



## EDITORIAL COMMENT

### The Editorial Board

Welcome to the December edition of the PEP newsletter. This month, Stephen Tromans QC analyses an important recent finding of the Compliance Committee under the Aarhus Convention concerning the scope of the Convention in the context of private nuisance proceedings, while John Pugh-Smith considers recent case law about the scope of an outline planning permission, as well as the application of permitted development rights to residential basement projects. Finally, Richard Harwood QC makes some suggestions – both legal and non-legal – for your Christmas reading list!

We hope you enjoy the newsletter and wish all our readers a Merry Christmas and a happy and prosperous New Year.

As ever, thanks for your interest.

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### Editorial Board

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## THE AARHUS CONVENTION AND PRIVATE NUISANCE CLAIMS

**Stephen Tromans QC**

The Compliance Committee under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters has found against the UK following a recent communication concerning the scope of the Convention in the context of private nuisance proceedings: see Findings and Recommendations with regard to Communications ACCC/C/2013/85 and ACCC/C/2013/86 which were placed before the Meeting of the Parties at its 55th Meeting in Geneva from 6-9 December 2016. The Committee made a number of important findings. In general, private nuisance proceedings are to be regarded as judicial procedures aimed to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment, within Article 9(3) of the Convention. The test is whether the nuisance complained of affects the environment, as defined in the Convention. The number of people affected and the claimant's motivation, or the proceeding's possible importance in public interest terms are irrelevant. Also importantly, it found that other administrative and judicial procedures, such as complaints to regulators, are not effective alternative remedies. A complaint is not a "challenge" under the Convention, particularly as commencement of any action would be at the discretion of the regulator. Nor is a claim in judicial review against the regulator for failure to act an adequate alternative. It found that whilst statutory nuisance proceedings might in many cases provide an alternative to private nuisance, in a number of cases this would not be so, and hence statutory nuisance does not present a fully effective alternative to nuisance claims. There was evidence before the Committee which was not disputed that costs in private nuisance proceedings typically exceed £100,000, and the Committee accordingly found that the UK has failed to ensure that private nuisance proceedings falling within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive.

This is a clear and important finding. It will require reconsideration of the approach of the Court of Appeal

in *Austin v Miller Argent* [2014] EWCA 1012 (in which

Stephen Tromans QC acted for Mrs Austin). Mrs Austin's case is now the subject of an application and claim for just satisfaction to the European Court of Human Rights.

*Stephen Tromans QC acted pro bono (instructed by Hugh James, also acting pro bono) for the Environmental Law Foundation (ELF).*

## HOW WIDE IS THE SCOPE OF AN OUTLINE APPLICATION?

**John Pugh-Smith**

According to those online founts of knowledge, the Planning Practice Guidance explains: "An application for outline planning permission allows for a decision on the general principles of how a site can be developed. Outline planning permission is granted subject to conditions requiring the subsequent approval of one or more 'reserved matters';<sup>1</sup> and the Planning Portal advises: "An application for outline planning permission establishes the principle of development and as such detailed plans will not normally be required although this is largely dependent on the nature of the application." Equally, each case turns on its facts; but where floorspace details are given how much do those influence a decision that essentially turns on height and scale?

In the recent case of *Crystal Property (London) Limited v Secretary of State for Communities and Local Government and Hackney London Borough Council* [2016] EWCA Civ 1265 (December 9th) these considerations, and the applicable case law, were the subject of review by the Court of Appeal, with the judgment being given by Lord Justice Lindblom. Crystal had applied for outline permission for a mixed use development of shops and offices on a site known as Morris House, adjoining 130 Kingsland High Street, London E8. The application form had been completed describing the proposal as "application for outline planning permission with all matters reserved". The proposed development had been described as a "part four, part five-storey building"; and details of the proposed floor space had been given. Drawings had also been submitted showing the height and massing of the building. The Council had refused the application

on the basis that, because of its excessive height and massing, the building would be detrimental to the area. This decision was upheld at appeal with the Inspector concluding that, as the drawings accompanying the application indicated the building's possible layout and design, the building would have an unacceptably harmful effect on the area because of its size. In the High Court, the Deputy Judge (Mr C.M.G. Ockleton QC) had held that because the drawings were not marked as "illustrative", height and massing were not reserved matters and that the Inspector had been correct to consider them. Before the Court of Appeal, Crystal now submitted that the Inspector should simply have considered whether there was any reason to withhold outline planning permission, leaving height and massing to be determined when the scale of the proposed development was considered at the reserved matters stage.

