



## EDITORIAL COMMENT

### The Editorial Board

This month's newsletter includes a range of topical articles which are likely to be of interest to planning, environment and property practitioners.

The first article is written by Stephen Tromans QC and Justine Thornton QC. It sets out the main environmental issues which have tended to crop up alongside major infrastructure projects. The paper discusses HS2 and Crossrail 2, the proposed Heathrow Expansion and Nuclear Newbuild. All of which are likely to be grabbing the headlines for the next few years.

The second article by Marion Smith QC reviews three recent first instance decisions which illustrate the approach which the Courts are adopting to the conditional grant of permission to change your expert witness at Court and in particular the broad approach to any disclosure condition.

The third submission is by Victoria Hutton and discusses two recent Court decisions on both the statutory and common law duties to give reasons for grants of planning permissions.

Finally, we have included a very thorough briefing paper prepared by five members of 39 Essex's PEP team: Peter Village QC, Richard Harwood QC, James Strachan QC, Ned Helme and Philippa Jackson. The briefing note provides readers with almost everything one needs to know about the Government's recent Housing White Paper.

## Contents

1. EDITORIAL COMMENT  
**The Editorial Board**
2. FORTHCOMING LARGE INFRASTRUCTURE PROJECTS – THE MAIN ENVIRONMENTAL ISSUES  
**Stephen Tromans QC and Justine Thornton QC**
5. THE CONSEQUENCES OF SECOND THOUGHTS WHEN DEALING WITH EXPERT EVIDENCE  
**Marion Smith QC**
6. THE DUTY TO GIVE REASONS FOR PLANNING DECISIONS – RECENT CASE LAW  
**Victoria Hutton**
9. HOUSING WHITE PAPER: FIXING OUR BROKEN HOUSING MARKET  
**Peter Village QC, Richard Harwood QC, James Strachan QC, Ned Helme and Philippa Jackson**
16. EDITORIAL BOARD
17. CONTRIBUTORS

### Editorial Board

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## FORTHCOMING LARGE INFRASTRUCTURE PROJECTS – THE MAIN ENVIRONMENTAL ISSUES

**Stephen Tromans QC and  
Justine Thornton QC**

### Introduction

Large infrastructure projects look set to be a feature of post Brexit Britain as the Government indicates its policy support for the second phase of HS2; Crossrail and a third runway at Heathrow. It remains to be seen whether the nuclear new build programme is affected by the recent political decision that the UK will withdraw from the Euratom Treaty. Large projects of this nature inevitably raise environmental and procedural issues outlined in this article.

### Rail: HS2 (Phase 2) and Crossrail 2

HS2 Phase 2 and Crossrail 2 will be major rail projects over the next five years. They will proceed by way of Hybrid Bill, which is a very different procedure from a Development Consent Order. The scheme is promoted by Act of Parliament. The principle of the scheme is debated by Parliament. There then follows a quasi-judicial stage for those directly and specially affected in front of Select Committees in both Houses.

A recent report from the House of Lords Select Committee in HS2 (Phase 1) is likely to set the standard for like HS2 (Phase 2) and Crossrail, as well as for smaller scale development in certain respects.

The House of Lords Select Committee in HS2 (Phase 1) was chaired by a former Supreme Court Judge, Lord Walker. The Committee produced its report in December 2016. The report should be viewed as authoritative having been largely written by Lord Walker after quasi-judicial Committee hearings.

Four particular areas of interest stand out. They are: Use and review of the Hybrid Bill procedure; Compensation; No net loss of biodiversity and ancient woodland and Repeal of Clause 48 of the Bill.

The Committee was scathing about the petitioning process for hybrid Bills, which is subject to an ongoing Parliamentary review:

*"Time and again during our proceedings we encountered*

*difficulties with the current procedure. It became abundantly clear to us that petitioners found it cryptic and complex to understand, and labyrinthine to navigate. We hope that the review can, in due course, devise a radically reformed Hybrid Bill procedure which rationalises and clarifies the current system. We sincerely hope to have been the last Select Committee to operate under the current procedure."*

Compensation was one of the Committee's principal concerns, referring to the compensation schemes as "complex, obscure and inadequate". The main changes recommended by the Committee included:

- Recognising that prolonged disturbance from construction of the railway may amount to a compelling reason why someone might need to sell their house and move, for which they should be compensated.
- Ending the policy distinction whereby rural areas were treated more favourably than urban homes.
- Drawing attention to the serious defect in the Statutory Code whereby blight, in the form of the substantial fall in market value of houses, because of the prospect of a large infrastructure project, is uncompensated.

The compensation schemes are under government review.

### No Net Loss of Biodiversity

HS2 phase 1 was the first major infrastructure project to seek to achieve "no net loss in biodiversity" at a route-wide level from the railway. This domestic principle is potentially of wider significance given Brexit and the search for post Brexit environmental settlement. It stems from the government's policy objective that there should be no net loss of biodiversity from development and a manifesto commitment to be the first generation to leave the environment of England in a better state than it was inherited.

No net loss can be measured by an offsetting tool. It gives a unit value to biodiversity lost so it can be traded for the purposes of compensation for loss of biodiversity. DEFRA produced a matrix for smaller scale development

proposals, which HS2 adapted it for the long linear development of a railway. Particular issues that arose with the matrix in front of the Lords Committee were the inclusion in the matrix of what Natural England considered to be “irreplaceable” habitats, i.e. ancient woodland and SSSIs. Natural England’s objection was founded on the basis that these habitats cannot be traded or compensated because they are irreplaceable.

Having heard evidence on the issues, the Committee said it might be sensible to remove SSSIs/ ancient woodland for relatively small scale developments, but not for much larger projects. Nonetheless, HS2 has agreed to take out ancient woodland from the metric. Compensation for ancient woodland will be via a specific fund. The issue will be dealt with in the forthcoming 25 year plan for the environment to be produced by DEFRA. Natural England also recommended that for every hectare of ancient woodland lost, the aim should be to create 30 hectares of new woodland. The House of Lords rejected this as lacking in evidential basis.

