EDITORIAL COMMENT
The Editorial Board

After what have been another busy few months in the world of planning, we hope that this month's newsletter will provide some fuel for debates and discussions. First, James Burton considers the linked appeals *Suffolk District Council v Hopkins Homes Ltd & SSCLG* and *Richborough Estates Partnership LLP v Cheshire East Borough Council & SSGLG* [2016] EWCA Civ 168 as to the meaning of 'relevant policies for the supply of housing' in paragraph 49 of the NPPF. Second, Richard Harwood QC reflects upon the recent report produced by the Local Plans Expert Group to which he was appointed by the Minister for Housing and Planning, Brandon Lewis, in September 2015. In a double bill of timely articles, John Pugh-Smith provides his thoughts on both the changing stance of the Court of Appeal on shortcomings in the heritage protection process after the Barnwell case and also the consequences of Government's decision to allow sections 106BA to BC of the Town and Country Planning Act 1990 to expire on 30 April 2016 without even introducing any transitional provisions, which is no doubt a decision that will have practical repercussions for developers, local authorities and practitioners alike. Finally, Jonathan Darby concludes with a brief consideration of the recent revisions to the office to residential permitted development regime.

As ever, thanks for your interest. We hope you enjoy this month's newsletter.

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NPPF PARAGRAPH 49: CLARITY AT LAST

James Burton

On 17 March 2016 the Court of Appeal gave judgment in the linked appeals *Suffolk District Council v Hopkins Homes Ltd & SSCLG* and *Richborough Estates Partnership LLP v Cheshire East Borough Council & SSGLG* [2016] EWCA Civ 168. The decision would appear to put to rest years of controversy, played out in numerous planning appeals and a confusing welter of High Court judgments, as to the meaning of 'relevant policies for the supply of housing' in paragraph 49 of the NPPF.

The key paragraphs in the judgment of the Court (delivered by Lord Justice Lindblom) are 32-48.

In a nutshell, the Court of Appeal has approved the 'wider' approach to 'relevant policies' advanced by the Secretary of State, construing the words to mean 'relevant policies that affect the supply of housing' (writer's emphasis added) (judgment, paragraph 32), and so including:

> *'policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed – including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development'* (judgment, paragraph 33).

Such restrictive policies may (the Court emphasised 'may') have the effect of constraining the supply of housing land, in which event if a LPA is unable to demonstrate the requisite five-year-supply then those policies are liable to be regarded as not up to date for the purposes of NPPF paragraph 49 and so out of date for the purposes of NPPF paragraph 14 (judgment, paragraph 35).

The Court described the 'narrow' interpretation of 'relevant policies for the supply of housing', in which the words were to be construed as meaning 'relevant policies providing for the amount and distribution of new housing development and the allocation of sites for such development', as 'plainly wrong' (judgment, paragraph 34). The Court likewise rejected the so-called 'intermediate' or 'compromise' construction of the wording, in which the 'narrow' construction was widened to capture restrictive policies of a general nature but not restrictive policies whose purpose is more specific (judgment, paragraph 36). Whilst the Court considered the distinction between 'general' purpose and 'specific' purpose restrictive policies in the development plan might be relevant to the application of NPPF paragraph 49 and the weight to be given to a particular development plan policy in the planning balance, it could not affect whether a policy fell within NPPF paragraph 49 as a matter of principle (judgment, paragraph 37).

Importantly, though, given the confusion apparent in some of the first-instance decisions, the Court of Appeal has confirmed that not only do the restrictive policies of the NPPF itself listed at NPPF footnote 9 remain relevant 'even where the development plan is absent, silent or relevant policies are out of date' (judgment, paragraph 39), but likewise even 'out of date' development plan policies may remain relevant and may be given weight (judgment, paragraph 46). This does not mean the continuing relevance of the NPPF footnote 9 restrictive policies renders development plan policies that are out of date up to date, but that both the restrictive policies in the NPPF and out of date policies in the development plan continue to command such weight as the decision-maker reasonably finds they should have (judgment, paragraphs 39, 46).

