

39 Essex Street

ENVIRONMENTAL & PLANNING LAW UPDATE¹

Top 10 Planning and Environmental Cases of 2014-2015

February 2015

INTRODUCTION

1. This paper is intended to provide a focused update in relation to the most significant cases within the last twelve months of interest to those practicing in the area of environmental and planning law. In relation to each of the cases, the paper sets out a summary of the pertinent facts, the key issues decided by the case, together with some reflections on the legal and practical implications of the decisions.
2. The paper is necessarily not a comprehensive treatment of all important decisions, but rather focuses on the decisions of most legal and practical significance.

¹ This paper is produced to accompany the seminar delivered by **Thomas Hill QC, Rose Grogan and Jon Darby** of Thirty-Nine Essex Street Chambers, London & Manchester.

It has been prepared with contributions from our colleagues, Stephen Tromans QC, Richard Harwood QC, Paul Stinchcombe QC, John Pugh-Smith, Justine Thornton, Colin Thomann, James Burton, Caroline Allen, Catherine Dobson, Philippa Jackson, Ned Helme, and Daniel Stedman Jones.

TOP TEN RECENT PLANNING CASES

GREEN BELT

1. *Redhill Aerodrome Limited v Secretary of State for Communities and Local Government* [2014] EWHC 2476 (Admin).
2. *Moore and Others v Secretary of State for Communities and Local Government* [2015] EWHC 44

HOUSING AND THE NPPF

3. *Solihull Metropolitan Borough Council v Gallagher Estates Ltd* [2014] EWCA Civ 1610.
4. *Dartford Borough Council v SoSCLG and Landhold Capital Limited* [2014] EWHC 2636 (Admin)

NEIGHBOURHOOD PLANS

5. *R (Gladman Developments) v Aylsbury Vale District Council* [2014] EWHC 4323 (Admin)

RECOVERED APPEALS

6. *Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government* [2014] J.P.L. 1338
7. *Wind Prospect Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 4041

HERITAGE

8. *Barnwell Manor Wind Energy Ltd v. East Northants DC, English Heritage and National Trust* [2014] EWCA Civ 137

ENFORCEMENT

9. *Ahmed v Secretary of State for Communities and Local Government* [2014] EWCA Civ 566
10. *Ioannou v. Secretary of State for Communities and Local Government* [2014] EWCA Civ 1432

GREEN BELT

3. 2014's hot topic has to be the continuing relevance and efficacy of Green Belt policy. Current Green Belt policy (as it applies to development management decisions) can be summarised as follows:

- (i) Is the development inappropriate in the Green Belt?
- (ii) If so, are there very special circumstances which clearly outweigh the harm by reason of inappropriateness and any other harm?

It is also important to remember the case of *Fordent Holdings Ltd v SSCLG and Cheshire West and Chester Council* [2013] EWHC 2844, the position under the NPPF is that all development is inappropriate in the Green Belt, unless it falls into the explicit categories of development which is potentially not inappropriate set out in paragraph 90 of the NPPF.²

Case 1: *Redhill Aerodrome Limited v Secretary of State for Communities and Local Government* [2014] EWHC 2476 (Admin).

4. The issue in *Redhill* was whether 'any other harm' in paragraph 88 of the NPPF was confined to harm to the Green Belt in addition to harm by reason of inappropriateness or included any other harm from the proposal.
5. In *River Club v Secretary of State for Communities and Local Government* [2009] EWHC 2674, Frances Patterson QC held that any other harm within paragraph 3.2 of PPG2 included any harm caused by the proposal, whether it was to the Green Belt or other interests. On its face, the text of paragraph 88 of the NPPF is not materially different from that in paragraph 3.2 of PPG2. However in *Redhill Aerodrome* the same judge (now Mrs Justice Patterson) considered that the NPPF led to a different result. Essentially she considered that the NPPF set particular thresholds for refusal on particular issues, such as noise. If those impacts did not reach the refusal thresholds then they could not be considered in

² "Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

- Mineral extraction;
- Engineering operations;
- Local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- The re-use of buildings provided that the buildings are of permanent and substantial construction; and
- Development brought forward under a Community Right to Build Order."

“any other harm” for the purpose of the Green Belt judgment. Sub-threshold harm could not be considered on a cumulative basis, as the learned judge said at paragraph 57:

“to permit a combination of cumulative adverse impacts at a lesser level than prescribed for individual impacts to go into the evaluation of harm of a Green Belt proposal seems to me to be the antithesis of the current policy. It would re-introduce a possibility of cumulative harm which the NPPF does not provide for”

6. It is notable that the *Redhill Aerodrome* judgment did not address the 2013 Ministerial Statement which explicitly says that other harm includes non-Green Belt harm: ‘outweigh harm to the green belt and other harm to constitute the ‘very special circumstances’.
7. On appeal, sanity was restored (see [2014] EWCA Civ 1386), when the Court of Appeal overturned the decision in the High Court and re-instated the *River Club* approach. Lord Justice Sullivan said as follows at paragraph 20 and 22:

“20. It is common ground that all “other considerations”, which will by definition be non-Green Belt factors, such as the employment and economic advantages referred to by the Inspector in her decision in this case, must be included in the weighing exercise. On the Judge’s approach, if an inappropriate development in the Green Belt is beneficial in terms of the appearance of the landscape, visual amenity, biodiversity or, presumably any other matter relevant for planning purposes such as the setting of a listed building, or transportation arrangements, it must be weighed in the balance when deciding whether “very special circumstances” exist; but if the inappropriate development is harmful to any of those non-Green Belt considerations, that harm must not be weighed in the balance when deciding whether “very special circumstances” exist. I accept the Appellants’ submission that this imbalance is illogical. If all of the “other considerations” in favour of granting permission, which will, by definition, be non-Green Belt factors, must go into the weighing exercise, there is no sensible reason why “any other harm”, whether it is Green Belt or non-Green Belt harm, should not also go into the weighing exercise.