### Removal of Clause 48

The Committee strongly criticized and removed, Clause 48 of the HS2 bill which would have conferred on the Secretary of State power to acquire land by compulsory purchase if he or she considers “that the construction or operation of Phase One of High Speed 2 gives rise to the opportunity for regeneration or development of any land”. The Committee said the powers were very wide, unnecessary and undesirable and that:

*“it is not sound law-making to create wide powers permitting the expropriation of private property on the strength of ministerial statements, not embodied in statute, that the powers would be used only as a last resort.”*

### SEA and EIA and hybrid Bill schemes

Robust promoters of forthcoming infrastructure projects proceeding by way of Hybrid Bill procedure may decide to dispense with strategic environmental assessment, following the decision of the *Supreme Court in R(HS2) v Secretary of State* [2014] UKSC 3. The Supreme Court gave a clear indication that large infrastructure projects subject to the Hybrid Bill process are unlikely to be subject to strategic environmental assessment on the basis that Parliament is the ultimate decision maker. As Lord Justice Sullivan recognised in the Court of Appeal,

this does potentially leave a gap in environmental protection in relation to large infrastructure projects going through the Hybrid Bill process. Any concerns of the European Commission in this regard may now not matter because of Brexit.

Coordinated and joint procedures for SEA and EIA are acceptable. The main substantive difference is that Strategic Environmental Assessment requires more detail on the alternatives. In the circumstances, prudent Promoters may simply focus on EIA together with an alternatives report, which considers strategic alternatives to chosen infrastructure, so as to avoid the risk of any legal challenge.

Environmental Assessments have mushroomed into vast documents (for example, there were 50,000+ pages for HS2 Phase 1 Environmental Statement). There is a legitimate and lawful interest by Promoters in shortening assessments into more manageable documents.

### Development Consent Orders

#### Air: Heathrow Expansion and air quality

In October 2016, the government announced its policy support for a third runway at Heathrow, subject to assurances on air quality, noise and carbon. Air pollution is likely to loom large in objections to the scheme because Heathrow is a major hotspot for exceedances of NO<sub>2</sub>. The health consequences of air pollution emphasise the seriousness of the issue.

The Government may also be constrained by the recent decision in *ClientEarth (No. 2) v Secretary of State for the Environment, Food & Rural Affairs* [2016] EWHC 2740 (Admin). The decision is a sequel to *ClientEarth (No. 1)* in the Supreme Court in April 2015. *ClientEarth* challenged the government over its air pollution plans. The Supreme Court ordered the UK to produce a plan and keep non compliance as short as possible. *ClientEarth (No. 2)* established was that Member States’ discretion under Article 23 is “narrow and greatly constrained” because they are required by EU Law to reduce air pollution as quickly as possible. The Court held that the Government could not rely on the costs of action to justify delay in reducing air pollution. Further, the Government’s approach to air quality modelling was flawed.

The Government has however had a recent victory in *R(Hillingdon & Oths) v Secretary of State for Transport* [2017] EWHC 121 (Admin). The Court struck out a challenge, on inter alia, air pollution grounds, to the draft National Policy Statement supporting a third runway at Heathrow. The Court struck out the challenge on the basis it has no jurisdiction under the Planning Act to hear the challenge at the present time. The Act confines challenges to an NPS to a particular 6 week period defined by reference to the designation or publication of an NPS, not during its (sometimes lengthy) preparation. Whilst then a NPS is protected from challenge during its preparation, conversely it appears that a challenge can be brought to an NPS on publication based on events many years beforehand (eg alleged bias by the Airports Commission).

The Claimants have decided not to appeal. However, it seems unlikely that this marks the end of the litigation road for Heathrow.

### **Nuclear New Build**

Nuclear New Build is governed by National Policy Statement EN6 Nuclear Power Generation (July 2011). Whilst most NPSs are not site specific, EN6 is, identifying sites at Hinkley Point, Horizon Wylfa Newydd; NuGen Moorside-Westinghouse AP-1000 PWR, Oldbury Gloucestershire, Sizewell C Suffolk and Bradwell in Essex.

Nuclear power stations are legally complex projects, with a number of intersecting legal regimes including: DCO; planning permission; environmental consents; site licence for safety regimes and, often, marine licences.

Hinkley Point C is the most advanced. It obtained development consent (DCO) in March 2013. The DCO survived a legal challenge on *Transboundary EIA Grounds in R (An Taisce) The National Trust for Ireland v The Secretary of State for Energy & Climate Change* [2014] EWCA Civ 1111.

Environmental Issues include developing site-specific safety case, following generic design approval on safety grounds. Management of safety has been modified greatly since Fukushima. The safety case must look at unlikely extreme events and serious things like core meltdown. Emergency response arrangements have

also become much more important after Fukushima. Ecology is a particular issue, particularly marine and terrestrial because the power stations are usually on the coast and many are in pretty sensitive areas, e.g. marine protected areas. Waste disposal remains a significant issue, not only for new build for historic waste and existing waste. 2017 will be significant in this context with a draft NPS on proposals for disposal of high level and intermediate level waste.

The main topical issue in the nuclear field is the realisation, following publication of the Bill empowering the Government to give notice to leave the EU under Article 50, that Brexit will also involve "Brexatom": the UK will cease to be a member of the European Atomic Energy Community as well as the European Union. While the two Treaties and Communities are legally distinct, they share common institutions including the CJEU and Commission, and continuation of membership of Euratom after leaving the EU would be both legally and politically untenable. The announcement has however caused consternation within the nuclear industry. It is most unlikely that it will have any real impact on standards of nuclear safety, since the Euratom approach is largely derived from international conventions of which the UK will remain a member, though if course these will not have the same legal potency as Euratom regulations and directives. The issues which could be much more concerning relate to international agreements for the supply of nuclear materials, equipment and technology. The UK's existing nuclear industry and its new build programme will be dependent on such transfers. These currently take place under agreements between Euratom and third parties such as the US and Japan. The UK will need to negotiate and enter into its own agreements to ensure the continuity of supply which is vital. However, such agreements are predicated in many cases on the UK having in place a system of independently verified safeguards to account for fissile and other nuclear material to prevent its diversion to non-peaceful uses. This function has for many decades been performed by Euratom. The UK will have to act urgently in establishing the necessary legal and practical arrangements if a potentially serious hiatus in the new build programme is to be avoided.



