

5 February 2024 – Decision of Upper Tribunal on set-aside application.

Do not assume that works can legally be undertaken to the property to reflect the change of use

1. Absolute or qualified covenants?
2. S.19(2) of the Landlord and Tenant Act 1927.
3. Balls Brothers Limited v Sinclair [1931] 2 Ch 325.
4. Lambert and Another v F W Woolworth and Company Limited [1938] Ch 883.
5. Iqbal v Thakrar [2004] EWCA Civ 592.

Do not assume that there will be the necessary ancillary rights for works to go ahead

1. Rights to access adjacent land.
2. Rights to operate equipment.
3. Rights to park construction vehicles.
4. Shared rights – rights of way, parking.

Headline Session – Main Room

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Housing and local government priorities: uncomfortable bedfellows?

David Forsdick KC

Fiona Scolding KC

Dan Kolinsky KC

Chair - Jacqueline Lean

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Headline Session – Main Room

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Housing and the environment

James Maurici KC and Joel Semakula

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Headline Session – Housing and the environment (Part 1)

James Maurici KC

Introduction (1)

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- "*Labour's plan to build 1.5m homes – can it be delivered?*" "https://www.bbc.co.uk/news/articles/cvgw7x4y5rzo
- To avoid any suspense the answer, in my view, is "no", for all kinds of reasons.
- But I will focus on just one of those reasons … the environment.
- **https://www.instituteforgovernment.org.uk/publication/how-government-build-more-homes**: "*It has set an ambitious target to build 1.5 million new homes in five years, through a combination of planning reform, new towns and the "biggest increase in social and affordable housebuilding in a generation". Now it faces the task of meeting this target; doing so will require a rate of completing new homes not seen since the 1960s."*

Introduction (2)

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- In the 1960s the environment was not a key issue on the priority list of many people in the UK, and certainly not politicians or the Government.
- Environmental policy, law and protection was in its infancy, if it truly existed at all at that point.
- The Department for the Environment was founded in 1970. Three former ministries of Housing and Local Government, Transport, and Public Building and Works were merged into a single department.
- And note Harold Wilson's speech at the 1969 Labour Party Conference – this spoke of the need to tackle the legacy of environmental issues left by the industrial revolution while also ensuring that "*the second industrial revolution… does not bequeath a similar legacy to future generations*", focusing on problems of air and water pollution as well as noise and congestion in urban areas: see **https://www.thebritishacademy.ac.uk/documents/4302/BA1121_Environmental_Policy_Histories_-_Proof_V6.pdf**.

Housing vs the environment (1)

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- It is often said by the Courts that our environmental law (most often EIA, but also habitats) is not supposed to be a legal obstacle course for developers.
- But looking back over the last 30 years that is very much what it has been.
- The rise of EIA from the late 1990s and following the ***Berkeley*** decision in the House of Lords led to many legal challenges, and delay to and frustration of, housing schemes.
- This was brought under control thanks to Lord Carnwath's decisions in several cases and culminating in ***Walton.*** But there is a real risk of revival of EIA as an issue following the Supreme Court's decision in ***Finch.*** Is the quarrying of aggregates used in building new homes an indirect upstream effect of that housing? Years of litigation on causation to come …
- But it has been habitats laws that have had the greatest impact on housing delivery over the last 20 years …

Housing vs the environment (2)

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1. Recreational impacts on the Thames Basin Heaths SPA and other SPAs including Dorset Heaths SPA. Back in 2006 the HBF was calling for "*a solution to the effective moratorium which has been placed on development in the Thames Basin Heaths SPA area.*" (https://www.hbf.co.uk/news/hbf-calls-for-action-on-thames-basin-heaths-spa/). See ***Hart DC v SSCLG*** [2008] 2 P. & C.R. 1.
2. By the mid 2010s, SANG and SAMM had "solved" the recreational impacts moratorium. But there was a new moratorium in town by then in relation to air quality (nitrogen) impacts on the Ashdown Forest and Epping SACs. The addition of a single additional vehicle trip from a scheme, it was said, was enough to down a development: see ***Wealden DC v SSCLG*** [2018] Env. L.R. 5.
3. As we entered the 2020s the air quality issues were slowly being resolved and there emerged on to the scene "nutrient neutrality" in the Solent. Again, creating in effect another moratorium: https://www.savills.com/research_articles/255800/319723-0

Housing vs the environment (3)

- (4) Without this one being resolved the next moratorium arrived.
- Water neutrality: see ***Ward v SSHCLG*** [2024] EWHC 1780 (Admin).
- Relates to impact of increased groundwater abstraction impacting European sites so that *"[f]or every new development, total water use in the region after the development must be equal to or less than the total water use in the region before the new development"*
- "*Nutrient neutrality and water neutrality are separate issues with different causes, but both effectively create a moratorium on new development. This is threatening development and preventing housebuilding at a time when the demand for social housing is growing rapidly*" **See https://www.local.gov.uk/publications/stuck-neutral-call-partnership-working-river-quality-and-water-quantity#:~:text=Nutrient%20neutrality%20and%20water%20neutrality,social%20housing%20is%20growing%20rapidly**.

Housing vs the environment (4)

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1. All these “moratoriums” have been driven by the Habitats Directive and the domestic legislation incorporating this.
2. Together, and over last 20 years, they have significantly hindered, slowed and/or reduced housing delivery in many parts of England.
3. Nutrient neutrality and water neutrality remain ongoing serious impediments to housing delivery.
4. These issues are most acute in areas of the south of England where both housing need and opposition to housing at its greatest.
5. Have other EU countries had same issues? If not, why not?

Housing vs the environment (5)

- https://committees.parliament.uk/committee/518/built-environment-committee/news/197533/government-must-get-a-grip-on-the-haphazard-implementation-of-environmental-regulations/ - 21 September 2023
- "*The Built Environment Committee … calls for the Government to show a strong display of political leadership to deliver and implement a comprehensive strategy for both driving development and protecting the environment*."
- *"There is a real risk that the Government will miss both its housing targets and its environmental ambitions. It should be possible to deliver both new development and improve the environment, but a lack of leadership and poor implementation is limiting opportunities to do this. The Government needs to show a strong display of political leadership to deliver and implement a comprehensive strategy for both development and the environment."*

Housing vs the environment (6)

- *"Housebuilding targets should be given statutory weight, giving them an equal status with environmental goals."*
- *"During its inquiry the committee heard that 45,000 new homes per year may not be delivered because of recent Natural England advice on the nutrient, water and recreational applications of the Habitats Regulations. At the same time, 61% of the country's Sites of Special Scientific Interest are in an unfavourable condition."*
- *"The Government is failing to provide sufficient support for smaller developers. Effective moratoria on housebuilding caused by advice such as nutrient and water neutrality risk putting small developers out of business in affected areas. All public sector development mitigation schemes should prioritise provision for small and medium-sized developers. These developers are also being disproportionately burdened by the new requirement to deliver biodiversity net gain. By allowing them to deliver offsite solutions and ensuring demands are not made ahead of statutory deadlines the Government can ensure these vital local businesses are able to survive"*

Why is the Habitats Directive so difficult? (1)

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1. Unlike EIA - which is procedural - it mandates a particular result. If there are adverse effects on integrity that cannot be ruled out consent must be refused (subject only to "imperative reasons of overriding public interest" "IROPI", which I am coming to).
2. NB the Built Environment Committee – unequal – housing targets not statutory vs environmental protection.
3. CJEU decisions such as Case C-323/17 ***People Over Wind v. Coillte Teoranta*** [2018] PTSR 1668. Prior to this decision very well-established in domestic case-law that in undertaking the trigger or "*screening" stage assessment* – e.g. deciding if LSE - it was legitimate for the decision-maker to take into account "*mitigation"* which would prevent LSE arising, e.g. SANG see, ***Hart*** and ***Smyth v SSCLG*** [2015] PTSR 1417. CJEU reversed this, a result Sullivan J in ***Hart*** said would have been "*ludicrous*" and contrary to common sense.
4. Concerns that in recent cases like ***Dutch Nitrogen*** applying a requirement for certainty that is too high and impractical. If that is what this case-law is doing vs domestic law approach as per ***Champion.*** Courts been navigating around this see ***Compton Parish Council & others v Guildford Borough Council*** [2020] J.P.L. 661.

Why is the Habitats Directive so difficult? (2)

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5. Much local opposition to new housing, especially in the south-east of England. Habitats always amongst the objections. And local members – chasing the votes (especially of the over 65s) –often see these issues as a convenient basis (a god send) not to deliver any housing, in my view that certainly was what was going on in Wealden.
6. IROPI: only way of granting if adverse effect on integrity. Must show: (i) in public interest; (ii) no alternative; and (iii) compensation provided. Almost impossible for a housing scheme because of requirement to show no alternative, and housing – in theory – can go anywhere, but might a local need amount to IROPI: see Wealden DC v SSCLG [2018] Env. L.R. 5 at [63] and [65] (by analogy with policy test for major development in the AONB), per Lindblom LJ.

Other habitats and species issues

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- I have focused on the biggest issues – all arising from impacts on what were called "European Protected Sites", now "Habitats sites" "Any site which would be included within the definition at regulation 8 of the Conservation of Habitats and Species Regulations 2017 for the purpose of those regulations, including candidate Special Areas of Conservation, Sites of Community Importance, Special Areas of Conservation, Special Protection Areas and any relevant Marine Sites": see the NPPF glossary. But examples out there of refusals of housing schemes based on:

1. Impact on "functionally linked land" – "land or sea occurring outside a designated site which is considered to be critical to, or necessary for, the ecological or behavioural functions in a relevant season of a qualifying feature for which a Special Areas of Conservation (SAC)/ Special Protection Area (SPA)/ Ramsar site has been designated. These habitats are frequently used by SPA species and supports the functionality and integrity of the designated sites for these features."
2. Impact on specific species
3. Impact on national and local nature designations: SSSIs, NNRs, LNRs etc. etc.

New requirements for housing

1. BNG – still bedding in, https://www.insidehousing.co.uk/comment/the-impact-of-biodiversity-net-gain-regulations-on-housing-developments-84909 *"Despite the positive changes introduced by BNG regulations, challenges loom for developers and local authorities. The primary hurdle involves the availability of suitable land for development that can concurrently facilitate BNG."* And see https://thelandtrust.org.uk/news/new-research-from-the-land-trust-reveals-challenges-of-delivering-bng/
2. New Planning Bill "***Nature Recovery and Development Funding***: *The government plans to leverage development projects to fund nature recovery initiatives. This approach seeks to balance environmental conservation with the need for development, addressing both ecological and housing needs simultaneously."*

Nutrient neutrality (1)

- Planning reported in July "…. *Labour is seeking to change nutrient neutrality rules in a bid to unblock 160,000 new homes. According to the article, housing secretary Angela Rayner and environment secretary Steve Reed have told environmental groups that the current rules, which say developments in designated areas would only be allowed if the builders could show they would not increase levels of phosphorus or nitrogen in waterways, are "not working". New proposals from the government said that developers would be allowed to begin work and agree to mitigation measures during construction, rather than beforehand, the paper adds."*
- This was welcomed by NE **(https://www.insidehousing.co.uk/news/natural-england-welcomes-labours-approach-to-nutrient-neutrality-logjam-87758) and the HBF (https://www.housingtoday.co.uk/news/hbf-welcomes-more-pragmatic-approach-to-nutrient-neutrality-as-labour-commits-to-reform/5130629.article)**
- Does this work? Start without knowing if can solve and built out fully? How is this compliant with Habitats Directive. Is it commercially sensible?

Nutrient neutrality (2)

The previous Government intended to solve this by:

1. Tabling an amendment to Levelling Up and Regeneration Bill 2022–23 which would have required local planning authorities to assume that nutrients in wastewater from new developments would not adversely affect protected habitats sites. This was defeated in the Lords and by Labour. So not part of LURA.
2. Then reports followed that previous Government would introduce a new Bill **https://www.telegraph.co.uk/news/2023/09/23/rishi-sunak-majority-140k-homes-labour-nutrient-neutrality/**
3. Conservative manifesto *"Abolishing the legacy EU 'nutrient neutrality' rules to immediately unlock the building of 100,000 new homes with local consent, with developers required in law to pay a one-off mitigation fee so there is no net additional pollution."*

Labour manifesto "*We will implement solutions to unlock the building of homes affected by nutrient neutrality without weakening environmental protections".* Sounds great! How?!

Nutrient neutrality (3)

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1. No easy solutions if reject the Conservative sledgehammer approach …
2. Credit schemes? Takes a lot of time to get going … And likely needs to remove land from farming … Ever increasing demands on agricultural land: for housing, for SANG, for BNG, to achieve NN … and what about food security?
3. Labour and REUL: Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Saving Provisions) (Revocation) Regulations 2024/976. The Commencement Regulations were made to commence section 6 of the Retained EU Law (Revocation and Reform) Act 2023 (c. 28) ("the Act") on 1st October 2024 and create appropriate saving provisions. The revocation of the Commencement Regulations by these Regulations means that section 6 of the Act will no longer come into force on 1st October 2024. Would have allowed Courts greater ability to depart from EU case-law.
4. No amends to NPPF on environmental matters. How does that work when combined with massive uplift in housing delivery.

Conclusions (1)

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- Many, many reasons we have failed to build enough houses over last 30 years
- One of those reasons is unquestionably the rise of environmental law and protection of the environment.
- You may feel that is the right result, after all no one can seriously dispute that development should not be at the expense of the environment.
- But we must accept that this will be one of the reasons Labour *will* fail to build the 1.5 million homes we need.
- And the need for more housing is dire. The lack of housing having highly deleterious effects on human health and on society.
- The problems are easy to identify. The solutions less so.

