PLANNING CASE LAW UPDATE
Seminar: 10th November 2015

John Pugh-Smith, Richard Wald, Rose Grogan

This review, in the interests of containment, must be selective. It broadly covers cases in which there have been transcripts towards the end of 2014 and the first ten months of 2015. They are set out under the following subject headings:

A. ENFORCEMENT
B. HERITAGE
C. GREEN BELT
D. PROCEDURAL FAIRNESS
E. HOUSING
F. DEVELOPMENT PLANS
G. NEIGHBOURHOOD PLANS
H. DECISION-MAKING
I. ENVIRONMENTAL IMPACT ASSESSMENT
J. STRATEGIC ENVIRONMENTAL ASSESSMENT
K. CONSERVATION, BIRDS AND HABITATS
L. NUISANCE
M. ENVIRONMENTAL SENTENCING
N. COSTS IN ENVIRONMENTAL JR
O. OTHER: AIR QUALITY & FRACKING

---

1 We express our thanks to the contributions to earlier papers from our colleagues in the Planning, Environment & Property Team (in particular Richard Harwood QC, John Steel QC, James Burton, Ned Helme, Catherine Dobson, Victoria Hutton, and Jon Darby) which are accessible via the 39 Essex Chambers website: www.39essex.com. The case law review that is provided by this paper, hopefully, updates to 05.11.15.
A. **ENFORCEMENT**

We start this paper with a recap of some enforcement cases. The first is *Jackson v Secretary of State for Communities and Local Government* [2015] EWHC 20 (Admin, which is an important case concerning the issue of concealment of breaches of planning control following the creation of Planning Enforcement Orders under the Localism Act 2011. The issue in this case concerned whether new sections 171BA to 171 BC TCPA introducing the planning enforcement order (“PEO”) replace the law laid down by the Supreme Court in the *Welwyn* case. Mr Jackson was the owner of a trout farm. He had erected a barn in 2004 which had not been built in accordance with the approved plans. A retrospective permission had been granted in 2005 subsequent to which dormer windows and a rooflights were inserted into the roof slopes. Thereafter, Mr Jackson's son began to use the first floor as a dwelling on a date between February and June 2009. Following council site visits a further retrospective permission was granted for the works. In April 2009 Mr Jackson submitted a CLEUD application claiming continuous use of the first floor as a dwelling. A subsequent enforcement notice led to an appeal on the sole immunity ground under s.174(2)(d) of the TCPA 1990 which the Inspector dismissed, concluding that as this was a case of deliberate concealment, the *Welwyn* principle applied so depriving Mr Jackson of the 4 year limitation period in s.171B(2). Upholding this approach, Mr Justice Holgate sets out in his judgment the various indicators that the legislative provisions were not an exhaustive replacement for the *Welwyn* principle. He also points out that whilst there were exceptional facts in that case there was no additional requirement to demonstrate “exceptionality”; and that Lord Brown's remark that it would apply to “only truly egregious cases” of deception to fall outside section 171B had not formed part of the ratio of that case. Accordingly, if the four criteria were satisfied that was all that was required, namely,

i) positive deception in matters integral to the planning process;

ii) that deception was directly intended to undermine the planning process;

iii) it did undermine that process and;

iv) the wrong-doer would profit directly from the deception if the normal limitation period were to enable him to resist enforcement.

---

2 *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] 2 AC 304
Here, the inspector had made plain his conclusion that the criteria derived from \textit{Welwyn} had been satisfied. He had reached conclusions which had been open to him and had not made any error of law.

In \textit{R (Wingrove) v Stratford-on-Avon District Council} [2015] EWHC 287 (Admin) the issue of section 70C (the power to decline to determine retrospective planning applications) was the subject of consideration by the High Court. There, the Claimant ran an equestrian business from a farm and several hectares of pasture. She had made a number of planning applications over the previous years, principally for using her land for residential purposes and had been the subject of enforcement action. However, rather than appealing an enforcement notice served in 2012 the Claimant had made two applications for retrospective consent, both of which had been declined by the LPA under section 70C. Dismissing her judicial review application, Cranston J. noted that Parliament's intention had been to provide local authorities with a tool to prevent retrospective planning applications being used to delay enforcement action and that the legislative steer in favour of exercising it took account of the fact that planning merits could be canvassed through an enforcement appeal. Since section 70C was directed at the problem of delay, a claimant's actual motives to use a retrospective planning application to delay matters were clearly a consideration in favour of a decision to invoke the provision. The judge noted that there might be factors pointing against exercising the section 70C discretion which, if ignored by a local authority, might open up their decision to a public law challenge, for example, where there had been a failure to appeal an enforcement notice and the development was plainly compliant with planning provisions or where the development could readily be made acceptable by the correct planning conditions. On the facts, however, he noted that there was no evidence that the Claimant had been badly advised. Nor was the exercise of the LPA’s discretion challengeable on public law grounds.

Finally, the case of \textit{Goremsandu v Secretary of State for Communities and Local Government} [2015] EWHC 2194 (Admin) considered an argument that an enforcement notice which required the demolition of a home extension built without planning permission was rendered ineffective by a subsequent grant of planning permission for an altered version of that extension. In July 2008 the local authority issued an enforcement notice against the contested extension. In 2009, it granted planning permission for an altered version of the extension, however that permission was never implemented by the owner (or subsequent similar permissions). In 2011 the owner applied to the local
authority for a certificate of lawful development in respect of the extension (which had been enforced against), this was refused and that refusal was upheld on appeal. The owner challenged the Inspector’s decision by way of a s288 challenge. One ground was that the enforcement notice was ineffective as it required the removal of the extension in its entirety, however subsequent planning permission allowed the retention of much of the ground floor.

Gilbart J held that under s180 TCPA 1990 where planning permission was granted after an enforcement notice was served, the notice would cease to have effect so far as it was inconsistent with the permission. However, there was no rule that steps in an enforcement notice had to be exercised in full for it to remain effective. Therefore, the presence of a step in the enforcement notice which required demolition of the whole extension, which was contrary to a subsequent grant of planning permission, did not mean that the remainder of the enforcement notice would become invalid/unenforceable.

*Alwyn De Souza v SSCLG [2015] EWHC 2245* is of note because it concerns the proper route for challenging a inspector’s decision in an enforcement appeal, where a deemed application for planning permission has been made pursuant to s.174(2)(a) TCPA (that planning permission ought to have been granted). The Claimant appealed against an inspector’s decision to uphold an enforcement notice under s.289 TCPA. The case raised a procedural issue as to whether, in light of the fact that the appeal had proceeded on ground (a) (amongst others), the correct route for challenge for the ground (a) issue was s.288 TCPA. The difference is important, both because it is important for the court to proceed on a correct understanding of its jurisdiction and because section 289 has a leave requirement, whereas at the relevant time, s.288 did not.³

The judge who considered the matter on the papers refused permission for the appeal against the inspector’s decisions on grounds (c), (d) and (g) but held that the appeal against the inspector’s decision on ground (a) was to proceed under s.288 TCPA, even though he had commented that it was unarguable. The s.288 application came before a different judge, who found that the only way to challenge the refusal of planning permission under ground (a), was by s.289. This was because s.284(3) referred to decisions to grant permission under ground (a), and not to refusals of permission. The reason for this apparently limited route of challenge was to give those aggrieved by the

³ It does now. A permission stage in s.288 challenges was introduced by s.91 and schedule 19 Criminal Justice and Courts Act 2015, which came into effect on 26 October 2015.
grant of permission the opportunity to challenge it, whereas the disappointed appellant could appeal under s.289 with leave.

To get around the jurisdictional problem, the judge treated the hearing as a resumed permission hearing, and that if he granted permission he would also deal with the substantive issue. Permission to appeal was ultimately refused.

Finally, there is the case of *St Edmundsbury Borough Council v Sophie Louise Oakley (Aka Sophie Louise Gaskin)* [2015] EWHC 1975: a recent example of the serious consequences that can follow where breaches of planning control are not remedied. The respondent had obtained conditional planning permission for the use of her land for the stationing of caravans for one gypsy pitch and a stable block with additional hard standing. The Council obtained an injunction for unauthorised use and, following the injunction, had observed evidence of repeated breaches of the injunction, for example the stationing of further caravans and the use of the land for parking vehicles. The respondent accepted at the committal hearing that she had breached the injunction, and apologised. The Court, taking into account the fact that court orders had to be respected and the authority of the court would be undermined if the respondent was allowed to be in breach indefinitely, handed down a four month custodial sentence. The sentence was suspended provided that the respondent complied with an undertaking she had given to the court. The judge warned the respondent that if an application was made for breach of the undertaking, another judge may be less sympathetic.

**B. HERITAGE**

The case of *Barnwell Manor* continues to be followed by the courts. A recent example is that of *Obar Camden Ltd v Camden LBC* [2015] EWHC 2475 where Stuart J found that the local authority has failed to have special regard to the desirability of preserving a listed building or its setting when granting planning permission for the conversion of a public house to retail and residential use. It is an example of matters going seriously wrong in an officer’s report. The site shared a party wall with a Grade II listed building of national importance which operated as a nightclub and live music space. Planning permission was granted, and following the members’ resolution the officers amended the proposed conditions before permission was formally granted. The court upheld the Claimant’s challenge on several grounds. First, the officers had failed to apply s.66 Planning (Listed Buildings and Conservation Areas) Act 1990. The report failed to bring
the importance of preserving the grade II listed building or its setting to the committee’s attention, nor did it assess the significance of the heritage asset in question.

If the failure on heritage issues was not enough, the council also fell into error on two other grounds: the report failed to put before the committee the environmental health officer’s recommendation that the noise assessment be amended to include noise from a nightclub across the street and officers had significantly amended the proposed noise conditions following the resolution to grant permission. The court held that they had no power to do so, as the conditions were entirely different in character to what had been approved. The correct course of action was to return to committee, which had not been done.

In respect of conservation area designation under s.69 of the Listed Buildings Act, we draw attention to two contrasting decisions. The first, R (GRA Acquisition Ltd) v Oxford City Council) [2015] EWHC 76 (Admin) concerned the Oxford Stadium Conservation Area, Blackbird Leys a former greyhound racing and speedway stadium with go kart track, ancillary buildings and car parking areas. The Claimant was the joint-owner, which had previously applied unsuccessfully to the City Council to demolish the stadium buildings and to develop the site for 220 dwellings. It was contended that the situation was similar to that in Metro Construction Ltd v London Borough of Barnet [2009] EWHC 2956 (Admin) where it was held that a building and its curtilage, a former monastery, could not be designated as a conservation area. However, Ouseley J. held that although the proposed area was enclosed as a single entity that did not prevent in law the enclosure, and the land and buildings within, from being an area for s.69 purposes. The absence of public access or visibility went only to the desirability of preserving or enhancing the area. Thus, the City Council had not erred in its understanding of the concept of an area for the purposes of s.69. Equally, although the buildings were of a mundane quality at best and were not intended to have a long life-span, but those were features which were acknowledged in the City Council’s conservation area appraisal and its officer’s report, and were part of the historic interest and character which the authority saw as worth preserving or enhancing. While the justification was very unusual, the designation was not irrational.