## THE CONSEQUENCES OF SECOND THOUGHTS WHEN DEALING WITH EXPERT EVIDENCE

**Marion Smith QC**

You may need the court's permission to change your expert, from Expert 1 to Expert 2, during civil proceedings. It is now well established that such permission will usually be conditional on the disclosure of documents relating to Expert 1's expert opinion. The early cases made it clear that this disclosure condition applied to Expert 1's final signed report prepared for disclosure under CPR 35, if it existed, or a "draft interim report".<sup>1</sup> Three recent first instance decisions illustrate the present broad approach to the formulation of the disclosure condition and the specific documents that it may catch: *BMG (Mansfield) Ltd v Galliford Try Construction Ltd*,<sup>2</sup> *Coyne v Morgan*,<sup>3</sup> and *Allen Tod Architecture Ltd (In Liquidation) v Capita Property and Infrastructure Ltd*.<sup>4</sup>

The disclosure condition can now be framed broadly to require disclosure of any report or document provided by Expert 1 to his instructing solicitors in which Expert 1 expressed opinions or indicated the substance of such opinions on the matters in issue in the proceedings.<sup>5</sup>

A series of such reports and documents may be disclosable. The history of the TCC proceedings and the material Expert 1 produced in *Allen Tod* is shown in the Table. The Claimant wanted to change Experts and voluntarily disclosed to the Defendant its September 2014 and January 2016 instructions to Expert 1 and Expert 1's February 2016 draft report.

The Claimant however submitted that it was not necessary or proportionate to include as part of the disclosure condition Expert 1's notes on the issues sent on 19 December 2014, Expert 1's "preliminary report" sent on 6 July 2015 and any documents in which Expert 1 provided his views before the April 2016 mediation.

HHJ David Grant disagreed. In his view the evidence

Dates	TCC Proceedings	Dealings between C's solicitors ("C") and Experts
January 2010	C's letter of claim to D	
December 2013	C issued proceedings	
April 2014	Claim Form and P/C served	
September 2014	Defence	C sends Expert 1 written instructions
December 2014		Expert 1 emails C "with responses to some of the questions ... put to him by counsel" attaching his notes to date.
May to June 2015		C presses Expert 1 for "his written report"
July 2015		Expert 1 emails C attaching his "preliminary report"
September 2015	CMC: expert evidence directions	
November 2015	Both parties serve Amended S/C	
January 2016		Conference with Expert 1. Afterwards C sends supplementary instructions to Expert 1.
February 2016		Expert 1 produces "draft report".
April 2016	Mediation	Expert 1 provides his views for the mediation.

before him showed that Expert 1's notes and preliminary report were documents in which Expert 1 expressed his opinion on the issues in the case and ought therefore to be part of the disclosure condition. He acknowledged that there could be no general rule that everything is disclosable.<sup>6</sup> Otherwise the main express guidance he gave as to why such documents were disclosable was that the court would exercise its power reasonably on a case by-case basis, having regard to the circumstances of the particular case.<sup>7</sup>

<sup>1</sup> *Vasiliou v Hajigeorgiou* [2005] EWCA Civ. 236, [2005] 1 WLR 2195 at paragraphs 25, 30 - 31

<sup>2</sup> [2013] EWHC 3183 (TCC) [2014] CP Rep 3

<sup>3</sup> 166 Con LR 114, [2016] BLR 491

<sup>4</sup> [2016] EWHC 2171 (TCC)

<sup>5</sup> *BMG Mansfield* paragraph 39 and *Allen Tod* paragraph 41

<sup>6</sup> *Odedra v Richard Ball* [2012] EWHC 1790 paragraph 19

<sup>7</sup> Paragraph 42

The three cases show that the identity of the author of the material recording the expert's opinion matters. Attendance notes or memoranda, made by a party's solicitors, of discussions with Expert 1 are treated differently from documents generated by Expert 1 personally. Documents generated by Expert 1 personally are disclosable even if the change of expert is not expert shopping or only such to a faint degree. Documents generated by a party's solicitors such as attendance notes are only disclosable if there is a very strong case or strong evidence of expert shopping.<sup>8</sup>

It is also clear that the disclosure condition applies to Expert 1's expert opinion on the issues in the case – nothing else. It does not apply to Expert 1's views on the other parties' experts, his/her instructing solicitor's tactical thinking about the conduct of the litigation or to "without prejudice" discussions between Expert 1 and the other party's expert or any other person acting on behalf of the other side. These parts of the written material can probably be redacted before disclosure.<sup>9</sup>

Apart from highlighting the importance of selecting the right expert from the beginning, the key issues to be borne in mind by the case handler are these:

- The case handler and the appointed expert need to appreciate that there is a risk that an extensive range of confidential and privileged written material relating to a party selected expert could be disclosed to the other side.
- This risk needs to be managed and the case handler needs to consider:
  - what questions the expert is asked to address;
  - what material the expert is provided with; and
  - how many times the expert is asked to provide a preliminary report or to set out the substance of his or her opinion. Specifically the case handler should consider whether simply to rely on his or her own notes of any conversation or discussion with the expert (which are less likely to be disclosable) rather than seek a further written opinion.
- Where fees are no object consider using a shadow expert in addition to the expert who gives evidence.

A shadow expert acts as an advisor and help parties and their legal advisors to understand the technical aspects of the case, identify the factual assumptions and documents to be provided and frame the appropriate questions for the other expert to answer.

- Finally, when dealing with permission to change experts, draft any waiver condition carefully and include specific permission to redact where appropriate.