Conclusions (2)

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- The HBF have pointed out that, *"Despite not being a major contributor to the problem of nutrient pollution, the house building industry has faced – and continues to face – a disproportionate weight of sanctions which are resulting in a significant nationally under-delivery of much needed housing with associated economic and social harm": see* **LF65056 Nutrient Neutrality - Solution Finding Doc - HBF Update - Feb23.indd**
- This adds to the burdens on housing delivery.
- Housing developers must provide affordable housing, and contribute funding to schools, GP surgeries, hospitals, the police, and then we add solving nutrient and water neutrality, as well as providing BNG, nature recovery funding. The list goes on and on.
- Just because the state is broke (largely the result of reckless spending during the lockdowns) does not mean developers should not also be saddled with meeting all the UK's nature obligations.
- Someone on LinkedIn compared this to the Government playing Buckaroo with developers …

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Headline Session – Housing and the environment (Part 2)

James Maurici KC

Introduction

- Housing
- New towns and large-scale developments
- Natural environment
- Air quality
- Minerals and aggregates
- Closing thoughts

Housing

1. WMS – July 2024
2. Presumption in favour of sustainable development: para 11
3. Housing land supply and standard methodology: paras 76-77
4. Focus on brownfield sites: paras 122 and 123
5. Affordable housing: paras 65 - 66

New towns and large-scale developments

1. Policy Statement
2. Incentivising new towns: para 75
3. Sustainable urban planning: paras 75 and 108
4. Renewable energy integration: para 163

Natural Environment

1. BNG: paras 180; 185-186
2. Climate resilience: paras 158 – 159; 173 and 175
3. Design: para 136
4. Protection of green spaces: paras 133; 155 and 160

Air quality

1. Air quality standards: para 192
2. Control of processes or emissions: para 194
3. Sustainable transport solutions: paras 107; 112 - 115

Minerals and Aggregates

1. Importance to housing development: para 215
2. Extraction: paras 216 - 217
3. Maintenance of an adequate and steady supply: paras 218 – 219
4. 2024 Annual Mineral Planning Survey Report

Closing thoughts

1. Economy v Environment
2. DEFRA's rapid review
3. Home buyers
4. Minerals and Aggregates
5. Hope?

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Breakout Session One

Linder Room

An Introduction to the Building Safety Act

Simon Allison and Camilla Lamont

Newman Room

Appropriation, disposal and development of public authority land

Alex Goodman KC and Jacqueline Lean

Conference Suite

NPPF 2024 Reforms: what to expect

Christopher Boyle KC and Nick Grant

LAND USE CONFERENCE 2024

Breakout Session One – Linder Room

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An Introduction to the Building Safety Act

Simon Allison and Camilla Lamont

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An Introduction to the Building Safety Act

Simon Allison

Camilla Lamont

The Grenfell Tower Tragedy

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The Golden Thread

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Building Safety Act 2022 - Overview

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- Part 2 – Building Safety Regulator
- Part 3 - Building control – design and construction phase
- Part 4 – Occupied Higher-Risk Buildings
- Part 5 – Remediation of building safety defects

Part 4 – Occupied Higher-Risk Buildings

Occupied Higher-Risk Buildings

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- At least 18 metres in height or has at least 7 storeys;
- Contains at least 2 residential units
- Is not excluded by regulations
- “Occupied” if there are residents of more than one residential unit in the building.

Accountable Persons

- BSA 2022 – s.72 - AP is either
- The owner of legal estate in possession of any of the common parts (unless entirety of repairing obligations are undertaken by a management company in a tripartite lease or an RTM co); or
- Other persons who are under a relevant repairing obligation in relation to any of the common parts.
- Principal AP (s.73) – will be the only AP or if more than one, the person with responsibility for the structure/ exterior

Key duties on APs and PAs

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- PAP must register the HRB with the Building Safety Regulator
- APs must assess building safety risks and must take all reasonable steps to prevent BSRs from arising and to reduce the severity of any incident
- APS must retain and update as necessary the golden thread information and report to Regulator when required
- PAP must engage with the residents

Part 5 - Remediation of Certain Defects (s.116-125)

A Relevant Building:

- Self-contained building or self-contained part of a building
- Contains at least 2 dwellings
- 11 metres high or has at least 5 storeys
- Exception for buildings that are held commonhold, are “leaseholder owned” or in respect of which collective rights of acquisition have been exercised.

Key duties on APs and PAs

Relevant Defects are defects as regards the building that:

(a) arise as a result of anything done (or not done) or anything used (or not used) in connection with **Relevant Works** and

(b) cause a **Building Safety Risk**

Building Safety Risk (s.120(5))

A **Building Safety Risk (“BSR”)** is a risk to the safety of people in or about the building arising from either

(a) the spread of fire, or

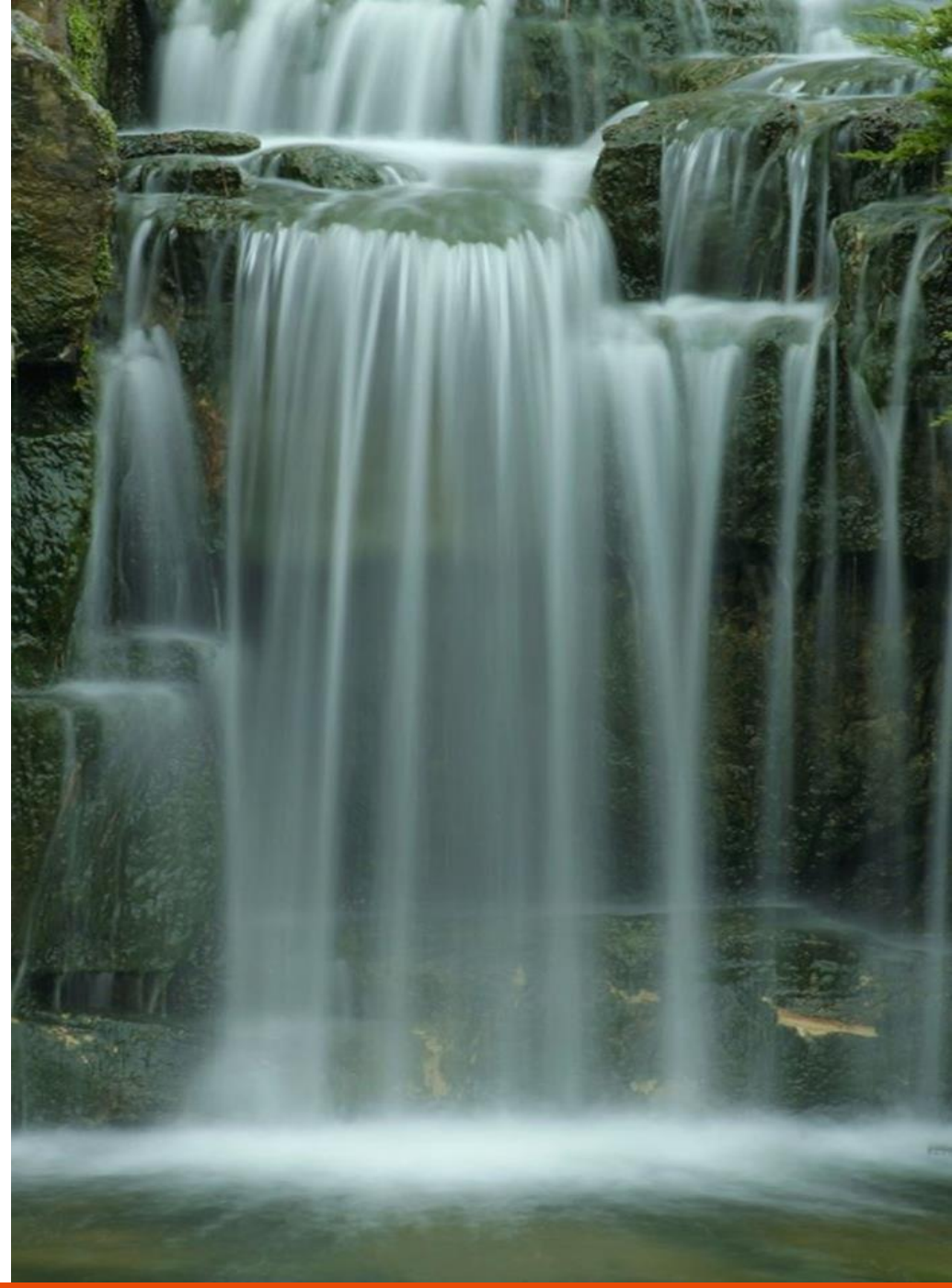
(b) the collapse of the building or any part of it

Relevant Works (s.120(3)

- Works relating to the construction or conversion of the building which were completed in the "**Relevant Period**" of 30 years ending with the time the section came into force (28 June 2022)
- Works undertaken or commissioned on behalf of a relevant landlord or management company which were completed in the "**Relevant Period**"; and
- Works undertaken after 27 June 2022 to remedy a **Relevant Defect** (including a defect under paragraph (c))

Ministerial statements

“We have been clear that it is fundamentally unfair that innocent leaseholders, most of whom have worked hard and made sacrifices to get a foot on the property ladder, should be landed with bills they cannot afford for problems they did not cause”



Remediation Orders (s.123)

- A *"remediation order"* is an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time.
- Will be amended by LAFRA 2024 with effect from 31.10.24 to allow FTT to order other relevant specified steps are taken (see s.120(4A)
- *“relevant landlord"* means a landlord (or other party)” under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect.
- “*Interested person*” includes regulator, a local authority, a fire and rescue authority as well as any person with a legal or equitable interest in the relevant building.
- **Secretary of State v Grey GR Limited Partnership (Vista Tower)** – FTT (29.4.24)

Remediation Contribution Orders (s.124)

- "Remediation contribution order", is an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects) relating to the relevant building.
- Will be amended by LAFRA 2024 with effect from 31.10.24 to widen the category of costs that can be subject to a RCO (taking relevant steps, obtaining expert report, some temporary accommodation costs).
- RCOs can be made against current landlords, persons who were landlords at the qualifying time and developers as well as their associates on the application of “interested person”
- FTT can make a RCO if it considers it just and equitable to do so.
- **Triathlon Homes LLP v Stratford Village Development Partnership** [2024] UKFFT 26

Restricting Service Charge Recovery – Schedule 8

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- The para. 2 restriction on service charge recovery that applies where landlord or its associate is responsible for the defect benefits all leaseholders (including “non qualifying” residential leaseholders and commercial tenants)
- The remainder of the restrictions and limitations on service charge recovery in Sch. 8 only benefit leaseholders who have a “Qualifying Lease”.
- Where a landlord is prevented from recovering service charges under Sch. 8, it cannot seek to recover the shortfall either from other tenants (including commercial tenants) or the reserve fund (Sch. 8, paras 10 & 11).

Relevant Measures (Sch. 8, para. 1(a))

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A Relevant Measure is a measure taken:

(a) to remedy the Relevant Defect; or

(b) for the purpose of:

(i) preventing a BSR that arises as a result of it from materialising, or

(ii) reducing the severity of any incident resulting from a BSR that arises as a result of it.

Qualifying Lease (s.119)

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- A long lease (more than 21 years) of a single dwelling within a relevant building under which the leaseholder is liable to pay a service charge nd which was granted before 14 February 2022
- At the beginning of 14 February 2022 the dwelling was the relevant tenant's only or principal home, the relevant tenant did not own any other dwelling in the United Kingdom, or the relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.
- Includes "connected replacement leases" (s.119A)
- Failure on part of landlord to take all reasonable steps (and any prescribed steps) to obtain a tenant's certificate can lead to lease being treated as a QL

No service charge is payable if landlord or associate is responsible (Sch. 8, para.2)

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No service charge is payable under any lease where the landlord (or any superior landlord) as at the beginning of 14 February 2022 is either responsible for the relevant defect or associated with a person so responsible

Broad “non fault” concept of responsibility for defects based on nothing more than undertaking or commissioning the works relating to them (or being or in a joint venture with the developer in respect of initial works)

For “associates” see s.121

A failure to provide a landlord’s certificate will result in the condition in para (2) being deemed met.

Landlord Contribution Condition (Sch. 8, para. 3)

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- No service charge is payable under a Qualifying Lease if the landlord at beginning of 14 February 2022 met the contribution condition
- The contribution condition is that the landlord's group net worth at 14 February 2022 was more than £2 million multiplied by the number of relevant buildings of which any member of the group was then a landlord.
- Does not apply to certain "excluded landlords"
- Failure to provide a landlord certificate will result in the contribution condition being treated as having been met.

Cladding Remediation (Sch. 8, para. 8)

- No service charge is payable under a Qualifying Lease in respect of cladding remediation
- Cladding remediation means the removal or replacement of any part of a cladding system that forms part of the outer wall of an external wall system and is unsafe
- Lehner v Lant Street Management Company Ltd [2024] UKUT 0135 (LC) – UT rejected a narrow interpretation of cladding system in holding that works to insert new insulation and new cavity barriers amounted to cladding remediation
- See also Almacantar v Leaseholders (Centre Point) FtT 25/3/24
    - 2 day appeal before UT to be heard December 24

Other restrictions

- Low value QLs (Sch. 8, para 4)
- Costs of legal and professional services incurred as a result of a relevant defect (Sch. 8, para. 9)
- Service Charge caps (Sch 8, paras. 5-7) – Permitted Maximum and Annual Cap

Does Sch. 8 operate with retrospective effect?

Adriatic Land 5 Ltd v The Long Leaseholders of Hippersley Point [2023] UKUT 271 (LC) at [165] and [170]

- Held that from 28.6.22 the restrictions apply regardless of (i) when the costs were incurred; and (ii) when service charge became payable
- PTA to Court of Appeal granted
- A1P1 arguments (s.3 Human Rights Act 1998)
- To be heard pre-Easter 25 (2 days) alongside Triathlon appeal (3 days)

Breakout Session Two – Newman Room

LANDMARK CHAMBERS

Appropriation, disposal and development of public authority land

Alex Goodman KC and Jacqueline Lean

LAND USE CONFERENCE 2024

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Appropriation, Disposal and Development of Public Authority Land

Alex Goodman KC

Summary of Main Powers: Acquisition (1)

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- Compulsory purchases can emanate from a range of sources such as hybrid bills, private bills, Development Consent Orders under the Planning Act 2008, or under Transport and Works Act powers.
- Local authorities have powers to acquire land by agreement under section 120 of the Local Government Act 1972 and various other specific powers (for example section 164 of the Public Health Act 1875 empowers the acquisition of land for the provision of public walks or pleasure grounds).
- Local authorities may acquire land compulsorily under section 121 of the Local Government Act 1972 and sections 226(1)(a) and (b) of the Town and Country Planning Act 1990.

Summary of Main Powers: Acquisition (2)

LANDMARK CHAMBERS

- The Acquisition of Land Act 1981 applies to the use of these powers of compulsory acquisition: see ss.121(4) and 226(7) respectively.
- Include by section 11 of the Acquisition of Land Act 1981, advertisement in a newspaper in two consecutive weeks and.
- In the case of open spaces, in addition, the compulsory acquisition would require the parliamentary procedure unless any of the exceptions in section 19 of the Acquisition of Land Act 1981 apply. These exceptions allow for the Secretary of State to give consent to the compulsory purchase of open space where there is exchange land; where the acquisition is for the preservation or improvement of the open space, or where the amount acquired is less than 250 yards and is required for drainage or highways purposes.

Summary of Main Powers: Appropriation

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- Local Authorities may appropriate land pursuant to section 122 of the Local Government Act 1972 or section 232 of the Town and Country Planning Act 1990. Under section 122(1) appropriation is only allowed if the land in issue "is no longer required for the purpose for which it is held immediately before the appropriation".
- A local authority may appropriate land held "for planning purposes…for any purpose for which they are or may be authorised in any capacity to acquire land" under section 232 of the Town and Country Planning Act 1990.
- Where it appropriates open space under that provision, it must undertake consultation (s.232(4) parallels s. 122(2A)). Where section 232 applies it does so to the exclusion of section 122 of the LGA 1972 (see s.232(6)). "Planning purposes" is defined by section 246 of the TCPA 1990.