In contrast, in R (Silus Investments SA) v Hounslow London Borough Council [2015] EWHC 358 (Admin) the challenge succeed but on the ground of inadequate consultation. Chiswick High Road had previously been considered for designation as a conservation area in 2001 and 2006. However, prompted by the Claimant’s application for approval
for the demolition of a public house on Chiswick High Road, a locally listed building and heritage asset, the LPA responded by proposing conservation area designation. It began a consultation exercise on August 19, giving the deadline for responses as August 27. While it emailed brief details of the designation proposal to local groups, posting the same on its website it did not consult landowners and occupiers individually, and, specifically, did not notify the developer, fearing that it would demolish the public house before the area was designated. Although the LPA continued to receive consultation responses up until August 27, it took the decision to designate early, on August 21 because of the non-availability of the Leader of the Council to make the decision. On August 27 it rejected the developer’s application for demolition approval, relying on the newly-granted conservation area status.

Granting the application, Lang J noted that while the desire to prevent the demolition of a particular building could not of itself justify designation, the existence of a particular building might contribute to the character of an area; and a threat of demolition might legitimately prompt a decision to designate. She also found that there was credible evidence that Hounslow had been considering designating Chiswick High Road for some years; and that designation had not happened because other areas had been prioritised, not because the area was unsuitable. However, although no procedure was specified and there was no statutory obligation to consult this particular process had been deficient. The information given to consultees had been too superficial to provide for a meaningful consultation; the seven-day consultation period had been too short; the decision to curtail it by five days had been unjustified; and not all the responses had been taken into account. As a result the Claimant had been denied the opportunity of being consulted; and the Court could not assume that its reasoned objections would have made no difference to the outcome. Upon the Claimant undertaking not to begin any demolition work for six months in order to enable the local authority to consider whether to exercise its s.69 duties in respect of Chiswick High Road, and, to conduct a fresh decision-making process if appropriate, the designation was quashed.

We conclude with a note on assets of community value. In R (Anne-Marie Loader) (Claimant) v Rother District Council (Defendant) & Churchill Retirement Living Ltd (Interested Party) [2015] EWHC 1877, the claimant challenged the grant of planning permission for a sheltered housing scheme. The appeal site was an area of open space in the urban area of Bexhill. It comprised two outdoor bowling greens, a pavilion, and an indoor rink, and was registered as an Asset of Community Value under s.88(1) Localism
Act 2011. Opposite the site is a large terrace of houses which are Grade II listed. The court confirmed the principle that listing as an Asset of Community Value is capable of being a material consideration in planning, but it does not generally restrict what an owner may do with his land, as that is a matter for planning policies. The case is also of note as an example of the court exercising its discretion not to grant relief on the basis of that the error (a failure to consult English Heritage) would have made no difference to the outcome of the decision.

C. GREEN BELT

The continuing relevance and efficacy of Green Belt policy remains the hot topic in planning.

The starting point should be its extent, the very issue in Fox Land & Property Ltd v Secretary of State for Communities and Local Government [2015] EWCA Civ 298. In that case, the Court of Appeal held that the fact that a green belt policy had lapsed did not mean that the green belt as defined by the proposals map in the local plan had ceased to exist or that other green belt policies had been rendered wholly ineffective. The proposals map did not itself constitute policy but identified the geographical area to which policies applied.

The next series of cases concern the interpretation of paragraphs 89 and 90 NPPF, and the exceptions to inappropriate development in the Green Belt. As was made clear in Fordent Holdings, the NPPF marked a change from previous Green Belt policy in that it defines all development as inappropriate unless one of the listed exceptions applies. This has, naturally, led to a significant number of cases seeking to test the boundaries of these exceptions.

Paragraphs 89 and 90 of the NPPF provide:

“89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
- buildings for agriculture and forestry;
- provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
- the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
- the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
- limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
- limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.

90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

- mineral extraction;
- engineering operations;
- local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- the re-use of buildings provided that the buildings are of permanent and substantial construction; and
- development brought forward under a Community Right to Build Order.”

The correct approach to paragraphs 89 and 90 was set out in R (Timmins) v Gedling Borough Council & Westerleigh Group [2015] EWCA Civ 10 which concerned whether the creation of a cemetery is inappropriate development in the Green Belt. The second appellant, Westerleigh, had applied to the LPA for planning permission for the development of a cemetery and crematorium in the Green Belt. The second respondent AW Lymm (The Family Funeral Service Ltd) had made a competing application for the development of a crematorium, within a cemetery, in the same area. The first respondent Mrs Timmins objected to both. The LPA granted permission on Westerleigh’s application but refused that of AW Lymm. Mrs Timmins and AW Lymm brought judicial review proceedings which had been successful at first instance. Dismissing the joint appeals, Richard LJ, giving the leading judgment, remarked that NPPF para.89, as well as para.90, was properly to be read as a closed list. Para. 89 stated the general rule that the construction of new buildings was inappropriate development and set out the only exceptions to that general rule. The NPPF did not give any scope to local planning authorities to treat development as appropriate if it did not fall within para.89 or para.90. In particular, there was no general test that development would be appropriate provided it preserved the openness of the green belt and did not conflict with the purposes of including land within it. Had such a general test been intended, it would have been spelt out expressly.

Following on from Timmins, are two cases which give guidance on the application of the exceptions in paragraph 89 NPPF.
Winstanley v SSCLG (unreported) concerns the first and second exceptions to paragraph 89: buildings for agriculture and forestry, and provision of appropriate facilities for outdoor sport and recreation and cemeteries which preserve the openness of the Green Belt and do not conflict with the purposes of including land within it. The agricultural exception is absolute, whereas the outdoor sport and recreation exception is qualified.

The court held that a proposed building which was intended for hay storage and for the exercise and training of horses did not fall within the agricultural exception. Although hay storage would be agricultural, training and exercising of racehorses was not. The application therefore fell to be considered under the second exception, and the inspector’s conclusion that the building had an unacceptable impact on openness was a matter of planning judgment that the court would not interfere with.

In John Turner v SSCLG [2015] EWHC 2728, the court considered the sixth exception, which reads: “limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on openness of the Green Belt and the purpose of including land within it than the existing development.”

The claimant sought planning permission to replace a mobile home and vehicle storage yard with a three bedroom bungalow. On appeal, the inspector held that the proposal did not come within the sixth exception because it would have a considerably greater impact on openness. The claimant argued that this conclusion was wrong, because the inspector had failed to assess the relative sizes of the existing and proposed development. The bungalow would be smaller in volume and so could not have a greater impact on openness.

The court rejected this argument. Although relative size was material, it was not determinative. The mobile home and trucks were moveable whereas the bungalow was permanent. The trucks were also more limited in height and the bungalow would close off views into the site. The question of impact on openness was a question of planning judgment that was for the inspector.

The case of R (Lee Valley Regional Park Authority) v Broxbourne Borough Council [2015] EWHC 185 (Admin) concerned a grant of outline planning permission for the redevelopment of some 4 hectares of land in the Green Belt (and the Lee Valley Regional Park), the demolition of existing structures, mainly glasshouses, and the redevelopment
of up to 90 dwellings along with public open space and access. In considering the NPPF glossary definition of “previously developed land” 4, Ouseley J. held that the words agricultural buildings” in the NPPF did not include a building that had been used for agricultural purposes but which lawfully was being used for another purpose, mixed with agriculture or not. The words of the exclusion "is or has been occupied by agricultural buildings" had to be read in the context of the words defining "previously developed land", namely "is or was occupied by a permanent structure". The policy first considered what buildings currently occupied the site. It then looked at whether the land was, or had been, occupied by certain buildings. That covered buildings that had been demolished or fallen down; it did not deal with buildings which continued to occupy the land but which were no longer agricultural buildings. On the facts the legal flaw lay in the officers’ report having not distinguished between the parts of the site in relation to whether the land was previously developed and whether special circumstances were required for development for housing, and, had treated the application site as one, and the whole development as not being inappropriate under the NPPF. In the absence of clear analysis and explanation, the report rationally could not have avoided saying that there was a significant loss of openness in breach of the NPPF and the local plan; and its conclusion was therefore irrational on the information and analysis available to the committee.

Finally, we consider the challenge to the policy of the former Secretary of State for Communities and Local Government of recovering appeals for gypsy and traveller sites in the Green Belt.

In Moore and Coates v Secretary of State for Communities and Local Government [2015] EWHC 44 (Admin), Gilbart J held that as a matter of fact from no later than September 2013 it was the case that all gypsy/traveller site Green Belt appeals were being recovered “as a matter of course”, despite the express terms of the July 2013 Ministerial Statement (“for the avoidance of doubt, this does not mean that all such appeals will be recovered”), hence the practice being applied was in conflict with the Ministerial

---

4 Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or has been occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill purposes where provision for restoration has been made through development control procedures; land in built-up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time.”
Statement (paras. 161-163). Further, whilst from the January 2014 Ministerial Statement the practice being applied was not in conflict with that Ministerial Statement, the practice being followed was not derived from it but from an unpublished policy that all such appeals would be recovered for, from September 2014, 75% of such appeals. Whilst the Secretary of State’s reliance on the undisclosed policy was not unlawful, the substantial delays occasioned by the application of the recovery policy had breached Art.6 ECHR and was also a breach of the Equality Act 2010, in that the recovery practice was discriminatory and not a proportionate way of achieving a legitimate objective.

D. PROCEDURAL FAIRNESS

In Turner v SSCLG [2015] EWCA Civ 582 it was held that a planning inspector’s conduct of an inquiry in respect of the Shell Centre regeneration proposals on London’s South Bank had not given rise to any appearance of bias. The Court of Appeal restated the test from Porter v Magill as being "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". In Turner, the Appellant’s allegations as to the appearance of bias were effectively divided into the Inspector’s conduct pre, during and post inquiry, and revolved around the appropriateness or otherwise of many of his inquiry management decisions and handling of the objectors and their evidence. Further, the court’s attention was also drawn to Halifax Building Society v Secretary of State for the Environment (1983) 267 EG 679 and Woolf J’s statement that the court had to intervene if reasonable people could take the view that they were not being given “a fair crack of the whip”. However, and notwithstanding a number of adverse comments in respect of the Inspector’s conduct made by Collins J in the High Court, the Court of Appeal held that a neutral observer (i.e. the “fair-minded and informed observer”) would appreciate that an inspector’s role had a strong inquisitorial dimension, meaning that it was fair and appropriate for him to perform robust case management and to focus debate by making interventions and giving clear indications as to areas or topics that he wanted to be focused upon during questioning.