Dismissing the challenge, the Court noted that although the application drawings had not been marked as "illustrative" or "indicative", they could only sensibly be understood as being illustrative. The central question, though, was how the floor space details submitted with the application were to be understood. Were they part of the proposal for which outline permission was being sought? If they were, the Court had to ask how they related to the scale of the development, which was reserved for future consideration. Some caution was needed in tackling those questions. Firstly, the relevant authorities<sup>2</sup> on reserved matters, scale and floor space were concerned with the interpretation of a grant of planning permission, rather than a rejected application. Secondly, some of those authorities were concerned with the legislative regime as it was before the concept of scale was introduced to the definition of reserved matters by the Development Management Order 2010. Finally, in all of them the decision had turned on the facts. However, it was entirely consistent with these authorities to regard the proposed floor area as an essential component of the outline proposal. Nevertheless, floor space and scale were not synonymous; and it was possible for floor space to be specified in an outline application while scale was reserved for future determination.

Here, the Inspector had not misunderstood the status of the application; for his decision letter clearly stated that it was for outline permission with all matters reserved. Nor had he fallen into the error of treating height and massing as if they were matters for determination at the outline stage. He had properly observed that the drawings indicated a possible rather than definitive layout and design, and, that Crystal was seeking to establish the parameters of a building that would be considered acceptable. It had put its case on the basis that the drawings represented its proposal for outline planning permission. The floor space details were not expressed to be indicative, approximate or maximums that might be materially changed when the reserved matters were submitted. Nevertheless, as a matter of basic geometry, a building on that site, with that number of storeys and that amount of floor space could not be designed so as to be materially different in terms of height and massing from the building shown in the drawings. In those circumstances, it could not be said that the Inspector had erred. He had not considered reserved matters but had, quite properly, looked at the height, bulk and mass of the proposed building in order to test its acceptability. He had properly carried out his task of considering the merits of the proposal. Therefore, there had been no error of law in his conclusion that it would not be a satisfactory development of the site. Finally, insofar as the Deputy Judge had thought that the height and massing of the building were not reserved matters and were formally before the inspector for determination, he had been wrong. Those matters informed the inspector's decision but did not alter the status of the application.

So, by way of practical considerations, is the concept of a bare outline application now effectively dead? If, as I venture to suggest it is, certainly in an urban context, then even greater care needs to be exercised in how the application form is completed and how the drawings are titled.

<sup>2</sup> *Lewis Thirkwell v Secretary of State for the Environment* [1978] JPL 844; *Slough Borough Council v Secretary of State for the Environment* (1995) 70 P&CR 560; *R. v Newbury District Council ex parte Chieveley Parish Council* [1997] JPL 1137; *R (on the application of Saunders) v Tendring District Council* [2003] EWHC 2977 (Admin); and *MMF (UK) Ltd v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin)

## DOWN TO BASICS!

**John Pugh-Smith**

In this article John Pugh-Smith reviews the recent decision of the High Court in *R (Eatherley) v London Borough of Camden [2016] EWHC 3108 (Admin)* on the application of permitted development rights to residential basement projects

For many years there has been a debate as to whether the excavation of a basement falls within the scope of Part 1 Class A of the General Permitted Development Order (G PDO). This Class permits "*T*he enlargement, improvement or other alteration of a dwellinghouse"; though none of the limitations or conditions within this Class refer to the excavation of a basement (or similar works). Nevertheless, a number of local planning authorities (LPAs) and planning inspectors have so held, and that the required engineering operations are also included. However in *R (Eatherley) v London Borough of Camden & Ireland [2016] EWHC 3108 (Admin)*, Mr Justice Cranston has now given a different insight.

Mr Ireland, the Interested Party, owns a two-storey mid-terrace house in Quadrant Grove, Chalk Farm, London NW5. His LDC application form, received by Camden Council on 18th December 2015, described the proposed development as "*Formation of new basement accommodation*". The submitted drawings showed the proposed excavation of a basement directly underneath the main part of the original house (i.e. with no lightwells or other external alterations). He had previously applied in November 2013 with a basement proposal including a front lightwell, but that application had been withdrawn. An application for a LDC had also been made in March 2014 but that had been rejected by Camden in October 2014 and a subsequent appeal then withdrawn.

