

**Welcome to Landmark Chambers’  
‘Planning High Court Challenges – Session 3’ webinar**

**The recording can be accessed [here](#).**

Your speakers today are...



**Jenny Wigley KC (Chair)**



**James Maurici KC**

**Topic:**  
The Levelling Up and  
Regeneration Bill and other  
mooted planning reforms: the  
likely issues for future litigation  
(with Sasha Blackmore)



**Gwion Lewis KC**

**Topic:**  
*Hillside,*  
*Pilkington* and  
drop-in  
applications

## Your speakers today are...



**Sasha Blackmore**

**Topic:**

The Levelling Up and Regeneration Bill and other mooted planning reforms: the likely issues for future litigation (with James Maurici KC)



**Ben Fullbrook**

**Topic:**

Practice and procedure update (including Aarhus costs)

## *Hillside, Pilkington and drop-in applications*



**Gwion Lewis KC**



## **Hillside: Essential facts**

- 1967: Full planning permission for 401 houses
- Approved masterplan showed locations of houses and internal roads
- 41 houses built to date, none in accordance with 1967 masterplan
- Vast majority of 41 houses built under subsequent planning permissions for parts only of the site; some houses unauthorized
- Roads built over areas shown for houses on 1967 masterplan (and vice versa)



## Hillside: Essential facts

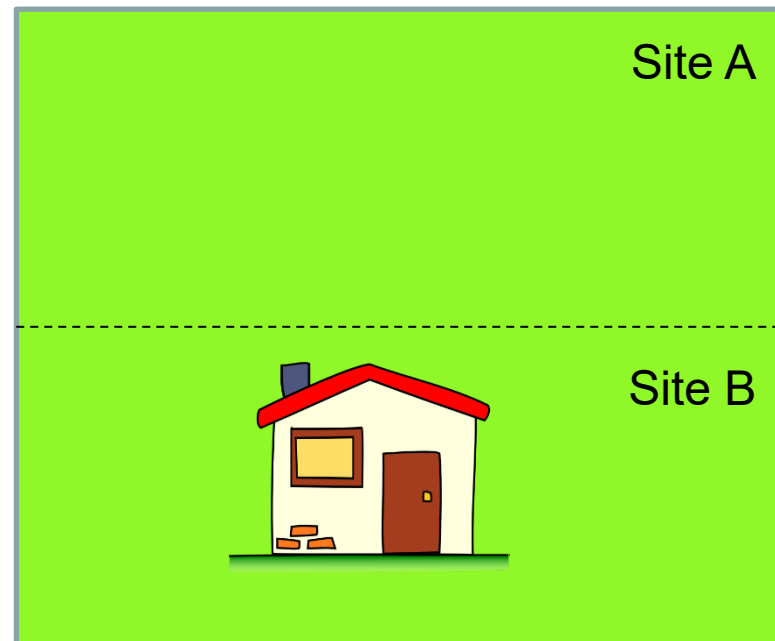
- 1987: 19 houses had been built under different permissions, but High Court ruled that developer could still rely on 1967 masterplan to build houses on unbuilt parts of the site
- High Court not referred to ***Pilkington*** case law on inconsistent planning permissions
- 1996-2011: LPA granted further permissions for houses on parts of site
- 2017: LPA told developer to stop all works on site, relying on ***Pilkington***

## **Hillside: Essential facts**

- Developer brought another High Court claim, submitting LPA bound by 1987 judgment
- High Court and Court of Appeal accepted LPA's case that matters moved on since 1987 and ***Pilkington*** applied
- 1967 permission no longer capable of being carried out

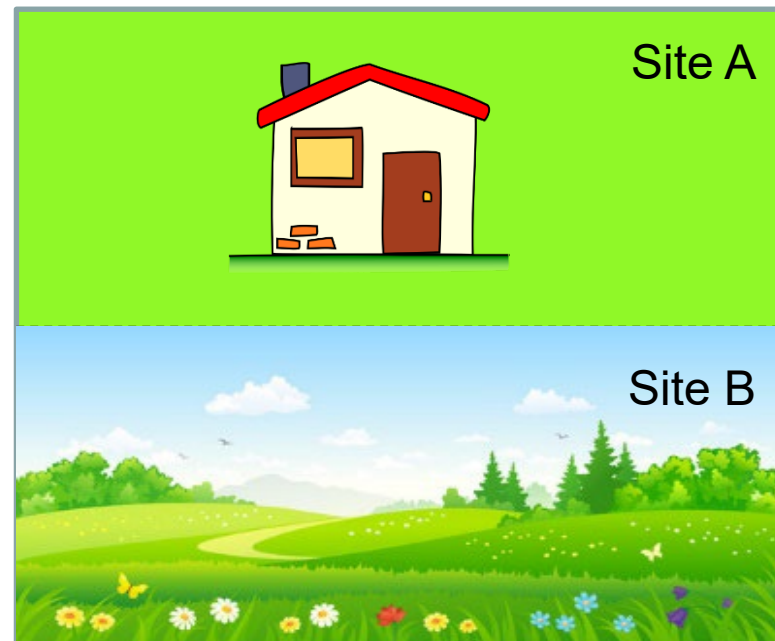
## What is the *Pilkington* case?