Summary of Main Powers: Disposal (1)

LANDMARK CHAMBERS

- Local authorities have powers of land disposal under section 123 of the Local Government Act 1972 (which are subject to conditions requiring consent of the Secretary of State for disposal for less than best consideration and in the case of open spaces subject to the processes in 123(2A) and (2B)).
- Section 233 of the Town and Country Planning Act 1990 provides a power to dispose of open space which has been acquired or appropriated by a local authority for planning purposes in order either to secure the best use of that or other land or to secure the construction of any buildings or works which appear to them to be needed for the proper planning of the area of the authority. By section 233(4) there is a consultation process (two weeks advertisement in a newspaper etc) and by section 233(9) the provision operates to the exclusion of section 123 of the LGA 1972. See section 246 for the definition of “planning purposes”.
- Section 241 of the TCPA 1990 provides that open space that has been acquired or appropriated by a local authority for planning purposes may be used by any person in accordance with planning permission “notwithstanding anything in any enactment relating to land which is or forms part of a… open space”.

Summary of Main Powers: Disposal (2)

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- There are no powers specifically for temporary disposal of land.
- Disposal of land includes disposal of an interest in land (see section 270 LGA 1972) and as such includes leasehold disposal or the grant of an easement.
- Section 111 of the LGA 1972 allows local authorities to do things which are incidental to the discharge of its functions.
- There are powers which apply to London local authorities under articles 8, 15, and 17 of the GLPO 1967.

Open Space - R (Day) v Shropshire [2023] AC 955

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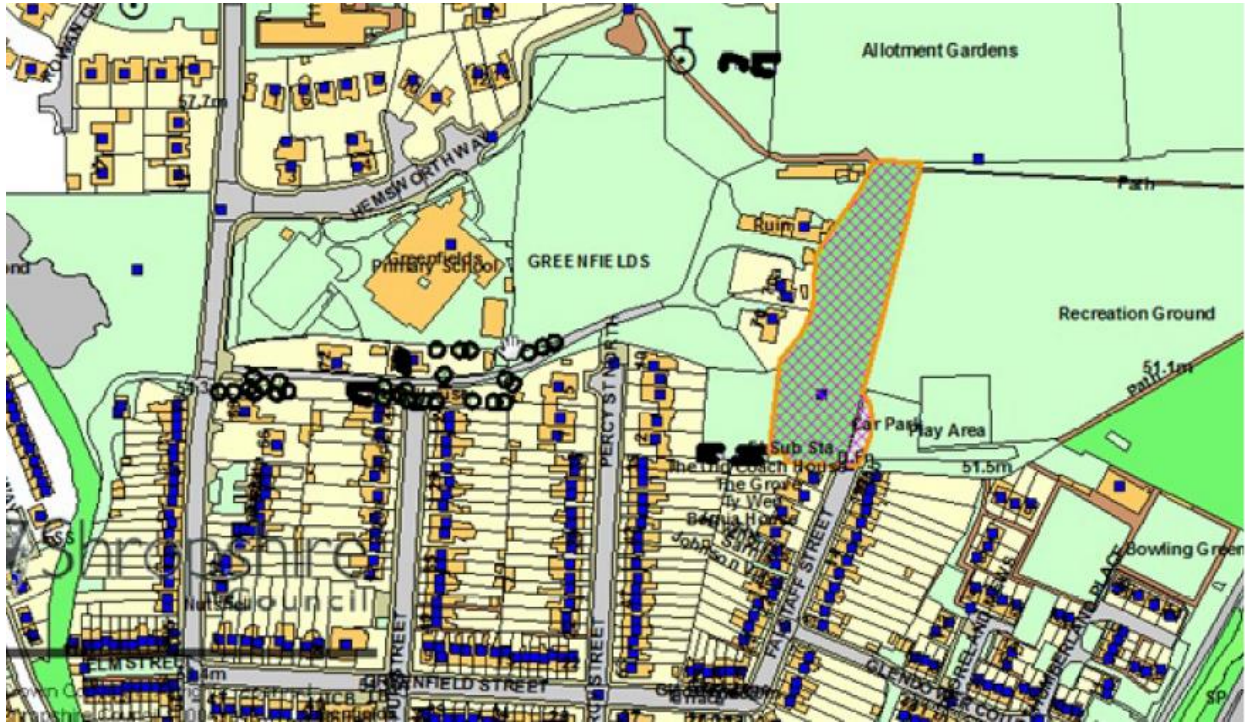

Day- Background

- Judicial Review of Decision to Grant Planning Permission for 15 houses
- Aarhus Costs Cap
- Volumes of Historic Evidence
- Site was purchased in 1925 and held pursuant to statutory trust either under the Public Health Act 1875 or the Open Spaces Act 1906
- Temporary use as allotments as part of the “Dig for Victory” project under war time powers did not affect the analysis
- Nor did the land falling into abeyance in the 1970s and its use as a nursery by the Council in the 1990s

Day- Argument

Argument:

- Trusts for recreational enjoyment of land by the public by right are creatures of section 164 of the Public Health Act 1875 and section 10 of the **Open Spaces Act 1906**.
- Land consisting of or forming part of an open space as defined by section 270 of the **LGA 1972** may be freed from trust by virtue of a disposal under section 123(2A) of the **LGA 1972**
- **BUT** requires satisfaction of the preconditions that:
  - notice of an intention to dispose of the land is advertised prior to disposal and
  - objections to disposal are considered.
- So the trust was not discharged
- Shropshire Council's failure to inquire into and ascertain that a public trust and recreational rights pertained over the Site and that the Site was open space was accordingly a public law error (ground 1). As was the failure to take into account material considerations related to open space (ground 2).

The Supreme Court's Decision

Starting point

"For many years Parliament has recognised the importance for local communities of having green spaces where people can take exercise, play sport and meet each other in the outdoors. Certainly, the events of recent years blighted by the Covid-19 pandemic with compulsory lock downs and social distancing have confirmed that recreation areas have a vital role to play in the physical and mental well-being of people living in an urban environment."

"Legislation has conferred powers on local councils to acquire and lay out recreation grounds and provide them to residents. Where a local authority uses the powers conferred by the Public Health Act 1875… or the Open Spaces Act 1906… to acquire and provide recreation land or open space to the public, the land is subject to a statutory trust in favour of the public and members of the public have a right to go onto the land for the purpose of recreation."

The Supreme Court's Decision
The issue

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- **<u>s.123(2A) and (2B) of the LGA 1972</u>**
  - Before disposing of land subject to a statutory trust the council must advertise their intention to do so in the local paper for two consecutive weeks & consider any objections
  - If the council complies with that procedure → land is freed from any public trust

- What if they don't comply?
  - **<u>s.128(2)</u>** provides that the disposition "shall not be invalid" as a result of the non-compliance and that the purchaser "shall not be concerned" to establish whether there has been compliance

- **But what happens to the statutory trust?**

The Supreme Court's Decision
The nature of the rights created by the statutory trust

- Statutory trusts created by the PHA 1875 and OHA 1906 [34]-[40] restrict the ability of the local authority to use the land subject to the trust for any purpose other than recreation and confer rights on the public to use the land for that purpose: see case law on this at [42]-[49]
- Not analogous to private trusts → no overreaching pursuant to/by analogy with s.2(1) of the LPA 1925 [50]-[52]
- **Simple transfer of the land into private ownership is not sufficient to extinguish the statutory trusts** [57]
- Rights are analogous with rights in town & village greens and over public highways which clearly survive the transfer of land into private ownership [58]

The Supreme Court's Decision
Conclusions

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- Appeal allowed
- Grant of PP quashed
- Impossible to say that it is highly likely that the outcome of the planning application would not have been substantially different if the mistake had not been made

"If, as a result of this appeal, other local authorities and parish councils … take stock of how they acquired and now hold the pleasure grounds, public walks and open spaces that they make available to the public to enjoy then that, in my judgment, would be all to the good."

Reflections on Supreme Court

LANDMARK CHAMBERS

- “ It is enough for the purposes of this appeal to conclude that the continued existence of the statutory trust binding the land would clearly have been **an important consideration** for Shropshire Council when considering CSE’s planning application.”
- The Supreme Court did not overrule cases in other contexts to the effect that matters contained in separate legislative schemes need not be considered for planning purposes.
- See for example *R v Solihull Borough Council, Ex parte Berkswell Parish Council* (1999) 77 P. & C.R. 312.
- *British Railways Board v. the Secretary of State for the Environment* [1993] 3 P.L.R. 125 in which the House of Lords held that there is no absolute rule that the existence of difficulties for the developer in meeting conditions imposed, even if apparently insuperable, must automatically lead to a refusal of permission.

Open Space Disposal- Further Restrictions

Other statutory restrictions on disposal of open space need to be carefully addressed.

For Example: Green Belt (London and Home Counties) Act 1938

The 1938 Act established the first mechanism for the creation and protection of Green Belt around London by providing for local authority acquisition of land; an ability for private landowners to declare land as green belt, and for the use of covenants. Once acquired under the 1938 Act Green Belt land was thereafter protected against development without ministerial consent (s.10) and protected against disposal without ministerial consent (s.5), but use for recreation, agriculture and camping was permitted (s.27).

R (Wilkinson) v L B Enfield [2024] EWHC 1193

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- London Borough of Enfield resolved to dispose of a 25 year lease of part of a local park to a company that owns Tottenham Hotspurs for use as training grounds.

- The claimant applied for judicial review of the defendant local authority's decision to enter into an agreement with the company that owns Spurs’

- The Claimant managed to prove that the London Borough held the relevant land under the Public Health Act 1875 s.164

R (Wilkinson) v L B Enfield

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- The argument was that the disposal power under s.123(1) could not be exercised otherwise than in accordance with the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967.
- The claimant argued that s.131(1)(b), read with art.7 and art.8, limited the local authority's powers of letting open space within the park to those conferred by art.7 and art.8, and that the agreement and lease fell outside those articles.
- Mould J held that a principal council (including a London borough) had a wide power under the Local Government Act 1972 Pt VII s.123(1) to dispose of land which it held by way of long lease. For land forming part of an open space, a principal council had to fulfil the requirements of s.123(2A) before it could lawfully dispose of such land under s.123(1). Conversely, having fulfilled those requirements, a principal council could, as a result of s.123(2B), dispose of such land freed from any trust arising solely by virtue of the land being held in trust for the enjoyment of the public under s.164 of the 1875 Act.

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Appropriation, Disposal and Development of Public Authority Land

Jacqueline Lean

Disposal: best consideration reasonably obtainable

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- **S.123 (2) “Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of short tenancy, for a consideration less than the best that can reasonably be obtained”**
- **Note: General disposal consent in Circular 06/03 ‘Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration than can reasonably be obtained’**
- Removes the requirement for authorities to seek specific consent from the SS for any disposal of land where the difference between the unrestricted value of the interest to be disposed of and the consideration accepted ("the undervalue") is £2m or less where the authority considers will help it to secure the promotion or improvement of the economic, social or environmental well-being of its area.

Disposal: best consideration reasonably obtainable

- Useful summary of applicable principles / approach in ***Cilldara Group Holdings Limited v West Northamptonshire Council*** **[2023] EWHC 1675 (Admin):**
- Competing offers for land owned by Council (leased to bidder 1) adjoining additional land leased to bidder 1
- LSH valuation £865k/£820k
- Bidder 1 (highest offer) £890k with a condition to construct a stand within 5 years, option for Council to buy back at £1 if not completed, and overage provisions
- Bidder 2 (highest offer) c.£3m
- Council accepted bidder 1's option. Bidder 2 challenged by JR.

Disposal: best consideration reasonably obtainable

- **On best consideration reasonably obtainable:**
- At [62] citing Mitting J in *R (London Jewish Girls High School Ltd) v Barnet LBC* [2013] EWHC 523 (Admin)
- "Consideration" mean price payable for the land, which may consist simply of sum of money or in part a sum of money and in part other elements such as rights in the nature of easements or rights to repurchase provided that such elements have a commercial or monetary value which is capable of being assessed by valuers (*R v Middlesborough BC ex p Frostree Ltd)*
- Or, as differently/ more widely phrased in *R v Pembrokeshire CC ex p Coker* [1999] 4 All ER 1007,*"the only consideration to which regard may reasonably be had is that which consists of those elements of the transaction of commercial or monetary value to the local authority"*
- "Elements of social value" (such as completion of a new stand in the stadium, or increasing likelihood land would be developed in accordance with Council's planning policies) do not count [63]
- (But doesn't mean that Council cannot have regard to those as an extra benefit once satisfied that it has obtained best consideration reasonably obtainable) [136]

Disposal: best consideration reasonably obtainable

LANDMARK CHAMBERS

- **On best consideration reasonably obtainable:**
- What is the best consideration reasonably obtainable is for the local authority to determine subject to challenge only on public law principles [67]
- “Bird in the hand” adage may apply: i.e. it may be open to a local authority to regard a lower offer with a substantially higher prospect of proceeding to completion as more commercially valuable than a higher offer which has a substantially lower prospect of coming to fruition [66]
- Council’s decision here that lower offer was to be preferred (having taken view that bidder 2’s offer was not realisable) was rational on the facts of the case [123-128]
- At [126] “It is not for this court to determine whether the claimant in fact made spoiler bids. It was reasonably open for the Council, on the evidence, to form the view it did that [C’s] offer was not a credible or reliable bid”.

Disposal: best consideration reasonably obtainable

LANDMARK CHAMBERS

- **Procedural requirements / fairness**
- No specified requirements in s.123. So have to look to common law.
- "The common law duty of fairness applies in this context, but, in my view, given the statutory purpose of protecting public assets in the interests of the public, the demands of procedural fairness towards bidders are at the lighter end of the spectrum" [93]
- It might have been "prudent" for the Council to have embarked on a competitive process from the outset (there had been an earlier report from KPMG criticising previous processes) but the evidence did not disclose any pre-determination on the part of the Council.
- Importance of the Council having sought/obtained expert valuation advice also clear from the case: see also *R v Darlington BC ex parte Indescon* [1990] 1 EGLR 278 (cited at [67]):
- "a court is only like to find a breach or intended breach by a council of the provisions of [s.123 LGA 1972] if the council has (a) failed to take proper advice or (b) failed to follow proper advice for reasons which cannot be justified or (c) although following proper advice, followed advice which was so plainly erroneous that in accepting it the council must have known, or at least ought to have known, that it was acting unreasonably"

Disposal in breach of s.123(2)

- **S.128 (2) – protection for purchasers?**
- ***R (oao Structadene Ltd) v Hackney LBC* (2001) 82 P & CR 328**
- Council looking to sell 12 tenanted light industrial units. C's agent was told it would be sold at auction. On the day of the auction, Council informed C that it was being withdrawn and was being sold to the tenants. C's agent was told tenants had offered £400k, and C subsequently offered £500k. Council rejected that offer and entered into contract of sale with tenants. JR-ed after contract of sale entered into (but before land transferred)
- Council accepted that it had acted in breach of duties in s.123, in that it had failed to take active steps to try to obtain the best price for the property.
- Not saved by s.128(2) in this case. "Disposal" was the conveyance of land pursuant to the contract of sale, not the contract of sale itself.
- Also (obiter) Court also took the view that s.128(2) only applied in circumstances stated (then, only failure to obtain consent of SS). It did not operate to save transaction in circumstances where defects were the Council's failure to act in accordance with its fiduciary duties to obtain best value for the public purse or *Wednesbury* irrationality.