In respect of the written representations procedure, Carroll v SSCLG [2015] EWHC 316 (Admin) is also instructive. A planning appeal had been made for a change of use from B1 office to C3 dwellinghouse and the construction of a three storey basement. At the six week statement date the appellant, Mrs Lisle-Mainwaring, said that the use had changed from B1 to B8 under permitted development rights and the development plan did not
protect B8 uses. The claimant neighbour, who objected to the proposed C3 residential scheme, was then not informed of this change in the appellant’s stance or that the planning inspector had unilaterally amended the description of development on the basis of evidence submitted after the expiry of the statutory time limit for representations without giving the claimant the opportunity to comment. Following the close of the representation periods, the appellant’s consultants sent to the Inspector the Council’s committee report on a further application which accepted that the use was now B8 and there was no objection to the loss of B8. This was after the Council’s committee had refused that second application objecting to the loss of B8, but the appellant failed to inform the Inspectorate of the decision. The failure to inform the claimant of the changes in the appellant’s position and of the amendment to the description and to give him an opportunity to comment was unfair. Additionally the refusal of the second application was a material consideration to which the Inspector had failed to have regard. The Secretary of State did not defend this challenge; so it was the continuing involvement of the third defendant landowner that led to the proceedings going to a full hearing before Mr Justice Supperstone. In his judgment, he provides a helpful summary of the re-stated requirements for procedural fairness. Mrs Lisle-Mainwaring has responded to the judgment in two ways. First, by seeking permission to appeal. Second, by painting the front of the building with red stripes.

E. HOUSING

The particular housing policies of the NPPF, paragraphs 47 and 47, have continued to generate a large number of legal challenges. Following the Court of Appeal’s decision in Solihull Metropolitan Borough Council v Gallagher Estates Ltd [2014] EWCA Civ 1610 confirming that the full objectively assessed need (FOAN) had to be made first the cases in 2015 have focussed on the ingredients involved in making of the FOAN.

One of the most recent decisions to address this issue is Borough of Kings Lynn & West Norfolk v SSCLG [2015] EWHC 2464 (Admin) where Mr Justice Dove considered a section 288 challenge brought by the local authority to an Inspector’s decision. The challenge concerned whether the Inspector had correctly included second homes and vacancies in his assessment of the FOAN. The Claimant argued that this was a matter of

Paras. 39-42
policy i.e. whether the existing amount of second homes should be perpetuated or not. The Judge rejected the challenge and in doing so stated:

“In terms of meeting household and population projections, taking account of migration and demographic change, the PPG [ID2a-001 to 029] illustrates that this is a statistical exercise involving a range of relevant data for which there is no one set methodology, but which will involve elements of judgement about trends and the interpretation of the empirical material available.”[34]

One other important aspect of the case is Mr Justice Dove’s comment upon the judgement of Mr Justice Hickinbottom in the case of Oadby & Wigston Borough Council v SSCLG [2015] EWHC 1879. In that case Mr Justice Hickinbottom considered a s288 challenge to an Inspector’s decision which had concluded that a SHMA was to some extent a ‘policy on’ figure as it incorporated figures which did not take into account in migration for economic purposes [25] and insufficient affordable housing Nonetheless, the application was refused upon the basis of that the inspector’s planning judgment had not been irrational. However, the case did raise the question as to whether the full affordable housing requirement should form part of the FOAN. Rejecting that inference, Mr Justice Dove remarks:

"Insofar as Hickinbottom J in the case of Oadby & Wigston Borough Council v SSCLG [2015] EWHC 1879 might be taken... to be suggesting that in determining the FOAN, the total need for affordable housing must be met in full by its inclusion in the FOAN I would respectfully disagree. Such a suggestion is not warranted by the Framework or by the PPG."[37]

A third case is Exeter City Council v SSCLG [2015] EWHC 1663 (Admin). There, the inspector’s decision was challenged upon the basis that an allowance should have been made within the 5-year housing land supply for new student housing releasing housing back into the market. Rejecting that argument Mr Justice Hickinbottom found that the inspector had been entitled to reject he point upon the basis that no specific proportion of the adopted housing requirement was attributable. Indeed, it would have been irrational as such accommodation did not even feature in the requirement.

---

[7] This view is also maintained by the PAS Technical Advice Note Objectively Assessed Need and Housing Targets (2nd edn. July 2015) upon the basis that affordable need measures aspiration (what ought to happen) while OAN measures expectation. A second major difference is that the calculated OAN relates to new dwellings accommodating new households (housing growth) whereas much of affordable housing concerns existing households. As there is an overlap the two cannot be simply added together. This calls into question the wider applicability of the point in Satnam Millenium Ltd v Warrington BC [2015] EWHC 1879 (Admin) where the council had not identified any Affordable housing need figure in its assessment of the FOAN.
It is clear from the above cases, that in the absence of an adopted figure, planning authorities and Inspectors on appeal have to do the best which they can from the material available, which can include the evidence base from now revoked regional strategies. These decisions illustrate that the Court will treat this as a matter of planning judgment and will give quite a bit of leeway to the decision maker to reach their own view. Since any legal challenger, whether a local planning authority, developer or third party, has a hurdle to show that the decision-maker’s approach was adopted unlawfully they need to be able to point to their contrary approach as being legally sound. It would seem that, if the challenger’s method of calculating the housing need has kept changing or not been clearly explained, then the Court is more likely to consider that the decision maker was doing their best in a difficult situation and acted lawfully.

The second issue has been whether a policy is a housing supply policy for consideration under NPPF paragraph 49. Whilst clearly a matter of planning judgment for the inspector it will be recalled that in South Northamptonshire Council v SSCLG & Barwood Land and Estates Limited [2014] EWHC 573 (Admin) Mr Justice Ouseley had noted\(^8\) that the language of the policy could not sensibly be given a very narrow meaning; and that policies which restrain development in certain areas are the “obvious counterparts” to policies designed to provide for an appropriate distribution and location of development elsewhere within the plan area.

The case of Hopkins Homes Limited v SSCLG & Suffolk Coastal DC [2015] EWHC 132 (Admin) is an example of the first category. There, Mr Justice Supperstone held that a policy which restricted new development outside the physical limit of settlements, subject to exceptions, was a policy for the supply of housing within NPPF, para.49. It is of note that the Treasury Solicitor had notified that it did not intend to defend the claim upon the basis of inadequate reasons but Suffolk Coastal DC, the local planning authority, had fought onwards.

The decision in Cheshire East BC v SSCLG & Richborough Estates Partnerships [2015] EWHC 410 (Admin) is an example of the latter. It concerned a housing proposal which the LPA had argued was unsustainable development within open countryside and which would cause significant erosion of the green gap between Nantwich and Crew. The

\(^8\) Judgment, para. 47
Inspector disagreed, finding that, in the absence of a five year provision, both the housing supply policies and the gap protection policy were out-of-date. However, Mrs Justice Lang took the view that the distinction in the relevant policies had to be looked at in the wider context of the NPPF, and, that the need for housing provision was not the only consideration and that protection and enhancement of the natural environment is a key dimension to sustainable development. Therefore it seemed unlikely that the Minister intended local policies protecting the environment or identifying areas where development would be inappropriate to be treated as out-of-date, solely on the ground that their indirect effect was to restrict the supply of housing in those areas, without consideration of their wider planning purpose and value. However, this case is the subject of an appeal due to be heard on 13/14 January 2016 when some necessary clarification may be given.

For the purposes of NPPF paragraph 14 and weighting, Mr Justice Lindblom in *Crane v SSCLG & Harborough DC [2015] EWHC 425 (Admin)* acknowledged that, whilst many phrases have been used, ultimately it is not a matter of law but of planning judgment. Neither NPPF paragraph 49 nor paragraph 14 advises that policies for the supply of housing should be given no weight or minimal weight or any specific amount of weight. Rather, the critical question is whether, in the particular circumstances of the case before him, the harm associated with the development proposed “significantly and demonstrably” outweighs its benefit, or that there are specific policies in the NPPF which indicate that development should be restricted. He concluded that the Secretary of State had not erred in concluding that the proposed development was in conflict with the neighbourhood plan even though the core strategy's policies were out-of-date.

In contrast, in *Woodcock Holdings v SSCLG [2015] EWHC 1173 (Admin)* Mr Justice Holgate found that the presumption in NPPF paragraph 49 applies to the housing supply policies in a draft development plan including a draft neighbourhood plan and therefore should have been applied in the instant case when assessing the weight to be attached to those policies in the neighbourhood plan.

Another case to note is *Horsham District Council v SSCLG [2015] EWHC 109 (Admin)* which addresses the issue of design in the context of the NPPF, para.64. Horsham

---

9 Para. 58; para. 70 etc.
10 “Permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions”
challenged a decision letter in favour of Barratt granting outline permission for 160 dwellings of various sizes arguing that the inspector's approach to the loss of views from the appeal site was unlawful, and, that the inspector should have rejected the scheme as being a poor design. Mr Justice Lindblom commented that NPPF paragraph 64 does not seek to define "poor design" simply as design which "fails to take the opportunities available for improving the character and quality of an area and the way it functions". Nor does it mean that a proposal which does not take every conceivable opportunity to improve the character and quality of an area, or which does not do as well in this respect as some alternative proposal might have done, must therefore automatically be rejected\textsuperscript{11}. Accordingly, he rejected the submission that the inspector could not approve Barratt's scheme if he thought a better one might have been proposed as misconceived.

The \textit{Horsham} decision reflects the view expressed by the Court of Appeal in \textit{First Secretary of State and West End Green (Properties) Ltd. v Sainsbury's Supermarkets Ltd.} [2007] EWCA Civ 1083 that there is no legal principle that permission must be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. The decision-maker is entitled to weigh the benefits and the disbenefits of the proposal before him and to decide (if that is his planning judgment) that the proposal is acceptable, even if an improved balance of benefits and disbenefits could be achieved by a different scheme.

On local housing needs \textit{Old Hunstanton Parish Council v SSCLG} [2015] EWHC 1958 (Admin) is also instructive. There, the planning inspector had misinterpreted and misapplied a rural exceptions policy in a Core Strategy by failing to consider whether a proposed affordable housing development on a green field site would maintain the vitality and meet the identified housing needs of local communities. The housing needs referred to were those of the small rural settlement in which the development site was based and not those of neighbouring towns and larger conurbations.

\section*{F. DEVELOPMENT PLANS}

Attention is briefly drawn to three cases under this heading. First, in \textit{Fox Land & Property Ltd v Secretary of State for Communities and Local Government} [2015]
**EWCA Civ 298,** following *Cherkley*, the Court of Appeal held that while the proposals map did not itself constitute policy it identifies the geographical area to which policies applied; and in that respect it was relevant to a proper understanding and interpretation of policy in the same way as the supporting text. Accordingly, a green belt notation could not simply lapse.

Secondly, in *Tiviot Way Investments Ltd v SSCLG* [2015] EWHC 2489 (Admin) Mrs Justice Patterson took the view, following *Fox Land*, that a key diagram in a local plan was sufficient to set out the geographical extent of a green wedge in indicative terms.

Thirdly, in *Samuel Smith Old Brewery (Tadcaster) v Selby District Council* [2015] EWCA Civ 1107 the Court of Appeal has confirmed that the duty to co-operate under s.33A of the Planning and Compulsory Purchase Act 2004 was a duty it had to perform when preparing a development plan document under s.19 and not at the examination stage under s.20. Accordingly, where the core strategy examination had been suspended for six months for changes to be made this did not require the LPA to perform the task. It is of note that the point arose because s.33A had come into force during the period of suspension. Therefore, the inspector’s ruling that the s.33A duty did not apply as the core strategy had been submitted six months beforehand had been correct.