As to that weight, the Court of Appeal has here injected shades of grey into a debate that has often been treated as black and weight. The weight to be given to 'out of date' development plan policy will vary according to the circumstances, including such as the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the LPA to address the shortfall, or the particular purposes of a restrictive policy, and the Court envisaged 'many cases' in which restrictive policies would be given sufficient weight to justify the refusal of planning permission despite being 'out of date' under NPPF paragraph 49, weight always being a matter of planning judgment for the decision-maker (judgment, paragraph 47).

The Court also emphasised that the NPPF is a policy document, which does not displace the statutory presumption in favour of the development plan and operates within the statutory framework of s.70(2)

of the 1990 Act and s.38(6) of the 2004 Act, albeit as government policy it is 'likely always to merit significant weight' (judgment, paragraph 42).

Finally, whether a particular plan policy is a relevant policy 'for the supply of housing' in the sense explained by the Court is a matter for the decision-maker, not the court. Provided the decision-maker correctly construes NPPF paragraph 49 in line with the Court's interpretation, this is a matter for his planning judgment reviewable only on *Wednesbury* grounds (judgment, paragraph 45).

To put flesh on the bones of the careful approach to planning decision-making the judgment confirms is required: if, for example, a decision-maker concludes that a development plan green belt policy is a 'relevant policy' and 'out-of-date' for the purposes of NPPF paragraph 49 due to a housing supply shortfall, not only do the NPPF footnote 9 restrictive policies, which include the NPPF's green belt policy, still apply with full force, but the 'out-of-date' development plan policy may still lawfully carry greater weight than the NPPF's housing supply policies, dependant of course on the circumstances.

Whilst developers will doubtless welcome confirmation that the 'wider' construction of NPPF paragraph 49 is the correct one, there is plainly plenty in the decision to counter-act the significance of that finding. The mood of the Court is well-captured by this concluding comment:

> *'The policies in paragraphs 14, 47 and 49 of the NPPF are not, as we understand them, intended to punish a local planning authority when it fails to demonstrate the requisite five-year supply of housing land. They are, however, clearly meant to be an incentive. As Sir David Keene said in paragraph 31 of his judgment in Hunston:*[1]
>
> > *"Planning decisions are ones to be arrived at in the public interest, balancing all the relevant factors, and are not to be used as some form of sanction on local councils. It is the community which may suffer from a bad decision, not just the local council or its officers."'*

As to what this judgment means for the High Court decisions that have dominated the debate to date, the Court of Appeal confirmed that the "Green Wedge" policy (Policy E20 of the North-West Lincolnshire Local Plan 2002) at issue in *William Davis Ltd v SSCGL* [2013] EWHC 3058 (Admin) was a 'relevant policy' and the decision was wrong to find otherwise. Similarly, the apparent decision in *Wenman v SSCLG* [2015] EWHC 925 (Admin), that policies D1 and D4 of the Waverley Borough Council Local Plan 2002 were not 'relevant policies', was also incorrect.

MORE EFFICIENT AND EFFECTIVE LOCAL PLAN MAKING

Richard Harwood OBE QC

The Local Plans Expert Group was appointed by the Minister for Housing and Planning, Brandon Lewis, in September 2015. Its report proposes widespread reforms to the content and preparation of local plans. It might be helpful to discuss some of the factors which affected our thinking.

The first was the importance of local plans. Local policy enables an area-wide approach to be taken to planning and introduces a degree of coherence and consistency to decision making. It puts the local community – through their elected councillors – in charge. It also gives an opportunity for contribution and challenge to all those interested in an area's planning. The response to our call for evidence was universally supportive of local plans, but often frustrated about how long the process has taken.

Of course, plans only work if they are in place, up to date and make the tough decisions about what, how much and where. Development management decisions which are taken on the basis of good planning principles and the National Planning Policy Framework are not a plan-led system, however justified the individual decisions are. Few plans are up to date. Only 31% of local planning authorities have plans examined since the publication of the NPPF and many of these are only strategic. Less than 20% of local authorities have a post-NPPF strategic and sites allocations plan. Some authorities are in a far worse position of having little in the way of plans under the Planning and Compulsory Purchase Act 2004 regime. Plan preparation has been slow. The average time between the publication of a submission draft plan and adoption is over 750 days. This is not the worse stage: it sometimes takes authorities years to produce a submission draft. Often multiple rounds of non-statutory consultation are carried out. One plan was the subject of five pre- submission consultations between

1 City and District Council of St Albans v Hunston Properties Ltd [2013] EWCA Civ.1610.

2011 and 2014, only two of which were statutory. It was subsequently found to be unsound and was withdrawn. Another authority carried out 12 sets of consultation, mainly on discreet aspects of their plan.