Development of public authority land: some potential additional issues to be aware of

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- Interference with easements / other rights
- Ss.203 HPA 2016 may be available (for public authority owned / formerly owned land)
- Applies to “relevant rights or interests” (defined in s.205) or “a restriction as to the user of land arising by virtue of a contract” or “conservation covenants”
- Compensation payable (s.204)
- No statutory test – but advisable to work by reference to compulsory purchase tests/guidance
- Development triggering applications to register PROW / village green / ACV
- The Camber, Portsmouth (Appeal refs ROW/3303176, ROW/3303178)
- *R (oao TV Harrison CIC) v Leeds City Council* [2022] EWHC 130 (Admin)
- Restrictions in statute or conveyance transferring land to the public authority / its predecessors in title
- *The Historic Parks and Gardens Trust v Minister of State for Housing* [2022] EWHC 829 (Admin)

Breakout Session One – Conference Suite

LANDMARK CHAMBERS

NPPF 2024 Reforms: what to expect

Christopher Boyle KC and Nick Grant

LAND USE CONFERENCE 2024

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NPPF 2024 Reforms: What to expect

Christopher Boyle KC

Nick Grant

Where are we now?

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We are analysing your feedback

Visit this page again soon to download the outcome to this public feedback.

Summary

This consultation is seeking views on our proposed approach to revising the NPPF. It also seeks views on a series of wider national planning policy reforms.

This consultation ran from
2pm on 30 July 2024 to 11:45pm on 24 September 2024

PLANNING

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Speaking at the Labour Party Conference on Sunday (22 September), Lords minister for housing and local government Baroness Taylor of Stevenage, said the government had so far received “thousands and thousands” of responses to the consultation.

The government will issue the revised NPPF “maybe later on this year”, she said, although it “may take into next year because there’s a lot of responses”.

Outline

Consultation NPPF includes changes to, e.g.: (i) Infrastructure/Community needs (paras. 97-98) (ii) Transport (paras. 112-113); (iii) design and the end to beauty (e.g. Ch 12, para. 135); (iv) Brownfield focus (para 112); (v) Density (para. 130) and (vi) Climate Change (e.g. para 164).

Focus of today

(i) Green Belt

(ii) Land Supply

(iii) Plan Making

Green Belt

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NPPF:

Grey belt: For the purposes of plan-making and decision-making, 'grey belt' is defined as land in the green belt comprising Previously Developed Land and any other parcels and/or areas of Green Belt land that make a limited contribution to the five Green Belt purposes (as defined in para 140 of this Framework), but excluding those areas or assets of particular importance listed in footnote 7 of this Framework (other than land designated as Green Belt).

Green Belt

LANDMARK CHAMBERS

Consultation Document

10. We are interested in whether further support is needed to assist authorities in judging whether land makes a limited contribution to the Green Belt purposes. We propose incorporating the following into the glossary appended to the NPPF but welcome views on the most effective way of providing this guidance: Land which makes a limited contribution to the Green Belt purposes will:

a) Not strongly perform against any Green Belt purpose; and
b) Have at least one of the following features:
i. Land containing substantial built development or which is fully enclosed by built form
ii. Land which makes no or very little contribution to preventing neighbouring towns from merging into one another
iii. Land which is dominated by urban land uses, including physical developments
iv. Land which contributes little to preserving the setting and special character of historic towns

Green Belt

LANDMARK CHAMBERS

Consultation Document

152. In addition to the above, housing, commercial and other development in the Green Belt should not be regarded as inappropriate where:

a. The development would utilise grey belt land in sustainable locations, the contributions set out in paragraph 155 below are provided, and the development would not fundamentally undermine the function of the Green Belt across the area of the plan as a whole; and

b. The local planning authority cannot demonstrate a five year supply of deliverable housing sites (with a buffer, if applicable, as set out in paragraph 76) or where the Housing Delivery Test indicates that the delivery of housing was below 75% of the housing requirement over the previous three years; or there is a demonstrable need for land to be released for development of local, regional or national importance.

c. Development is able to meet the planning policy requirements set out in paragraph 155.

Green Belt

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155. Where major development takes place on land which has been released from the Green Belt through plan preparation or review, or on sites in the Green Belt permitted through development management, the following contributions should be made:

a. In the case of schemes involving the provision of housing, at least 50% affordable housing [with an appropriate proportion being Social Rent], subject to viability;

b. Necessary improvements to local or national infrastructure; and

c. The provision of new, or improvements to existing, green spaces that are accessible to the public. Where residential development is involved, the objective should be for new residents to be able to access good quality green spaces within a short walk of their home, whether through onsite provision or through access to offsite spaces.

Green Belt

LANDMARK CHAMBERS

~~145.~~142. Once established, ~~there is no requirement for~~ Green Belt boundaries should only ~~to~~ be altered ~~reviewed or changed when plans are being prepared or updated. Authorities may choose to review and alter Green Belt boundaries~~ where exceptional circumstances are fully evidenced and justified, ~~in which case proposals for changes should be made only~~ through the preparation or updating of plans~~plan-making process.~~ Exceptional circumstances include, but are not limited to, instances where an authority cannot meet its identified need for housing, commercial or other development through other means. In these circumstances authorities should review Green Belt boundaries and propose alterations to meet these needs in full, unless the review provides clear evidence that such alterations would fundamentally undermine the function of the Green Belt across the area of the plan as a whole. Strategic policies should establish the need for any changes to Green Belt boundaries, having regard to their intended permanence in the long term, so they can endure beyond the plan period. Where a need for changes to Green Belt boundaries has been established through strategic policies, detailed amendments to those boundaries may be made through non- strategic policies, including neighbourhood plans.

Green Belt

~~147.~~144. When drawing up or reviewing Green Belt boundaries, the need to promote sustainable patterns of development should be taken into account. Strategic policy-making authorities should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary. Where ~~it has been concluded that~~ it is necessary to release Green Belt land for development, plans should give first consideration to previously-developed land in sustainable locations, then consider grey belt land in sustainable locations which is not already previously-developed, and only then consider other sustainable Green Belt locations. They should also set out ways in which the impact of removing land from the Green Belt can be offset through compensatory improvements to the environmental quality and accessibility of remaining Green Belt land.

Green Belt

~~150.~~147. Once Green Belts have been defined, local planning authorities should plan positively to enhance their beneficial use, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land. Where Green Belt land is released for development through plan preparation or review, development proposals on the land concerned should deliver the contributions set out in paragraph 155 below.

Land Supply: Assessing housing need

LANDMARK CHAMBERS

~~60.~~61. To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay. The overall aim should be to meet ~~as much of~~ an area's identified housing need ~~as possible~~, including with an appropriate mix of housing types for the local community.

~~61.~~62. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance~~. The outcome of the standard method is an advisory starting point for establishing a housing requirement for the area (see paragraph 67 below). There may be exceptional circumstances, including relating to the particular demographic characteristics of an area[26] which justify an alternative approach which to assessing housing need; in which case the alternative approach should also reflect current and future demographic trends and market signals.~~ In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for[27].

Land Supply: Assessing housing need

LANDMARK CHAMBERS

6. Local planning authorities will be expected to make all efforts to allocate land in line with their housing need as per the standard method. Authorities would be able to justify a lower housing requirement than the figure the method sets on the basis of local constraints on land and delivery, such as existing National Park, protected habitats and flood risk areas, but would (as now) have to evidence and justify their approach through local plan consultation and examination. All local planning authorities will need to demonstrate they have taken all possible steps, including optimising density, sharing need with neighbouring authorities, and reviewing Green Belt boundaries, before a lower housing requirement will be considered.

7. There will be some specific circumstances in which local planning authorities have to use an alternative approach – for example, because the data used in the method is not available. We propose that further guidance on this small number of specific circumstances will be set out in Planning Practice Guidance.

Land Supply: Assessing housing need

LANDMARK CHAMBERS

Current standard Method (PPG on housing and economic needs assessment)

- Step 1: set baseline by reference to 2014 household growth projections
- Step 2: adjustment to take account of affordability (4:1, 0.25%)
- Step 3: cap the level of any increase
- Step 4: cities and urban uplift

Land Supply: Assessing housing need

LANDMARK CHAMBERS

Proposed standard method

- Step 1: set baseline at 0.8% of current housing stock per year
- Step 2 adjust for affordability (4:1, 0.6%)
- No cap
- No uplift

Land Supply: Affordable housing

LANDMARK CHAMBERS

63. Within this context of establishing need, the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies. These groups should include (but are not limited to) those who require affordable housing (including Social Rent); families with children; looked after children[29]; older people (including those who require retirement housing, housing-with-care and care homes); students; people with disabilities; service families; travellers[30]; people who rent their homes and people wishing to commission or build their own homes[31].

64. Where a need for affordable housing is identified, planning policies should specify the type of affordable housing required (including the minimum proportion of Social Rent homes required)[32], and expect it to be met on-site unless:

a) off-site provision or an appropriate financial contribution in lieu can be robustly justified; and

b) the agreed approach contributes to the objective of creating mixed and balanced communities.

Land Supply: Affordable housing

LANDMARK CHAMBERS

66. Where major development involving the provision of housing is proposed, planning policies and decisions should expect that the mix of affordable housing required meets identified local needs, across both affordable housing for rent and affordable home ownership tenures. ~~at least 10% of the total number of homes to be available for affordable home ownership[34], unless this would exceed the level of affordable housing required in the area, or significantly prejudice the ability to meet the identified affordable housing needs of specific groups. Exemptions to this 10% requirement should also be made where the site or proposed development~~:

~~a) provides solely for Build to Rent homes;~~

~~b) provides specialist accommodation for a group of people with specific needs (such as purpose-built accommodation for the elderly or students);~~

~~c) is proposed to be developed by people who wish to build or commission their own homes; or~~

~~d)~~a) ~~is exclusively for affordable housing, an entry-level a community-led development exception site or a rural exception site~~.

Land Supply: Affordable housing

LANDMARK CHAMBERS

69. Mixed tenure sites can provide a range of benefits including creating diverse communities and supporting timely build out rates and local planning authorities should support their development through their policies and decisions. Mixed tenure sites can include a mixture of ownership and rental tenures, including rented affordable housing and build to rent, as well as housing designed for specific groups such as older people's housing and student accommodation, and plots sold for custom or self-build.

Supporting majority affordable housing developments

8. While we want to promote a mix of tenures on developments, we also acknowledge that there will be circumstances where developments that are predominately (or exclusively) single tenure will be appropriate and should be supported. In particular, we want to make clear that development that delivers a high percentage of Social Rent (or other affordable housing tenures) should be supported.

9. We also know that predominately or exclusively affordable housing developments can raise concerns, given evidence around the benefits of mixed communities. Through this consultation we are seeking views on how to best promote sites of this type, while ensuring that adequate safeguards are in place that avoid unintended consequences (for example whether there is an appropriate maximum size for schemes of this nature). We are also seeking views on the best approach for supporting affordable housing developments within rural areas.

Land Supply: Affordable housing (rural)

LANDMARK CHAMBERS

65. Provision of affordable housing should not be sought for residential developments that are not major developments, other than in designated rural areas (where policies may set out a lower threshold of 5 units or fewer). To support the re-use of brownfield land, where vacant buildings are being reused or redeveloped, any affordable housing contribution due should be reduced by a proportionate amount[33].

Designated rural areas: National Parks, Areas of Outstanding Natural Beauty and areas designated as 'rural' under Section 157 of the Housing Act 1985.

Question 54

What measures should we consider to better support and increase rural affordable housing?

Land Supply: Maintaining supply

~~75.~~76. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should ~~monitor their deliverable land supply against their housing requirement, as set out in adopted strategic policies~~ identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing[42] 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[43]. The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:

a) 5% to ensure choice and competition in the market for land; or

~~b) 10% where the local planning authority wishes to demonstrate a five year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year; or~~

b) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply[44].

[43] 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 [5YHLS] of specific deliverable sites exists, it should be calculated using the standard method set out in national planning guidance

Land Supply: Maintaining supply

LANDMARK CHAMBERS

76. Local planning authorities are not required to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing for decision making purposes if the following criteria are met:

a. their adopted plan is less than five years old; and

b. that adopted plan identified at least a five year supply of specific, deliverable sites at the time that its examination concluded.

77. In all other circumstances, local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide either a minimum of five years' worth of housing or a minimum of four years' worth of housing if the provisions in paragraph 226 apply. The supply should be demonstrated against either the housing requirement set out in adopted strategic policies, or against the local housing need where the strategic policies are more than five years old. Where there has been significant under delivery of housing over the previous three years the supply of specific deliverable sites should in addition include a buffer of 20% (moved forward from later in the plan period). National planning guidance provides further information on calculating the housing land supply, including the circumstances in which past shortfalls or over-supply can be addressed.

78. Where the criteria in paragraph 76 are not met, a local planning authority may confirm the existence of a five year supply of deliverable housing sites (with a 20% buffer, if applicable through an annual position statement which:

a) has been produced through engagement with developers and others who have an impact on delivery, and been considered by the Secretary of State; and

b) incorporates the recommendation of the Secretary of State, where the position on specific sites could not be agreed during the engagement process.

Land Supply: Commercial

LANDMARK CHAMBERS

~~86.~~84. Planning policies should:

a) set out a clear economic vision and strategy which positively and proactively encourages sustainable economic growth, having regard to Local Industrial Strategies and other local policies for economic development and regeneration;

b) set criteria, ~~or~~ and identify strategic sites, for local and inward investment to match the strategy and to meet anticipated needs over the plan period. Appropriate sites for commercial development which meet the needs of a modern economy should be identified, including suitable locations for uses such as laboratories, gigafactories, data centres, digital infrastructure, freight and logistics.

c) seek to address potential barriers to investment, such as inadequate infrastructure, services or housing, or a poor environment; and

d) be flexible enough to accommodate needs not anticipated in the plan, allow for new and flexible working practices (such as live-work accommodation), and to enable a rapid response to changes in economic circumstances.

Land Supply: Commercial

~~87.~~85. Planning policies and decisions should recognise and address the specific locational requirements of different sectors. This includes making provision for:

a) clusters or networks of knowledge and data-driven, creative or high technology industries; and for new, expanded or upgraded facilities and infrastructure that are needed to support the growth of these industries (including data centres and grid connections);

b) storage and distribution operations at a variety of scales and in suitably accessible locations. that allow for the efficient and reliable handling of goods, especially where this is needed to support the supply chain, transport innovation and decarbonisation;

c) the expansion or modernisation of other industries of local, regional or national importance to support economic growth and resilience.

Land Supply: Community-Led Development

~~73.~~74. Local planning authorities should support the development of exception sites, or community-led development[38] (as defined in Annex 2) on sites that would not otherwise be suitable as rural exception sites. These sites should be on land which is not already allocated for housing and should:

a) comprise community-led development that includes one or more types of affordable housing as defined in Annex 2 of this Framework. A proportion of market homes may be allowed on the site at the local planning authority's discretion, for example where essential to enable the delivery of affordable units without grant funding; and

b) be adjacent to existing settlements, existing settlements, proportionate in size to them[39], not compromise the protection given to areas or assets of particular importance in this Framework[40], and comply with any local design policies and standards.