- Landowner built a house on part of his land (“Site B”)
- Condition on planning permission stated house should be only house on all of wider land

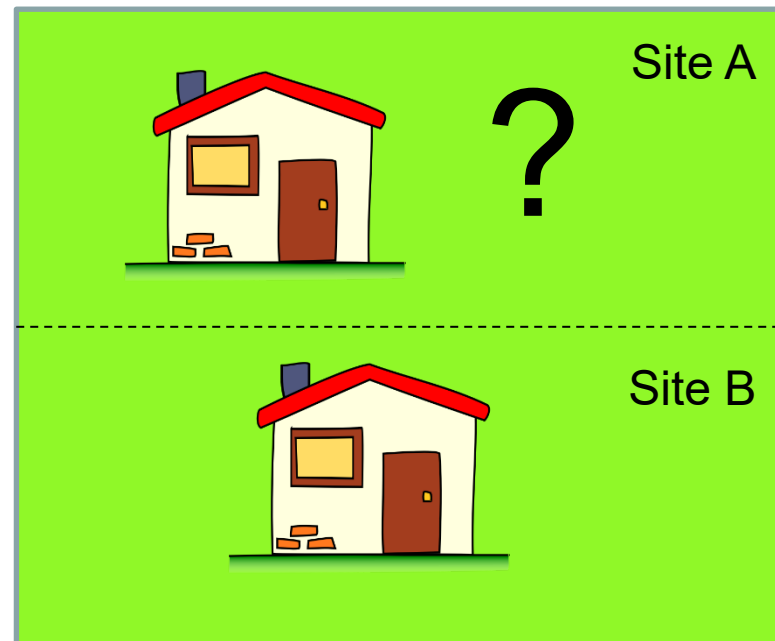


## Pilkington

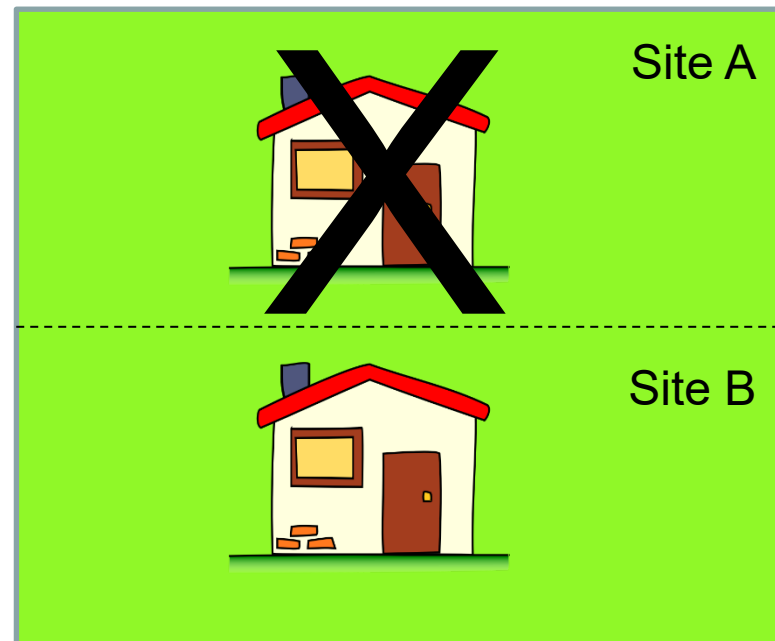
- Owner found earlier permission to build house on other part of land (“Site A”)
- Plan submitted with this previous application showed rest of land used as smallholding



- Could the owner go back to the earlier permission to build a house on Site A, having already relied on the later permission to build a house on Site B?



- Court: implementation of later permission for Site B had made it **impossible** to implement earlier permission relating to Site A



- Reasoning of the court:
  - Later permission for Site B contemplated only one bungalow on the whole site
  - No longer physically possible to implement earlier permission for Site A, which had also only contemplated one building on wider site, with Site B being used as a smallholding
  - Implementation of later Site B permission had destroyed the smallholding

*“... I think one looks to see what is the development authorised in the permission which has been implemented. One looks first to see the **full scope** of that which has been done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented.”*

**Lord Widgery CJ**

## *Pilkington in Hillside: Developer's case*

- ***Pilkington*** distinguishable:
  - “*Pilkington* based on having **abandoned** the right to develop land; conduct of Hillside developer over the years shows that it has not abandoned 1967 permission”;
  - “1967 permission should be interpreted as a **severable planning permission** separately authorizing clusters of housing within the site, some of which it was still possible to build alongside the 41 houses built under later permissions” (“the ***Lucas*** argument”)
  - “subsequent planning permissions were, in substance, **variations** of the 1967 permission which meant that the 1967 permission (as varied) was still valid”

## Supreme Court judgment

- Appeal unanimously dismissed
- **Abandonment**
  - *Pilkington* could not be explained on basis of ‘abandonment’
  - No basis for a principle of abandonment in planning law
  - True basis of *Pilkington*: development carried out under later permission had made it **physically impossible** to implement the previous permission in accordance with its terms
  - Test of physical impossibility applied to whole site covered by unimplemented permission, not just the part of the site where the owner now wanted to build