## THE DUTY TO GIVE REASONS FOR PLANNING DECISIONS – RECENT CASE LAW

**Victoria Hutton**

This brief article discusses two recent cases dealing with the duty to give reasons for the grant of planning permission. The first was the decision of the High Court in *R(oao Shasha) v Westminster City Council* [2016] EWHC 3283(Admin) promulgated on 19 December 2016 which dealt with the statutory duty on officers to give reasons for granting permission under delegated authority. The second is the decision of the Court of Appeal in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71 which concerned the extent of a common law duty on a planning committee to give reasons for a grant of permission.

### Shasha

The duty to give reasons was not the central feature of this case. It arose because the Defendant Council sought to rely upon a witness statement from the decision-making officer in order to further 'explain' their reasons for granting planning permission for a basement development at Portman Mansions, Westminster which would result in material adverse amenity impacts to the Claimant's property on the lower ground floor. The Claimant argued that the witness statement was inadmissible as there was a statutory duty to give reasons under the Openness of Local Government Regulations 2014 and therefore the principles in *Ioannou v Secretary of State for Communities and Local Government* [2013] REHC 3954 (Admin) at [51] and *R v Westminster City Council exp Ermakov* (1995) 28 HLR 819 ought to apply. I.e. only evidence which seeks to elucidate or exceptionally to correct or add to the reasons ought to

<sup>8</sup> BMG paragraphs 32 – 38, Coyne paragraph 31, Allen Tod paragraph 45

<sup>9</sup> BMG paragraphs 29 – 30, Coyne paragraph 35, Allen Tod paragraph 46

be admissible.

The Defendant argued that there was no such statutory duty to give reasons and therefore the witness statement was not inadmissible on *Ermakov* principles.

Regulation 7 of the Openness of Local Government Regulations 2014 states:

- (1) *The decision-making officer must produce a written record of any decision which falls within paragraph (2).*
- (2) *A decision falls within this paragraph if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either –*
  - (a) *under a specific express authorisation; or*
  - (b) *under a general authorisation to officers to take such decisions and, the effect of the decision is to –*
    - (i) *grant a permission or license;*
    - (ii) *affect the rights of an individual; or*
    - (iii) *...*
- (3) *The written record must be produced as soon as reasonably practicable after the decision making officer has made the decision and must contain the following information –*
  - (a) *the date the decision was taken;*
  - (b) *a record of the decision taken along with reasons for the decision;*
  - (c) *details of alternative options, if any, considered and rejected; and*
  - (d) *where the decision falls under paragraph (2)(a), the names of any member of the relevant local government body who has declared a conflict of interest in relation to the decision.*
- (4) *The duty imposed by paragraph (1) is satisfied where, in respect of a decision, a written record containing the information referred to in sub-paragraphs (a) and (b)*

*of paragraph (3) is already required to be produced in accordance with any other statutory requirement'*

Surprisingly, although this regulation has been in force since 2014 this was the first case in which it had been relied upon by a Claimant to establish a statutory duty to give reasons.

John Howell QC held that Regulation 7 did indeed give rise to a statutory duty to give reasons. He held '*there was an obligation on the decision-making officer in this case to produce a record of the decision to grant planning permission and the reasons for it as soon as practicable after the decision-making officer made the decision.*'

Although the decision-making officer had not produced reasons after the decision had been made, no point was taken on this by the Claimant. The Judge stated that this was understandable and held that:

*'Where members of an authority take a decision, it is a reasonable inference, in the absence of contrary evidence, that they accepted the reasoning in any officer's report to them, at all events where they follow the officer's recommendation: see Palmer v Hertfordshire County Council [2016] EWCA Civ 1061 per Lewison LJ at [7]. In my judgment the same inference in the like circumstances is reasonable when one officer takes a decision having received a report from another officer containing a recommendation.'* [32]

The Judge then went on to examine the standard of reasons which were required under Regulation 7. He held:

*36 In my judgment the reasons to be produced for such a decision should make clear whether or not the decision to do so was in accordance with the development plan and, if it was not, what material considerations indicated that planning permission should be granted otherwise than in accordance with it. It may be clear whether or not the development was considered to be in accordance with the development plan, however, even when that is not stated explicitly: see Secretary of State for Communities and Local Government v BDW Trading Ltd [2016] EWCA Civ 493 per Lindblom LJ at [25], [27].*

*37 In R (Hawksworth Securities Plc) v Peterborough City*

*Council [2016] EWHC 1870 (Admin) Lang J suggested (obiter) at [87], that, where fairness required a planning authority to give reasons for a decision to grant planning permission, "it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission." But, as Laws LJ stated in R (CPRE Kent) v Dover District Council [2016] EWCACiv 936 at [21], "Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State." In my judgment, as the guidance provided in Lord Scarman's speech indicates, the reasons given by an officer for a decision granting planning permission also need to "deal with the substantial points that have been raised" and that may well involve giving reasons for rejecting any objections which raise substantial points to the grant of planning permission. Such reasons, however, may be briefly stated.*

This decision has therefore confirmed that the Openness of Local Government Regulations 2014 do give rise to a statutory duty to give reasons where a planning decision is delegated to an officer either by general or specific delegation and the decision gives rise to the grant of a permission. Although Regulation 7 states that reasons should be provided as soon as possible after the decision is taken, it will often be appropriate for an inference to be made that the officer's report which informed the decision are the reasons for the grant of permission. However, local authorities may wish to consider whether to specifically adopt any relevant officer's report when granting permission under delegated authority.

### **The Oakley Decision**

The issue in the case was whether the planning committee of South Cambridgeshire District Council had a duty to give reasons for granting planning permission for a development of a football stadium on land within the Green Belt.

The planning officer had recommended that permission be refused as the applicants had not demonstrated 'very special circumstances' for their development. The planning committee however did not follow the officer's recommendation. It did not grant planning permission at the meeting where it discussed the application but instead approved the development in principle and

delegated to officers the power to grant permission subject to certain matters being resolved and conditions being imposed. The outstanding issues were resolved and the permission was promulgated some 10 months after the committee meeting.

The challenge was brought on the basis that it was incumbent upon the planning committee to give reasons for their decision.

At first instance Mr Justice Jay rejected the challenge. He held that the mere fact that the committee had disagreed with the officer's recommendation was not enough to trigger a duty to give reasons. Further, he was of the view that there were good reasons for not imposing a common law duty.