“22. It is true that the “policy matrix” (see paragraph 54 of the judgment) has changed in that the Framework has, in the words of the Ministerial foreword, replaced “over a thousand pages with around fifty, written simply and clearly.” Views may differ as to whether simplicity and clarity have always been achieved, but the policies are certainly

shorter. There have been changes to some of the non-Green Belt policies, and there have also been changes to detailed aspects of Green Belt policy, not all of which were identified in the Impact Assessment: see eg. Europa Oil and Gas v Secretary of State for Communities and Local Government [2014] EWCA Civ 825, [2014] JPL 1259."

Case 2: Moore and Others v Secretary of State for Communities and Local Government [2015] EWHC 44

8. This case, decided in January 2015, concerns the legality of the Secretary of State's approach to the recovery of planning appeals for gypsy and traveller pitches within the Green Belt.
9. From the last part of 2013 until September 2014, the Secretary of State recovered all appeals relating to pitches for caravans in the Green Belt for his own determination. This practice was challenged on the basis that it was indirectly discriminatory to ethnic communities (in particular Romany gypsies and Irish Travellers), in particular because it led to a significant delay in determining their appeals compared to those determined by Inspectors.
10. The statistics relied upon by the Appellants are of some interest. First, there was a considerable disparity between recovery in non-traveller residential Green Belt cases and recovery of traveller residential Green Belt Cases. Second, evidence was produced to show that appeals determined by Inspectors usually had a decision issued within 8 weeks, whereas if a decision is determined by the Secretary of State, the average time is 6 months. In the case of the Claimants, they had been waiting for decisions for over a year.
11. The Claimants were successful in their challenge that the Secretary of State's practice amounted to unlawful indirect discrimination. There was a disproportionate adverse impact on an ethnic group, and the Secretary of State had failed to show that the practice was a proportionate way of achieving a legitimate objective. The Secretary of State had also failed to discharge his duty under s.149 of the Equality Act 2010 (the Public Sector Equality Duty). Although this duty is only a procedural one (to have "due regard"), in this case he had had no regard at all to the need to eliminate discrimination, advance equality of opportunity and foster good relations between persons who share a protected

characteristic and those who do not. This was not to say that a policy of recovering a certain class of appeals could never be lawful, but any such policy had to be made and exercised in accordance with the duties set out in the Human Rights Act 1998 and the Equality Act 2010.

12. The Claimants were also successful in their challenge under article 6 ECHR, on the basis that the delays in deciding the appeals were not necessary or justified, and they had not been determined within a reasonable time.

13. There have been a number of other cases on Green Belt policy, in particular:
 - a. *R (Timmins) v Gedling Borough Council* [2015] EWCA Civ 10 where it was held that the creation of a cemetery would be “inappropriate development”. Paragraph 89 concerns the construction of new buildings as appropriate facilities for an existing cemetery, but not a material change of use to a cemetery.
 - b. The unsuccessful challenge in *Copas v Secretary of State for Communities and Local Government* [2014] EWHC 2634, concerning the Written ministerial statement of July 1, 2013 on development in the Green Belt and unmet housing need.
 - c. *Europa Oil and Gas Limited v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825 upholding [2014] J.P.L. 21 at 35. Oil and gas exploration and appraisal is part of mineral extraction for the purposes of paragraph 90 of the NPPF.
 - d. *Lloyd v. Secretary of State for CLG and Dacorum BC* [2014] EWCA Civ 839, which confirms that “new buildings” in paragraph 89 of the NPPF, did not include a mobile home.

THE NPPF AND HOUSING

14. Housing continues to be a hotly contested topic this year. It is just under 3 years since the NPPF came into effect, and many Local Planning Authorities are still struggling to produce an up to date local plan. In October 2014, *Inside Housing* carried out an analysis

of PINS data and concluded that only 61 out of 346 planning authorities have fully adopted, NPPF compliant, local plans.³

15. Two key issues have been considered by the Courts this year: the use of RS figures to assess 5 year housing land supply, and the application of paragraph 14 of the NPPF in cases where a LPA does not have an up to date local plan.

Case 3: *Solihull Metropolitan Borough Council v Gallagher Estates Ltd* [2014] EWCA Civ 1610.