Finally, of relevance in respect of CIL charging schedules and their interaction with local plans, is *R (Oxted Residential Ltd) v Secretary of State for Communities and Local Government* [2015] EWHC 793 (Admin) in which a planning inspector’s decision that a local plan and development charging schedule were sound was held to be lawful despite the core plan on which they were based being out of date. Notwithstanding the “limited objectives” of the plan (in particular, it did not include an examination of the objectively assessed need for housing in the administrative area it covered), the inspector’s decision that the plan would remain useful and applicable irrespective of what emerged in the core plan review was both logical and lawful. Further, the inspector was entitled to conclude that there was no requirement for a recently adopted plan to be in place before a schedule could be adopted. While charging schedules should be consistent with and supported by an up-to-date plan, the inspector’s departure from that policy was lawful given that he provided reasons.

---

12 *R (Cherkley Campaign Ltd) v Mole Valley District Council* [2014] EWCA Civ 567.
G. NEIGHBOURHOOD PLANS

*R (Larkfleet Homes) v Rutland County Council [2015] EWCA Civ 597* was a challenge to Rutland's decision to allow the Uppingham Neighbourhood Plan, which contained site specific allocations, to proceed to a referendum. The Core Strategy left site allocations to a subsequent Site Allocations and Policies DPD (SAPDPD). The initial SAPDPD included Larkfleet's site but the final version stated that a separate neighbourhood development plan (NPD) would be prepared instead. The NDP allocated in accordance with the strategy contained in the core strategy and the SAPDPD. At first instance Collins J had held that although The Town and Country Planning (Local Planning) (England) Regulations 2012 reg.5(1)(a)(ii) dealt with strategic considerations in local development documents that did not mean that precise sites within the scope of the required policy approach needed to be identified so that local communities had no say. A "site allocation policy" was wider than an identification of a particular site within a policy. Although the regulation was badly drafted, it would be contrary to what a neighbourhood plan was supposed to achieve if allocation of precise sites could not be dealt with in it.

This approach was endorsed by the Court of Appeal but in stronger terms. Larkfleet had argued that (i) site allocation policies could only be contained in a local development document adopted under s.17 of the PCPA 2004 not in an NDP made under s.38A of that Act; (ii) the decision not to carry out an SEA was legally flawed by a failure to consider whether the NDP was likely to have significant positive effects on the environment. Giving the lead judgment, Lord Justice Richards held that s.17 had nothing to do with NDPs. Rather, it fell within a part of the 2004 Act dealing with local development and the functions of LPAs. The power in s.17(7)(za) to make regulations prescribing "which descriptions of documents are, or if prepared are, to be prepared as local development documents" related to what a LPA might or might not do as regards its planning policies, in particular what it must include in local development documents. The structure of reg.5 of the 2012 Regulations reflected the wording of s.17(7)(za). It was plain that reg.5 related to documents prepared or to be prepared by a LPA, even though express reference to a LPA was made only in reg.5(1). NDPs, by contrast, were not prepared by a LPA, and the statute did not use the term "prepared" in relation to them. They were "proposed" by a qualifying body under s.38A and were made by a LPA on completion of the process so initiated. NDPs were governed by a separate statutory regime. The relevant statutory provisions, namely s.38A to s.38C were inserted into a different part of the 2004 Act from...
that dealing with local development documents. The relevant definition of “development plan” in s.38(3) drew a clear distinction between, on the one hand, development plan documents, which, by s.37 were local development documents, and, on the other hand, NDPs. The provisions relating specifically to NDPs were plainly wide enough to allow site allocation policies to be included in such plans. It would be surprising if that were not the case, since the location of housing was likely to be the single most important planning issue for a neighbourhood. S.38B dealt in terms with the provision that could be made by NDPs. There was nothing in that section to restrict the inclusion of site allocation policies.

On the second ground, while certain paragraphs in the screening report did suggest a limited focus on the part of the author, other paragraphs indicated that the author had regard to both negative and positive effects. The report was badly expressed, but documents of that kind were to be read as a whole and with a “degree of benevolence”. The judge’s conclusion did not take benevolence beyond its permissible limits.

Although overtaken by the Court of Appeal’s judgments in Larkfleet it is of passing note, now, that the issue was also considered in the case of R (Gladman Developments) v Aylesbury Vale District Council [2014] EWHC 4323 (Admin) where Mr Justice Lewis held that an NDP (here, the Winslow Neighbourhood Plan) might include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, even where there was at present no development plan document setting out strategic policies for housing. The constraint that they had to be in general conformity with “the strategic policies contained in" the development plan documents did not deal with a situation where there were no such strategic policies. Schedule 4B para.8(2)(d) of the TCPA 1990 referred to whether, having regard to national policies and guidance, "it is appropriate" to make the neighbourhood development plan. That language did not preclude an examiner from considering that it was appropriate to approve an NDP because future development plan documents might require the provision of further development. That interpretation was consistent with the statutory framework, which required that an examiner be satisfied that an NDP met the basic conditions in para.8(2)(e) of the TCPA which ensured that the plan conformed with the strategic policies contained within the development plan documents. If the local planning authority subsequently made a development plan document which did include strategic policies, that document would be part of the development plan and would prevail over any inconsistent policies in the earlier NDP under section 38(5) of the PCPA 2004.
The judgement in *R (DLA Delivery Ltd) v Lewes DC [2015] EWHC 2311 (Admin)*\(^{13}\) provides some little hope for developers omitted from NDPs. Although Mr Justice Foskett followed the reasoning in *Gladman* he went on to analyse how a site which sits in a local authority area lacking a local plan but has 'general planning merit' and meets the requirements of the Framework but not an NP might be unlocked for development. He stated

"138. In the broadest sense, the fact that in a particular area there is no up-to-date Local Plan with which a "made" NDP can be "in general conformity" (because the latter has been made in advance of the former) may, as it seems to me, arguably be a material consideration in determining a planning application which conflicts with the made NDP. The weight to be attached to it will, of course, be a matter of planning judgment when the issue arises and will doubtless depend, at least in part, on the likely prospect of the emerging Local Plan being adopted and the extent to which there is a divergence between the made NDP and the emerging Local Plan. But this, in my view, offers some, albeit perhaps limited, prospect of unlocking for development a site that has general planning merit and otherwise meets the requirements of the NPPF, but which is currently not allocated for housing within the NDP."

Judicial decisions following an Inspector’s refusal of planning permission which was based heavily upon conflict with an NDP have provided further stark reminders that a proposal’s conflict with the NDP is in itself a powerful and decisive factor against granting planning permission, as reflected in the advice in NPPF paragraph 198 (see the decision of Mr Justice Lindblom in *Crane v SSCLG [2015] EWHC 425 (Admin)*)

However, in *Woodcock Holdings v SSCLG [2015] EWHC 1173 (Admin)* Mr Justice Holgate took a more strict approach on the issue of supposed prematurity in respect of the Sayers Common appeal and Eric Pickles’ robust pre-election decision-making in West Sussex. There, the SSCLG had refused permission on the ground of prematurity to the Parish Council’s emerging NDP despite accepting his Inspector’s views on planning merits. Quashing the decision, the judge found The presumption in favour of granting permission for sustainable development in NPPF paragraph 49 applies to the housing supply policies in a draft development plan, including a draft neighbourhood plan. It does not simply apply to a plan forming part of the statutory development plan.

**H. DECISION MAKING**

\(^{13}\) Note that at the time of writing the claimants have been granted permission to appeal to the Court of Appeal on one ground. They are seeking permission on all other grounds before the Court of Appeal.
The case of *R (Carter) v Swansea City & County Council* [2015] EWHC 75 (Admin), a windfarm challenge, confirms that a local planning authority is not required to adopt a rigid two-stage approach to a planning application and start by determining whether the proposal met the statutory presumption that it should accord with the relevant development plan, before looking at other material considerations to decide whether the presumption was outweighed. Rather, it is perfectly proper for it to assemble all relevant material and proceed to assessment, paying due regard to the priority of the development plan but reaching a decision after a general study of all the material. In the instant case, the officer’s report contained numerous references to the unitary development plan, in particular the policy on when proposals for the provision of renewable energy resources would be permitted, and to the fact that the proposal was in conflict with that policy, and, to the presumption arising from s.38(6) of the TCPA 1990. Accordingly, there was no doubt that the officer had had full proper regard to the development plan and the priority which should be given to its provisions.

The decision in *Oxfordshire County Council v Secretary of State for Communities and Local Government* [2015] EWHC 186 (Admin) has clarified that s.106 monitoring fees are not necessarily recoverable when put under the spotlight of an appeal inspector’s scrutiny under regulation 122 of the CIL Regulations 2010. In that case, the appeal proposal was for 26 houses and the related s.106 agreement included contributions required by the County Council towards education, libraries, household waste management, museums, adult learning, day care, public transport and administration/monitoring of the obligations, a fee of £3,750 (assessed on a standardised basis). It also included a clause which enabled the inspector to strike out contributions that did not meet the tests for planning obligations set out at regulation 122. The inspector found that the contributions required towards education and libraries were necessary to make the development acceptable in planning terms but that the contributions relating to waste, adult learning, museums, day care, refuse bins and administration/monitoring did not meet the required tests.

Mrs Justice Lang found that there was nothing in the wording of the Town and Country Planning Act 1990, the Planning Act 2008, the CIL Regulations, the NPPF or the Planning Obligations Practice Guidance which suggested that authorities could or should claim administration and monitoring fees as part of planning obligations. She noted that it was part of the Council’s functions as a local planning authority to administer, monitor and
enforce planning obligations in s.106 agreements. Further, that the appealed application was a routine planning application for a relatively small development and that the proposed fee was “based on [a] standardised table of fees rather than any individualised assessment of special costs liable to be incurred for this particular development”. As the only allowable contributions (education and library services) did not require ongoing management or maintenance, since they were single payments to be made prior to the commencement of development, the inspector had been entitled to conclude that a contribution to the administration and monitoring costs was not ‘necessary’ to make the development acceptable in planning terms.

In *R (Tesco Stores Ltd) v Forest of Dean District Council [2015] EWCA Civ 800* the Court of Appeal confirmed that in determining whether a s.106 agreement complied with regn. 122(2) the CIL Regulations 2010 a decision-maker was not required in every case to undertake a “quantification” of the benefits of the agreement and their relationship to the development. Some form of quantification would be necessary in some cases, but it did not follow that it was necessary in every case. Here, the rival developer had agreed to provide a shuttle bus service between the new store and the town centre and money to fund town centre improvements.