The Court of Appeal disagreed. Elias LJ (with whom Patten LJ agreed) gave six reasons for preferring the argument that reasons should always be given unless the reasoning of the decision is intelligible without them:

1. Planning decisions generally affect individuals other than the applicant for permission and they have a legitimate interest in the outcome [45];
2. There did not appear to be any decisions (other than the first instance decision in *Oakley*) where a court has held that reasons did not need to be given even though the reasoning is otherwise opaque [46]-[49];
3. If reasons are required when a committee changes its mind then there is a powerful case for asserting that they should also be required when the committee disagrees with the planning officer [50];
4. If there was no duty to give reasons when the committee disagrees with the officer's recommendation there would be an anomaly between that situation and the case where permission is in line with the officer's views [51];
5. For past decisions to properly be taken into account the basis of any earlier decision needs to be known [52]; and
6. There is no strong argument against the giving of reasons [53].



However, those comments should be regarded as obiter as Elias J made it clear that he was not going to decide the case on the basis of the broad principle advanced by the claimant. He specifically stated '*...I would not decide the appeal on this broad principle. The courts develop the common law on a case by case basis, and I do not discount the possibility that there may be particular circumstances, other than when the reasoning is transparent in any event, where there is justification for not imposing a common law duty. It is not necessary for me to rely upon the broad argument because in my judgement the duty arises under the alternative argument.*' [55].

Further, Lord Justice Sales provided a judgement which dissented in part from that of Elias LJ. He was much more reticent to support the idea of a general common law duty to give reasons for the grant of planning permission. This included the view that such a duty would be burdensome and may dissuade otherwise public-spirited volunteers from sitting on a planning committee [76].

The Court of Appeal went on to find that the particular circumstances of the case gave rise to a common law duty to give reasons. This included the fact that the development involved building upon Green Belt land which was in breach of the development plan together with the fact that the committee decision departed from the officer's recommendation which left the reasoning obscure (see Elias LJ at [60]-[61] and Sales LJ at [80]).

Although the Court stopped short of stating that there was a general common law duty on a planning committee to give reasons for a grant of planning permission, the reasoning of Elias LJ (with whom Patten LJ agreed) provides considerable support to claimants wishing to challenge the inadequate reasoning of a planning committee for such a grant. Further, in circumstances where any grant is contrary to the development plan, reasons will be required.

*Victoria Hutton represented the Claimant in Shasha.*

## HOUSING WHITE PAPER: FIXING OUR BROKEN HOUSING MARKET FEBRUARY 2017

**Peter Village QC, Richard Harwood QC,  
James Strachan QC, Ned Helme and  
Philippa Jackson**

### Introduction

On 7 February 2017, the Department for Communities and Local Government ("DCLG") published its much trumpeted and long awaited Housing White Paper, together with a flurry of associated documents. The White Paper is called "Fixing our broken housing market" and it accepts the existence of a housing crisis in emphatic terms: our "broken" housing market is, the Prime Minister tells us in her Foreword, one of the greatest barriers to progress in Britain today. And the White Paper is clear that there is a "moral duty" for everyone involved in politics and the housing industry to tackle the problem.

The underlying issue is simple: for decades, there has been an undersupply of new homes (since the 1970s there have been on average 160,000 new homes each year in England, but there is a broad consensus that England needs in the order of 225,000 to 275,000 or more each year to keep pace with population growth and to start to tackle historic undersupply).<sup>10</sup> But tackling this undersupply has proved profoundly difficult, and although the White Paper aims for a comprehensive approach that "tackles failure at every point in the system"<sup>11</sup> there is much that needs to be done.

The White Paper recognises the problems of affordability and finance which hinder development, the need to promote smaller sites and smaller developers, the role of the public sector and the contribution which planning makes. Our note focuses on the planning aspects and seek to provide some initial thoughts on the difference which the proposals will make. It is important to recognise what parts of the paper are White – as steps which the government will take – and which are Green – being ideas put out for consultation. On some matters such as planning steps to encourage permissions to be built out quickly and policy making processes there

<sup>10</sup> Housing White Paper, page 9.

<sup>11</sup> Housing White Paper, Foreword from the Prime Minister.

is a great deal of debate to be had. James Strachan QC, Philippa Jackson and Ned Helme provide briefings on different aspects, whilst Peter Village QC looks at the measures to speed up housebuilding from the developer's viewpoint.

We will be discussing these issues further in a seminar at 39 Essex Chambers on 29th March 2017.

### **The Housing White Paper and Associated Documents**

The Housing White Paper Collection, as it is referred to on the gov.uk website,<sup>12</sup> consists of the following materials, all published on 7 February 2017:

- a. The Housing White Paper itself, together with the Press Release and Oral Statement to Parliament that accompanied it;
- b. A consultation on the Housing White Paper, running to 2 May 2017;
- c. A consultation on "Planning and affordable housing for Build to Rent" running to 1 May 2017;
- d. The Government response to its consultation on "proposed changes to National Planning Policy" which ran from 7 December to 22 February 2016;
- e. The Government response to its technical consultation on "starter homes regulations" which ran from 23 March to 30 June 2016;
- f. The Government response to its technical consultation on "implementation of planning changes", its consultation on "upward extensions in London" and its consultation on "Rural Planning Review call for evidence", all of which ran from 18 February to 15 April 2016;
- g. The Government response to the Communities and Local Government Select Committee inquiry into the 16 March 2016 Report of the Local Plans Expert Group; and
- h. The Community Infrastructure Levy review: report to Government.

Although not part of the Housing White Paper Collection, 7 February 2017 also saw the publication of the Government response to the DCLG Committee Report on the Consultation on National Planning Policy.<sup>13</sup>

The Housing White Paper itself is a substantial document, running to 106 pages, and separated into four Chapters:

(1) planning for the right homes in the right places; (2) building homes faster; (3) diversifying the market; and (4) helping people now. It includes a substantial Annex providing further detail and consultation on the proposals in Chapters 1 and 2 (but not 3 and 4, other than a separate consultation on Build to Rent proposals in Chapter 3). Many of the changes proposed in the Housing White Paper will require amendments to the National Planning Policy Framework ("NPPF"), and the Government intends to publish a revised NPPF later this year, consolidating the outcomes of the Housing White Paper consultation and the various associated consultations.