16. The Solihull Local Plan was adopted in December 2013. As part of that Local Plan, sites owned by Gallagher and their co-claimant, Lioncourt Homes, were included in the Green Belt. They challenged the Local Plan on the grounds, amongst others, that it was not supported by an objectively assessed figure for housing need, within the meaning of the NPPF.
17. The Local Plan proposed a housing provision over the period 2006-28 of 11,000 dwellings. That figure was derived from 2009 revisions of the revoked West Midlands Regional Spatial Strategy and these revised figures had been formulated in the old policy context of PPS3. The Local Plan did not therefore identify a figure for the “objectively assessed need”.
18. Laws LJ, giving the lead judgment in the Court of Appeal, held that the NPPF had effected a “radical change”. Whereas the methodology under the previous PPS3 was essentially the striking of a balance, by contrast, paragraph 47 of the NPPF required the objective assessment of needs (OAN) to be made first, and to be given effect in the local plan save only to the extent that that would be inconsistent with other NPPF policies. That two-step approach meant that housing need was clearly and cleanly ascertained. He also endorsed the observations of Sir David Keene in *Hunston Properties*⁴ that “needs assessment, objectively arrived at, is not affected in advance of the production of the local plan, which will then set the requirement figure” applies to plan-making as well as decision-

³ <http://www.insidehousing.co.uk/fewer-than-1-in-5-councils-have-adopted-local-plans/7006264.article>

⁴ *St Albans City and District Council v Hunston Properties and SSCLG*[2013] EWCA 1610

taking. The Court also allowed a cross-appeal that the relevant parts of the plan should be remitted to the Council for re-consideration rather than to an inspector.

19. Councils should therefore think very carefully before preparing local plans which rely on pre-NPPF housing figures. The requirements of the NPPF cannot be met by transposing the PPS3 approach, because the NPPF requires plan-makers to take the preliminary step of identifying the objectively assessed housing need. While earlier figures from regional strategies can form a relevant starting point, they must be regarded with “extreme caution”.

Case 4: *Dartford Borough Council v SoSCLG and Landhold Capital Limited* [2014] EWHC 2636 (Admin)

20. In *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin), Mrs Justice Lang held that paragraph 14 of the NPPF only applied to a scheme which is found to be “sustainable development (see paragraph 37). When this judgment was handed down, it was thought by some that a new “Lang test” had been created, requiring a decision-maker to determine whether development was “sustainable development” as a preliminary issue, before considering paragraph 14 NPPF.

21. In *Dartford*, the court qualified what had previously been stated by the court in *William Davis*. Mrs Justice Patterson held:

“52... the claimant’s argument depends on elevating the dicta in William Davis (supra) into a formulaic approach to be followed in a step by step sequential order in a decision letter. I reject that approach.

...

“54. In my judgment the claimant’s approach is excessively legalistic. When the decision letter is read as a whole it is clear that the Inspector reached an overall conclusion, having evaluated the three aspects of sustainable development, that the positive attributes of the development outweighed the negative. That is what is required to reach an eventual judgment on the sustainability of the development proposal. As was recognised in the case of William Davis ... the ultimate decision on

sustainability is one of planning judgment. There is nothing in NPPF, whether at paragraph 7 or paragraph 14 which sets out a sequential approach of the sort that Mr Whale, on behalf of the claimant, seeks to read into the judgment of Lang J at paragraph 37. I agree with Lang J in her conclusion that it would be contrary to the fundamental principles of the NPPF if the presumption in favour of development, in paragraph 14, applied equally to sustainable and non-sustainable development. To do so would make a nonsense of Government policy on sustainable development."

...

Here ... the policy framework set the structure for determining [whether the proposal was sustainable development]. Once that was resolved in favour of the development, the additional presumption in NPPF paragraph 14 applied."

22. It can be seen that Patterson J expressly rejected Mrs Justice Lang's implicit first-stage sustainability test in order to get to paragraph 14. She held that once paragraph 14 applied, by virtue of the policy (and five year housing land supply) position alone, the planning balance was then to be carried out. If, having carried out that balance within the context of the paragraph 14 presumption in favour, the development was found to be sustainable then permission should be granted. If the development was not sustainable, then permission should not be granted. This is the only logically tenable approach to paragraph 14: it would not make any sense to interpret paragraph 14 as forcing decision makers to carry out the planning balance twice, specifically applying a different frame of mind each time. Not only is this the only logical interpretation of paragraph 14, it is the interpretation the Secretary of State intends his inspectors to apply.
23. By way of example of this shift by the Secretary of State, in the subsequent Pulley Lane, Droitwich s.78 appeal decision he endorses Inspector Harold Stephens' approach. This contrasted Lang J's understanding of the operation of paragraph 1 with that of three other High Court judges and found it inconsistent with them.

"8.20 In my view this is an incorrect interpretation of that paragraph. First, the wording of paragraph 14 does not support this view. The paragraph clearly relates to all 'development proposals' it does not qualify this with an extra test of sustainability. It is therefore wrong to reach such a test into the paragraph. The test also ignores the balance exercise in paragraph 14. It is that exercise which determines whether or not

development is sustainable. On the ‘Lang’ interpretation there is no identified means by which sustainability can be assessed. Secondly, the weight of High Court authority runs contrary to Lang J’s view. The judgments at Stratford, Tewkesbury and North Devon demonstrate the correct reading of paragraph 14. Three High Court judges have disagreed with Lang J. Given this and the clear wording of paragraph 14, I consider that there is no extra test of sustainability included in paragraph 14, not least because the other three judges’ interpretation enables sustainable development must be measured within the balance of paragraph 14.”

24. In the Decision Letter, the Secretary of State expressly agrees with Inspector Stephens’ rejection of the approach in William Davis

“12 ... Like the Inspector, the Secretary of State finds the relevant policies for the supply of housing are out of date (IR 8.24) and therefore the presumption applies, and that the evidence (IR 8.21-8.23) demonstrates that the Appeal A scheme is sustainable in terms of economic, environmental and social benefits.”