The 2015 application was submitted under 'permitted development rights' as set out within Camden's policy *CPG4 Basement and Lightwells* "which allows such applications that are not within Conservation Areas or subject to Article 4 Directions." Adjoining occupiers had objected and Mr Eatherley obtained an engineer's opinion stating that a basement dug beneath an existing building within a terrace was one of the riskiest situations in which to construct a basement because of the shared foundations, that any movement of the

house would directly impact its neighbours, and that the proposal amounted to more than a simple building operation because expert engineering input was required to ensure that the balance of forces in both directions was understood and controlled. Due to its local controversy this LDC application was referred to the Planning Committee on 25th February 2016.

The officer's report stated: "The proposed depth of the basement is approximately 2.85m, with the width (side to side of the house) a maximum of 4.5m and length (front to back of house) a maximum of 7.5m". It advised:

*"The proposals [are] for a new basement under the footprint of the house with a depth of 2.8m from ground floor to top of basement slab. The basement footprint would be c33sqm. No lightwells are proposed. The basement works will, by necessity, involve temporary engineering works associated with protecting the structural stability of the host and neighbouring buildings. However it is considered that these works would be entirely part of the basement works to number 24, and they do not constitute "a separate activity of substance that is not ancillary to the activity that benefits from permitted development rights".*

It concluded that the proposals could be considered to be permitted development under Class A, Part 1, Schedule 2 of the 2015 G PDO. The Committee resolved to issue the LDC subject to a tendered section 106 agreement requiring the submission of a Construction Management Plan. Following the issue of the LDC on 5th May 2016 a neighbour, Mr Etherley, commenced judicial review proceedings. Prior to the High Court hearing on 22nd November 2016 the Council, on 3rd October 2016, had confirmed an Article 4(1) direction covering the whole of the borough; so with effect from 1st June 2017 planning permission would be required for basements.

In his judgment, handed down on 2nd December 2016, Mr Justice Cranston granted judicial review and quashed the LDC on the basis that the Committee had misdirected itself. He rejected a number of contentions. First, that interpreting a permission under the G PDO should not be how a reasonable reader would understand it. The case of *Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74*, and the authorities culminating in it, were all cases that

concerned permissions granted by planning authorities, not permissions laid down by statutory instrument. Instead, the ordinary rules of statutory interpretation applied. Second, he declined to consider the purpose behind the GPDO as the Order was so wide that it was impossible to determine its overall purpose. It covered a disparate collection of topics, some minor and others less minor. In attempting to establish any underlying purpose, each individual permission and its attendant conditions had to be examined separately. The judge further considered that documents prepared by the Department of Communities and Local Government did not assist with interpretation. They merely showed that issues concerning the excavation of basements and permitted development rights had been on the political agenda for a considerable time and that no clear Parliamentary intention had ever been formulated.

Rather, the crucial issue was the meaning of the plain words of the permission, granted by Article 3(1) of the GPDO to enlarge, improve or alter a dwellinghouse. Camden asserted that "development", as defined by section 55 of the Town and Country Planning Act 1990 covered underground development; and that planning permission granted for "development" included permissions under the GPDO. It maintained that the straightforward English words of Class A embraced domestic basements because a basement undoubtedly enlarged, improved, or altered a dwelling house. The judge remarked that that logic had an attractive simplicity; but the difficulty in accepting it arose from the absence of any boundaries to the permission. There had to be a point where the excavation, underpinning and support for a basement became different in character from the enlargement, improvement and alteration of the dwelling. In the context of a "two up two down" terrace house in suburban London, the development of a new basement when there was currently nothing underneath the house could, as a matter of fact and degree, amount to two substantial developments because the engineering aspect of excavating a space while supporting the house and the neighbours' properties might be a separate planning aspect. It was for the Planning Committee, not for the court on an application for judicial review, to decide whether there were two activities or one. In the instant case, the Planning Committee had asked itself the wrong question. It had focused on whether the engineering works were part

and parcel of making a basement when it should have asked whether they constituted a separate activity of substance. Had the Committee asked the right question it would have needed to assess the additional planning impact of the engineering works at the time of granting the LDC. Here, it was only afterwards, with the Construction Management Plan secured by the section 106 agreement, that the Council had given attention to some of the impacts of the development. At that point it was too late. The issue was one of planning judgment, but since the Planning Committee had misdirected itself as to the issue it never got as far as properly exercising that judgment.