## Supreme Court judgment

- **Severability**
  - Developer wrong to rely on ***Lucas***
  - ***Lucas***: Court had interpreted 1952 planning permission for a cul-de-sac of 28 houses as separately authorizing each of the 28 houses
  - Winn J: some of the 28 houses could still be built in reliance on the 1952 permission even though it was no longer physically possible to build others due to development carried out under later permissions
  - Supreme Court in ***Hillside: Lucas*** clearly wrongly decided
  - Winn J unlikely to have interpreted 1952 permission correctly

## Supreme Court judgment

- **Severability** (cont.):
  - Not completing a development for which permission granted did not make development already carried out unlawful
  - But without clear words in the permission to make it severable, planning permission cannot be construed as authorizing further development if compliance with the permission has become **physically impossible due to other development carried out**
  - 1967 permission in Hillside case was not a severable permission, but granted detailed permission for an integrated scheme

## Supreme Court judgment

*“[...] It follows that carrying out under an **independent** planning permission on any part of the Balkan Hill site development which **departed in a material way from that scheme** would make it physically impossible and hence unlawful to carry out any further development under the 1967 permission.”*

(para. 72)

## Supreme Court judgment

- **Variation**
  - 3 of the post-1996 planning permissions were granted on their face as “variations” of the 1967 permission
  - But they were permissions for only small parts of the site and “reasonable reader” would interpret them as such
  - “Variations” did not authorize a new scheme of development for the entire site
  - Other 3 post-1996 permissions were not even expressed as “variations”
  - “Reasonable reader” would not be expected to know the planning history of the site when interpreting the individual permissions

## Practical implications?



## What is a “drop-in” application?

- Usual background:
  - Outline planning permission for a large, multi-phase development
  - Changes are needed which can’t be accommodated by a section 73 application alone
  - A “drop-in” application is made for a different form of development for a particular phase
  - Usually accompanied by a section 73 application to amend conditions on the main permission so that it is not inconsistent with relying on the drop-in permission for that particular phase

## Hillside not about “drop-in” applications

- 1967 permission was not an outline planning permission, but a full planning permission granted subject to a detailed masterplan
- 1967 permission was not granted subject to a phasing condition
- No section 73 permission ever granted, in form or in substance, at any point in the history of the site
- Hillside simply did not concern modern practice of using “drop-in” permissions in the context of an outline permission for a large, multi-phase development
- At no point in High Court or Court of Appeal did either of the parties characterize **Hillside** as involving grant of “drop-in” permissions, nor did courts suggest this

## “Death of drop-ins” greatly overplayed

- Supreme Court did not once refer to the practice of “drop-in” applications
- Case involved highly unusual facts:
  - Developer sought to rely on a 55-year old detailed planning permission overtaken by subsequent, detailed permissions for parts of the site
  - 1987 judgment of High Court, not mentioning ***Pilkington***, had led developer to have misplaced confidence in its case
  - Development of site had progressed at “glacial” pace
- Further case law likely on the implications of ***Hillside*** for the use of drop-in applications within multi-phase schemes involving an outline permission

## Spotting a “*Hillside* issue”

- Whether a drop-in application raises a “*Hillside* issue” will turn on:
  - Is the drop-in application for a genuinely “**independent**” planning permission, or for a permission that is **co-dependent on another permission**?
  - If co-dependent on another permission, with the “drop-in” (and any related section 73 application for the main outline consent) working as a whole to achieve a coherent overall scheme → ***Hillside*** surely distinguishable

## Spotting a “*Hillside* issue” (2)

- Whether a drop-in application raises a “*Hillside* issue” will turn on:
  - Is the drop-in application for development that **materially departs** from the main permission that the developer still wants to rely upon (save for the departure)?
    - ‘Materiality’ will be a question of planning judgment
    - If the departing development can be readily reconciled and connected with the remainder of the development authorized by the main permission, very unlikely that LPA would consider it expedient to prevent ongoing reliance on the main permission
  - Problem in ***Hillside***: this was not possible due to extent of departures from 1967 masterplan (e.g. building houses over roads)

## Conclusion

- **Hillside** will pose very limited risk when drop-in permissions are implemented at the end of the development process, by when all development sought to be carried out under main permission has already been carried out
  - No issue then arises that it is “physically impossible” to return to rely on the main permission
- **Hillside** will pose greatest risk when drop-in permissions are implemented at the beginning or middle of the construction process, before the developer needs to rely again on the main permission
  - If construction schedule cannot be amended to push implementation of any drop-in permission to the end, relying on a drop-in permission is unlikely to be prudent (but will depend on facts)

## *Hillside* significance short-lived?

- Levelling-up and Regeneration Bill
- Proposes to insert new section 73B into the TCPA 1990
- New procedure for seeking planning permission for development the effect of which “will not be **substantially different**” from an existing permission
- If enacted, would give developers a new route to achieve moderate variations to planning permissions
- Would provide the legal certainty that is sometimes lacking when relying on the “drop-in” method
- Significance of *Hillside* thereby reduced

## Practice and procedure update (including Aarhus costs)



**Ben Fullbrook**

## Judicial Review and Courts Act 2022

- Introduction of new remedies, including "suspended quashing orders" (s.1)
- Could have implications for planning cases, where a quashing order could be suspended to give local planning authorities time to correct defects.
- E.g. *R (Nicholson) v Allerdale BC* [2015] EWHC 2510 (Admin)
- E.g. *R (Hough) v SSHD* [2022] EWHC 1635 (Admin)