[39] Community-led development exception sites should not be larger than one hectare in size or exceed 5% of the size of the existing settlement, unless specific provision to exceed these limits is made in the development plan.

NB: Amendment to definition of "Community-led developments" makes clear they don't have to have been set up for housebuilding

Land Supply: Small sites

Making the small site allocation mandatory

16. We know that most authorities preparing plans have been unable to identify enough small sites to reach the current 10% NPPF local plan allocation expectation, and the Government is concerned this is hindering local SMEs ability to identify sites to bring forward, build out, and for their businesses to grow. We would like to gather views on why authorities are unable to identify 10% small sites, welcoming views on measures to strengthen small site policy through the NPPF, and in particular:

a. whether the 10% small site allocation should be required in all cases (removing the current caveat that there may be some places where strong reasons exist which mean this cannot be achieved);

b. what would be required to implement this more stringent approach, if pursued;

c. whether a definition distinguishing between small and medium sites would improve clarity; and

d. whether requiring authority-specific small-site strategies would help implement the 10% allocation.

Land Supply: Tilted balance

LANDMARK CHAMBERS

11. Plans and decisions should apply a presumption in favour of sustainable development.

For **decision-taking** this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies for the supply of land[8] ~~which are most important for determining the application~~ are out-of-date[9], 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[7]; 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, in particular those for the location and design of development (as set out in chapters 9 and 12) and for securing affordable homes.

Land Supply: Tilted balance

LANDMARK CHAMBERS

[8] Policies for the supply of land are those which set an overall requirement and/or make allocations and allowances for windfall sites for the area and type of development concerned.

[9] This includes, for applications involving the provision of housing, situations where: ~~(a)~~ the local planning authority cannot demonstrate a five year supply ~~(or a four year supply, if applicable, as set out in paragraph 226)~~ of deliverable housing sites (with the appropriate ~~a~~ buffer~~, if applicable~~, as set out in paragraph 76~~77) and does not benefit from the provisions of paragraph 76~~; or ~~(b)~~ 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.

Local Plans: Cooperation

LANDMARK CHAMBERS

24. Effective strategic planning across local planning authority boundaries will play a vital and increasing role in how sustainable growth is delivered and key spatial issues, including meeting housing needs, delivering strategic infrastructure, and building economic and climate resilience, are addressed. Local planning authorities and county councils (in two-tier areas) ~~are~~ continue to be under a duty to cooperate with each other, and with other prescribed bodies, on strategic matters that cross administrative boundaries.

27. Once the matters which require collaboration have been identified, strategic policy-making authorities should make sure that their plan policies are consistent with those of other bodies where a strategic relationship exists on these matters, and with the relevant investment plans of infrastructure providers, unless there is a clear justification to the contrary. In particular their plans should ensure that:

a) a consistent approach is taken to planning the delivery of major infrastructure, such as major transport services/projects, utilities, waste, minerals, environmental improvement and resilience, and strategic health, education and social infrastructure (such as hospitals, universities, major schools, major sports facilities and criminal justice accommodation);

b) unmet development needs from neighbouring areas are accommodated in accordance with paragraph 11b; and

c) any allocation or designation which cuts across the boundary of plan areas, or has significant implications for neighbouring areas, is appropriately managed by all relevant authorities.

Local Plans: Cooperation

~~27.~~28. In order to demonstrate effective and on-going joint working, strategic policy-making authorities should prepare and maintain one or more statements of common ground, documenting the cross-boundary matters being addressed and progress in cooperating to address these. These should be produced using the approach set out in national planning guidance, and be made publicly available throughout the plan-making process to provide transparency. Plans come forward at different times, and there may be a degree of uncertainty about the future direction of relevant development plans or plans of infrastructure providers. In such circumstances strategic policy-making authorities and Inspectors will need to come to an informed decision on the basis of available information, rather than

Local Plans: Soundness

~~35.~~36. Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are 'sound' if they are:

a) **Positively prepared –** providing a strategy which, as a minimum, seeks to meet the area's objectively assessed needs[20]; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;

b) **Justified –** an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;

c) **Effective –** deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and

d) **Consistent with national policy –** enabling the delivery of sustainable development in accordance with the policies in this Framework and other statements of national planning policy, where relevant.

Local Plans: Intervention

LANDMARK CHAMBERS

8. Local planning authorities that fail to do what is required to get their plan in place, or keep it up to date, would be at risk of government intervention. A range of intervention options exist, from the issuing of plan-making directions through to the removal of plan-making powers, where the Secretary of State would arrange for a plan to be prepared in consultation with local people, and then brought into force. Decisions on intervention should have regard to:

a. local development needs; b. sub regional, regional, and national development needs; or c. plan progress.

The Secretary of State will give planning authorities an opportunity to put forward any exceptional circumstances in relation to intervention action.

9. Should these criteria be confirmed, they would be applied flexibly. They would be matters to which the Secretary of State would "have regard", along with any other material considerations. The relative weight afforded to the different criteria would be determined by the Secretary of State, depending on the circumstances of the relevant area, and aligned with relevant statutory powers and obligations.

Local Plans: Transitionals and plan making

LANDMARK CHAMBERS

If	Then
Plans were submitted for examination on or before 24/01/2019	Examine under NPPF 2012 (**unless** withdrawn or do not proceed)
Emerging Local plan reaches reg. 19 stage **on or before** NPPF+1 month and emerging annual housing requirement <200 dwellings below "Published Local Housing Need" figure (put online)	Examination under relevant previous version of NPPF.
Emerging Local plan reaches reg. 19 stage **on or before** NPPF+1 month and emerging annual housing requirement >200 dwellings below published LHN	Will be examined under NPPF 2024/5 (so revise), **and** if, after applying that, requirement still >200 below LHN, proceed to examination within 18 months
Emerging Local plan is a Part 2 plan and does not introduce new strategic policies setting housing requirement	Examination under relevant previous version of NPPF
Emerging Local plan is a part 2 plan, does introduce new strategic policies setting housing figure **but** Part 1 was prepared under NPPF (2024/5)	Examination under relevant previous version of NPPF

Local Plans: Transitionals and plan making

LANDMARK CHAMBERS

If	Then
Spatial Development Strategy reached consultation under s. 335(2) GLAA 1999 on or before NPPF+1 month	Relevant previous version of framework applies
Local plan has been submitted under reg. 22 on or before NPPF+1 month	Examination under relevant previous version of NPPF. **BUT** if annual housing requirement >200 dwellings lower than published LHN figure, start new plan at “earliest opportunity”
In all other cases	Examine under NPPF 2024/5

Breakout Session Two

LANDMARK CHAMBERS

Linder Room

Leasehold and Freehold reform

Ellodie Gibbons and Richard Clarke

Conference Suite

Flood risk : existing problems and planning for new homes?

Richard Turney KC and Matthew Dale-Harris

Newman Room

Land values and changes to compensation: where might we be heading?

Dan Kolinsky KC and Jacqueline Lean

LAND USE CONFERENCE 2024

Breakout Session Two – Linder Room

LANDMARK CHAMBERS

Leasehold and Freehold reform

Ellodie Gibbons and Richard Clarke

LAND USE CONFERENCE 2024

LANDMARK CHAMBERS

The Future of (Leasehold) Housing: The Leasehold and Freehold Reform Act 2024

Ellodie Gibbons

Where are we now?

- 24 May 2024 - royal assent (the remaining parliamentary stages of the bill were fast-tracked in the wash-up period before the general election)
- The majority of the provisions are not yet in force and will need to be commenced through secondary legislation
- The 2019 Conservative government anticipated the majority of the reforms would come into effect in 2025-26
- The Labour government has committed to “act quickly to provide homeowners with greater rights, powers and protections over their homes by implementing the provisions of the Leasehold and Freehold Reform Act 2024…”
- No other announcements about the implementation timetable: “Due to the complexity of the legislation it may be implemented in stages”

The Arrangement of the Act

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Part 1 Leasehold Houses
Part 2 Leasehold Enfranchisement and Extension
Part 3 Other Rights of Long Leaseholders
Part 4 Regulation of Leasehold
Part 5 Regulation of Estate Management
Part 6 Leasehold And Estate Management: Redress Schemes
Part 7 Rentcharges
Part 8 Amendments of Part 5 of The Building Safety Act 2022

Part 2 Leasehold Enfranchisement and Extension

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- Eligibility for enfranchisement and extension
- Effects of enfranchisement
- Effects of extension
- Price payable on enfranchisement or extension
- Costs of enfranchisement or extension
- Jurisdiction of the county court and tribunals
- Jurisdiction of the High Court
- Enfranchisement and extension: miscellaneous amendments
- Preservation of existing law for certain purposes
- Consequential amendments to other legislation

Eligibility for enfranchisement and extension

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- Removal of qualifying period before enfranchisement and extension claims
- Removal of restrictions on repeated enfranchisement and extension claims
- Change of non-residential limit on collective enfranchisement claims
- Eligibility for enfranchisement and extension: specific cases

No minimum period of ownership

- **What?** Abolition of two-year ownership requirement
- **Why?** Reduces remaining term of the lease; easily avoided
- **Easier/cheaper?** Yes – though minor win?

Increase in non-residential limit

- **What?** Increase from 25% to 50%
- **Why?** To enable more leaseholders to enfranchise
- **Easier?** More buildings can benefit
- **Cheaper?** Not to manage - and landlord resistance?

Effects of enfranchisement and extension

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- Acquisition of intermediate interests in collective enfranchisement
- Right to require leaseback by freeholder after collective enfranchisement
- Longer lease extensions
- Lease extensions under the LRA 1967 on payment of premium at peppercorn rent

Right to require leaseback by freeholder after collective enfranchisement

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- **What?** The landlord can be forced to accept a 999-year lease of commercial premises rather than receive compensation for the loss of its freehold interest in them
- **Why?** Reduces the cost for leaseholders
- **Easier?** Probably not
- **Cheaper?** Yes

Longer lease extensions

- **What?** 990-year lease extension, peppercorn, payment of premium (compared to 50 years for houses and 90 years for flats under current law)
- **Why?** Only one extension needed
- **Easier/cheaper?** Yes, when compared to undertaking multiple extensions

Price payable on enfranchisement or extension

- Section 37(1) - the price payable is
  - (a) the market value, and
  - (b) other compensation (if any)

- “Other compensation” – same as existing law

- Schedule 4 - sets out how “market value” is to be determined (and shared, where necessary)

Key Points

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1. Change to the calculation of lease extension premiums
2. Prescribed valuation methodology (with some exceptions): “the standard valuation method”
    - Tenant holding over or unexpired term of 5 years or less
    - Market rack rent leases
    - Leases already extended under the old law in the LRA 1967
    - Business tenancies
    - Acquisition of a freehold house under the LRA 1967: shared ownership leases
    - Collective enfranchisement: property other than relevant flats etc and appurtenant property
3. Prescribed rates
4. Ground rent capped - 0.1% of the market value of the premises being valued
5. No discount for risk of holding over (where unexpired terms exceeds 5 years)
6. Section 9(1) stays
7. No restriction on development

Assumptions

LANDMARK CHAMBERS

1. Intermediate leases assumed to merger with superior interest
2. Removal of marriage and hope value
3. Transfer of freehold house or lease extension: repairing obligations and improvements

    (a) tenant has complied with repairing obligations under the lease, so that the property has not been devalued by any breach of those obligations, and

    (b) any improvements to the premises that have been made by any tenant under the current lease (including the current tenant) at the tenant's own expense have not been made, unless they were required to be made by any tenant's repairing obligations under the lease
4. Applies to the above to collective enfranchisement
5. Collective enfranchisement: it must be assumed that the relevant freehold is subject to any leases to be granted in accordance with section 36 of the LRHUDA 1993

Costs of enfranchisement or extension

- **What?** Each party bears their own non-litigation costs (save in limited circumstances)
- **Why?** Mirrors a voluntary sale
- **Easier?** Less scope for disputes v. may disincentivise landlords to engage
- **Cheaper?** Yes

Jurisdiction

- **What?** Transfer of functions to FTT; no first instance role for High Court
- **Why?** Unified system, no costs jurisdiction
- **Easier? Cheaper?** FTT may be better placed to determine; avoids confusion about jurisdiction…reflects current practice anyway…?

Part 3 Other Rights of Long Leaseholders

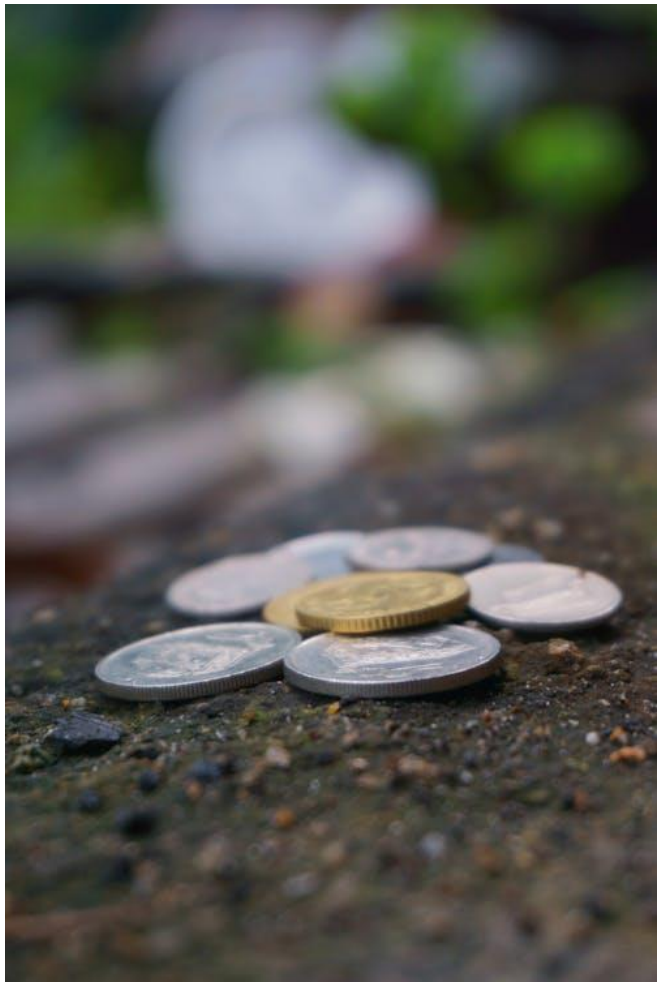
LANDMARK CHAMBERS

New right to replace rent with peppercorn rent

The right to manage

- Change of non-residential limit on right to manage claims
- Costs of right to manage claims
- Compliance with obligations arising under Chapter 1 of Part 2 of the CLRA
- No first-instance applications to the High Court in tribunal matters

Buying out ground rent



- **What?** New right for leaseholders under leases with over 150 years remaining to buy out the ground rent under those leases and replace it with a peppercorn rent
- **Why?** Part of “suite of enfranchisement rights” (Law Comm); reduce ongoing financial burden and help saleability
- **Easier?** ….
- **Cheaper?** …….