Next, there is the question of what should be done when material circumstances change. In *Wiltshire Council v SSCLG [2015] EWHC 1261 (Admin)* after the close of an appeal inquiry but before the decision letter had been published the LPA sent its Core Strategy Inspector’s report to PINS which questioned the required housing figure and recommending lower one. However, the CS report was not received by the appeal Inspector, in consequence he issued his decision letter on the basis of a higher requirement. In the High Court, Mrs Justice Patterson found that the CS report was an important material consideration and that there was a real possibility that the resolution of the housing numbers might have affected the outcome. She commented that there had to be some administrative mechanism for notifying an inspector and enabling a decision letter to be recalled, supplemented or amended. The current PINS administrative procedures in place were, in the circumstances, not fit for purpose. She also reminded that until a decision letter had been issued, the responsibility for it remained with the inspector. However, having invited submissions as to the Order (and costs) the judge decided to make a declaratory order (*[2015] EWHC 1459 (Admin)*) on the basis of the severe prejudice of the developer which had arisen through no fault of its own.
Finally, we turn to *West Berkshire DC v SSCLG [2015] EWHC 2222 (Admin)*, a rare instance of the judiciary interfering with government powers to institute policy. It concerned the new planning policy to exempt small developments from affordable housing contributions and the introduction of a vacant building credit (VBC) being ruled unlawful. Mr Justice Holgate took the view that changes made by the previous government had been too significant and inconsistent with other national planning policy and objectives reflected in local plans to have simply been introduced by amending policy guidance. It should have been done through primary legislation. Like a number of local planning authorities, the co-claimants, West Berks DC and Reading Council, had recently been faced with reduced affordable housing requirements as a result of change to the Planning Practice Guidance, introduced in a Written Ministerial Statement (WMS) of 28 November 2014, which prevented authorities from seeking requirements for development of 10 dwellings or fewer. The inclusion of the VBC also meant that the floor space of vacant buildings demolished through development would be deducted from affordable housing contributions. The councils argued that the policy would significantly reduce affordable housing across the country by more than 20 per cent with a particular impact in their areas (West Berks a loss of 23.5% of affordable housing units; Reading 15% of annual completions). Their grounds of challenge included: the SSCLG had failed to take into account material considerations; the policy was inconsistent with the statutory scheme; failure to comply with the public sector equality duty; and the decision to introduce exemptions from affordable housing requirements was irrational.

The judge found that the WMS had not been formulated to be taken into account alongside local plan policies in development control decisions or as guidance when new local plan policies come to be formulated, concluding that the policy was inconsistent with the statutory scheme because its aim, and the language chosen, purported to confer exemptions in every case where affordable housing in an adopted local plan policy is inconsistent with national thresholds. It was unlawful because the purported effect was to override relevant policies in the statutory development plan in so far as they are inconsistent with national policy. He agreed that the DCLG had not given proper evidence of the “disproportionate burden” the policy sought to address, thus preventing councils from properly responding to the consultation. While the DCLG argued that the VBC policy was intended to incentivise brownfield development, the judge held that the policy was made with a lack of proper consideration for its impact. The councils’ challenge succeeded on all other grounds. The SSCLG has now obtained permission to appeal with an expedited hearing due on 15/16th March 2016.
I. ENVIRONMENTAL IMPACT ASSESSMENT

The pace of challenges on EIA grounds has slowed in the past year or so, however there are still some High Court and Court of Appeal decisions of 2015 which are worth paying attention to.

The first two cases concern screening and the threshold for when another project/development is “reasonably foreseeable”, and so to be taken into account in the consideration of cumulative impacts at the screening stage.

**Commercial Estates Group Ltd v SSCLG & ors [2014] EWHC 3089 (Admin)** was a decision on permission only, in which Stuart-Smith J refused the claimant permission for judicial review. As such, the case is not authoritative, but it is interesting nonetheless as a careful judicial consideration of the meaning of “reasonably foreseeable” in the European EIA Guidance in relation to cumulative impact with other projects at the EIA screening stage.

The claimant was a housebuilder who had an outline planning permission for a large, mixed-use development across an area of land identified as a sustainable urban extension (SUE) in the LPA’s submission draft core strategy. The EiP submission draft had been suspended following criticism by the Inspector. The second interested party in the claim had planning permission within the SUE for a smaller development of 150 homes. It had obtained a negative screening opinion, and it was this opinion that the claimant sought to challenge, on the basis that the council should have taken into account the claimant’s development and the proposed SUE allocation.

The claimant argued that the Commission Guidance on indirect and cumulative impacts, which refers to “reasonably foreseeable actions” equated with the test of reasonable foreseeability in tort – meaning that there was a real risk in the mind of an ordinary person. The court rejected this argument on the basis that the guidance goes beyond Annex 3 of the EIA Directive, which speaks only of ‘cumulation with other projects’, and that the test of “reasonably foreseeable” was significantly higher than when used in the assessment of the foreseeability of risk in the law of tort.
In *R (Oldfield) v SSCLG [2014] EWCA Civ 1446; [2015] Env LR* 9 the Court of Appeal were concerned with a challenge to the Secretary of State’s decision to grant permission for a the redevelopment of a sizeable site on the Margate front, known as the "Arlington site", immediately adjacent to the well-known Dreamland site, for which redevelopment was also proposed (and had been the subject of considerable recent CPO litigation). The question was ultimately whether the Secretary of State had failed, as a matter of fact, to have regard to the Dreamland site and its proposed development when assessing cumulative effects in the course of the EIA screen for the Arlington proposal, which led the Secretary of State to produce a “negative” screening direction. Both Moses LJ at first instance and the Court of Appeal found there had been no such error.

As to the test for when another project must be included within the cumulative effects of the project subject to EIA, the Court (per Maurice Kay LJ) said this (only):

> "It is important that an assessment is made in the light of what is known and what is reasonably predictable on or ascertainable at the time"

Given the future of the Dreamland site "remained uncertain", with the issue of the CPO unresolved and no planning application yet forthcoming, it was permissible for the Secretary of State to conclude that there were *at that point in time* no cumulative significant environmental effects (by reason of the Dreamland site/proposal) (see paragraph 24, Macur LJ also agreed on this point).

A further ground of challenge, that the Secretary of State had impermissibly failed to take a holistic view of the proposal’s environmental effects because foul and surface drainage were left up in the air at the time of his screening decision, also failed. The statutory water and sewerage undertaker, Southern Water, had stated that the proposed drainage strategy was acceptable and recommended a *Grampian* condition requiring full details to be submitted to the LPA for its approval in consultation with Southern Water. The Secretary of State was not “hiving off” an important issue by dealing with this by way of condition (see paragraph 28).

In *R (Gilbert) v Secretary of State for Communities and Local Government [2014] EWHC 1952 (Admin)*, the claimant local resident applied for judicial review of the first defendant secretary of state’s screening direction and the second defendant local authority's grant of planning permission to the interested party. The challenge alleged
errors in the screening assessment in relation to noise. Mr Justice Supperstone held that the test for whether a development required an Environmental Impact Assessment was whether the project was likely to have significant effects on the environment, as judged by planning authorities having regard to the precautionary principle. Screening assessments are, by their nature, not as detailed as planning permission assessments (see further R (Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157). The secretary of state had asked the right questions, equipped himself with the relevant information and applied Wednesbury principles. The decision maker had considered the evidence, including the cumulative effects of noise emissions and traffic congestion, and had found that a significant impact was unlikely. Furthermore, the reasons for the secretary of state’s conclusions were expressed in clear and precise terms, as required by the regulations, and were intelligible and adequate. Whilst permission to appeal was granted by Sullivan LJ, the appeal was dismissed: [2015] EWCA Civ 314.

In R( Larkfleet Ltd) v South Kesteven DC [2015] EWCA Civ 887 the claimant property developer brought a challenge to a planning permission granted to the Highways Authority for a by-pass to the south of Grantham. The Local Plan identified a site to the south of Grantham which was suitable for residential development but whose access would be dependent upon the construction of the bypass. The environmental statement (‘ES’) for the road treated it as a separate ‘project’ from the residential site development, however it did assess the cumulative impact of both.

Larkfleet brought the challenge on the grounds that (1) the link road and residential development were so interconnected that they constituted a single project and therefore the ES was deficient; (2) even if the link road was a separate project the ES failed adequately to address the cumulative effects. The High Court found against Larkfleet and the Court of Appeal dismissed their appeal. In doing so it held that although what is in substance a single project could not be divided into smaller projects (Ecologistas en Accion-CODA v Amtentamiento de Madrid (C-142/07) the fact that two sets of proposed works might have a cumulative effect on the environment does not make them a single project. The Directive’s objective of environmental protection was protected by the requirement to assess cumulative effects. The Court also held that the ES supplied as much information as it reasonably could about the cumulative effects. The appeal therefore failed.
The Supreme Court has also been concerned with EIA in the last year. In the case of *R(oao Champion) v North Norfolk DC* [2015] UKSC 52 the Court heard an appeal from the Court of Appeal who had found that the respondent local authority had been entitled to conclude that an EIA was not required in relation to a proposed development near a Special Area of Conservation. The issues which came before the Court were: (i) the correct approach towards the timing of screening decisions; (ii) whether and to what extent ‘mitigation measures’ could be taken into account in screening decisions; (iii) if procedural irregularity had occurred whether the court should nevertheless exercise its discretion to refuse to quash a planning permission.

The Supreme Court dismissed the appeal. It was common ground between the parties that the screening opinion issued by the local authority was defective. At the stage it was carried out mitigation measures were not fully identified and therefore it was impossible at that stage to conclude that the project would not be likely to have significant effect on the environment. The 2011 Regulations make clear that the assessment of the proposal should be based upon its characteristics and effects not by reference to steps subsequently taken to address any effects. The Court further held that mitigation measures could be taken into account at the screening stage however any doubt should, in line with the precautionary principle, be resolved in the undertaking of an EIA.

Finally the Court held that where a breach of the 2011 Regulations had been established the court is able to exercise its discretion to refuse relief if in fact there had been no substantial prejudice to the applicant and the applicant had been able to enjoy the rights conferred by European legislation. In this case there was nothing to suggest that the screening decision would have been different had the breaches not occurred.

### J. STRATEGIC ENVIRONMENTAL ASSESSMENT

In *R (HS2 Action Alliance Ltd & anr) v (1) Secretary of State for Transport (2) HS2 Ltd* [2014] EWCA Civ 1578 the claimants/appellants argued that the safeguarding directions put in place by the Secretary of State along the proposed HS2 route were a ‘plan or programme’ which was subject to the SEA Directive. The Court of Appeal agreed with the High Court. It stated that the Directions did not ‘set the framework for development consent for projects’ and therefore the claimant’s case had failed to distinguish between procedure and substance in the decision making process.
Next we consider three cases on defects in the SEA process. *Abbotskerswell Parish Council v Teighbridge DC* [2014] EWHC 4166 (Admin); [2015] Env. LR 20 concerned an alleged failure on the part of the LPA to comply with Reg.13(2)(b) of the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”) by reason of a failure to take steps to draw the attention of those interested in or affected by the Local Plan to the existence of the environmental information in the SEA and to invite comments upon it.

The LPA acknowledged that when it published the SEA and subsequently the Addendum to the SEA it failed to expressly invite the public to comment. However, the Judge was in no doubt that the claimant’s interests had not been “substantially prejudiced”, given the text of the SEA stated it was “being published for consultation”, the claimant was aware of the SEA and the Addendum(s) when it made written representations to the EiP Inspector and the EiP included specific consideration of the SEA (amongst other reasons). The challenge failed on the basis that the claimant was seeking to rely on a procedural failing which had not caused it any substantial prejudice.

The decision in *Kendall v Rochford District Council* [2014] EWHC 3866 (Admin); [2015] Env LR 21, handed down only three days after *Abbotskerswell*, was another s.113 challenge that involved more promising facts for the claimants, but led to the same result. The claimants alleged that they had not been adequately consulted on proposed allocations for gypsy and traveller pitches. At EiP stage, the Inspector had found that about 93% of 5,000 objectors had been unaware of the specific proposals.