We were conscious not to repeat the mistakes of the 2004 Act. As at 2001, 16% of local planning authorities did not have local plans produced following the previous set of reforms in 1991. The then government decided to rip up the previous plan system and start again. Ten years after the 2004 changes, the same proportion of authorities did not have a plan under the 2004 regime. Telling authorities to start all over again would cause another decade of delay. Consequently our proposals are designed to improve the current system and to be taken up by authorities at whatever stage they have reached.

A major source of problems, delay and cost has been working out the Objectively Assessed Need for housing. We propose to simplify the calculation: taking the household projections and adding any uplifts for market signals (on affordability) and affordable housing needs. The OAN is not the housing requirement for the particular authority. That is a political decision, but the soundness tests should be tightened to expect authorities to ensure that their OAN is met in their or other authority areas, unless the adverse effects of doing so significantly and demonstrably outweigh the benefits. The need cannot simply drop off the table. Joint working, including often joint local plans on strategic issues, should be part of the devolution arrangements for local authorities.

Our objectives for local plan processes were to improve local control over the plan content, promote efficient and effective plan making and to speed up and simplify the process. Those all work together. The initial (regulation 18) consultation will be widened to the public at large. Local planning authorities would be able to modify plans following the pre-submission consultation and there would be a further consultation confined to those modifications. This avoids the current difficulty that the Local Planning Regulations only provide for comments on the draft plan when it is too late for the local planning authority to change it. At the current pre-submission stage, local plans can only be modified on the Inspector's recommendation if they are unsound. Part of improving the statutory consultation process is that non-statutory consultation stages ought not to take place. The result will be a simpler, clearer and shorter process.

Broadly the examination process works well and there was near universal support for this in the comments we received. Effective testing of plans will be strengthened by cutting down the evidence base to 'strictly necessary' documents. Other documents ought to be shorter and more focused. Sustainability appraisals should just explain whether and how the plan is sustainable development and not be strategic environmental assessments extended to economic and social matters. SEA reports ought to be more focussed on the issues that arise. There is not point producing 300 pages of tables with ++ and – entries if no one is going to refer to them. Local plan content can be reduced, in some cases quite dramatically.

These changes should allow a much quicker process and we propose a statutory timetable requiring a local plan to be adopted within two years of the start of the initial consultation on it. That will be a maximum period: partial reviews of local plans should progress quicker. A compact timetable promotes public involvement – people can understand where they are in the process – and also reduces the risk of issues changing during the plan making process and causing further delay.

The report, appendices, detailed recommendations and discussion papers of the expert group at available at: www.lpeg.org The Department for Communities and Local Government is inviting representations on our recommendations which should be made by 27 April 2016.

Richard Harwood OBE QC was the sole lawyer member of the Local Plans Expert Group.

A MORE BENEVOLENT APPROACH?