25. Further cases on housing include:

- a. *Barrow-upon-Soar-Parish Council v Secretary of State for Communities and Local Government & Jelson Limited* [2014] EWHC 274: on deliverability. It was lawful for a Gampian type negative condition to be imposed requiring issues of sewerage capacity to be overcome before development commenced.
- b. *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Homes Limited* [2014] EWHC 570 (Admin) and *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land and Estates Limited* [2014] EWHC 573 (Admin). In the absence of any objectively assessed housing need, Inspectors on appeal and decision-makers must do the best they can from the material available (which can include the evidence base from now revoked regional strategies).⁵

⁵ It would seem that, if the challenger’s method of calculating the housing need has kept changing or not been clearly explained, then the Court is more likely to consider that the decision maker was doing their best in a difficult situation and acted lawfully.

NEIGHBOURHOOD PLANS

26. After a slow start, neighbourhood planning is starting to gain momentum and is having a tangible impact on planning decisions. Over 1000 areas have applied for designation.⁶
27. With an increase in draft neighbourhood plans inevitably comes an increase in litigation and challenges to decisions.⁷ The Secretary of State is also more likely to recover a planning appeal if there is a draft neighbourhood plan. On 10 July 2014, the Secretary of State announced that he would like to “consider the extent to which the Government’s intentions are being achieved on the ground.” For a period of 12 months, the recovery criteria has now been amended to include “proposals for residential development of over 10 units in areas where a qualifying body has submitted a neighbourhood plan proposal to the local planning authority: or where a neighbourhood plan has been made.” The Secretary of State has since decided a number of appeals himself, and refused appeals on the grounds of a conflict with an emerging neighbourhood plan.⁸

Case 5: *R (Gladman Developments) v Aylsbury Vale District Council* [2014] EWHC 4323 (Admin)

28. In *Gladman*, Lewis J held that a Neighbourhood Development Plan (NDP) might include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, even where there was at present no development plan document setting out strategic policies for housing.
29. An NDP must be in general conformity with "the strategic policies contained in" the development plan documents, however that requirement does not deal with a situation where there were no such strategic policies. Schedule 4B para.8(2)(d) of the TCPA 1990 referred to whether, having regard to national policies and guidance, "it is appropriate" to make the neighbourhood development plan. That language did not preclude an examiner from considering that it was appropriate to approve an NDP because future development plan documents might require the provision of further

⁶ <https://www.gov.uk/government/speeches/neighbourhood-planning>

⁷ See e.g. *BDW Trading Ltd (trading as Barratt Homes) v Cheshire West and Chester Borough Council* [2014] EWHC 1470 and *R(Larkfleet Homes) v Rutland County Council* [2014] EWHC 4095 (Admin)

⁸ See e.g. the Decision in *Land off Coate Road and Windsor Drive, Wiltshire* dated 27 October 2014 and *Land off Park Road, Malesbury, Wiltshire* dated 8 September 2014.

development. That interpretation was consistent with the statutory framework, which required that an examiner be satisfied that an NDP met the basic conditions in para.8(2)(e) of the TCPA which ensured that the plan conformed with the strategic policies contained within the development plan documents. If the local planning authority subsequently made a development plan document which did include strategic policies, that document would be part of the development plan and would prevail over any inconsistent policies in the earlier NDP under section 38(5) of the PCPA 2004.

RECOVERED APPEALS

Cases 6&7: Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government [2014] J.P.L. 1338 and Wind Prospect Developments Ltd v Secretary of State for Communities and Local Government [2014] EWHC 4041

30. The Secretary of State's enthusiasm for recovering appeals relating to renewable energy, particularly onshore wind, has come under challenge (indirectly) in two cases this year. Both cases concern the scenario where the Secretary of State refuses an appeal against the recommendation of his inspector. These cases came about amid concerns expressed by the onshore wind industry about the Secretary of State's practice of recovering wind farm appeals.
31. In *Ecotricity* the Secretary of State upheld the refusal of planning permission of a local authority for a four turbine scheme. The Inspector had recommended that permission be granted and had found that the turbines could be absorbed into the landscape and would not have an unacceptable impact on the area's visual amenity. The Secretary of State recovered the appeal for his own determination and dismissed the appeal. He disagreed with the Inspector's conclusions on visual impact.
32. The Claimant challenged this decision on the ground, among others, that the Secretary of State was required to conduct his own site visit before disagreeing with the conclusions of his inspector on visual impact. The High Court held, applying the earlier case of *R (on the application of Novalong) Ltd v Secretary of State for Communities and Local Government [2008] EWHC 2136 (Admin)* that there was no general duty on the Secretary of State. The Secretary of State had before him evidence, including from those who had visited the site

extensively, and including photomontages upon which he could base his opinion. He had not simply based his opinion on his view, but had taken into account the relevant evidence.