Costs of right to manage claims

- **What?** Each party bears their own non-litigation costs (save in limited circumstances); One-way costs shifting (s. 88(3) of 2002 Act) removed
- **Why?** Issues with reasonableness, undercapitalisation of RTM companies, RTM should be cheaper than enfranchisement
- **Easier?** Less scope for disputes v. may disincentivise landlords to engage
- **Cheaper?** Yes

Part 4 Regulation of Leasehold

LANDMARK CHAMBERS

Service charges

- Extension of regulation to fixed service charges
- Notice of future service charge demands
- Service charge demands
- Accounts and annual reports
- Right to obtain information on request
- Enforcement of duties relating to service charges

Insurance

- Limitation on ability of landlord to charge insurance costs
- Duty to provide information about insurance to tenants

Costs

- Limits on rights of landlords to claim litigation costs
- Right of tenants to claim litigation costs from landlords
- Restriction on recovery of non-litigation costs

LANDMARK CHAMBERS

Leasehold and Freehold reform - Reform of rentcharges

Richard Clarke

What is a rentcharge?

- **Rentcharges Act 1977 s1:**

"…any annual or other periodic sum charged on or issuing out of land, except—

(a) rent reserved by a lease or tenancy, or

(b) (b) any sum payable by way of interest."

Nature of rentcharges

LANDMARK CHAMBERS

- An interest in land – a right to a periodical sum of money secured on land;
- Can be legal or equitable – LPA 1925 s1(2):

"The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—

…

(b) A rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

…

(e) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.

(3) All other estates, interests, and charges in or over land take effect as equitable interests."

Legal rentcharges

LANDMARK CHAMBERS

To be a legal interest:

- Must be ‘in possession’ (i.e. immediate, not in remainder or reversion);
- Where the payments start at a date later than the date of creation, rentcharge still in possession unless it takes effect in remainder or expectant upon the determination of some other interest – Law of Property (Entailed Interests) Act 1932 s2;
- Either (i) perpetual or (ii) for a term of years absolute;
- Must comply with formality requirements (by deed, by statute).

Land registration and rentcharges

LANDMARK CHAMBERS

- A rentcharge is not an overriding interest and must be protected by notice to retain priority (LRA 2002 s29);
- Legal rentcharges can be registered – given its own title and noted on the registered title out of which it is granted;
- An equitable rentcharge cannot be given a title but may be the subject of an entry of an agreed or unilateral notice against the registered title out of which it is granted.

Origins and uses for rentcharges (i)

LANDMARK CHAMBERS

- In the 19th century, to enable the rapid development of cities, in parts of the country:
- *"…freehold land was sold in exchange for a capital sum lower than its full value together with a liability to pay an annual sum, secured by a rentcharge. The new owner in effect deferred some of the capital payment and was able to pass it on to the new owners of the houses he or she built…The liability to pay the annual sum was permanent, as was the rentcharge."*
- *(Roberts v Lawton [2016] UKUT 395 (TCC) §5-6)*
- Became problematic as the burdened land was subdivided;
- Left freehold land burdened with small perpetual liabilities with disproportionate enforcement mechanisms.

Origins and uses for rentcharges (ii)

LANDMARK CHAMBERS

- Useful for schemes of development where: (i) plots are sold freehold and (ii) the purchasers are to contribute to the cost of maintaining/managing the common parts/ facilities/ gardens;
- Known as ‘estate rentcharges’;
- Useful means of circumventing the rule that the burden of positive covenants does not run with freehold land;
- Remain useful.

Abolition of rentcharges

LANDMARK CHAMBERS

- Rentcharges examined by Law Commission – led to Rentcharges Act 1977;
- From 22 July 1997, no new rent charge (at law or in equity) can be created – s2(1);
- Most existing rent charges will be extinguished on 22 July 2037 – s3;
- Right to apportion certain rentcharges (s4-7);
- Right to redeem certain others (s7-10 + regulations)
- Certain rentcharges exempted from prohibition on creation / abolition.

Retained rentcharges

- Act does not prohibit the creation of new (s2(3)):

  - ‘Estate rentcharges’;

  - Rentcharges pursuant to a Court Order;

  -Rentcharges by Act of Parliament (in connection with the execution of works on land).

Estate rentcharges

LANDMARK CHAMBERS

- Defined as a rentcharge created for the purpose (s2(4)):

"(a) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or

(b) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land."

- By s2(5):

(5) A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant.

Estate rentcharges cont.

- Section 2(5) takes rentcharges outside the scope of estate rentcharges if for more than an amount "*which is reasonable"* in relation to the services provided;
- Considered by the Court of Appeal in *Orchard Trading Estate Management Ltd v Johnson Security Ltd* [2002] EWCA Civ 406;
- C.A. agreed with the trial judge that:

"…the purpose of the deed is to meet in full the expenditure and, given that no more than 100 per cent of the expenditure is recoverable, then the payment must… be reasonable in relation to that covenant. The mischief attacked by subsection 5 is I think the circumstance where a fixed sum is provided for in the rent charge which bears no proportion to the actual expenditure, and that is not the present case."

Orchard Estates cont.

LANDMARK CHAMBERS

- Also agreed that provisions for the payment in advance of surveyors and other professional charges:

"…are all part of the scheme of the rent charge, which is to cover, and cover entirely so far as the draftsman could, the expenditure, including the running expenditure to Orchard, but no more. They do not, in my judgment, provide for a payment for the performance by the rent owner of the covenant of sums which are not reasonable in relation to Orchard's obligations."

- Implication of a limitation that any expenditure be reasonable left undecided (§30);
- Severability of charges outside s2(4)(b) left undecided (§27).

Extinguishment of rentcharges

LANDMARK CHAMBERS

- Rentcharges can be extinguished by:
  - Release;
  - Merger (no longer automatic- s185 LPA 1925);
  - Limitation – by non-payment for 12 years and no acknowledgement of owner's title (s15, 17, 38(8), Sch 1 para 8(3) Limitation Act 1980, *Shaw v Crompton* [1910] 2 KB 370);

  (NB: For rentcharges with a registered title – see s96(1) LRA 2002 + Sch 8 Land Registration Rules 2003);
  - By statutory redemption.

Ongoing controversies

LANDMARK CHAMBERS

- Disproportionate legal remedies to enforce against breaches;
- Limited ability of the paying party to contest the reasonableness of estate rentcharges;
- Both addressed by the Leasehold and Freehold Reform Act 2024.

Enforcement of rentcharges

Remedies for non-payment included:

- A personal action for the money against the freeholder for the time being (*Shand v Morgoed Estates Ltd* [2010] 1 E.G.L.R. 149);
- Right of entry: s121 LPA 1925

  - Applies where rentcharge is unpaid for 40 days, whether or not demanded (s121(3));

  - Take possession and the income until the rent and costs are paid (s121(3));

  - In the absence of a contrary intention in the instrument creating the rentcharge (s121(5));

Enforcement cont.

- Demise to a trustee (LPA 1925 s121(4));
  - In the absence of a contrary intention (s121(5));
  - If rent 40 days in arrear, whether demanded or not (s121(3));
  - Demise to a trustee for a term of years;
  - The trustee may raise money to meet past and future liabilities under the rentcharge, plus all costs and expenses, with the balance of any income being paid to the freeholder;
  - No provision for lease to be extinguished when arrears are paid. Freehold may be rendered valueless by the long lease.

Roberts v Lawton [2016] UKUT 0395 (TCC)

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- 99-year leases granted following failures to pay (undemanded) rentcharges);
- UT confirmed any lease does not end when the arrears are cleared: §9;
- UT recognised the leases rendered the freeholds *"unsaleable"* and were a *"stranglehold on the property owner whose freehold property is worthless in the presence of the lease"*;
- Further:

"It is clear from s.121 of the LPA that the right to grant a rentcharge lease arises once there is 40 days of arrears, provided that the rentcharge remains in existence and even if payment was not demanded. That right is unaffected even if the Appellants have provided no information about their entitlement to the rentcharge, even if they have sent demands to the wrong address, and even if they have refused arrears after the grant of the lease."

Roberts v Lawton cont.

- Tribunal recognised:

"Section 121(4) of the LPA, and its statutory predecessor s.44 of the Conveyancing Act 1881, was no doubt an efficient and useful provision when drafted, but inflation has made it toxic. The remedy – draconian as it is — is out of all proportion to the wrong. It is understandable that the extinguishing of existing rentcharges was deferred, by the Rentcharges Act 1977, to 2037, but it is unfortunate that the opportunity was not taken to reform the remedies available to the rentcharge holder in the meantime."

Reform: section 113 of the 2024 Act

- Already brought into force;
- Adds s120A - s120D into LPA 1925, amends s121 LPA 1925;
- A ‘regulated’ rentcharge is one which could not be created in accordance with s2 Rentcharges Act 1977 (s120A(1));
- No action to recover payment of regulated rentcharge arrears may be brought unless (s120B):

  - s.120B(2) compliant demand for payment made;

  - Costs of preparing a s120B(2)-(3) complaint demand irrecoverable (s120B(6))

  - 30 days has passed since the demand;

Section 113 cont.

- Section 120D – regulation making power to *“limit the amounts payable by landowners, directly or indirectly, in respect of action to recover or compel payment of regulated rentcharge arrears”;*
- New s121(1A)

“(1A) But where such a sum is charged by way of a regulated rentcharge, the rent owner does not have any of those remedies for recovering and compelling payment of the sum on and after 27 November 2023.”

- Effectively abolishes the s121 remedies for regulated rentcharges.

Part 5 of the 2024 Act

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- Not yet in force;
- Applies to ‘relevant obligations’, which includes, in relation to a dwelling, *“an estate rentcharge”* – s72(6);
- ‘Relevant costs’ include, in relation to a dwelling, *“costs which are incurred by an estate manager in carrying out estate management for the benefit of the dwelling or for the benefit of the dwelling and other dwellings” (s72(11).*
- ‘Estate management’ defined by s72(2), ‘estate management charge’ by s72(8)-(9);

Part 5 cont.

- Section 73: general limitations on estate management charges;
- Payable only to the extent it (i) “reflects relevant costs” and (ii) is not otherwise limited by Part 5;
- Sections 74-76 set out circumstances in which costs that would otherwise by relevant costs are (i) not to be so treated or (ii) are *“relevant costs only to a limited extent”*
- Section 74 mirrors s19 of the 1985 Act in relation to leasehold service charges;

Sections 74, 75, 76

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- S.74: Costs incurred by an estate manager are relevant costs—

  - only to the extent that they are reasonably incurred, and

  - where they are incurred in the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

- Where an estate management charge is payable before relevant costs are incurred, no greater amount than is reasonable is so payable.
- S.75: consultation requirement is costs exceed an appropriate amount;
- S. 76 costs not demanded (or subject to a future demand notice) within 18 months of being incurred are not relevant costs;

Section 77: access to Tribunal

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- Provides for applications to the appropriate Tribunal to determine whether an estate management charge is payable and, if so, by who and in what amount;

Other provisions in Part 5

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- S78 requires demands for payment of an estate management charge to be in a specified form;
- S79 requires the production of annual reports;
- S80 establishes a right to request information from estate managers;
- Sections 78-80 enforceable by an application to the Tribunal (s82);
- Sections 83 to 87 govern administration charges – only payable to the extent reasonable – s86(1), notice of amount given in an administration charge schedule – s84, s86(2);
- Can apply to Tribunal to determine amount payable (s87);
- Procedure to replace managers – s89-93.

Part 6 of the 2024 Act

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- Section 100 - regulation making power to require persons carrying out estate management to be a member of a redress scheme;
- A ‘redress scheme’ is an approved scheme—

  - which provides for a complaint against a member of the scheme made by or on behalf of a current or former owner of a dwelling *“to be independently investigated and determined by an independent individual…”*
- Section 105-106 – financial penalties for breaching the obligation to be a member of a redress scheme;
- Section 107 – provision for determinations under a redress scheme to be treated as court orders.

Forthcoming legislation – Leasehold and Commonhold Reform Bill

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- In the King's Speech 2024 the government committed to publish a draft Leasehold and Commonhold Reform Bill to –
- **enact remaining Law Commission recommendations**
- **reinvigorate the commonhold tenure**
- **regulate ground rents for existing leaseholders**
- **strengthen the rights of freehold homeowners**
- **remove the threat of forfeiture**
- The government intends to publish the draft legislation on leasehold and commonhold reform in the 2024-25 parliamentary session

Breakout Session Two – Conference Suite

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Flood risk : existing problems and planning for new homes?

Richard Turney KC and Matthew Dale-Harris

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Flood risk : existing problems and planning for new homes?

Richard Turney KC

Matthew Dale-Harris

Overview

1) Planning policy on flood risk – the recent caselaw
2) Flood risk infrastructure – opportunities and pitfalls

Flood risk policy

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Sources

1) Chapter 14 of the NPPF - Meeting the challenge of climate change, flooding and coastal change.

- Specifically paragraphs 165-175,
- But see also “Planning for Climate Change”

2) Planning Practice Guidance
3) No changes to relevant parts of NPPF in recent consultation draft.

NPPF – Planning and Flood Risk

Central tests = sequential test and exception test. We're going to focus on sequential test (and the sequential approach).

NPPF 168:

"168. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."

See also para 173

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"173. When determining any planning applications, local planning authorities should ensure that flood risk is not increased elsewhere. Where appropriate, applications should be supported by a site-specific flood-risk assessment[59]. Development should only be allowed in areas at risk of flooding where, in the light of this assessment (and the sequential and exception tests, as applicable) it can be demonstrated that:

a) within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location;

b) the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment;

c) it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate;

d) any residual risk can be safely managed; and

e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan. "

Planning Practice Guidance (“PPG”)

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- Revised in 2022.
- Describes a hierarchy of action: Avoid, Control, Mitigate, and Manage residual risk. Sequential Approach forms part of “Avoid”.
- Sets out detailed advice on the application of sequential test, for both plan-making and decision-taking, and the exception test.
- Describes both together as the “sequential approach”.
- Distinguishes between different sources of flooding. Including from seas and rivers, from rain, from rising groundwater. Defines areas at risk of sea flooding and river (or “fluvial”) flooding (Flood Zones 2 and 3).

When is the sequential test *engaged*?

- In the original PPG (2014), it was clear that the sequential test was only interested *fluvial* risk. Not concerned with other kinds of flood risk, e.g. surface water flood risk.
- However, NPPF 168 says:

> "the aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source"

2022 PPG

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2022 update to PPG says at para 23 that sequential approach:

"…means avoiding, so far as possible, development in current and future medium and high flood risk areas considering all sources of flooding including areas at risk of surface water flooding."

…

"Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied."

And at para 024:

"the Sequential Test ensures that a sequential, risk-based approach is followed to steer new development to areas with the lowest risk of flooding, taking all sources of flood risk and climate change into account."

R (Substation Action Save East Suffolk Limited) v SSESNZ [2024] EWCA Civ 12

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R (Substation Action Save East Suffolk Limited) v SSESNZ [2024] EWCA Civ 12

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- Decided in relation to 2019 NPPF, Energy NPS and the 2014 PPG.
- Development consent granted for two offshore windfarms in East Anglia.
- The NSIPs included a generating substation for each windfarm plus one
- National Grid substation at Friston, Suffolk. The connection hub covers around 46ha of land on the edge of the village.
- Part of this infrastructure is proposed to be built over land which has a high risk of flooding from surface water.
- Local residents argued the applicant did not apply a sequential test to the location of the site at the site selection stage which incorporated this surface water flood risk.