John Pugh-Smith

In *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors [2014] EWCA Civ 137* the Court of Appeal determined that a 'strict approach' should be taken by decision-makers involved with heritage setting issues, in their consideration of the specific preservation and enhancement duties under the Planning (Listed Buildings and Conservation Areas) Act 1990 ('LBCAA'). Since then failure to follow the Barnwell approach has acted as a trip wire for many LPAs. For example, in *R(Obar Camden Ltd) v Camden LBC [2015] EWHC 2475 (Admin)* Stewart J found that Camden had 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. There, the claimant operated a nightclub and live music space in a Grade II listed building which shared a party wall with the relevant site. It was concerned that new residents would complain about noise from its space, which might affect its business. It submitted written representations about heritage issues, and a noise survey from its own consultant. Following the planning officer's report, Camden's environmental health officer wrote to the senior planning officer, recommending that the report be amended to take into account previous noise complaints about a nightclub across the street, and noting that Camden's noise survey did not take traffic noise into account. Camden's committee resolved to grant planning permission, subject to certain conditions. Subsequently, environmental health officers informed the senior planning officer that the noise conditions were not satisfactory and should be rejected, and suggested new conditions which were incorporated into the decision notice under officers' delegated powers. The Judge held that Camden had complied with its statutory duty under s.72(1) LBCAA in that it had paid special attention to the desirability of preserving or enhancing the character or appearance of the area. However, the s.66 requirement to have special regard to the desirability of preserving the building or its setting and give considerable importance and weight to that factor, had not been brought to the committee's attention in the officer's report, nor had the report assessed the significance of the heritage assets as required. Those were material considerations which had not been considered so the decision was therefore flawed. Anecdotally, given that Camden has subsequently commissioned an independent report from Nathalie Lieven QC into the matter, it is also of interest that the officer's report had also not recorded the environmental health officer's statement that the noise report had to be amended to take into account noise from the other nightclub. As the tenor of the officer's report on that subject was not accurate its overall effect in relation to noise significantly misled the committee about material matters which were left uncorrected before the planning decision was taken. Further, the conditions suggested after the committee's resolution were entirely different in character from what had been approved; and there had been nothing in the resolution or any other document permitting officers to reword the conditions. If the officers had wished to remove or amend the conditions they were under a duty to return to the committee to have that done.

However, last November, in *Jones v Mordue* [2015] EWCA Civ 1243 a differently constituted Court of Appeal from that in *Barnwell* took a much more benevolent view as to how the s.66(1) duty (and likewise that under s.72(1) of the LBCAA) should be addressed. Again, the subject-matter was the ubiquitous wind turbine, the subject of a planning appeal. Following the approach taken by the House of Lords to "reasons challenges" in the two leading cases, *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 and *South Buckinghamshire DC v Porter (No.2)* [2004] 1 WLR 1953. Sales LJ, giving the judgment of the Court, has sought to 'explain' *Barnwell*, which, when read in context, was not intended to state an approach to the reasons required to be given by a decision-maker dealing with a case involving application of s.66(1) which was at variance from, and more demanding than, that stated in *SAVE* and *South Bucks.* Accordingly, the relevant standard to be applied in assessing the adequacy of the reasons given in the instant case was indeed the usual approach explained in *SAVE* and *South Bucks.* They did not have to separately address the specific statutory duty under s.66(1). Rather, they could be briefly stated, provided they were intelligible and adequate so as to enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues including how this issue of law was resolved. Again, the degree of particularity required depended entirely on the nature of the issues falling for decision. On the facts, and, applying the correct approach, it could not be said that the inspector's reasoning gave rise to any substantial doubt

as to whether he had erred in law. On the contrary, his express references to local policy and para.134 of the NPPF were strong indications that he had in fact had the relevant legal duty according to s.66(1) in mind and had complied with it. Paragraph 134 appeared in part of the NPPF which lay down an approach which corresponded with the duty in s.66(1). Generally, a decision-maker who worked through those paragraphs in accordance with their terms would have complied with the s.66(1) duty. However, this author's view is that caution needs to be exercised as to the wider application of this approach to LPA decision-making; for it a well-established principle, endorsed in *SAVE* and *South Bucks,* that the standard of reasons is commensurate with the likely readership of the document in question. With PINS decision letters the parties are assumed to be sufficiently informed. In contrast, with local authorities and their committee members the same assumption cannot and should not be paid; and what may pass for "local knowledge" may not equate with a sufficient legal or technical understanding even as in *Obar Camden.* Clearly, much still depend upon the quality of the work done by reporting officers; and the continuing need to legally audit such reports in draft remains a significant safeguard against judicial review challenges.