## Standing (1)

- *R (Good Law Project) v Prime Minister* [2022] EWHC 298 (Admin)
- JR of decisions to appoint individuals to senior positions critical to COVID-19 response
- No person or other group has standing to bring judicial review challenges *in all cases*
- GLP did not have standing to bring PSED challenge in this case
- Runnymede Trust did (an organisation which exists to promote racial equality)

## Standing (2)

- Admin Court Guide now says (§6.3.2.4):

*An association or non-governmental organisation claiming standing on this basis will normally have to demonstrate genuine involvement in a specific subject area. The court will not necessarily accept that a corporate entity with very widely drawn objects will have standing to pursue claims in every case whose subject matter falls within those objects.<sup>43</sup>*

- See also *R (Good Law Project) v SSHSC* [2022] EWHC 2468 (TCC) – Multifaceted: merit, context, effect on claimant, gravity, other possible claimants, claimant's position in the context of the case as a whole

## Timing

- *R (Save Britain's Heritage) v City of London* [2021] EWHC 3561 (Admin)
  - Time limit for bringing JR of planning permission runs from date permission is issued and not date it communicated
  - May be different for EIA ground of challenge (*Uniplex*)
  - But not different merely where the permission for EIA development

## Service (1)

- *R (Good Law Project) v SSHSC* [2022] EWCA Civ 355
- Rule 7.6 does not apply to extensions of time for serving JR claims
- Relevant rule Rule 3.1(2)(a), but principles of 7.6 relevant – application to be made within time if poss and if not court to consider promptness and whether all reasonable steps taken
- Actual service is not deemed service. Actual service is taking of the relevant step in 7.5: *Paxton Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB)

## Service (2)

- *R (Tax Returned Ltd) v Revenue and Customs* [2022] EWHC 2515 (Admin)
  - D gave two emails for service. Not open to C to elect which email (PD 6A, §4.1 “an email address”).
  - Valid service could only be effected by another valid means or by clarifying which email address for service

- *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin)
  - Definition of Aarhus Claim in CPR 45.41(2)(a) requires attention to be focused on the nature of the claim and not on its subject matter
  - Pure public law challenge (i.e. failure to have regard to material consideration) might not without more be enough to bring within Aarhus
  - But if one ground is an Aarhus ground then that enough to bring whole claim within the costs caps – provided that ground brought in good faith
  - But note that decision under challenge not a challenge to a planning decision but a challenge to a decision to adopt a business case
  - Where C brings claim as an individual and on behalf of a UI it does not automatically follow that the £10k cap applies
  - OK for SFR to estimate amount likely to be received from crowdfunding. So long as genuine estimate does not matter that it exceeded for CPR 45.42(1)(b)

# The Levelling Up and Regeneration Bill and other mooted planning reforms: the likely issues for future litigation



**James Maurici KC**



**Sasha Blackmore**

## Introduction

- Will cover likely litigation arising from:
- **(1) LURB:**
  - The end of s. 38(6) of the PCPA 2004 in England and the advent of national development management policies;
  - Environmental outcome reports;
  - Statutory protection of heritage assets and their settings being extended;
  - The Infrastructure Levy;
  - Changes to plan-making processes.
  - Newsflash.
- **(2) Other reforms:**
  - The retained EU Law Revocation Bill;
  - The Truss reforms.

## **(1) LURB**

# Changes to the role of the development plan and national policy in decision-making (1)

So, goodbye then (in England, but not in Wales) to our old, old friend s. 38(6) of the PCPA 2004:

- *“(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”*

Been with us since 28 September 2004. And s. 38(6) was itself a re-enactment of s. 54A of the TCPA 1990 which has been with us since September 1991:

- *“Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.”*

## Changes to the role of the development plan and national policy in decision-making (2)

- How s.38(6) works is now very well established, as is the relationship between national policy and the development plan, under that provision: see cases like:
  - (1) ***Edinburgh City Council v Secretary of State for Scotland*** [1997] 1 W.L.R. 1447 (dealing with s.18A of the Town and Country Planning (Scotland) Act 1972, the equivalent of s. 54A);
  - (2) ***BDW Trading v SSCLG*** [2016] EWCA Civ 493 paras 20 and 21 *"the section 38(6) duty is a duty to make a decision ... by giving the development plan priority ... the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan"*
  - (3) ***Secretary of State for Communities and Local Government v Hopkins Homes Ltd*** [2017] 1 W.L.R. 1865;
  - (4) ***Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government*** [2021] P.T.S.R. 1450.

# Changes to the role of the development plan and national policy in decision-making (3)

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So, see in **Hopkins** (per Lord Carnwath)

"7. ... Unlike the development plan provisions, these sections contain no specific requirement to have regard to national policy statements issued by the Secretary of State, although it is common ground that such policy statements may where relevant amount to "material considerations".