While both the outcome of this case and the imposition of an Article 4(1) direction mean that the whole Borough and not just the residents of Quadrant Grove, NW5 may be able to sleep more soundly in their beds from 1st June 2017, the issue remains of considerable importance as to how the GPDO can be sensibly interpreted in this type of situation. Clearly, when determining an application for an LDC for the excavation of a basement, LPAs and Inspectors will now need to assess whether the engineering works constitute "*a separate activity of substance*". The obvious difficulty with such an assessment is trying to establish when the tipping point arises. Indeed, on its facts, Mr Ireland's proposal actually involved no more than excavation of 100 cubic metres; and although the judge did not answer this question, he did state that such development "*could well amount, as a question of fact and degree, to two activities, each of substance*"; and he did refer to the claimant's submissions in relation to this question as "*persuasive*". Accordingly, it would not be unreasonable for an LPA to conclude that such development (i.e. the excavation of a basement of say 100 cubic metres) is not permitted development. Furthermore, if such a conclusion is correct, for a scheme which involved the excavation of a fairly typical basement (i.e. a single storey directly underneath the main part of the original house), then in the future the majority of such schemes are unlikely to be permitted development. Whether or not that is in the wider public interest is not for me to comment upon.

*John Pugh-Smith has been involved with several basement development schemes within Greater London for both applicants and neighbours.*

## CHRISTMAS BOOKS

### Richard Harwood QC

If you are struggling for last minute Christmas gifts, these books by members of 39 Essex Chambers might (or might not) provide an answer:

Even with the prospect of Brexit, the standard work on *Environmental Impact Assessment*.

[http://www.amazon.co.uk/Environmental-Impact-Assessment-Stephen-Tromans/dp/1847666752/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1375654215&sr=1-1&keywords=tromans](http://www.amazon.co.uk/Environmental-Impact-Assessment-Stephen-Tromans/dp/1847666752/ref=sr_1_1?s=books&ie=UTF8&qid=1375654215&sr=1-1&keywords=tromans)

by Stephen Tromans QC remains essential.

Stephen has also written *Nuclear Law: The Law Applying to Nuclear Installations and Radioactive Substances in its Historic Context*.

[http://www.amazon.co.uk/Nuclear-Law-Installations-Radioactive-Substances/dp/1841138576/ref=sr\\_1\\_3?s=books&ie=UTF8&qid=1375654463&sr=1-3&keywords=stephen+tromans](http://www.amazon.co.uk/Nuclear-Law-Installations-Radioactive-Substances/dp/1841138576/ref=sr_1_3?s=books&ie=UTF8&qid=1375654463&sr=1-3&keywords=stephen+tromans)

Richard Harwood QC's set of standard planning law texts expanded in 2016 with the publication of *Planning Permission*.

[https://www.amazon.co.uk/Planning-Permission-Richard-Harwood00CYLVPUC\\_1\\_1?s=books&ie=UTF8&qid=1481449838&sr=1-1](https://www.amazon.co.uk/Planning-Permission-Richard-Harwood00CYLVPUC_1_1?s=books&ie=UTF8&qid=1481449838&sr=1-1)

joining *Planning Enforcement*

[http://www.amazon.co.uk/Planning-Enforcement-Richard-Harwood/dp/1780431783/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1405692405&sr=1-1&keywords=planning+enforcement](http://www.amazon.co.uk/Planning-Enforcement-Richard-Harwood/dp/1780431783/ref=sr_1_1?s=books&ie=UTF8&qid=1405692405&sr=1-1&keywords=planning+enforcement)

and *Historic Environment Law (with 2014 supplement)*

<http://www.ial.uk.com/product/historic-environment-law-planning-listed-buildings-monuments-conservation-areas-and-objects/>

2017 will see the publication of *Planning Policy*, co-authored with Victoria Hutton.

Possibly not bedside reading, but the 8 volume *Encyclopedia of Environmental Law*

<http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=184&productid=6034> is edited by Justine Thornton QC, Richard Wald, James

Burton, Rose Grogan, Ned Helme, Josephine Norris, Daniel Stedman Jones, Mungo Wenban-Smith and Stephen Tromans, QC.