Lang J decision: [2022] EWHC 3177 (Admin)

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- Within context of NPS EN-1, outside of flood zones on fluvial risk, it is a matter of judgment for an applicant, and ultimately the decision-maker, as to how to apply the sequential test to flood risks from other sources, such as surface water: para 58.
- NPPF and PPG require surface water flooding to be taken into account when considering location of development, as part of the sequential approach, but, beyond that, there is no further direction as to exactly how surface water flooding is to be factored into the sequential approach. It is a matter of judgment as how to give effect to this: para 64.
- Policy does not mean that where there is some surface water flood risk, it must be positively demonstrated that there are no sites reasonably available for the development with lower surface water flood risk: para 65.

Appeal to the Court of Appeal

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- Is the sequential test in respect of flood risk as set out in national policy a matter for the lawful exercise of planning judgment in circumstances where no "sequential approach" was applied at the site selection stage? **Answer: in short, yes.**
- Did Lang J make a perverse error of fact in finding that no part of the site was in an area at high risk of surface water flooding? **Answer: no.**

Court of Appeal decision: paras 41-42 – EN-1 (2011)

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Where there is a risk of flooding from surface water, no provision of EN-1 (2011) required an applicant to demonstrate there is no site reasonably available with a lower risk of surface water flooding. However, a decision-maker will have to be satisfied a “sequential approach” has been applied at site level to minimize risk by directing the most vulnerable uses to areas of lowest flood risk, which is a question of planning judgment.

Court of Appeal decision: para 43 part (i) – NPPF and PPG

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"Similar considerations apply to the relevant paragraphs of the Framework and the PPG. It is clear that the aim underlying the policy on planning and flood risk is to ensure that inappropriate development is avoided in areas at risk of flooding by directing development away from areas of highest risk (see paragraph 159). At paragraph 162, the Framework recognises that the 'aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source' and also refers to development not being allocated or permitted if there are reasonably available sites in areas with a lower risk of flooding. That is a reference to the sequential test as defined in EN-1 and is applicable to areas subject to fluvial flooding. The final sentence of paragraph 162 deals with flood risk more generally and refers to the 'sequential approach' being used in areas known to be at risk from any form of flooding."

Court of Appeal decision: para 43 part (ii) – NPPF and PPG

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"The provisions of the Framework do **not**, however, require an applicant for development consent to demonstrate that there are no other sites reasonably available if any part of the development is to be located in an area where there is a risk of flooding **from surface water**. The same is true of the relevant paragraphs of the PPG. Paragraph 7.019 of the PPG, by way of example, makes it clear that the sequential test is concerned with steering development to Flood Zone 1 (areas with a low probability of fluvial flooding), and only if no sites are a reasonably available in that Zone, should consideration be given to reasonably available sites in Flood Zone 2."

Court of Appeal decision: para 44 – NPPF and PPG

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"It was apparent from the Framework and the PPG that the risk of flooding from surface water must be taken into account at all stages as part of the aim of avoiding inappropriate development in areas at risk and to direct development away from areas at highest risk. The decision-maker will have to be satisfied that a sequential approach has been applied at the site level to minimise risk and direct the most vulnerable uses to areas of lowest flood risk. How that is done, however, is a matter of planning judgment for the decision-maker subject to review on public law grounds. The relevant provisions of EN-1, the Framework, and the PPG do not require that wherever there is a risk of flooding from surface water, an application for development consent must demonstrate that there is no other reasonably available site with a lower risk of flooding."

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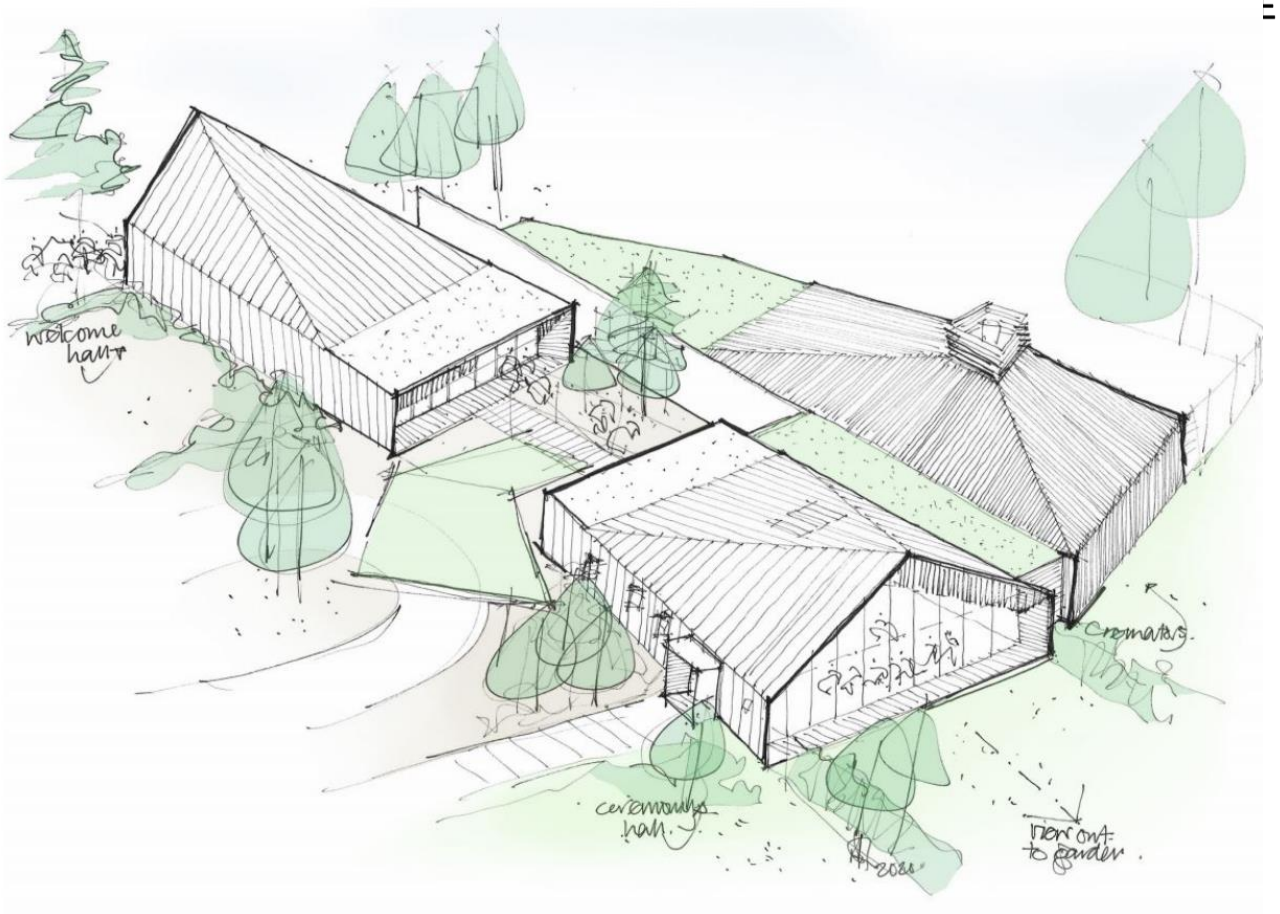
Wathen-Fayed v SSLUHC [2024] EWCA Civ 507



Wathen-Fayed v SSLUHC [2024] EWCA Civ 507

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- Decided under 2021 NPPF and 2014 PPG
- Planning permission for crematorium in Green Belt.
- Flood Zone 1 but SFRA identified area at risk of groundwater flooding.
- Objectors referred to other sites and advanced one as an alternative on the basis that it was sequentially preferable, but Inspector (a) concluded that he was satisfied that there was no requirement for the sequential test to be undertaken and (b) that the alternative was not reasonably available.
- Claimant argued Inspector had misunderstood NPPF and PPG in concluding no sequential test required despite evidence in SFRA.

Tim Mould KC decision: [2023] EWHC 92 (Admin)

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- Accepted that the site specific FRA misstated the position in asserting that the sequential test was irrelevant.
- But confirmed that the question of whether the sequential test should be applied was a question of planning judgment.
- It was lawful for him to do so on basis of his consideration of (i) the findings of the SFRA (ii) the advice of the FRA that site investigation should be carried out and scheme designed to respond to findings (iii) position of the LLFA and (iv) objectors' contention that the surface water flooding presented medium degree of risk.
- Not irrational for him to conclude as he did. Judge saw no reason why the ability to manage flood risk via conditions should not be relevant to assessment as to whether sequential test should apply. (contrary to 2022 PPG)

Court of Appeal: [2024] EWCA Civ 507

- No reason to distinguish *Substation Action*: para 117.
- Inspector was correct to recognise that *"the question whether to apply the sequential test was a matter of planning judgment for him*": para 122
- "124. I agree with Mr Darby's description of the Inspector's approach in his skeleton argument as "the epitome of the pragmatic approach urged upon decision-makers by the PPG." The Inspector clearly recognised that the location of the site within Flood Zone 1 was not sufficient in itself to avoid the need to consider the risk of flooding from water sources other than rivers, how this might be mitigated, and whether there were alternative sites which might be less susceptible to groundwater flooding. He rationally took into account the ability effectively to manage the risk of flooding at the site through conditional controls. As the Judge said at [124], he was entitled to take the controls imposed by condition 6 into account in reaching a conclusion, in the exercise of his planning judgment, that a sequential test need not be applied in this case…"

What next?

- Permission to appeal to Supreme Court sought by Substation Action
- On 14 March 2024, Tim Smith, sitting as a Deputy High Court Judge, refused permission in ***R (CCD) v Brent LBC (***AC-2023-LON-003851), but indicated in doing so that in his view ***Substation Action*** was about the outcome of the sequential test rather than whether it was required at all.
- Not consistent with ***Wathen-Fayed***.
- However, what is consequence of PPG change?

Mead Realisations v SSLUHC [2024] PTSR 1093

- Two challenges heard together (Mead and Redrow).
- Inspectors in each dismissed appeal on basis that sequential test was not met because there were reasonably available sites with a lower flood risk than the appeal site.
- In each case it was argued that:

1. PPG was not national policy such that its definition of “reasonably available” could not impose a more stringent test than under NPPF.
2. In order to be sequentially preferably, alternative sites had to be capable of accommodating the identified needs for the type of development at issue – such that Inspectors had to consider whether alternatives could accommodate development in fact proposed.

PPG

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What is a "reasonably available" site?

'Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.

These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'.

The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications.

Paragraph: 028 Reference ID: 7-028-20220825

Revision date: 25 08 2022

Status of PPG

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- Holgate J rejected contention that PPG was could not alter national policy as set out in NPPF.
- Neither have force of statute or legal binding effect, and Secretary of State's powers to make each derive from same source – i.e. the planning statutes which give him overall responsibility for the planning system.
- Both are statements of policy.
- N.B. this analysis does not preclude the contention that the terms of one might assist in interpreting the requirements of the other.

Approach to reasonably available sites

Holgate J went on to reject narrow approach advanced by developers.

- "Appropriateness" in NPPF 168 was deliberately broad and open-textured.
- PPG performs "*legitimate role of elucidating the open-textured policy in the NPPF*".
- Consideration of specific need not irrelevant; but nor is it necessary for the search for sites to be limited to sites capable of meeting the specific requirements set my the developer – there is a need for "*realism and flexibility on all sides*". General need would normally be irrelevant as applies equally to all possible sites.
- PPG was correct to advise that reasonably available sites could include sites not owned by developer – but deliverability and time scales ("temporal dimension") would also be relevant.

Application to facts

Inspector in Mead

- Entitled to say that development of an alternative site did not have to follow the same timescale as envisaged for appeal proposal.
- Entitled not to accept relevance of general need for housing

Inspector in Redrow was

- Wrong not to address appellant's case on interconnectivity of benefits on their site, in accepting an alternative based on smaller unconnected sites
- Entitled to rely on lack of evidence showing that larger sites would take too long to come forwards.

Holgate J also commented that an argument that there was a substantial need which could not be met entirely on sequentially preferable land was relevant (at least to weight to be given to non-compliance) but that this argument had not been advanced.

Where does this leave engagement of sequential test?

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- 2022 PPG says (i) sequential approach means "*avoiding, so far as possible, development in current and future medium and high flood risk areas considering all sources of flooding including areas at risk of surface water flooding"* and is explicit that (ii) "*Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, the sequential test still needs to be satisfied*.".
- To some degree the first point (also at para 24) is similar to NPPF 168 "*The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source*" but arguably goes further.
- Basis for departing from authority on approach to interpretation of the sequential approach? (i) as to nature of judgment (ii) as to relevance of an FRA finding that development can be made safe?

What about sites where part of red-line area is within an area of flood risk but no built development?

Inspector's training manual (as at March 2024) said

- They also advised that the circumstances leading to the High Court's decision in ***Wathen-Fayed*** "*no longer apply*".
- "It is relevant to note that a Sequential Test should be applied when any part of the site is at risk of flooding. While an appellant may suggest or imply that no building would take place within those areas, the parts of the site at risk may form part of the access or may include areas where property could be put at risk."
- Any basis for that statement in the PPG?

So where does this leave us?

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- Engagement of sequential test is (for now) a matter of planning judgment
- Whether development can be made safe without increasing flood risk elsewhere is (arguably) to be disregarded – notwithstanding ***Wathen-Fayed***
- Where a site includes area of flood risk but no development in that area or consequential risk from any proposals for it, then hard to see how planning judgment could be exercised to require sequential test
- However, in practical terms might be safer to exclude from red line area
- Assessment of reasonably alternative sites (where ST engaged) must follow / engage with PPG. Realism and flexibility are required.