8. The principle that the decision-maker should have regard to the development plan so far as material and "any other material considerations" has been part of the planning law since the [Town and Country Planning Act 1947](#). The additional weight given to the development plan by [section 38\(6\)](#) of the 1990 Act reproduces the effect of a provision first seen in the [Planning and Compensation Act 1991, section 26](#) (inserting [section 54A](#) into the 1990 Act). In [City of Edinburgh Council v Secretary of State for Scotland \[1997\] 1 WLR 1447](#), the equivalent provision ([section 18A of the Town and Country Planning \(Scotland\) Act 1972](#)) was described by Lord Hope of Craighead, at p 1450B, as designed to "enhance the status" of the development plan in the exercise of the planning authority's judgment. Lord Clyde spoke of it as creating "a presumption" that the development plan is to govern the decision, subject to "material considerations", as for example where "a particular policy in the plan can be seen to be outdated and superseded by more recent guidance [e.g. national policy]"

## Changes to the role of the development plan and national policy in decision-making (4)

Cl. 83 inserts into the PCPA 2004:

*“(5A) For the purposes of any area in England, subsections (5B) and (5C) apply if, for the purposes of any determination to be made under the planning Acts, regard is to be had to— (a) the development plan, and (b) any national development management policies.*

*(5B) Subject to subsections (5) and (5C), the determination must be made in accordance with the development plan and any national development management policies, unless material considerations strongly indicate otherwise.*

*(5C) If to any extent the development plan conflicts with a national development management policy, the conflict must be resolved in favour of the national development management policy.*”

## Changes to the role of the development plan and national policy in decision-making (5)

- Cl. 84, inserts into the PCPA 2004:
  - "(1) A “national development management policy” is a policy (however expressed) of the Secretary of State in relation to the development or use of land in England, or any part of England, which the Secretary of State by direction designates as a national development management policy.*
  - (2) The Secretary of State may— (a) revoke a direction under subsection (1); (b) modify a national development management policy.*
  - (3) Before making or revoking a direction under subsection (1), or modifying a national development management policy, the Secretary of State must ensure that such consultation with, and participation by, the public or any bodies or persons (if any) as the Secretary of State thinks appropriate takes place.”*

## Changes to the role of the development plan and national policy in decision-making (6)

- **The judicial review issues:**

- (1) All the principles established in the case-law since 1991 as to the operation of what is a key provision (s. 54A, then s. 38(6)) completely up for grabs again;
- (2) The Bill is in this regard radical in two regards:
  - (A) Very much strengthening the importance of the development plan which must now be followed unless material considerations **strongly** indicate otherwise; and
  - (B) But also undermining the development plan as national development management policies now also benefit from the statutory presumption and will (in the case of conflict) trump Development Plans (whence localism?);
- (3)) What does "*strongly indicate otherwise*" mean? How different is it as a test from just the old "*indicate otherwise*" and how is it different from NPPF para. 11 test of "*significantly and demonstrably outweigh*"?

## Changes to the role of the development plan and national policy in decision-making (7)

- (4) Given the strengthening becomes even more important to understand when the development plan is complied with and when not: see **R. (Cummins) v Camden LBC** [2001] EWHC Admin 1116 per Ouseley J " *It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: "is this proposal in accordance with the plan?". The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach*"
- This line of case law becomes more important and likely to be revisited by Courts.

## Changes to the role of the development plan and national policy in decision-making (8)

- 5) Plus :
  - (A) Legal challenges to designation of national development management policy?
  - (B) Reasoning of Court in ***R (Friends of the Earth Ltd) v Secretary of State for Housing, Communities and Local Government*** [2019] PTSR 1540 as to why SEA not applicable to the NPPF cannot stand for a national development management policy.

# Environment Outcome Reports (1)

## “EORs”

- The new EIA and SEA
  - Without EU law
  - whilst meeting the UK’s obligations under international law (in particular Aarhus and Espoo)
- Cl.118 “outcomes based” approach
  - SoS will by regulations set “*specified environmental outcomes*” against which consents will be assessed,
  - Likely to be subject to public consultation (cl.127(1) and the affirmative parliamentary procedure (cl.195(5)(c))
  - Cl.121 – regulations as to how EOR can be monitored, enabling dynamic mitigation. Regulations may require action to be taken, “*increasing the extent to which*” an EO is to be delivered, “*mitigating or remedying*” the effects or “*compensating*” for an EO not being delivered.

### Environment

- 55 A new system of Environmental Outcomes Reports will replace the EU processes of Environmental Impact Assessment and Strategic Environmental Assessment whilst retaining the UK’s obligations under the UN Aarhus and Espoo Conventions.
- 56 The Bill introduces an outcomes-based approach that will allow the government to set clear and tangible environmental outcomes which a plan or project is assessed against. This will allow decision-makers and local communities to clearly see where a plan or project is meeting these outcomes and what steps are being taken to avoid and mitigate any harm to the environment. These outcomes will be set following consultation and parliamentary scrutiny but will, for the first time, allow the government to reflect its environmental priorities directly in the decision-making process.
- 57 By moving to an outcomes-based approach, and taking powers to address procedural issues with the current system, the Bill provides the opportunity to go further for the environment and to turn passive assessment into a more active tool to support environmental regeneration.
- **NOTE** – cl.121 NOT currently proposed to be subject to affirmative parliamentary procedure (not in cl.195(5))

## EORs (2)

- **Cl.122 Safeguards: non-regression, international obligations and public engagement**