33. In *Wind Prospect Developments*, the Secretary of State disagreed with the conclusions on landscape impact and visual impact of his inspector. It was argued in that case that the Secretary of State had a duty to consider whether he had sufficient evidence upon which to base a difference in view, and if he did not, he had to consider whether to carry out a site visit and give reasons if he decided not to.
34. There was also a further ground of challenge to the Secretary of State's decision, that he did not give adequate and intelligible reasons for his decision. The Claimant argued that an analogy should be drawn between cases where an Inspector disagrees with expert evidence, and is required to give a cogent, reasoned rebuttal⁹, and cases where the Secretary of State disagrees with one of his Inspectors.
35. Lang J rejected both grounds of challenge. She held that the Secretary of State was empowered to make his own decision about the merits of the appeal. He was not reviewing the decision of the Inspector but making the decision himself. While he should give due consideration to the Inspector, he was not required to follow it. The standard of reasons required where the Secretary of State disagrees with his Inspector was the standard set out by Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 W.L.R. 153 and Lord Brown in *South Buckinghamshire DC v Porter (No.2)* [2004] UKHL 33, [2004] 1 W.L.R. 1953 (reasons must be proper, intelligible and adequate) and no heightened standard of reasons was justified.

HERITAGE

Case 8: *Barnwell Manor Wind Energy Ltd v. East Northants DC, English Heritage and National Trust* [2014] EWCA Civ 137

⁹ See *Tegni Cymru Cyf v. Welsh Ministers* [2010] EWCA Civ 1635 and *Georgiou v. SSCLG* [2011] EWCA Civ 775, and *RWE NPower Renewables Ltd v. the Welsh Ministers* [2012] EWCA Civ 311.

36. The most important of the recent cases on Heritage issues is the Court of Appeal's decision in *Barnwell Manor*, where the court clarified what decision-makers have to do to meet the "special regard" duty under s66 of the 1990 Act. The appeal concerned an inspector's decision granting planning permission for a 4-turbine wind farm which affected the setting of a number of high-value heritage assets in Northamptonshire, including the internationally significant Elizabethan complex at Lyveden New Bield.
37. The inspector found some, but "less than substantial" harm to the setting of the assets, and held that this harm was outweighed by the "significant" weight which should attach to the renewable energy benefits of the scheme. Lang J quashed the grant of permission.
38. Upholding Lang J's decision, the Court of Appeal held as follows:
- a. The assessment of harm is a matter of planning judgment. However, once the decision-maker finds some harm to a heritage asset, the effect of s. 66(1) is that the harm must be given "considerable weight" in the balance, creating a "strong presumption" against the grant of planning permission.
 - b. In striking the balance, it is not enough simply to ask whether the advantages of the scheme outweigh the harm in a loose or general sense, but whether they sufficiently outweigh the harm to rebut that strong presumption.
 - c. The courts will need to see a clear indication on the face of the decision that the section has been approached in that way. Even where harm is properly assessed as less than substantial, "it does not follow that the 'strong presumption' against the grant of planning permission has been entirely removed" (paragraphs 28 and 29).
 - d. The Inspector in that case had misapplied policy on heritage assets in what was then PPS5 (now incorporated into the NPPF), undermining his assessment of the harm as "less than substantial". He had failed to properly examine the contribution the setting of the assets made to their significance, with the result that his assessment of the harm caused by the introduction of the turbines to that setting was flawed.

39. This decision is significant in that it (i) clarifies the weight to be given to harm to heritage assets when applying the policies of the NPPF, including the balancing exercise under paragraph 134 (“considerable weight”) and (ii) acts as a reminder that the policies of the NPPF do not override the relevant statutory duties. However the Court of Appeal’s decision does not change/ increase the weight to be given to harm to heritage assets in determining planning applications. That weight is established by the statutory tests. Instead the decision clarifies the relationship between those statutory tests and the relevant provisions of the NPPF.

ENFORCEMENT

40. Recent cases in this topic have considered the extent to which an Inspector, in determining an appeal against an enforcement notice, is entitled to consider whether an alternative scheme to the one being enforced against should be permitted.

Cases 9&10: Ahmed v Secretary of State for Communities and Local Government [2014] EWCA Civ 566, and Ioannou v. Secretary of State for Communities and Local Government [2014] EWCA Civ 1432

41. Earlier in 2014, the case of *Ahmed*, considered the extent of an Inspector’s duty to consider “obvious alternatives” to demolition of an unlawful building in appeals under ground (f).¹⁰ In *Ahmed*, the Claimant had obtained planning permission for the demolition of an existing property and the erection of a three storey building with a butterfly roof, comprising of a retail unit on the ground floor and six flats on the floors above. In breach of that planning permission, the Claimant erected a four storey building with seven flats and a stepped flat roof. The building was therefore in breach of planning control and did not constitute lawful commencement of the planning permission, which then expired on 7 June 2010. The Local Authority issued an enforcement notice on 3 September 2010.

¹⁰ s.174(2)(f) Town and Country Planning Act 1990: “the steps required to be taken exceed what is necessary to remedy any injury to amenity that may have been caused by the breach of planning control.”