The Council did not consult individual members of the public on its draft plan or the sustainability appraisal, and instead relied on its website when consulting the public generally. Whilst accepting that it was for the LPA to decide who “public consultees” are pursuant to Reg.13, the Judge stated that there was ‘potential for problems to arise if an authority resorts to the internet alone when consulting the public’ (as noted by the Court of Appeal, albeit for a different process, in *R (Breckland DC) v The Boundary Committee* [2009] EWCA Civ 239). As the Judge observed:

"The real problem here is...that in purporting to discharge its duty to consult the "public" under art.6 of the SEA directive, the council relied on its website...in Rayleigh...exclusively, or almost so – not only as the sole means by which it invited the general public to comment on the draft plan and its sustainability appraisal but also as the sole means by which it made known to them that this is what it was doing."
Only a very small number of individual members of the public were consulted directly. Those who were not consulted directly, the overwhelming majority, were left to find the consultation for themselves on the internet, either once they had been prompted by someone else to do so or acting on their own initiative. Unless one knew that the sustainability appraisal for the draft allocations plan was being prepared and unless one was resourceful or inquisitive enough to be regularly checking the council’s website to find out if formal consultation on those two documents had begun, one would not have known of their existence or that consultation upon them had begun…"

That was ‘not good enough’ and breached art.6 of the SEA Directive and reg.13 of the SEA Regulations. In addition to using its website, the LPA ought also to have announced and carried out its consultation on the draft plan together with the sustainability appraisal ‘by some other means which would not have excluded those without access to the internet’. However, having found breach, the Judge applied Walton (citing, in particular, paras.138-139 per Lord Carnwath SCJ), rejecting the claimant’s submission that they were inconsistent with the judgment of the CJEU in Gemeinde Altrip & ors v Land Rheinland-Pfalz (C-72/12) [2014] PTSR 311, noting that the Walton principles should guide the court and were sufficient, unenlarged and unrefined, for the decision he had to make, and refused to exercise his discretion to quash. As “the plan-making process as a whole gave the public a sufficient opportunity to reflect upon and respond to the policies and allocations proposed in the draft plan in the light of the sustainability appraisal” this was “to afford the public effective participation in the plan-making process”, such that neither the claimant nor any other individual member of the public had suffered “substantial prejudice” for the purposes of s.113 of the 2004 Act. In fact, it was inconceivable that the outcome of the plan-making process would have been different if the breach had not occurred and neither the claimant nor any other had suffered even ‘any real prejudice’. The Judge was, however, keen to emphasise that his judgment should not be seen as encouraging LPAs to rely upon their website in the way the defendant council had done.

The judgment in Kendall preceded that of the Court of Appeal in No Adastral New Town v (1) Suffolk Coastal DC (2) SSCGL [2015] EWCA Civ 88. No Adastral New Town confirms that earlier breaches of the SEA Directive/SEA Regulations may be cured by later steps [56-59]. The Court of Appeal essentially endorsed the reasoning of Singh J, at paragraphs 112-113 and 125, in Cogent Land v Rochford DC [2012] EWHC 2542 (Admin); [2013] 1 P&CR 2 (an unsuccessful challenge to the Core Strategy that preceded the Allocations Plan the subject of Kendall).
As Singh J had noted in *Cogent Land*, SEA is not a single document, nor the same thing as the environmental report, but a process. Although Arts.4 and 8 of the SEA Directive require a SEA to be carried out and taken into account during the preparation of the plan, neither article stipulates when in the process this must occur other than that it must be ‘before [the plan’s] adoption’. Similarly, Art.6(2), which requires the public to be given an ‘early and effective opportunity…to express their opinion on the draft plan or programme and the accompanying environmental report’ does not prescribe what is meant by ‘early’, other than that it must be before adoption of the plan. If earlier defects in the process, such as failure to adequately conduct a sustainability appraisal of early drafts, could not be cured at a later stage, then the result would be absurdity; that a Local Plan with proposals which at some prior stage had not been the subject of sufficient appraisal, or sufficient consultation, could never be adopted even if before adoption they had subsequently been sufficiently appraised and sufficiently consulted on. Obviously, a later, compliant, SEA must not be a ‘bolt-on consideration of an already chosen preference’.

Criticisms that the earlier flaws in *No Adastral New Town* meant that the LPA had ‘closed its mind’ by the time sufficient appraisal had been carried out, or that the public was required to follow an unlawful paper chase to understand the appraisal, failed on the facts (see paragraphs 56-59).

In *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government* [2015] EWCA Civ 681 the Court of Appeal heard the claimant’s/appellant’s appeal against the High Court’s dismissal of their challenge to part of Wealden District Council’s Core Strategy. The appellant challenged a policy which was concerned with the protection of Ashdown Forest which was a special protection area (‘SPA’) and special area of conservation (‘SAC’). The Core Strategy provided that where new residential development was permitted within a 7km zone around the forest it would be required to contribute to Suitable Alternative Natural Greenspaces (‘SANG’). The appellant argued that the local authority had failed to comply with regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 in that it had failed to assess reasonable alternatives to the 7km buffer.

The Court held that the identification of reasonable alternatives was a matter for the local planning authority subject to review on public law principles. There was no evidence before the court that the local authority had given any consideration to the question of
reasonable alternatives to the 7km zone. The local authority argued that inferences could be drawn from the Habitats Regulations Assessment which demonstrated the assessment of reasonable alternatives. However, the Court found that was not the function of that assessment. The Court therefore allowed the appeal and quashed the part of the policy which related to the 7km zone.

In *R(Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 the High Court heard a challenge from the Wildlife Trust to the grant of outline planning permission for development in an area populated by a protected species of bat. The planning committee had approved the application subject to the approval of an appropriate assessment and also Natural England’s agreement on biodiversity mitigation. Following changes to the AA and Natural England withdrawing its objection the planning permission was granted by officers. The challenge was brought on three grounds (i) the local authority had failed to ascertain whether the proposed development would adversely affect the integrity of the SAC because the planning committee members did not have sufficient information to approve the application; (ii) the local authority failed to consider whether to consult the general public on the AA and the proposed mitigation measures; (iii) the local authority failed to undertake and publish a screening opinion.

The Court held that the information before the committee was an adequate foundation on which to delegate the resolution to officers on the basis that the permission could not be granted unless Natural England withdrew its objections and certain amendments in the AA were made. Regulation 61(4) did not oblige a local authority to consult the public on an AA and nor was there any common law duty to consult. Consultation was therefore a matter for the local authority. The claimants did have partial success on EIA grounds however. The Court held that there had been no proper screening opinion adopted and published before the grant of planning permission, the officer had decided there was no need for the EIA because the only potential adverse effects of the proposed development were on the SAC and those would be addressed as part of the AA. The Court therefore upheld the grant of planning permission.

**K. CONSERVATION, WILD BIRDS AND HABITATS**

In *R (Badger Trust) v SoS for Environment* [2014] EWHC 2909 (Admin) the Claimant, an organization devoted to the conservation and welfare of badgers, challenged the Secretary of State’s decision to continue, for a second season, the culling of badgers by
controlled shooting in two pilot areas. The single ground of challenge was that the SoS had given an unequivocal assurance that, as long as she had in real contemplation the rolling out of the cull to other geographic areas, she would keep in place an Independent Expert Panel. Having carefully reviewed the policy documents relied upon by the Claimants, Mr Justice Kenneth Parker saw no warrant for the claimed assurances. The decision contains a helpful survey of the current learning on substantive legitimate expectation, and the requirement for a representation which is "clear, unambiguous and devoid of relevant qualification".

In a further action for judicial review, the Royal Society for the Protection of Birds challenged the decision of the Secretary of State to direct Natural England to give consent for the culling of 552 pairs of Lesser Black-backed Gull and, as well as further operations to maintain population levels of Herring Gull at a reduced level along the left bank of the Ribble Estuary (RSPB v SoS for Environment [2015] EWCA Civ 227). On the right bank of the estuary is Warton Aerodrome, where British Aerospace operates the principal UK facility for developing, manufacturing and testing military aircraft. It was with a view to mitigating the risk of aircraft damage and crashes through ingestion of large, thermalling birds that British Aerospace sought a consent for a cull of a limited number of breeding pairs.

At the heart of the case is the suggestion by the RSPB that the Wild Birds Directive should be construed as prohibiting any non-natural intervention, or cull, of a designated species below its present stable population level within a special protection area. The Court of Appeal overturned the first instance decision of Mr Justice Mitting and found that the Secretary of State had erred in law in that his direction under s28F(5) of the Wildlife and Countryside Act 1981 was based on a misinterpretation of the conservation objectives for the area and for the gulls. The conservation objective ‘subject to natural change, to maintain the populations of the qualifying features’, which included the lesser black-backed gulls and the seabird assemblage had to be considered in the context of the overriding objective of Directive 2009/147 which included avoiding deterioration of the habitats or significant disturbance of the qualifying features and ensuring that the integrity of the site was maintained. The Court emphasized that the objectives should be read in a sensible way and concluded that it was difficult to see how the deliberate reduction of the relevant bird populations at a level above 75% of that designation could sensibly be said to accord with that objective.
The issue of risk has also been recently considered in the case of *R (Savage) v Mansfield District Council* [2015] EWCA Civ 4. There, outline planning permission had been granted for a mixed use development near a wood containing substantial breeding populations of nightjar and woodlark. A nearby SSSI meant that the planning authority had been obliged to consult Natural England, which although it did not object to the development, advised that, in future, the woodland could be included in a potential SPA. If so, then a 400 metre buffer zone would be a likely feature in which no residential development could take place. Accordingly, a "risk-based" approach should be undertaken by the local authority. The claimant submitted that the local authority should have followed Natural England’s advice. However, the Court of Appeal took a strict view that as the woodland was not a proposed SPA the planning authority had been under no obligation to consult Natural England; and whilst Natural England had power to give advice under reg.129 of the Conservation of Habitats and Species Regulations 2010, as a material consideration, the weight to be given to such advice was a matter for the decision-maker. In any event, Natural England’s advice was given because there was a risk that the nearby area might be proposed as an SPA, in which event the planning permission would have to be reviewed. The "risk-based approach" which it advised had nothing to do with the impact on the habitat of the birds, rather it was the risk that the local authority would have to reassess the environmental impact of the development on habitats. The risk was therefore ultimately the financial risk of having to pay compensation. How the local authority chose to confront that issue was a matter for it; and its decision to include a clause within a s.106 agreement against the risk of having to pay compensation if the planning permission had to be revoked was an appropriate response.

The Court of Appeal analysed the case-law relating to the precautionary approach required under the Habitats Directive in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 and in doing so considered whether an inspector had been entitled to conclude that a proposed development, even when combined with other development, would not be likely to give rise to any significant effects on the area concerned. The appeal related to the grant of planning permission for a development of 65 residential dwellings. It was held that the planning inspector had not erred in granting planning permission for residential development on undeveloped agricultural land close to a special protection area for birds, which incorporated a special area of conservation and was also designated as a site of special scientific interest. The Appellant was chair of an association of local residents which objected to the development.
The Appellant alleged that the inspector had failed properly to comply with article 6(3)’s strict precautionary approach as he could not be certain to the required standard that there would be no possibility of adverse effects on the area. The Court noted two important preliminary points. First, the local authority's assessments suggested that the proposed development was likely to have a significant effect on the area only because of the potential effects of the proposed development in combination with substantial residential developments planned in the vicinity of the special protection area. The “critical question” for the inspector was, therefore, whether the mitigation measures were sufficient to satisfy him that if permission was granted there would be no significant in-combination adverse effects. Second, the inspector’s article 6(3) inquiry was informed by work done for the local authority when it was considering whether to grant permission. The inspector had further information, including evidence from an ecology expert, and could properly consider the position at the screening assessment stage (first limb of article 6(3)). If that information properly enabled him to make that screening assessment, he was not obliged to require an “appropriate assessment” (second limb of article 6(3)).