### **Local Plans**

The White Paper identifies the failure to have in place up-to-date local plans as one of three key factors behind the country's current housing crisis. This will come as no surprise to either Local Planning Authorities or Developers, and indeed the proposals contained in the White Paper largely reflect the recommendations of the Local Plans Expert Group, which was established in September 2015 to consider this issue.

The paper notes that over 40 per cent of local planning authorities do not have a plan that meets the projected growth in households in their area. In broad terms, the government therefore intends to: (i) simplify and streamline the Local Plan process to speed up plan making, including introducing a standardised approach to assessing housing requirements (discussed below) and; (ii) establish new powers of intervention to ensure that every authority has an up-to-date plan in place.

The Government has also indicated that it will remove the expectation that areas should be covered by a single local plan. Instead, it will set out the "strategic priorities" that each area should plan for, with flexibility over how to achieve these. At the same time, it intends to strengthen expectations about keeping plans up-to-date by requiring them to be reviewed regularly and updated at least every five years. The White Paper also reiterates the Government's commitment to and support for the Neighbourhood Plan process.

<sup>12</sup> <https://www.gov.uk/government/collections/housing-white-paper>

<sup>13</sup> <https://www.gov.uk/government/publications/government-response-to-the-clg-committee-report-on-the-consultation-on-national-planning-policy>

While the need for regular reviews is laudable, it remains to be seen whether this new requirement will help to reduce the cost, time and bureaucracy associated with the Local Plan process. Nor is it currently clear that allowing Local Authorities to have more than one plan – presumably with multiple examinations and the prospect of multiple legal challenges – will help to streamline the Local Plan process.

The government's threat of intervention is also nothing new: a similar statement was made in 2015 by the then Housing Minister, Brandon Lewis. The ability for the Government to compel dilatory local authorities to produce up-to-date plans makes sense, but whether these powers will be effective will presumably depend on the strength of the sanctions available to the Government in the event of non-compliance.

### **Neighbourhood Plans**

The Government shows no signs of curbing its enthusiasm for Neighbourhood Plans. The White Paper states that those plans in force that plan for a housing number have, on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority. The White Paper refers to the separate legislative measures in the Neighbourhood Planning Bill to encourage their preparation, by giving them "full weight" in the planning process as early as possible and measures for streamlining their production and amendment.

The White Paper expresses a Government concern that these plans are being "undermined" because they are vulnerable to speculative applications where the local planning authority does not have a five-year housing land supply. To make such plans more effective, the White Paper announces proposals to amend planning policy so that neighbourhood planning groups can obtain a "housing requirement figure" from their local planning authority. No guidance is given as to how that "housing requirement figure" will be set by local authorities; however, views are being sought in the consultation on the standardised methodology on OAN as to whether it could be used for calculating housing need in a neighbourhood plan area.

This may well be difficult to achieve. A frequent weakness in Neighbourhood Plans is the lack of clear correlation

or realism as to how the housing requirements for the local authority will be met if the Neighbourhood Plan is too restrictive or is not itself based upon a proper understanding of the wider OAN.

Controversially, the Government had already sought to bring in what it regarded as additional policy protection for Neighbourhood Plans against being treated as out-of-date where there is a lack of five year housing supply in the local authority's area. By Written Ministerial Statement of 12 December 2016, the Government stated that relevant policies for the supply of housing in a neighbourhood plan should not be deemed to be 'out-of-date' for 2 years after the statement, or where the neighbourhood plan was no more than 2 years old if the plan allocates site for housing and the local planning authority can demonstrate "a three-year supply of deliverable housing sites". The introduction of this policy without consultation is the subject of an outstanding legal challenge. The White Paper proposes amending this policy (subject to consultation) so that the protection applies where (a) neighbourhoods can demonstrate that their site allocations and/or housing policies will meet their share of local housing need; and (b) the local planning authority should be able to demonstrate through the housing delivery test that, from 2020, delivery has been over 65% (25% in 2018; 45% in 2019) for the wider authority area (to ensure that delivery rates across the area as a whole are at a satisfactory level).

As to (a), this gives rise to the difficulty already mentioned of being able to establish a local "housing requirement figure". As to (b), it is evident that delivery for these purposes will be measured against that local housing requirement figure using the "housing delivery test" that the White Paper seeks to introduce.

### **Objectively Assessed Need for Housing**

The White Paper refers to some local authorities being able "to duck potentially difficult decisions" on delivering housing requirements for their area by coming up with their own methodology for calculating their objectively assessed need (OAN). The importance of an "honest" assessment of such need is identified.

This part of the White Paper refers to a recurring difficulty. An accurate calculation of OAN is of fundamental

importance if one is to plan properly for required housing growth; equally, it is a key ingredient for assessing five years of housing land supply and so when a local plan is out of date. Local authorities are well aware that the higher the OAN, the greater the pressure there will be to find housing for their area and the harder it may be to show the existence of a five year supply. For some local authorities, this has led to the promotion of unrealistically low figures.

The White Paper suggests that arguments over OAN and its calculation have been a factor in making plan-making slow, expensive and bureaucratic. It identifies that a lack of a standard methodology in the existing system creates particular complexity and lack of transparency. Whilst the NPPF contains criteria, it is silent on how the assessment itself is to be done. This has led to many disputes over methodology, be it over factors like the 'Liverpool' or 'Sedgefield' approach, or how one decides whether a local authority is a 5% or 20% buffer authority. History has demonstrated that some local plans have been found unsound at examination due to unrealistic OANs.

The Government believes that the lack of a standard methodology makes the process opaque for local people, as well as meaning that the number of homes needed is not fully recognised. The White Paper therefore anticipates the introduction of a more standardised approach from April 2018. But it does not set out what the standardised approach is proposed to be. Instead it says that consultation is to be published "at the earliest opportunity" this year with the outcome resulting in changes to the NPPF. Any standardised approach will therefore very much depend upon such outcome.