- (1) The Secretary of State may make EOR regulations **only if satisfied** that making the regulations will not result in environmental law providing an **overall level** of environmental protection **that is less than** that provided by environmental law at the time this Act is passed.
- (2) EOR regulations **may not** contain provision that is **inconsistent** with the **implementation of the international obligations** of the United Kingdom **relating to** the assessment of the environmental impact of relevant plans and relevant consents.
- (3) In exercising functions under this Part, the Secretary of State **must seek to ensure that** (so far as would not otherwise be the case) arrangements **will exist** under which the **public will be informed** of **any** proposed relevant consent or proposed relevant plan in sufficient detail, and at a sufficiently early stage, to enable adequate public engagement to take place
- (4) In this section— **“adequate public engagement” means** such engagement with the public, in relation to a proposed relevant consent or proposed relevant plan, **as the Secretary of State considers appropriate**; “environmental law” means environmental law (within the meaning of Part 1 of the Environment Act 2021), **whether or not the environmental law is in force.**

- **Cl.129 “Interaction with existing environmental assessment legislation and the Habitats Regulations”**
- EOR regulations may make a wide variety of provisions in relation to “anything done, or omitted to be done” in an EOR in relation to a requirement under existing environmental assessment legislation or Habitats Regulations (cl.129(1) and cl.129(2))
- EOR regulations may amend, repeal or revoke existing environmental assessment legislation (cl.129(3)) – but the provision does not refer to Habitats Regulation

## EORs (4)

- **CI.131 EOR regulations – further provision.** Regulations may make provision for:
- Procedure to be followed including deadlines
- Qualifications or experience to prepare a EOR
- How a public authority can be required to assist
- Public engagement
- Information; the information to be included and content and form; how information is to be provided and collated; how information may be rejected
- Who is to required to be given an EOR, and how
- How failures to comply with requirements may be taken into account in plan-making
- As to appeals or reviews of the decisions of a public authority in relation to EORs
- Conferring specific functions

## Other elements of new proposed structure

- Cl.127 other public consultation requirements - requires the public to be consulted before making EOR regulations “*amending, repealing or revoking existing environmental assessment legislation*”
- Cl.117 – regulations will provide for EOR where relevant plans or consents. Where “EOR” is required, consent cannot be granted unless it has been prepared, and it has to be considered when determining whether or not to grant consent – likely similar to EIA
- Cl.120 – power to define what requires EOR, with “category 1” (must have an EOR) and category 2 (other regulations) – likely similar to EIA
- Cl.124 – exemption for national defence and civil emergency, but also cl.124(2) regulations “*may provide for further circumstances*” in which the SoS may direct no EOR is required
  - Cl.127(2)(a) requires consultation “*such persons as the Secretary of State considers appropriate*” – i.e. not necessarily the public generally.
- Cl.125 – enables regulations in connection with enforcement. Cl.125(2)(a) empowers creation of a criminal offence “*but may not create a criminal offence punishable with imprisonment*”, cl.125(2)(c) and cl.125(3) civil sanctions and appeals. Other powers gives powers of entry, inspection, seizure, detention
- cl.130 – omits cl.71A (assessment of environmental effects) from TCPA 1990

- Potential litigation:
  - (1) The new concept of outcomes
  - (2) The impacts of “dynamic mitigation”
  - (3) The rationality and subject to regulations, effectiveness, of the “safeguards”
  - (4) The application of International law
    - Aarhus Convention – hundreds of cases on Westlaw. Impacts often translated through EIA but understood
    - ESPOO? 8 cases on Westlaw. The last consideration in the UK courts was 2014
    - Other international environmental law?
  - (5) Principles established in EIA/SEA caselaw similarly will need to be re-established. Many potential points under cl.131 but require the regulations – not clear what the appeal route would be.

- Explanatory Notes:

*The changes to the planning system **will all have familiarisation costs** for local authorities. The measures which such costs include changes to the development of local plans, neighborhood plans and strategic plans or spatial development strategies, changes to heritage, enforcement and planning permissions, **the new system of environmental outcomes reporting. These costs will all be balanced by efficiency savings** and are affordable and accounted for within Departmental budgets and arrangements. Any skills or capability building needed to successfully implement these changes is accounted for in the agreement reached with Her Majesty's Treasury.*

## Heritage assets (1)

- **We are all familiar with:**

- (1) S. 66(1) of the P(LB&CA)A 1990 *"In considering whether to grant planning permission or permission in principle for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."*
- (2) S. 72(1) of the P(LB&CA)A 1990: *"In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."*

## Heritage assets (2)

- These provisions, especially s. 66(1), the basis for much litigation in recent years with issues such as: (a) extent and nature of the duty to have "*special regard*" and (b) the relationship of these provisions to national and local policy;
- Westlaw suggests since March 2012 (date NPPF introduced):
  - 105 Higher Court cases considering s. 66(1)
  - 74 Higher Court cases considering s. 72(1)
- Not though currently any similar statutory provision for other heritage assets such as: ancient scheduled monuments, registered parks and gardens, world heritage sites and sites designated as a restricted area under the Protection of Wrecks Act.
- That changed by cl. 92 ...

## Heritage assets (3)

- For all these assets:
  - *"In considering whether to grant planning permission or permission in principle for the development of land in England which affects a relevant asset or its setting, the local planning authority or (as the case may be) the Secretary of State must have special regard to the desirability of preserving or enhancing the asset or its setting"*
  - Also provided *"preserving or enhancing a relevant asset or its setting includes preserving or enhancing any feature, quality or characteristic of the asset or setting that contributes to the significance of the asset"*
  - Relevant assets listed in table and there is a column specifying what significance means for each asset.