Finally, so far as the topic of nature conservation is concerned, the Court of Appeal gave judgment in the long-running Chagos Islander litigation last year (R(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 708). This part of that litigation is an attempt by former inhabitants of the islands to quash the decision of former Foreign Secretary David Miliband to enact the world’s largest Marine Protected Area in the international waters adjacent to the outer islands of British Indian Ocean Territory, more than 1000 nautical miles north east of Mauritius in the Indian Ocean. Mr Bancoult claimed, on the basis of a WikiLeak cable recording a meeting between US and UK officials in 2009, that Foreign Secretary David Miliband’s decision to enact the world’s largest marine protected area was for taken for the improper purpose of preventing Chagossians from ever returning to their homeland. It was also contended that the decision followed a flawed consultation process and was in breach of EU law.

Whilst the Court of Appeal held that the WikiLeak cable was admissible in court (and therefore overturned the judgement of the Divisional Court on this point) it also held that its absence from proceedings below made no difference to the cross-examination of relevant UK officials and that therefore no improper purpose could be established with
or without the use of the cable. The Court also held that the consultation process which
led the to the decision was not defective and that the decision itself did not breach EU law.

Mr Bancoult has applied for permission to appeal to the Supreme Court.

I. NUISANCE

In the days before statutory regulation, private nuisance claims provided an important
means of providing effective environmental control. It might have been thought the
advent of planning and environmental controls would limit the role for nuisance.
However, a number of high profile cases before the appellate courts in recent years have
confirmed that private nuisance claims provide a key means of remedying and
compensating interferences with property rights and, in some cases, preventing
environmental harm.

One of the central issues that has arisen is the relationship between the existing statutory
controls and the ability of those affected to bring a claim in private nuisance. This issue
was the subject the Court of Appeal’s judgment in *Barr v Biffa Waste Services Ltd [2012]*
EWCA 312. Last year, the issue was considered by the Supreme Court in *Lawrence v Fen
Tigers [2014] UKSC 13*. Consistent with the Court of Appeal in *Barr v Biffa*, a majority
of the Supreme Court held that the fact that an activity which is said to give rise to a
nuisance is carried out in accordance with statutory controls (in *Lawrence*, the owners
of the Fen Tigers had planning permission to carry out motocross at the stadium) is no
answer to a claim in nuisance: “There is no principle that the common law should “march
with” a statutory scheme covering similar subject matter. Short of express or implied
statutory authority to commit a nuisance … there is no basis, in principle or authority, for
using such a statutory scheme to cut down private law rights.”¹⁴  Thus, *Lawrence* confirms
that (a) the view of a planning authority or other regulator on whether an activity is
acceptable should not affect private property rights and (b) that common law nuisance
claims should be available to vindicate those rights.

For completeness, mention of recent cases in nuisance should include reference to two
further cases.

¹⁴ Lord Carnwath in *Barr v Biffa*, approved by Lord Neuberger in *Lawrence v Fen Tigers*
The first is *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] Env LR 28. In that case, the Court of Appeal reviewed the authorities on the relationship between the law of nuisance and the rule in *Rylands v Fletcher*. Moore-Bick LJ derived three key principles from the authorities:

(i) although liability in nuisance has traditionally been regarded as strict, in the sense that it does not depend on proof of negligence, if the defendant’s user of his land is reasonable, he will not be liable for interference with his neighbour’s enjoyment of his land;

(ii) unless the case can be brought within the scope of the rule in *Rylands v Fletcher*, the defendant is not liable for damage caused by an isolated escape, i.e., one that is not intended or reasonably foreseeable.

(iii) foreseeability of harm of the type suffered by the claimant is necessary for the defendant to be liable in damages for nuisance.

The Court rejected the Claimant’s contention that there is a general rule imposing strict liability in respect of nuisance causing physical damage to property. On the facts, the claim failed because the escape of concrete from land occupied by Sir Robert McAlpine Ltd and the consequent damage to Northumbrian Water’s sewer were unforeseeable.

The second is the Supreme Court’s decision in *Manchester Ship Canal Company Ltd v United Utilities Water plc.* [2014] UKSC 40. That case involved a statutory sewerage undertaker’s appeal against a decision ([2013] EWCA Civ 40) that the right of discharge onto third party property of the respondent owner of a private watercourse had not been transferred to private water companies as part of the privatisation process.

The Supreme Court held that sewerage companies do not enjoy an implied right under the provisions of the Water Industry Act 1991 to discharge sewage from outfalls created after 1991 into private canals or onto private land. They do, however, continue to have an implied right of discharge from pre-privatisation outfalls subject to the safeguards contained in the 1991 Act about foul sewage and interference with the assets of canal and other statutory undertakers, and payment of full compensation for damage caused.

**M. ENVIRONMENTAL SENTENCING**
**R v Thames Water Utilities Ltd [2015] EWCA Crim 960** was the first case to be sentenced under the Environmental Offences Definitive Guideline. Thames Water pleaded guilty to an offence contrary to regulations 38(1)(a) and 39(1) of the Environmental Permitting (England and Wales) Regulations 2010, following the discharge of untreated sewage from its pumping station and was fined £250,000. The failure of pumps caused raw sewage to be discharged directly into a brook flowing through a nature reserve in an AONB for five days rather than to the downstream pumping station despite an alarm system being in place to alert Thames Water. The Court of Appeal noted that fines for environmental offences are calculated according to the size of the organisation, its degree of culpability, and the harm caused. The Court of Appeal said a fine of £250,000 was proportionate, considering Thames Water’s profits. Further, and in order “to bring the message home to the directors and shareholders of organisations which have offended negligently more than once before, a substantial increase in the level of fines, sufficient to have a material impact on the finances of the company as a whole, will ordinarily be appropriate”.

**Natural England v Day (Philip Edward) [2014] EWCA Crim 2683; [2015] Env.L.R.15** was an appeal against a sentence handed down before the Guideline and long before **Thames Water**, but the judgment of the Court of Appeal is entirely consistent. The facts were out of the ordinary. The extremely wealthy appellant (whose fortune the prosecution estimated at some £300 million), owner with his wife of an estate in Cumbria that included part of a SSSI, had caused (by his own admission through his eventual guilty plea) substantial unauthorised works to the SSSI in order to conduct commercial grouse shooting, in breach of s.28E(1) of the Wildlife and Countryside Act 1981 and so constituting an offence under s.28P(1). The works included the felling of trees and the construction of a road and bunds. The sentencing judge found that Mr Day had thereafter, through solicitors, deliberately sought to intimidate local residents who were concerned to raise the alarm and alert Natural England.

Having elected trial by jury, Mr Day was then convicted on his own guilty plea, the prosecution having rejected his basis of plea but he having elected to maintain his plea. After a four-day Newton hearing, the Judge found Mr Day had been grossly negligent in flouting the protection afforded the SSSI and sentenced him to a fine of £500,000 less 10% to reflect his, belated, guilty plea, so £450,000. The Judge remarked that the sentence would have been £1,000,000 had he found the conduct deliberate. Mr Day was also ordered to pay full prosecution costs of a little more than that figure.
The Court of Appeal rejected Mr Day’s appeal against sentence on every point. The Court noted that the sentence had been handed down before its decision in *R v Sellafied* [2014] EWCA Crim.49; [2014] Env LR 19, which gave guidance as to the approach to fines to be imposed on companies of very significant size. Given the appellant’s wealth, a fine ‘significantly greater than that imposed by the judge would have been amply justified for his grossly negligent conduct in pursuit of commercial gain, particularly when so seriously aggravated by his conduct in obstructing justice’ [46].

The irony was that Natural England had been content to accept summary jurisdiction, which, had Mr Day agreed, would have meant a fine limited to £20,000 for each of the two offences for which Mr Day was convicted.

The Court of Appeal also took the opportunity to note, obiter dicta, that the *Empress Car* approach to causation well known to environmental lawyers was much more likely to apply to the s.28P(1) offence than the narrower *R v Hughes* test applied to causing death by driving in circumstances defined in s.3ZB of the Road Traffic Act 1998 [23].

**N. COSTS IN ENVIRONMENTAL JR**

The judgment of the Court of Appeal in *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012; [2015] 1 WLR 62 confirmed the fears of those who specialise in claimant nuisance actions; the UK courts will rarely countenance costs protection for claimants bringing nuisance actions by reason of the Aarhus Convention. However, the fact that the Court of Appeal was willing to countenance them at all does represent progress.

The underlying claim in *Austin* concerned the effects of a land reclamation project carried out by the defendant opencast coal mining company. The claimant complained of nuisance by reason of the development, which she said was due to breach of the conditions attached to the planning permission that authorised it. She brought proceedings in private nuisance and sought a PCO. The court at first instance (Judge Milwyn Jarman QC) found that the claimant was a woman of modest means, that public funds were not available to fund the litigation, that ATE insurance policies were prohibitively expensive, that she had a reasonably arguable case and that others living in
the vicinity of her home would benefit were she successful, but that it was far from clear
it would have any wider impact. He refused a PCO.

The Court of Appeal rejected the Claimant’s appeal, which was brought on the basis, first,
that in light of the well-established principle of English law that, where possible, UK law
should be interpreted and applied in harmony with the UK’s international obligations, the
Court should exercise its discretionary powers of costs management to give effect to
Art.9(4) of the Aarhus Convention, second, and in the alternative, that the obligation to
ensure the proceedings should not be prohibitively expensive has become binding on the
domestic courts via EU law, because (a) the Convention has, in part, been incorporated
into the EIA Directive which is part of domestic law, and (b) the EU itself is a party to the
Convention [10-11].

The Court accepted that private nuisance actions were, in principle, capable of
constituting procedures which fall within the scope of Art.9(3) of the Convention, given
the potentially significant public interest in the wider environmental benefits they may
bring if successful [17]. But this would not be true of all private nuisance actions, by any
means; complaints such as those about damage from tree roots or water leaks from an
upstairs flat, concerning only the claimant’s property with no wider public interest, would
not fall within Art.9(3). There ‘must be a significant public interest in the action to justify
conferring special costs protection on the claimant’ [21]. As the Court put it at [22]:

"...there are two requirements which have to be met before a particular claim can
fall within the scope of (Art.9(3)). First, the nature of the complaint must have a
close link with the particular environmental matters regulated by the Convention,
even although the action in private nuisance does not directly raise them. Second,
the claim must, if successful, confer significant public environmental
benefits...if...the purpose of the claim was principally to protect private property
interests and any public benefit was limited and accidental, it ought not to attract
the procedural costs protections afforded by article 9(4)."