42. On appeal, the Claimant argued that the steps required by the Council to remedy the breach of planning control were excessive because the scheme approved under the, now expired, planning permission would still have been acceptable in planning terms and the Claimant could therefore remedy the breach by modifying the building rather than demolishing it. The planning inspector found that he did not have power pursuant to ground (f) to authorize the six-flat building now that planning permission had expired. He concluded that the only way for the Claimant to achieve this would be by submitting a fresh application to the Council. As this had not been done, the inspector could not conclude that it was unreasonable to require the whole building to be taken down.
43. The Claimant's appeal to the High Court against the inspector's findings on ground (f) was allowed on the basis that the inspector failed to consider an "obvious alternative" that could have remedied the breach of planning permission, namely the possibility of granting permission for the six-flat scheme. The Court of Appeal held, dismissing the Secretary of State's appeal, that the Inspector had a duty¹¹ to consider obvious alternatives which would overcome the planning difficulties of the scheme being enforced against at less cost and disruption.¹² In this case, the Claimant had appealed under ground (a) as well as ground (f). Section 177(1) empowered an inspector to grant permission for "a whole or any part of" the development as built. Therefore, he did have the power to grant planning permission for the six flat scheme if that scheme could be considered to be a part of the development being enforced against. The Inspector therefore erred in law by refusing to consider the possibility of granting permission under ground (a) for the six flat scheme and then amending the notice under ground (f) to reflect this.
44. *Ahmed* was distinguished in the subsequent Court of Appeal decision in *Ioannou v. Secretary of State for Communities and Local Government* [2014] EWCA Civ 1432. Mr Ioannou had been served with an Enforcement Notice in respect of the unlawful conversion of a dwelling-house into 5 self-contained flats. He appealed and sought to rely upon an alternative 3-flat scheme which he contended the Inspector could grant permission for on appeal. The Inspector held that he had no power to grant permission for the 3-flat scheme since it was a different development to that enforced against.

¹¹ See the decision in *Moore v Secretary of State for Communities and Local Government* [2013] JPL 192.

¹² See the decision in *Tapecrown Ltd v First Secretary of State* [2006] EWCA Civ 1744

45. Mr Ioannou appealed to the High Court and, at first instance, Mr Justice Ouseley allowed his appeal. He held that the Inspector's powers under the Ground (a) appeal were confined by s.177 of the 1990 Act to the "*whole or any part of*" the development enforced against, so that the 3-flat scheme, being a different development, could not be considered under Ground (a). However, he also found, under Ground (f), that the Inspector could have altered the requirements of the Enforcement Notice to require the 5-flat scheme to be converted to the 3-flat scheme. Mr Justice Ouseley held that the only limit to the Inspector's power to achieve this result was the *Wheatcroft* principle. However, since the Inspector's Decision Letter contained no assessment of whether the 3-flat scheme would be consistent with that principle, the Inspector had erred in law.
46. The Secretary of State appealed this successfully to the Court of Appeal (reported at [2014] EWCA Civ 1432). Once again delivering the lead judgment, Lord Justice Sullivan held that the Ground (f) appeal could not be relied upon to bring about the grant of deemed planning permission for an alternative development which was not in existence at the time of the Enforcement Notice. In so deciding, Lord Justice Sullivan distinguished the earlier decision of the Court of Appeal in the case of *Ahmed* [2014] EWCA Civ 566, since, it was said, there the question was whether the "*obvious alternative*", a previous scheme, could be regarded as "*part*" of the matters stated in the Enforcement Notice as constituting a breach of planning control, so that, as Richards LJ said in paragraph 32 of *Ahmed* : "*The question of a grant of permission going beyond the terms of the notice does not arise.*"
47. One alternative argument always available to a concerned appellant in such cases is to invite to the Inspector extend the time for compliance with the Enforcement Notice under Ground (g), enabling a fresh planning application to be made for an alternative development which may be acceptable in planning terms.

TOP TEN RECENT “ENVIRONMENTAL” CASES

AARHUS/COSTS

1. *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012
2. *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539

EIA/SEA

3. *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324
4. *R (HS2 Action Alliance Ltd & LB Hillingdon) v Secretary of State for Transport* [2014] EWHC 2759 (Admin) and [2014] EWCA Civ 1578)

NUISANCE/WASTE

5. *Coventry and others v Lawrence* [2014] UKSC 13
6. *Manchester Ship Canal Company Ltd v United Utilities Water plc* [2014] UKSC 40
7. *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] Env. L.R. 28,

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8. *R (Badger Trust) v Secretary of State for Environment* [2014] EWHC 2909 (Admin)
9. *RSPB v Secretary of State for Environment* [2014] EWHC 1645

FRACKING

10. *R (on the application of Frack Free Balcombe Residents Association) v West Sussex CC* [2014] EWHC 4108 (Admin)

AARHUS/COSTS

48. The first two “environmental” cases covered by this paper relate to costs and the Aarhus regime.

Case 1: *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012

- *Private nuisance actions in principle capable of constituting procedures which fall within scope of Aarhus Convention, article 9(3).*
- *If Convention applies and a claimant seeks a PCO, the requirement in article 9(4) of the Convention that the proceedings should not be prohibitively expensive is no more than a factor to be taken into account.*

49. Miller Argent is a company that reclaims land relating to historic mining activities. Following an unsuccessful group challenge, a local resident (Mrs Austin) brought a claim in private nuisance against the company. She claimed that the company was in breach of conditions in the relevant planning permission, which had caused an unreasonable interference with the enjoyment of her home. Mrs Austin’s application for a Protective Costs Order (PCO) had been refused by the High Court.

50. In finding that private nuisance actions can, in principle, fall within the scope of Article 9.3, the Court of Appeal applied a two part test. First, the complaint must have a close link with the particular environmental matters regulated by the Convention. Second, should the claim be successful it must achieve significant public environmental benefits. In applying that test to the facts of Mrs Austin’s claim, it was held that the public benefit was too uncertain and limited to fall within the scope of Article 9.3. The appeal was dismissed, with the Court of Appeal also finding that because protection of a private interest was such a significant part of Mrs Austin’s claim it would not properly fall within Article 9.4.