## Heritage assets (4)

- The judicial review issues:
  - (1) Expect tsunami of litigation alleging breaches of these duties in respect of all of these assets and their significance;
  - (2) NB: is it correct that for all heritage assets now a statutory protection for the asset and its setting apart from Conservation Areas, as s. 72(1) silent on setting. Why?

# The Infrastructure Levy (1)

- Explanatory notes to the Bill:

## Infrastructure

47. The Bill **replaces the current system** of securing developer contributions (through section 106 agreements and the Community Infrastructure Levy) with a new Infrastructure Levy. The rates and thresholds will be set contained in '**charging schedules**' and set and raised by **local planning authorities (rather than nationally)**, meaning that **rates are tailored to local circumstances** and deliver **at least as much onsite affordable housing**. Charging schedules must have regard to previous levels of affordable housing funded by developer contributions such that they are **kept at a level that will exceed or maintain previous levels**. All schedules will be subject to **public examination**.

48. There will **also be a process** to require developers to deliver **some forms of infrastructure that are integral to** the design and delivery of a site. To make sure that infrastructure requirements and levy spending priorities are considered carefully, the Bill places **a new duty on local authorities to prepare infrastructure delivery strategies** to outline how they intend to spend the levy.

49. In preparing their development plans, local authorities may consult infrastructure providers where changes to or investment in their infrastructure is required to support development, such as providing for transport, education, the environment, healthcare, or blue light services. Under the Bill, those infrastructure providers will be obliged to respond and to assist as is reasonable in the preparation of the plan.

## The Infrastructure Levy (2)

- Noble aim: Simplify and replace CIL (and reduce s.106) with a new “Infrastructure Levy”
- IL regulations must be laid before Parliament and approved by resolution (cl.204Z (3))
- Intended to be based on gross development value (not floorspace)\*
  - → evidential and legal uncertainty → litigation
- Based on locally set charging schedules
  - → detailed design highly likely to be challenging → litigation
    - 204H: Regulations will provide for evidence (including “*evidence that is to be taken to be not available*”, “*how evidence is, and as to evidence that is not, to be used*”)
    - 204 I: Regulations will provide for examination of schedules (including now amended to require reasons)
  - → examinations → litigation
- Application of charging schedules when established...
  - Appeals → litigation

## The Infrastructure Levy (3) – some examples of why challenging to set schedules

- **CI.204G (2):** Amounts – charging authority to have regard “*to the extent and in the manner specified*” in regulations, to the “*desirability of ensuring that*” the level of affordable housing funded by developers in their area, and the level of funding “*is maintained at a level which, over a specified period, is equal to or exceeds the level of such housing and funding provided over an earlier specified period of the same length*” → complexity in translating to individual schemes
- **CI.204G (3)** Regulations “*may*” provide how the level of AH provided and the level of funding is to be measured
- **CI.204G (4)** must have regard “*to the extent and in the manner specified*” regulations relating to viability (“*which may include, in particular, actual or potential economic effects of the imposition of IL*” or matters “*relating to the actual or potential economic effects (including increases in the value of land)*” of the development plan, planning permission, provision of infrastructure, or “*any other matter that may affect the value of land*”
- **CI. 204G(6):** May also be required to have regard to “*costs of anything other than infrastructure*”
- **CI. 204G(8):** Regulations may also “*permit or require charging schedules to operate by reference to any measurement of the amount or nature of development (whether by reference to measurements of floor space, to numbers or intended uses of buildings, to numbers or intended uses of units within buildings, to allocation of space within buildings or units, to values or expected values or in any other way*”;

# The Infrastructure Levy (4) –more examples what's even included???

- 204N(1) provided that “regulations **must** require” that the authority “apply it, or cause it to be applied to supporting the development of an area by funding the provision, improvement, replacement, operation or maintenance of infrastructure”.
- What's to be included?
  - 204N (3) In this section (except subsection (4)) and sections 204G, 204O(2), 204P(2) and 204Q “infrastructure” includes—
    - (a) roads and other transport facilities, (b) flood defences, (c) schools and other educational facilities, (d) medical facilities, (e) sporting and recreational facilities, (f) open spaces, (g) affordable housing, (h) facilities and equipment for emergency and rescue services, (i) facilities and spaces which— (i) preserve or improve the natural environment, or (ii) enable or facilitate enjoyment of the natural environment, and (j) facilities and spaces for the mitigation of, and adaption to, climate change.
- Expect to see **changes** in this definition....
  - Including that regulations may alter it (204N(4)(a)), or items may be “excluded from the meaning” (204N(4)(b)), or permit IL to be spent on unspecified items
  - 204N(2) regulations “may” make provision about “the extent to which IL paid” to an authority “may or must” be applied for a particular type of infrastructure
  - 204O “anything else that is concerned with addressing demands that development places on an area”

# The Infrastructure Levy (5) – appeals...

## How will appeals against decisions work?

### Cl.204(V) appeals

- (1) IL regulations **may** make provision about appeals in connection with IL.
- (2) Regulations under this section may, in particular, make provision about—
  - a) **who** may make an appeal,
  - b) the **grounds** upon which an appeal may be made,
  - c) the **court, tribunal or other person** who is to determine an appeal,
  - d) the **period** within which a right of appeal may be exercised,
  - e) the **procedure** on an appeal, and
  - f) the payment of fees, and award of costs, in relation to an appeal.
- (3) IL regulations **must** provide for a right of appeal on a **question of fact** in relation to the **application of methods** for calculating IL (including **any questions in relation to valuation**).
- (4) In any proceedings for judicial review of a decision on an appeal, the defendant is to be such person as is specified in the regulations (and the regulations **may also specify a person who is not to be the defendant** for these purposes).