The Court of Appeal has taken a similar benevolent view to procedural irregularity in the recent case of *R (Gerber) v Wiltshire Council & Ors* [2016] EWCA Civ 84. Planning permission had been granted under delegated powers for a solar farm on a 22 hectare site in June 2013. Mr Gerber, the owner of a nearby Grade II* listed building, had not seen the planning notices and had only become aware of the installation when work started. He immediately contacted the Council in March 2014 but did not apply for judicial review until October 2014. The solar farm was completed in June 2014. Dove J ([2015] EWHC 524 (Admin)) had quashed the planning permission and ordered the removal of the solar panels. It was common ground that the companies would have to spend £1.5 million in dismantling the panels and restoring the land, and would lose expenditure of £10.5million. The appellant Council and Interested Parties submitted that that the judge had erred in holding that the Council had created a legitimate expectation of neighbour notification by reason of its Statement of Community Involvement (SCI), in his assessment of the significance of Mr Gerber's delay in commencing his claim under both CPR Part 54 and the Senior Courts Act 1981 s.31(6), and, in the exercise of his discretion to quash the planning permission. Sales LJ, giving the Court's judgment again, found that the SCI did not contain an unambiguous promise that any neighbour would be consulted about the application for planning permission. The judge had been wrong to run together para.5.6 of the SCI with its Appendix. Paragraph 5.6 was limited to properties adjoining the development site rather than neighbouring properties such as that of the householder. There had been no breach of Mr Gerber's legitimate expectation. As the judge's error regarding legitimate expectation had affected the exercise of his discretion to extend time to bring the claim. He had had no reasonable explanation for his lengthy delay in bringing judicial review proceedings; and in the light of a developer's detrimental reliance on permission, it was incumbent on an objector to bring proceedings without delay. Even if time were to be extended, the judge's exercise of his discretion under s.31(6) of the 1981 Act was also flawed. Given the long delay for which there was no good excuse; the major financial detriment which would be suffered by the companies; the lesser harm to the householder's amenity; the balance of factors affecting good administration, including the importance of renewable energy in the national interest, and the need for certainty and finality, his order quashing the planning permission had to be set aside.

Whilst the decision of Dove J. was surprising it appeared just in the circumstances, given the Council's failures both to consult Historic England (then English Heritage) as well as not notify Mr Gerber. Common sense suggests that Dove J. was right to find that it had not been possible to discharge the s.66(1) duty without obtaining the input of the relevant national body with responsibility for such matters. That omission had also been compounded by the fact that there had also been no mention of the s.66(1) duty in the documentary record relating to the decision, the conservation officer having relied on a site visit which had taken place several years earlier and a single photograph. Accordingly, it is unfortunate that such a lax approach has now, seemingly, been endorsed by the Court of Appeal, one that too often occurs with significant and lasting consequences. Whilst both recent Court of Appeal decisions concerned renewable energy projects with a finite life heritage assets are a "non-renewable resource". Judicial review is an expensive

exercise; and even with costs limitation under CPR Part 45.43 access to environmental justice over heritage issues should, in this author's view, not be unfairly blunted in the interests of judicial pragmatism.

John Pugh-Smith has been and is currently involved with a number of judicial review cases involving the issues raised by this article, including the potential physical harm to a Grade I listed building as well as to its setting by a major London development project.

REPEALING SECTIONS 106BA TO BC – YET ANOTHER EXAMPLE OF THE LAW OF UNINTENDED CONSEQUENCES?

John Pugh-Smith

In Social Sciences 'unintended consequences' (or unforeseen consequences) are outcomes that are not the ones foreseen and intended by a purposeful action. Idiomatically, it is commonly used as a wry or humorous warning against the hubristic belief that humans (let alone politicians) can sufficiently control the world around them.

Section 7 of the Growth and Infrastructure Act 2013 (which added Sections 106BA to BC to the TCPA 1990) was intended to unlock 'stalled developments' due to over-burdensome affordable housing obligations making consent implementations 'economically unviable'. Having provided detailed statutory Guidance, DCLG has seen its Guidance correctly applied in at least 40 Section 106BC appeals determined by PINS since May 2013; of which 24 were allowed and 16 were dismissed. According to Planning Magazine (08 April 2016) the decisions involved schemes comprising nearly 4,000 homes of which developers had originally committed to providing nearly 700 as affordable units and to pay over £12 million in off-site contributions. Furthermore, there has continued to be a steady stream of Section 106BA applications this year, and, for schemes that have not yet been commenced, all seemingly contributing to much needed five-year housing supply tables and to Treasury growth forecasts.