Case 2: Secretary of State for Communities and Local Government v Venn [2014] EWCA Civ 1539

- *Application of PCO regime to statutory applications under section 288*
- *CPR 45.41 not compliant with the Aarhus Convention insofar as it is confined to applications for judicial review, and excludes (environmental) statutory appeals and applications*

51. It is worth recalling that, previously, in *Venn v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin), Mrs Justice Lang had held that CPR rule 45.43 was limited to judicial review proceedings only. In distinguishing between section 288 applications and judicial review claims, she had noted that although “*applications under section 288 frequently raise the same public law issues as in judicial review claims, the wording of CPR 45.41 refers to “claims” not “issues”*”. Whilst agreeing that it “*seems inconsistent*” to exclude section 288 claims from costs protection it was nevertheless acknowledged that “*there has been no ruling in the EU or UK courts that their exclusion from CPR 45 is unlawful*”. Notwithstanding, Mrs Justice Lang held that the “*inherent jurisdiction of the court to grant protective costs orders*” and a consequential relaxation of the *Corner House* criteria in relation to environmental claims would enable the court to give effect to the requirements of the Convention. She then adopted the approach in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 and [2011] EWCA Civ 891), and “*treated the public importance and public interest criteria for making a protective costs order as met*” because the claim raised “*environmental matters within the scope of the Convention*”.

52. In its recent judgment, the Court of Appeal confirmed that the Convention definition of environmental information is broad enough to catch planning matters, including section 288 applications. Therefore, such challenges fall within Article 9(3) of the Aarhus Convention and require access to a judicial procedure that is not prohibitively expensive. However, the Court of Appeal also held that its clear wording specifically confines CPR 45.41 to claims for judicial review. Further, the court held that it could not exercise its discretion to make a PCO under *Corner House* principles because the exclusion of statutory appeals and applications from CPR 45.41 was a deliberative expression of legislative intent. As such, it would be inappropriate to bypass that deliberate limitation.

53. In light of the above, it is clear that CPR 45.41 is not compliant with the Aarhus Convention insofar as it excludes environmental statutory appeals and applications because the present costs protection regime depends upon the identity of the decision-taker rather than the nature of the environmental decision. The Court of Appeal indicated that such a system is “*systemically flawed*” in terms of Aarhus compliance.

EIA/SEA

Case 3: R (Buckinghamshire County Council) v Secretary of State for Transport [2014] 1 WLR 324

- *Exemption from scheme of EIA Directive*
- *Interpretation of “plan or programme” in the context of SEA*

54. The *Buckinghamshire* case was perhaps the most significant environmental case of last year. It concerned a command paper (the DNS) issued in January 2012 by which the Government signalled its intention that HS2 should be taken forward by way of hybrid bills in Parliament. It raised weighty issues on EIA. Where a project is authorised by legislative acts, it may be exempted from the general scheme of the EIA Directive, but will still need to comply with all the elements relevant to assessing environmental impacts. The question on EIA was whether the hybrid bill procedure was compliant with these requirements. Lord Reed (with whom the rest of the court agreed) held that it was *acte clair* that it would. In coming to this view, he provided a detailed analysis of the separation of powers in the United Kingdom and the parliamentary process.

55. The *Buckinghamshire* case is also of key importance in relation to SEA. The issues for the Supreme Court so far as SEA were concerned were whether the DNS was a “*plan or programme*” which “*set the framework for development consent*” and was “*required by administrative provisions*” within the meaning of articles 2 to 3 of the SEA Directive and whether article 3(2)(a) of the SEA Directive was inconsistent with article 7 of the Aarhus Convention. Lord Carnwath gave the main judgment concerning the SEA issues. He was “*prepared to proceed*” on the assumption that the DNS was “*required by administrative provisions*” for the purposes of Article 2(a) or “*at least that there is a referable issue on the*

meaning of that part of the definition” (paragraph 22) and devoted the majority of his judgment to the question of whether the DNS “*set the framework*” for the purposes of Article 3. In his judgment, “*influence*” in the ordinary sense was not sufficient to set the framework. Rather, the influence “*must be such as to constrain subsequent consideration, and to prevent appropriate account from being taken of all of the environmental effects which might otherwise be relevant*” (paragraph 40). He considered that the DNS did not in any way constrain the decision-making process and so did not require SEA. He also dispatched the Aarhus point in brief terms at paragraph 52, finding that the SEA Directive must be interpreted and applied on its own terms and that, if this falls short of full compliance with the Aarhus Convention, it does not invalidate the Directive so far as it goes. It simply means that a possible breach of the Convention may have to be considered as a separate and additional issue. In the HS2 case the point was academic because no such breach was alleged.

Case 4: *R (HS2 Action Alliance Ltd & LB Hillingdon) v Secretary of State for Transport* [2014] EWHC 2759 (Admin) and [2014] EWCA Civ 1578

- *Safeguarding directions and HS2*

56. Last year, Lindblom J considered a second judicial review claim brought by the HS2 Action Alliance Ltd, arguing that safeguarding directions for the proposed route of Phase 1 of HS2 ought to have been assessed under the regime for strategic environmental assessment (*R (HS2 Action Alliance Ltd & LB Hillingdon) v Secretary of State for Transport* [2014] EWHC 2759 (Admin)). It was argued that such directions, unlike the Command Paper, operated as a legal constraint on development consent for various projects, including EIA development. In rejecting that submission, Lindblom J characterised such directions as “*safeguards*” taking their shape from project which had already been found by the Supreme Court not to constitute a plan or project setting the framework for future development consent. It was again critical that they did not constrain the discretion of the decision-maker considering the development consent in due course.