Moreover, the standardised approach will not be mandatory. The Government is proposing incentives for its adoption and will require local authorities that decide not to use to explain this and justify any different methodology to the Planning Inspectorate. The Government proposes to set out what might constitute reasonable justification from deviating from the standard methodology (presumably in the NPPF as well). The Government anticipates that if a local authority does not have an up-to-date local or strategic plan by April 2018, the new methodology for calculating OAN will apply as the baseline for assessing five year

housing land supply and housing delivery in a Council's area the local authority can justify an exception (such as ambitious new plans for its area).

### **Five Year Housing Land Supply**

The White Paper does not signal any change to the policy importance of being able to demonstrate a five year housing land supply and treating policies for the supply of housing as out of date where no such supply exists. The White Paper describes this policy as having been an effective, but blunt tool which has led to an increase in planning by appeal. To reduce this effect, the Government is proposing to amend the NPPF to give local authorities the opportunity to have their housing land supply agreed on an "annual basis" and fixed for a one year period (ie relevant plan policies will be assumed to be up to date for the ensuing year). It seems that this option will be available if local authorities include a 10% buffer within the requirement. It is unclear if this is intended to be a further buffer over the 5% or 20% figure relating to past performance.

The White Paper is light on how this new policy will be delivered in practice. It identifies that annual assessments will need to be prepared in consultation with developers as well as other interests who will have an impact on the delivery of sites (such as infrastructure providers). It anticipates that guidance will set out more detail on how the 5 year land supply must be calculated, including making appropriate allowance for the fact that smaller sites tend to be built out more quickly than larger ones. It also anticipates the need to publish the assessment in draft, following by consideration and agreement by the Planning Inspectorate. But beyond that the proposed mechanisms are unclear and views are sought on what will inevitably be controversial, namely whether PINS should merely be reviewing the draft to see if it is "robust" or whether PINS should be making its own assessment itself.

For those that do not follow this process, the current approach in the NPPF will remain applicable.

### **The Housing Delivery Test**

As part of the drive to stimulate building homes faster, the White Paper promotes an intention to hold local authorities to account through a new "housing delivery test".

The test is intended to show where the number of homes being built is below the relevant target. The first assessment period will be for the financial years April 2014 - March 2017. Statistics on net additional dwellings will be used to derive a rolling three year annual average. Where under-delivery is identified, the Government proposes a tiered approach to addressing the situation that will be set out in national policy and guidance. The White Paper envisages that from November 2017, if delivery of housing falls below 95% of the authority's annual housing requirement, the local authority will need to publish an action plan. If delivery is below 85%, authorities will be expected to plan for a 20% buffer in their five year land supply. From November 2018, if delivery of housing falls below 25% of the housing requirement, the presumption in favour of sustainable development in the National Planning Policy Framework will apply automatically. From November 2019, if delivery falls below 45% the presumption would apply. From November 2020, if delivery falls below 65% the presumption would apply.

The intention is therefore again one of introducing some standardised approach to the consequences of failing to deliver housing at agreed percentages. But the details of the policy and its implementation will be critical and it remains to be seen whether threshold percentages applied in this way are effective in boosting housing delivery in practice.

### Green Belt and Brownfield Issues

In the run-up to the publication of the Housing White Paper, there was much speculation that it would signal a major weakening of Green Belt protection and/or support major releases from the Green Belt. That has turned out not to be the case, and in his Oral Statement to Parliament, Sajid Javid was keen to confirm that the Housing White Paper does not remove any of the Green Belt's protections. This has caused some consternation in the developer community, but has contributed to the Housing White Paper being broadly welcomed by the Campaign to Protect Rural England.<sup>14</sup> The logic appears

to be that only around 13% of land is covered by Green Belt,<sup>15</sup> and only about 11% of total land has been built upon,<sup>16</sup> so that fixing the housing market does not require the Government to renege on its manifesto promise to protect the Green Belt.<sup>18</sup> The realism of that approach remains to be seen.

Yet changes to NPPF Green Belt policy are proposed. The current NPPF states at paragraph 83 that Green Belt boundaries should only be altered in "exceptional circumstances" through the preparation or review of the Local Plan, but the NPPF does not specify what might constitute such circumstances. In a desire to "be more transparent about what this means in practice and so that local communities can hold their councils to account" the Government proposes<sup>18</sup> to amend the NPPF to make clear:

- a. that authorities should amend Green Belt boundaries only when they can demonstrate that they have examined fully all other reasonable options for meeting their identified development requirements;
- b. that where land is removed from the Green Belt, local policies should require the impact to be offset by compensatory improvements to the environmental quality or accessibility of remaining Green Belt land;
- c. that when carrying out a Green Belt review, local planning authorities should look first at using any Green Belt land which has been previously developed and/or which surrounds transport hubs;
- d. that appropriate facilities for existing cemeteries are not to be regarded as 'inappropriate development' in the Green Belt;
- e. that development brought forward under a Neighbourhood Development Order should also not be regarded as inappropriate in the Green Belt, provided it preserves openness and does not conflict with the purposes of the Green Belt; and
- f. that where a local or strategic plan has demonstrated the need for Green Belt boundaries to be amended, the detailed boundary may be determined through a neighbourhood plan (or plans) for the area in question.