Therefore, it seems surprising that despite concerns being expressed over the same period about the "sunset" provisions of s.7(4) neither Ministers nor DCLG officials have yet grappled with the legal consequences. Indeed, with informal comments from officers within DCLG and PINS that provided a Section 106BC appeal is made before the end of April, it will still be considered, there would still appear to be no legal basis supporting this advice at the time of the writing of this article. At law, the wording of s.7(4) is unequivocal: *"Sections 106BA, 106BB and 106BC of the Town and Country Planning Act 1990, and subsection (5) of this section, are repealed at the end of 30 April 2016".* Despite a positive reference in the last Autumn Statement, the Planning Minister has now let it be known in planning 'circles' that he has decided not to substitute a later date under the power given by s.7(5) due to perceived concerns about the undermining effects of this legislation on the proposed 'Starter Homes' initiative, subsequent to which, on 11th April, Steve Quartermain, the recently returned DCLG Chief Planner, has circulated his "Planning Update Newsletter" in which he remarks:

> *"Ministers have now decided not to extend sections 106BA, 106BB and 106BC of the Town and Country Planning Act 1990, requiring authorities to renegotiate unviable affordable housing requirements, and providing an appeal mechanism for this. These sections will therefore be repealed at the end of April 2016. Applications can be submitted to the appropriate authority under section 106BA until the end of April 2016, and if an application is submitted before that date a subsequent appeal to the Secretary of State will generally still be considered"*

Nevertheless, given that Ministers, albeit in the last Coalition Government were heavily criticised for "back door" policy amendments in the *West Berkshire* case [(2015) EWHC (Admin), and, albeit that the Court of Appeal's judgments are awaited it is surprising that common sense as well legal certainty has not been applied through the use of s.7(6) which reads: *"The Secretary of State may by order make transitional or transitory provision or savings relating to any of the repeals made by subsection (4)".*

Without formal provision being clearly made under s.7(6), a judicial review by a frustrated local authority, or, a desperate appellant claiming legitimate expectation may yet lead to justified Section 106BC appeals being unnecessarily put in jeopardy. Let's hope that common sense and legal certainty will yet prevail.

It is also ironic that, at last, there is a High Court case

on these provisions. On 18th March 2016 Mr Justice Gilbart gave judgment in *Medway Council v Secretary of State for Communities and Local Government & Byrne Estates (Chatham) Ltd* [2016] EWHC 644 (Admin). The High Court challenge arose from an inspector's claim was brought by Medway Council following a decision of an Inspector to remove a requirement to pay a commuted sum of approximately £1.3m in lieu of on-site provision of affordable housing at a mixed use development in Chatham Quays. The Section 106BA application had been made after the residential element of the development had been completed but before the commercial element had been completed. The parties to the appeal had agreed that the development was not viable if the commuted sum was required, but the Council had argued that the appeal should be dismissed because the relevant development had been completed at the time of the application. The Judge rejected this submission on the basis that the assessment of the viability of a scheme related to the development authorised by the planning permission, including the commercial elements of the mixed use scheme as well as the residential part. Accordingly, the Inspector had not erred in recording that the parties were agreed that the development was not completed, since it was not disputed that the commercial elements were incomplete. He noted that he had found it unnecessary to go on to consider the Interested Party's alternative submission that an application under Section 106BA can be made even if the development in question has been completed

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Co-incidentally, that issue was considered by this author in an earlier 2015 Newsletter following the decision of Inspector Paul Clark in a Section 106BC appeal concerning No. 53 Pavilion Drive, Southend-on-Sea (APP/D1590/Q/14/2228061). Although dismissing the appeal on his viability findings, he helpfully remarked:

> *"…The requirement to provide affordable houisng is subject to trigger which ahs been passed and so, has come into effect. But, for whatever reason, it has not been acted upon (and so, is stalled) but is still capable of of enforecement. It is not spent. So, at the operative date for this appeal (immediately before the date on which the applicenforecement. It is not spent. So, at the operative date for this appeal (immediately before the date on which the application aws made), which could be acted upon and enforced. I therefore conclude that it is open to me to consider whether this affordable houisng requirement means that the development is not economically viable and; if so, how the appeal should be dealt with so that the development becomes economically viable".*

Given that I am now dealing with the same point but this time for the developer, rather than the local authority, I may too need to make case law, again, if reason and common sense do not prevail. As is also said so often these days: 'a month is a long time in planning, not just in politics'.