## Plans and plan making (1)

Schedule 7 makes provision for: (1) joint spatial development strategies, (2) local plans, minerals and waste plans and (3) supplementary plans (to replace SPDs);

No right to be heard in respect of joint spatial development strategies;

For supplementary plans the purposes of the examination is very limited presumption examination only in writing; but where a hearing there is a right to be heard;

Right to be heard remains for Local Plans;

Plus for Local Plans "*[a]longside this, regulations will be updated to set clear timetables for plan production – with the expectation that they are produced within 30 months and updated at least every five years*"

## Plans and plan making (2)



So reduced participation;



Fewer examination hearings;



Tight timetables



All that a recipe for:

- (a) more legal errors;
- (b) more legal challenges.



NB the Bill also prevents a LPA withdrawing a Plan once submitted for examination unless the examiner or Secretary of State so recommends. Court challenges to refusal to recommend this by LPAs?

# Other likely areas for judicial/statutory review arising from LURB

Landmark Chambers

- (A) changing time limits for enforcement: 10 years for everything – difficult transitional issues;
- (B) New provisions on neighbourhood plans: including as to content, already been lots of challenges by developers to such plans and not many successes (NB new requirement that plan *"will not result in the development plan for the area of the authority proposing that less housing is provided by means of development taking place in that area than if the neighbourhood development plan were not to be made"*)
- (C) Requirement for all LPAs to have a design code: challenges to design codes?!
- (D) CPO reforms: explicit provision for CPO for purposes of "regeneration"; gives greater discretion to the acquiring authority on appropriate procedure for considering objections It also includes a provision for the CPO to be "conditionally confirmed", which aims to encourage acquiring authorities to make a CPO earlier in the delivery process alongside other consenting and funding processes.

## Newsflash ...

- LURB in trouble:
- Backbench amendments:
- (A) No national housing targets or 5YLS
- (B) Good character test for the grant of PP
- (C) Community right of appeal



## Other reforms

# The Retained EU Law (Revocation and Reform) Bill (1)

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## UK government finds extra 1,400 laws to scrap under Rees-Mogg's Brexit bill

Discovery follows admission that previous list of 2,400 pieces of EU legislation was 'not comprehensive'

● [UK politics live - latest news updates](#)



📷 Jacob Rees-Mogg and his allies championed the bill as an opportunity to expunge EU laws. Photograph: Kirsty Wigglesworth/AP

Government researchers have found another 1,400 laws that will be wiped off the statute books next year by Brexit legislation tabled by [Jacob Rees-Mogg](#) in September, according to reports.

# The Retained EU Law (Revocation and Reform) Bill (2)

1. **Sunset clause** – revokes EU-law end of 2023\* (\*some exceptions)

2. **Abolition**

**Supremacy EU law – cl.4.** *“The principle of the supremacy of EU law is not part of domestic law. This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made)”*

**General Principles of EU law – cl.5.** *“no general principle of EU law is part of domestic law after the end of 2023”*

3. **Role of Courts – cl.7.**

- A relevant appeal court is not bound by any retained EU case law *“except so far as there is relevant domestic case law which modifies or applies the retained EU case law and is binding on the relevant appeal court”*
- *“In deciding whether to depart from any retained EU case law ..... the higher court concerned must (among other things) have regard to— (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding; (b) any changes of circumstances which are relevant to the retained EU case law; (c) the extent to which the retained EU case law restricts the proper development of domestic law.”*
- A higher court may depart from its own retained domestic case law if it considers it right to do so having regard (among other things) to (a) the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart... [(b) and (c) similar to the above]
- Lower courts or tribunals may make *“references”* if they are bound by the retained case law if the point is *“of general public importance”* Law officers may similarly make references and must be given notice of proceedings if a higher court is *“considering any argument made by a party to proceedings that the court should depart from retained case law”*

## Other reforms

- The Truss reforms:
  - Investment Zones: scrapped;
  - Fracking: banned again
  - Banning solar on farmland? Still going ahead?

### Truss's plan to ban solar on farmland risks £20bn of investment, sector warns

Industry questions UK prime minister's claim that move is essential to protect food security



Solar developers fear the technology will be banned from 58% of agricultural land in England © Ashley Cooper/Alamy

### Government's flagship investment zones will create 'slums of the future', planning experts claim

There are concerns the new proposals could allow development on environmentally protected sites, sites of special scientific interest and even national parks



Prime Minister Liz Truss has announced the policy as part of her supply side reforms to increase economic growth (Photo: Stefan Rousseau/Getty Images)

### Fracking groups seek further steps on Truss reforms

Companies welcome lifting of moratorium but say more is needed to make projects viable



The Cuadrilla shale gas extraction site in Preston, England © Getty Images

# Thank you for listening

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