<sup>14</sup> [http://www.cpre.org.uk/media-centre/sound-bites/item/4511-housing-white-paper-cpre-reaction?gclid=CJvT\\_IzsgtICFYe\\_7Qodzn0JpA](http://www.cpre.org.uk/media-centre/sound-bites/item/4511-housing-white-paper-cpre-reaction?gclid=CJvT_IzsgtICFYe_7Qodzn0JpA)

<sup>15</sup> Housing White Paper Introduction page 9

<sup>16</sup> Housing White Paper paragraph 1.37

<sup>17</sup> Housing White Paper paragraph 1.38

<sup>18</sup> Housing White Paper paragraphs 1.37-1.40 and A.59-A.64



The Housing White Paper also indicates the Government's intention to explore whether higher contributions can be collected from development as a consequence of land being released from the Green Belt.<sup>19</sup>

As can be seen, therefore, the Government is proposing significant changes to Green Belt policy. It is not clear whether this will lead to it becoming more or less strict. But the requirement on authorities to examine fully all other reasonable options before amending Green Belt boundaries may prove burdensome, and render such amendments less likely. It is also not clear whether or how the scale of compensatory improvements to offset releases will be set so as to take account of the quality of the Green Belt released (by no means all of the Green Belt is of high quality or serves any of the paragraph 80 Green Belt purposes). And the proposal for higher contributions may prove controversial in the context of the CIL tests. Despite the Government's broad intention to retain Green Belt policy, the consultation is therefore likely to provoke considerable response.

The decision broadly to preserve the Green Belt inevitably means that housing land must be looked for elsewhere. The Housing White Paper proposes a range of measures to maximise the use of suitable land. These include proposals: to free up public sector land;<sup>20</sup> to increase the support for windfall sites;<sup>21</sup> to support a new wave of garden towns and villages (including legislating to allow locally accountable New Town Development Corporations);<sup>22</sup> and to encourage higher housing density (including reviewing the Nationally Described Space Standard).<sup>23</sup>

Perhaps foremost among the measures to maximise suitable land use is an increased emphasis on the use of brownfield land, and the Government is proposing to amend the NPPF to indicate that "great weight" should

be attached to the value of using suitable brownfield land within settlements for homes.<sup>24</sup> They are also proposing to change the NPPF specifically to allow more brownfield land to be released for developments with a higher proportion of starter homes<sup>25</sup> (including in the Green Belt, but only where it contributes to the delivery of starter homes and there is no "substantial harm" to the openness of the Green Belt).<sup>26</sup> And they confirm that the £1.2 billion Starter Home Land Fund will be invested to support the preparation of brownfield sites to support these developments.<sup>27</sup>

All in all, there is a considerable range of measures seeking to address the fundamental difficulty of finding sufficient suitable and available land for housing, but many of the measures are not new, and without a greater input from Green Belt sites it is questionable whether the measures will succeed.

### **Compulsory purchase powers**

In chapter 2 the White Paper tackles the difficult question of how to speed up the building process itself, including by encouraging developers to start building on sites which have already been through the planning process.

Central to the government's proposals is the use of compulsory purchase powers by local planning authorities to "support the build out of stalled sites". It is also envisaged that the Homes and Communities Agency (HCA) will take a more proactive role, by working with local authorities to use their compulsory purchase powers for these purposes.

The White Paper indicates that the Government will prepare further guidance on this issue and at this stage there is limited information about how – or if – the Government will pursue this threat.

19 Housing White Paper paragraph 1.39

20 Housing White Paper paragraphs 1.26-1.28

21 Housing White Paper paragraph 1.30

22 Housing White Paper paragraphs 1.35-1.36

23 Housing White Paper paragraphs 1.51-1.55

24 Housing White Paper paragraph 1.25

25 It is worth noting that the proposal for a mandatory requirement for 20% starter homes on all developments over a certain size has been dropped, but there is proposed to be a policy expectation that housing sites will deliver a minimum of 10% affordable home ownership units (see paragraphs 4.16-4.17 of the Housing White Paper).

26 Housing White Paper paragraph 4.18

27 Housing White Paper paragraph 4.20

The threat of strengthened CPO powers certainly makes the government seem serious about expediting the house building process, but it is far from clear that measures which increase the risk of holding land will ultimately result in more houses being built. Developers may be particularly alarmed by the government's intention to examine whether the level of compensation payable following the use of such powers could be 'unambiguously' established through the auction process. Given the serious interference with property rights involved in using CPO powers and the inherent unpredictability of the auction process, the answer to this question seems likely to be in the negative. The complexity and cost associated with compensation claims may therefore prove a significant obstacle to the government's proposals to use enhanced CPO powers to speed up development.

### **The White Paper – the Developer's Perspective**

What all those involved in the development industry crave, be they local planning authorities, land-owners, developers, house builders or investors, is certainty. For uncertainty deters investment and decision-making and can ultimately seriously harm housing delivery. It would be a terrible irony if this was the effect of this White Paper, and that is one of the matters that the 39 Essex White Paper seminar will wish to discuss.

Does this White Paper offer certainty? Well it depends. As in the nature of all consultation documents, it offers a direction of travel. It is in fact much more of a Green paper than a White Paper – and its ultimate destination will not be known until the autumn. Until then one can expect endless hours of argument as to the weight to be given to this provision or that. The weight that may be given to any of the White Paper's contents will depend on the extent to which any provision is the subject of consultation, or whether it represents a settled position. But the White Paper is itself a material planning consideration in the determination of planning applications.

As to its contents, there are aspects of which might give rise to unintended consequences and which will not be welcome, at least by land-owners, investors, developers and house-builders. Chief amongst these is the provision proposing reducing the time to make an application for approval of reserved matters from 3 to 2 years. This

provision has been proposed in order to combat what has been suggested is a practice of land-banking by housebuilders. Whether land-banking is an example in the planning context of fake news, it has recently been cogently unpacked and debunked by Nathaniel Litchfield and Partners in their paper: *Stock and Flow: Planning Permissions and Housing Output*. So is the introduction of such a potentially damaging provision worth it, even if does provide some headlines for Mr Javid?

For land-owners to be encouraged to sell their land, they need time to market it effectively, and on large sites any house-builder needs time to work up their reserved matters approval, and then implement it. Undertaking all this within a period of 2 years appears, especially on strategic sites, is somewhat unrealistic. This could have the consequence of dissuading land owners from agreeing to an early release of their land; or only agreeing to releasing a much smaller area, which (if a site is identified in a local plan for residential development) would not be likely to jeopardise its long term prospects. Coupled with the threats regarding CPO (themselves somewhat odd and confused) property investors make take flight.

These are all issues which will be considered in greater detail in the 39 Essex Chambers White Paper Seminar on 29th March.

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