John Pugh-Smith has been and is currently involved with several Section 106BA applications involving the issues raised by this article including one that now has to proceed to a Section 106BC appeal before 30th April 2016.

OFFICE TO RESI: A SUMMARY OF RECENT REVISIONS

Jonathan Darby

After months of 'will they, won't they', the government recently confirmed the permanence of office to residential permitted development rights that had been introduced only a temporary basis in May 2013. This short note highlights some of the points to note in respect of the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016, which was the mechanism through which such rights gained permanence and was laid before Parliament on 11 March 2016 before coming into force on 6 April 2016.

Class O permits the change of use of a building and any land within its curtilage from a use falling within B1(a) (Office) to a use falling within C3 (Residential). It is subject to various restrictions, qualifications and conditions. Under the temporary regime, Class O was subject to a requirement to make a Prior Approval application only in respect of transport and highways impacts, contamination risks on the site and flooding risks. Paragraph W in Schedule 2, Part 3 of the GPDO sets out the requirements for such an application and the manner in which such an application is to be processed.

- The most noteworthy of the recent revisions is the addition of the *"impacts of noise from commercial premises on the intended occupiers of the development"* as a matter for the Prior Approval of the authority (by virtue of the substitution of a revised paragraph

O.2). This addition may be seen by some as a logical extension of what has been described as the apparent development of an 'agent of change' doctrine in a planning context.

- Development under Class O is now permitted subject to the condition that it must be completed *"within a period of 3 years starting with the prior approval date",* meaning that prospective developers will be required to 'use it or lose it'.

- Further to the above, the Amendment Order also removed the exemption of certain areas from the office to residential right with effect from 31 May 2019. This will allow local authorities for exempted areas to utilise article 4 directions in order to remove the rights.

- Despite it having been announced on 13 October 2015 that the office to residential right was to be extended to allow the demolition of office buildings, other operational development and new building for residential use, the Amendment Order takes no steps in this regard. However, it has been reported that the same still features on the government's 'to do' list and so it will be necessary to keep an eye on future announcements and developments in this regard, possibly as part of the progression of the Housing and Planning Bill.

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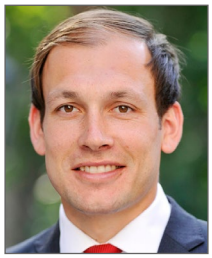

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Richard specialises in planning, environment and public law, acting for developers, landowners, central and local government, individuals and interest groups. He appears in the courts, inquiries, examinations and hearings, including frequently in the Planning Court and appellate courts. Voted as one of the top ten Planning Silks in Planning magazine's 2014 and 2015 surveys, he has appeared in many of the leading cases of recent years. Richard is also a leading commentator, a case editor of the Journal of Planning and Environment Law and the author of books including Planning Enforcement, Historic Environment Law and the newly published Planning Permission. To view full CV click here.

John Pugh-Smith

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John Pugh-Smith, MA, FSA, CEDR Accredited Mediator, practises in the fields of planning and environmental law with related local government and parliamentary work for both the private and public sectors. Much of his work is project and appeal related with a particular workload at present in strategic and retirement housing developments. John also practises as a mediator in a wider range of areas. He is a committee member of the Bar Council's ADRC and a founding member of the Planning Mediation Group of the RICS. He has been and remains extensively involved in various initiatives to use mediation to resolve a wider range of public law issues including as one of the mediator on the DCLG/HCA's joint panel of "Section 106 brokers". He is also one of the Design Council/Cabe's Built Environment Experts. To view full CV click here.

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James specialises in three main areas, planning, environmental and civil liability. In addition to his core specialisms, James also has substantial expertise in compulsory purchase, energy, claims under Part I of the Land Compensation Act 1973 and national infrastructure/Hybrid Bill work (High Speed 2). James's experience includes appointments as an investigating officer in respect of matters relating to allegations of misconduct in public office and numerous appearances before the House of Commons Hybrid Bill Select Committee (High Speed 2). James was named Chambers & Partners Environmental and Planning 'Junior of the Year' at the 2015 Chambers Bar Awards. To view full CV click here.