57. In a judgment handed down in December ([2014] EWCA Civ 1578), the Court of Appeal agreed that the safeguarding directions did not constitute a plan or programme setting the framework for future development consent under the SEA Directive 2001 or implementing regulations. The Court of Appeal considered that the safeguarding directions were a procedural addition to the legislation which governs development control decision-making in the safeguarded zone but they did not constrain the discretion of the decision-maker in making decisions about developments in that area. As such, the directions did not prevent the likely environmental impacts from being taken into account in applications for planning permission. The safeguarding directions were not an “*evolution of the HS2 project into a plan or programme setting the framework for future development consent*”. Thus, it was the Court of Appeal’s clear view that HS2 is being pursued by specific legislation rather than pursuant to any “*plan or programme*” for the purposes of the SEA Directive.

NUISANCE/WASTE

Case 5: *Coventry and others v Lawrence* [2014] UKSC 13

- *Revolution in the law of private nuisance*

58. In *Coventry v Lawrence* the Supreme Court reviewed the law of private nuisance in the context of a claim brought by the owners of a house purchased in 2006 in the vicinity of a Speedway racing stadium. In judgments spanning 68 pages, the Supreme Court held, inter alia, that it was possible to obtain a right by 20 years’ prescription to commit a private nuisance but that it continued to be no defence that a claimant came to the nuisance. Further, the Supreme Court declined to find that what amounted to a private nuisance could be defended either on the basis that it informed the “*character*” of the area, or by reference to a grant of planning permission. In giving the majority judgment, Lord Neuberger further observed that a claimant remained entitled to expect a defendant would take all reasonable steps to ensure that noise was kept to a minimum. The grant of planning permission could, Lord Neuberger considered, be advanced in support of a submission that damages should be awarded instead of an injunction. He further advocated a “*much more flexible*”

approach to the question of whether to award damages only.

Case 6: *Manchester Ship Canal Company Ltd v United Utilities Water plc* [2014] UKSC 40

- *Water Industry Act 1991*
- *No implied right of discharge from outfalls created after 1991*

59. The Supreme Court *United Utilities* case involved a statutory sewerage undertaker's appeal against a decision ([2013] EWCA Civ 40) that the right of discharge onto third party property of the respondent owner of a private watercourse had not been transferred to private water companies as part of the privatisation process.

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

Case 7: *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] Env LR 28

- *Review of authorities on relationship between the law of nuisance and the rule in **Rylands v Fletcher***

61. In *Northumbrian Water* Moore-Bick LJ derived three key principles from the authorities on the relationship between the law of nuisance and the rule in *Rylands v Fletcher*:

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

- b. unless the case can be brought within the scope of the rule in *Rylands v Fletcher*, the defendant is not liable for damage caused by an isolated escape, i.e., one that is not intended or reasonably foreseeable;
- c. foreseeability of harm of the type suffered by the claimant is necessary for the defendant to be liable in damages for nuisance.

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

CONSERVATION, WILD BIRDS AND HABITATS

Case 8: *R (Badger Trust) v Secretary of State for Environment* [2014] EWHC 2909

- *Challenge to badger cull*
- *Survey of the law on substantive legitimate expectation*

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

Case 9: *RSPB v Secretary of State for Environment* [2014] EWHC 1645

- *Wild Birds Directive*
- *Habitats Directive*

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

65. At the heart of this case is the suggestion by the Royal Society for the Protection of Birds that the Wild Birds Directive should be construed as prohibiting any non-natural intervention, or cull, of a designated species below its present stable population level within a special protection area. In rejecting that submission, Mr Justice Mitting held that the specification of population levels was but a feature of the national application of more general requirements set out in Article 6(3).

66. He went on to observe that, in so far as Directive 2009/147EC had sought to codify the Wild Birds Directive “*in the interests of clarity and rationality*”, the European legislator had failed to achieve that aim.

67. By Article 6(3) of the Council Directive 92/43 (“the Habitats Directive”) it was clear, however, that the determinative question was the impact of the plan consented to upon the integrity of the special protection area. This involved an exercise of judgment on the Secretary of State’s part. He had regard to the exponential increase in numbers of breeding pairs of these large gulls since the 1970s. It was self-evident that the habitat of the gulls would not be interfered with, except temporarily. The Secretary of State had been entitled to conclude that the long-term viability of the designated species on this site would not be impaired, nor would the integrity of the site be affected.

68. The case is currently proceeding to the Court of Appeal.

FRACKING

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

Case 10: R (on the application of Frack Free Balcombe Residents Association) v West Sussex CC [2014] EWHC 4108 (Admin)

- *Application for judicial review*
- *Relevance of statutory authorisations*

70. The Balcombe claim was a high profile application to challenge Cuadrilla's "temporary permission for exploration and appraisal comprising the flow testing and monitoring of the existing hydrocarbon lateral borehole along with site security fencing, the provision of an enclosed testing flare, and site restoration" at its Exploration Site in Balcombe. As will no doubt be recalled, the site had been the scene of a number of protests when operations took place under an earlier planning permission. It is also worth noting that the proposed development had required a number of statutory authorisations from the Environment Agency, the Department of Energy and Climate Change and the HSE.

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

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

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