Flood risk infrastructure: key sources

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- Flood and Water Management Act 2010
- Need for FCERM Strategy and local strategies
- Environment Act 1995, s 6(4)
- National Flood and Coastal Erosion Risk Management Strategy for England (EA, 2020)
- Flood and coastal erosion risk management strategy: Policy Statement (Defra, 2020)
- Local flood risk management strategies (s 9 FWMA 2010)
- Environmental and sustainable development duties

Delivering new flood risk infrastructure

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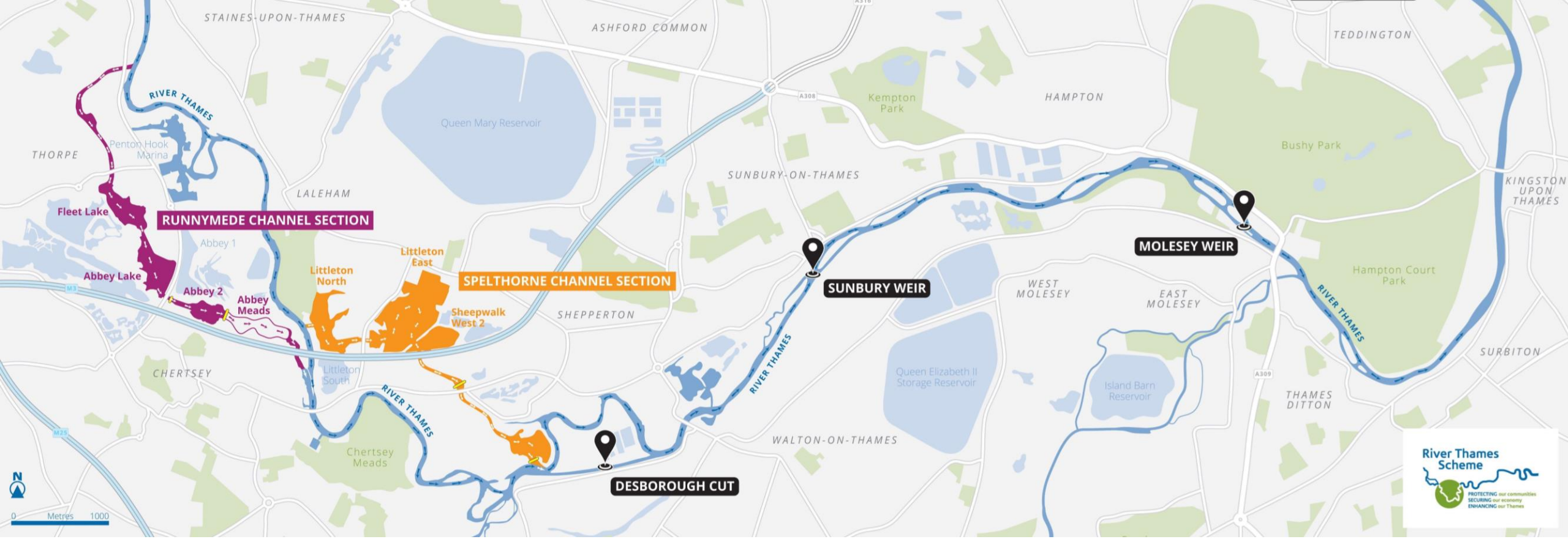
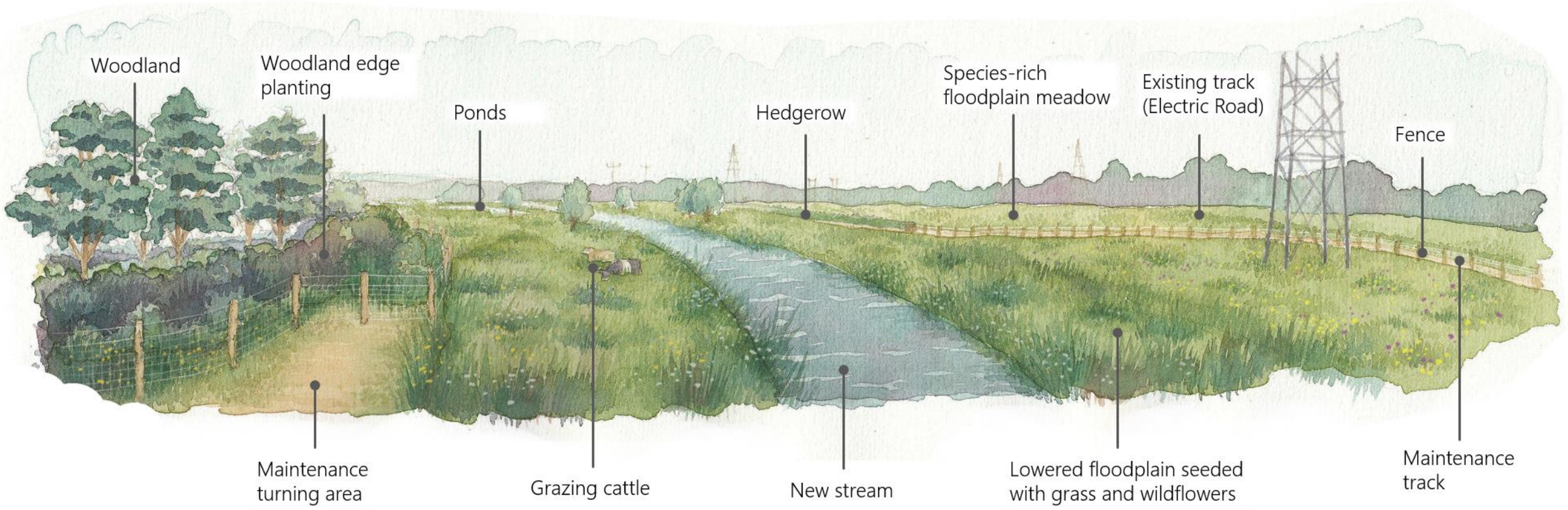
- Planning Act 2008 (s 35 directions) – e.g. River Thames Scheme
- Planning applications and CPO under Part VII Water Resources Act 1991 – e.g. Oxford FAS
- Use of WRA powers (e.g. s 165 WRA 1991)
- Delivery as part of new development



River Thames Scheme


Woodland
Woodland edge planting
Ponds
Hedgerow
Species-rich floodplain meadow
Existing track (Electric Road)
Fence
Maintenance turning area
Grazing cattle
New stream
Lowered floodplain seeded with grass and wildflowers
Maintenance track

Oxford FAS

Risks for delivery of housing

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- Impact of national or local flood alleviation schemes on development potential
- Schemes designed to address risk to existing properties, not to enable future development
- Schemes may lead to increased flooding of undeveloped land at risk of flooding
- Expectation that new development will help to deliver wider flood risk benefits
- **Compulsory purchase of land with development potential**

Flood risk infrastructure: opportunities

- Delivery of flood defences or reduction of risks elsewhere as a reason to grant planning permission (e.g. management of existing surface water flows, improvements to defences)
- Extensive Government funding for flood defences
- Engagement with development of new infrastructure including making funding contributions to protect land for new housing development
- Delivery of biodiversity enhancements and net gain

Plan-making

- Interaction between plan-making and flood risk management strategies
- Strategic Flood Risk Assessment and the delivery of housing in areas of flood risk
- Beyond the sequential approach - planning for flood resilience

Breakout Session Two – Newman Room

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Land values and changes to compensation: where might we be heading?

Dan Kolinsky KC and Jacqueline Lean

LAND USE CONFERENCE 2024

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Land values and changes to compensation: where might we be heading?

Dan Kolinsky KC

Jacqueline Lean

History

- 1909-1948
- expansion of planning control but lack of full coverage;
- some use of betterment levy; some compensation for refusal of planning permission;
- CPO regulated by principles of compensation in the Acquisition of Land (Assessment of Compensation) Act 1919 (market value includes potential to develop)
- 1948 – new planning regime applies
- System draws on : 3 key reports (during WW2):
- Barlow Report – Distribution of industry
- Scott Report – Countryside and its preservation
- **Uthwatt Report – Compensation and betterment**

Uthwatt Report (1941 terms of reference)

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- “To make an objective analysis of the subject of the payment of compensation and the recovery of betterment in respect of public control of land;
- To advise as a matter of urgency what steps should be taken now or before the end of the war to prevent the work of reconstruction thereafter being prejudiced
- In this connection the Committee are asked to consider

(a) Possible means of **stabilising the value of land required for development or redevelopment** and

(b) Any extension or modification of powers to **enable such land to be acquired by the public on an equitable basis.**

(c) To examine the merits and demerits of methods considered

(d) To advise on what alterations of the existing law would be necessary to enable them to be adopted”

Uthwatt

Key financial framework

- No compensation for the refusal of planning permission (albeit compensatory fund for those affected by the new regime of compulsory PP)
- Betterment levy on the grant of PP
- Rationale - socialise the benefits of increased land values conferred by planning permission
- But at what level and how does this interplay with incentives?
- Uthwatt recommends 75% betterment levy
- Lewis Silkin (planning minister) envisaged a dynamic approach depending on circumstances (parliamentary speech on the second reading of the 1947 Town and Country Planning Bill)
- Central Land Board given role to determine betterment
- In practice – CLB fixed 100%

(trenchantly criticised for doing so in Desmond Heap's 1975 Hamlyn lectures)

Land value (evolving approaches)

s.51 and 55 of the TCPA 1947 limits compensation to existing use value

Uthwatt on CPO compensation: - the increase in development value arising from public demand for land as opposed to private demand would not form part of compensation

(NB - dissenting memorandum from James Barr on betterment and compensation).

Desmond Heap's critique :

"The 1947 financial arrangements were **rooted, absolutely and utterly, in the principle that on a sale of land for development the land would change hands at its existing use value because that is all that the vendor had to sell after the development value in the land had been nationalised**"

1954-1961 – All change (1947 financial model dismantled)

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- **1954 Act:- ends betterment; limits compensation for planning restrictions**
- Compulsory purchase compensation still based on existing use value
- **So –2 tier system:**
- CPO – existing use
- Transactions – seller able to demand market value which includes hope value expectations
- Inconsistencies of the 2 tier system criticised– eg Franks Report
- 1959 Act – aligns CPO with market by compensating for development opportunity
- 1961 Land Compensation Act –hope value compensation

1961 – present day

Series of piecemeal initiatives to capture parts of development value

- **Land Commission Act 1967 (40% betterment levy; abolished in 1970)**
- 1973 – 1985 (development gains tax then development land tax)
- Use of s.106 obligations
- Policies for affordable housing (tensions transfer to viability exercise – see Parkhurst Road appeals and recasting of benchmark land value in NPPG guidance)
- CIL 2010
- LURA 2023 – s.190 – disapplication of hope value for certain developments (affordable housing, education and health) – MHCLG guidance published on 3 October 2024

Some political focus on 1961 LC Act as a key impediment to delivery

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Liam Halliwell– “Homes Truths”

Shelter regard it as a key reform

HCLG committee report: Land Value Capture (2018) - “reform of the Land Compensation Act 1961 will provide a powerful tool for local authorities to build a new generation of New Towns, as well as extensions to, or significant developments within, existing settlements”

Becomes Labour Party Policy (Housing for Many 2018)

The other view

- 2 tier system is unworkable
- Market always captures hope value
- Betterment tax – fails to incentive risk taking required to deliver sites
- Betterment is achieved through taxation – eg business rates based on frequent revaluations captures community uplift over time.

Recent changes

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Neighbourhood Planning Act 2017

- Replaced ss.6-9 LCA 1961 with new ss.6A – 6E
- S.6A (No scheme principle) for purpose of applying rule 2A in s.5
- S.6D definition of “scheme”
- S.6D(2): Where AA authorized to acquire land in connection with development of an area designated as (a) urban development order (s.134 LGPLA 1980); (b) new town (s.1 NTA 1981); or (c) a Mayoral development area (s.197 LA 2011) “the scheme” is “the development of any land for the purposes for which the area is or was designated”
- S.6D(3): Where land is acquired for regeneration or redevelopment which is facilitated or made possible by a “relevant transport project” (defined in s.6D(4)), “the scheme” includes the relevant transport project (subject to s.6E)
- S.6E: makes further provision in respect of relevant transport projects

Recent changes

Neighbourhood Planning Act 2017

- Repealed Part 4 LCA 1961 (additional compensation where planning permission granted after development)
- Part 2 introduced new provisions relating to temporary possession of land instead of / in addition to compulsory acquisition in a CPO/other authorizing instrument (Not yet in force)
- S.23 – power for landowner served with notice of temporary possession to serve counter-notice, including a counter-notice which provides that AA may not take temporary possession of land (AA may then have to consider whether to compulsorily acquire it)
- S.23 – compensation. Claimant is entitled to receive compensation for "any loss or injury the claimant suffers as a result" (s.23(2)).
- Q: what if compensation for 'temporary possession' exceeds cost of compulsory acquisition?

Recent changes: LURA 2023

- S.188: makes amendments to ‘no scheme principle’ in LCA 1961
- S.6D(3)/(4) (relevant transport projects), “regeneration or redevelopment” replaced by “development”
- New s.6D(7): definition of “development”: “includes redevelopment, regeneration and improvement”
- Similar & consequential amends in s.6E

- S.189: amendments to CAAV provisions in Part III LCA 1961and to s.14 (not yet in force)
- S.14 (taking account of actual or prospective planning permission for purpose of assessing r.2 OMV)
- New s.14(2A) and (2B) (replacing s.14(3) and (4)). If landowner obtains CAAD, planning permission for that alternative development is to be taken as a certainty for purpose of assessing OMV. Otherwise, prospect of alternative development being consented is to be assessed on the specified assumptions.
- S.17: new s.17(1A) and (1B) specifying ‘tests’ to be met, and to be met at (or before) valuation date

Recent changes: LURA 2023

- S.190: power to require prospect of planning permission to be ignored
- New s.14A LCA 1961: cases where prospect of planning permission to be ignored for purpose of assessing r.2 compensation
- New s.15A & Schedule 2A ALA 1981
- S.15A(2): AA may include in CPO a direction that compensation is to be assessed in accordance with s.14A LCA 1981
- Schedule 2A lists authorizing enactments eligible for such directions within a CPO
- Essentially (1) housing (must include affordable housing – s.15A(5)); (2) health facilities (acquisition by NHS trust, NHS foundation trust, local health board); and (3) educational institutions
- Where direction is included in order, order submission must be accompanied by ‘statement of commitments’ (s.15A(3) and (4)): a statement of the AA’s intentions as to what will be done with the project land should the acquisition proceed, so far as the AA relies on those intentions in contending that the direction is justified in the public interest
- Also applies to new towns corporations: new Sch 4 para 5A NTA 1981
- New Sch 2A LCA 1961: provides for payment of additional compensation where statement of commitments not fulfilled / no realistic prospect of being fulfilled

Recent changes: LURA 2023

- MHCLG Guidance (3 Oct 2024): “Compulsory purchase compensation: power to remove hope value”
- Identifies AAs which can seek such directions (includes GLA, local authorities, Homes England)
- AAs **must** demonstrate that there are “compelling reasons why the inclusion of the direction in the CPO is justified in the public interest”
- AAs **should** ensure that “the public benefits to be delivered through the assessment of compensation for land without hope value are appropriately and clearly described in a Statement of Commitments”
- AAs **should** “fully evidence the public benefits expected to be delivered as a result of the non-payment of hope value, setting out where appropriate the public needs they will meet, the impact on affected landowners, and how a fair balance between public and private interests will be reached.”
- Directs AAs to MHCLG ‘Guidance on the compulsory purchase process’ for evidence they “should consider producing”

What next?

- Currently applies (in principle) for housing schemes with affordable housing, for health care purposes and for educational purposes
- Extension to transport projects? Energy/renewables? Statutory undertakers? Other public works projects? 'Amenity'?
- Currently a case-by-case scenario (i.e. available in principle but not presumption of s.14A direction. Might that change?
- What about compensation for temporary possession ("any loss or injury") or shadow losses *(Shun Fung)?*

Views sought…

- Acceptable / unacceptable in principle?
- Unlocking development: is this likely to be effective?
- How in practice does an AA demonstrate ‘compelling interest' for such a direction?
- Does it matter if AA's role is land assembly (rather than delivery)? What about JVs? Does private sector involvement alter the justification?
- Does it go far enough?

LAND USE
CONFERENCE 2024

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