However, it rejected the Claimant Appellant’s submission that the EIA Directive was
applicable [35] (no great surprise there), and applying R v Home Secretary ex parte Brind
[1991] 1 AC 696, rejected the Claimant’s further submission that the Court was obliged to
exercise its discretion to grant a PCO where the failure to do so would involve a breach of
Aarhus [37]. The Court said this [39]:

40
“39. In our view, therefore, the article 9.4 obligation is no more than a factor to take into account when deciding whether to grant a PCO. It reinforces the need for the courts to be alive to the wider public interest in safeguarding environmental standards when considering whether or not to grant a PCO.”

Whilst the mere fact a claimant has a personal interest in litigation does not bar a PCO [44] the Court of Appeal had no doubt that the public benefit in the claim was both relatively limited and uncertain and, as such, the claim did not fall within Art.9(3). Even if it did, the Court would not have disturbed the Judge’s finding against a PCO, given the strong element of private interest in the claim, the lack of satisfactory evidence that she had adequately explored the alternative, potentially cheaper, statutory route of contacting the local planning authority with her complaints and that the defendant, a private body, had already had to pay out substantial sums in costs in relation to the previous claim for a group litigation order unsuccessfully brought by the claimant in Austin v Miller Argent (South Wales) Ltd [2011] Env LR 650.

The judgment of the Court of Appeal in Venn v Secretary of State for Communities and Local Government [2014] EWCA Civ 1539; [2015] 1 WLR 2328, which builds upon the decision in Austin v Miller Argent, is surely a fine example of a pyrrhic victory for both sides.

Venn concerned a statutory challenge pursuant to s.288 of the Town and Country Planning Act 1990 (“TCPA”) to the decision of the Secretary of State’s Inspector to grant permission on appeal for a dwelling in a residential side-garden in Lewisham. The claimant lived next door. A particular basis of her challenge was that the Inspector had failed to take into account an emerging Local Plan policy that set its face against such “garden grabbing”. She sought, and was granted, a protective costs order capped at £3,500 in respect of adverse costs at first instance, in light of her means. Lang J ordered the PCO having concluded that the claimant could not avail herself of the protection afforded by CPR 45.41 for ‘Aarhus Convention claims’ as defined by that rule, as CPR 45.41 on its plain terms applied only to applications for judicial review. On appeal, that point was common ground. The live issues were whether the claimant’s challenge was an environmental challenge falling within Art.9(3) of the Aarhus Convention and, if so, whether the Corner House rules were to be applied differently for environmental claims, so as to give effect to Aarhus.
The Court (Sullivan LJ giving the single judgment, with which Gloster and Vos LJJ agreed), noted that the definition of “environmental” in Aarhus is a broad one, and arguably broad enough to catch most, if not all, planning matters, particularly in light of the decision of the CJEU in *Lesoochransarske VLK v Slovenskej Republiky (Case C-240/09)* ("Brown Bear")\(^{15}\) [11]. It rejected the Secretary of State’s submission that Art.9(3) was nonetheless not engaged as the claimant was not challenged an act/omission by a public authority which contravened a provision of national law relating to the environment, given that the matter the claimant said the Inspector had missed was simply emerging local plan policy. Sullivan LJ offered a swift rebuttal of that analysis, noting that Parliament had chosen to implement much of the UK’s environmental protection through its sophisticated town and country planning system. EIA being a case in point. Given that, it would deprive Art.9(3) of much of its effect, contrary to Brown Bear, if a distinction were drawn between policies which relate to the environment at national or local level and the law which, whilst not relating directly to the environment, requires that those policies be prepared and taken into account (and sometimes followed unless material considerations indicate otherwise, e.g. s.38(6) of the Planning and Compulsory Purchase Act 2004) [17]:

“In the Aarhus context the UK’s combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as "national law relating to the environment".”

On that basis the claimant’s s.288 challenge fell within Art.9(3) Aarhus. However, absent any directly effective EU environmental directive incorporating the Aarhus principles, this did not assist her. The Court rejected her submissions that CPR 45.41 marked a change from the previous position, whereby the claimant had to satisfy the *Corner House* principles (flexibly applied and with allowance made for a private interest, as explained in *Austin v Miller Argent*) in order for a PCO to be justified. It was telling that a conscious decision had been taken to afford Aarhus costs protection to judicial review only, not statutory challenges [33]. That this meant the question of whether a claimant seeking a quashing order would enjoy costs protection under a PCO depended on the identity of the decision maker, local authority or Secretary of State, was anomalous and regrettable but a matter for Parliament. Similarly that this meant the UK would be in breach of its obligations under Aarhus in relation to such statutory challenges and in specific breach were the claimant’s application for a PCO refused, given the judgment of the CJEU in

\(^{15}\) [2012] QB 606.
Commission v UK (Case C-530/11); [2014] 3 WLR 853. However, the Court could not remedy that ‘flaw’ by exercise of judicial discretion; action by the legislature would be required [35].

Note that the grant of a PCO in Kendall v Rochford District Council [2014] EWHC 3866 (Admin); [2015] Env LR 2, which grant imposed the same reciprocal caps as would apply under CPR r.45.43 and PD 45, was made before the judgment of the Court of Appeal in Venn, but did not rely upon CPR r.45.41. It may be that Lindblom J would have granted a PCO in any event, applying Corner House principles flexibly, even had his decision come after Venn.

In better news for Aarhus claimants, the Court of Appeal in R (HS2 Action Alliance & anr) v Secretary of State for Transport & anr [2015] EWCA Civ 203; [2015] 2 Costs LR 411 has held that public authority claimants enjoy the costs protection afforded by CPR r.45.41 (a cap of £10,000 in respect of adverse costs) as much as any other non-individual claimant.

The Court (Sullivan LJ giving the single judgment, with which both Longmore and Lewison LJJ agreed) noted that the touchstone to Aarhus costs protection, establishing a claim was an “Aarhus Convention claim” for the purposes of 45.41(2), turned on the nature, or claimed nature, of the claim, not the nature of the claimant [12]. Once that issue has been resolved, further recourse to the Aarhus Convention in relation to costs protection is unnecessary, as the terms of CPR r.45.43 and the Practice Direction are clear and draw no distinction that would exclude public authorities from their scope. The word “claimant” in the Practice Direction means what it says [15]. To hold otherwise would undermine legal certainty and promote satellite litigation, the very things the government wished to avoid through the Aarhus costs protection rules [14]. Moreover, CPR r.45.43 expressly provides that the Practice Direction may prescribe a different amount for the costs cap depending on the nature of the claimant.

As to whether the protection conferred by Art.9(3) of the Aarhus Convention in respect of, inter alia, prohibitively expensive costs applies only to members of the public as defined in Art.2(4), not public authorities as defined in Art.2(2), with the Art.2(2) and 2(4)
definitions being mutually exclusive, that was a matter for the Aarhus Compliance Committee [22].

P. OTHER: AIR QUALITY & FRACKING

If 2014/2015 have not been particularly good to the planet, they have at least been particularly good to ClientEarth in the courts, as first the decision of the Commission to launch infraction proceedings against the UK, then the November 2014 decision of the CJEU, then the April 2015 decision of the Supreme Court, marked a rousing crescendo to years of litigation over the UK (non) compliance with the Air Quality Directive.16

The Supreme Court considered the UK Government’s admitted failure to secure compliance with the air quality directive (Directive 2008/50/EC) in relation to limits for nitrogen dioxide in R (Client Earth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28. A previous Supreme Court judgment in May 2013 had declared the UK to be in breach of article 13 (which was, in any event, accepted by the UK Government) before making a reference to the CJEU about the correct interpretation of articles 13 (limit values in respect of nitrogen dioxide “for the protection of human health”), 22 (procedure to postpone compliance date for not more than five years, subject to specified conditions) and 23 (general duty to prepare “air quality plans” for areas in which limits exceeded) of that directive. On this occasion, the Supreme Court had to consider whether the decision of the CJEU (C-404/13) should be interpreted as meaning that the article 22 extension procedure was mandatory.

The CJEU’s reformulation of the first two questions introduced ambiguity as to whether the state was obliged to make an application under article 22. However, the time taken by the instant proceedings meant that the article 22 issue was of no practical significance save for in relation to Annex XV section B of the Directive, which required information on all air pollution abatement measures considered to be included in the air quality plan when an application for postponement was made under article 22. Furthermore, the “critical breach” was that of article 13, which had been continuing for more than five years, and there was no doubt about the national court’s responsibility to secure compliance. The Supreme Court had jurisdiction to make an order and whilst in many circumstances it might be right to accept a suitable undertaking rather than impose a mandatory order,

the Supreme Court considered that “the new government should be left in no doubt as to the need for immediate action” and thus imposed a mandatory order requiring the secretary of state to prepare new air quality plans under article 23(1) by 31 December 2015.

There are few current environmental issues that are as high profile as fracking. As such, a review of the environmental case law of the past year would not be complete without at least passing reference to the issue.

*R (Frack Free Balcombe Residents Association) v West Sussex CC [2014] EWHC 4108 (Admin)* was a high profile application to challenge Cuadrilla's “*temporary permission for exploration and appraisal comprising the flow testing and monitoring of the existing hydrocarbon lateral borehole along with site security fencing, the provision of an enclosed testing flare, and site restoration*” at its Exploration Site in Balcombe. As will no doubt be recalled, the site had been the scene of a number of protests when operations took place under an earlier planning permission. It is also worth noting that the proposed development had required a number of statutory authorisations from the Environment Agency, the Department of Energy and Climate Change and the HSE.

The Claimant applied for judicial review on relating to the assertion that the local authority's planning officer had wrongly advised the committee in five respects. First, that it should leave matters such as pollution control, air emissions and well integrity to the EA, the HSE and other statutory bodies. Second, as to the views of Public Health England on air emissions monitoring and of the HSE on well integrity. Third, to treat evidence of Cuadrilla’s past breaches of planning conditions attached to an earlier permission as immaterial. Fourth, that the number of objections received was immaterial. Fifth, that the issue of the costs generated by protests at Cuadrilla’s activities was immaterial.

Gilbart J refused the Claimant's application in relation to all five matters. Notably, it was held that there was ample authority to the effect that the planning authority could, in the exercise of its discretion, consider that matters of regulatory control could be left to the statutory regulatory authorities. In the present case, the existence of the statutory regimes applied by the Environment Agency, Department of Energy and Climate Change and the HSE showed that there were other mechanisms for dealing with the Claimant's environment-related concerns. Those concerns were actually a merits argument rather
than a challenge to the lawfulness of the decision, given that it related to the assessments made by the statutory bodies rather than the planning committee’s reliance upon the same. Furthermore, in relation to the fourth ground of challenge, the committee had been well aware of the substantial opposition and was directed to the scale of the opposition, including the number of objections, but was also advised to look at the issues raised rather than the numbers raising them. It was held that there was nothing wrong with that advice in the context of the case.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 39 Essex Street, London WC2R 3AT. 39 Essex Chambers’ members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 39 Essex Street, London WC2R 3AT. The material within this Paper is only intended to provoke and stimulate. It does not constitute advice. Detailed professional advice should be obtained before taking or refraining from taking action in relation to this material. Further updates plus regular newsletters can be obtained via Chambers website: www.39essex.com.