Another looseleaf is *Planning Law: Practice and Precedents*

<http://www.sweetandmaxwell.co.uk / Catalogue/ProductDetails.aspx?recordid=176&searchorigin=planning+law&productid=6007>

by Stephen Tromans QC, Jon Darby and Daniel Stedman Jones

Local authority and corporate lawyers might appreciate *Shackleton on the Law and Practice of Meetings* by

John Pugh-Smith and James Burton

[https://www.amazon.co.uk/Shackleton-Practice-Meetings-Madeleine-Cordes/dp/041403290X/ref=pd\\_sbs\\_14\\_1?\\_encoding=Uc=1&refRID=DM5BVG3RP2P566RCMBFZ](https://www.amazon.co.uk/Shackleton-Practice-Meetings-Madeleine-Cordes/dp/041403290X/ref=pd_sbs_14_1?_encoding=Uc=1&refRID=DM5BVG3RP2P566RCMBFZ)

Books which are not on legal topics, but could be better holiday reads are: *An important economic history* by Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*.

[http://www.amazon.co.uk/Masters-Universe-Friedman-Neoliberal-Politics/dp/0691151571/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1375654696&sr=1-1&keywords=stedman+jones](http://www.amazon.co.uk/Masters-Universe-Friedman-Neoliberal-Politics/dp/0691151571/ref=sr_1_1?s=books&ie=UTF8&qid=1375654696&sr=1-1&keywords=stedman+jones)

Patrick Hennessey's recollections of service in Iraq and Afghanistan *Junior Officers' Reading Club: Killing Time and Fighting Wars*, Patrick Hennessey

[http://www.amazon.co.uk/The-Junior-Officers-Reading-Club/dp/0141039264/ref=pd\\_sim\\_sbs\\_b\\_1](http://www.amazon.co.uk/The-Junior-Officers-Reading-Club/dp/0141039264/ref=pd_sim_sbs_b_1) and his book on the Afghan Army Kandak: *Fighting with Afghans*.

[https://www.amazon.co.uk/KANDAK-Fighting-Afghans-Patrick-Hennessey-x/dp/0241951275/ref=sr\\_1\\_1?ie=UTF8&qid=1482310305&sr=8-1&keywords=kandak+fighting+the+afghans](https://www.amazon.co.uk/KANDAK-Fighting-Afghans-Patrick-Hennessey-x/dp/0241951275/ref=sr_1_1?ie=UTF8&qid=1482310305&sr=8-1&keywords=kandak+fighting+the+afghans)

Our former colleague, Ellen Wiles, has written on literary life in Myanmar Saffron Shadows and Salvaged Scripts:

*Literary Life in Myanmar Under Censorship and in Transition*

[https://www.amazon.co.uk/Saffron-Shadows-Salvaged-Scripts-Censorship/dp/0231173288/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1481450255&sr=1-1&keywords=ellen+wiles](https://www.amazon.co.uk/Saffron-Shadows-Salvaged-Scripts-Censorship/dp/0231173288/ref=sr_1_1?s=books&ie=UTF8&qid=1481450255&sr=1-1&keywords=ellen+wiles)

Finally, the "Funny, sad, intelligent, gripping" debut novel by Rory Dunlop, *What We Didn't Say*.

[https://www.amazon.co.uk/What-Didnt-Say-Rory-Dunlop/dp/178577042X/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1481450174&sr=1-1&keywords=rory+dunlop](https://www.amazon.co.uk/What-Didnt-Say-Rory-Dunlop/dp/178577042X/ref=sr_1_1?s=books&ie=UTF8&qid=1481450174&sr=1-1&keywords=rory+dunlop)

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Jonathan's broad practice encompasses all aspects of public and administrative law. His planning, environmental and property practice encompasses inquiries, statutory appeals, judicial review, enforcement proceedings and advisory work. Jonathan is instructed by a wide variety of domestic and international clients, including developers, consultants, local authorities and the Treasury Solicitor. He is listed as one of the top junior planning barristers under 35 in the Planning Magazine Guide to Planning Lawyers. Before coming to the Bar, Jonathan taught at Cambridge University whilst completing a PhD at Queens' College. To view full CV click [here](#).



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Victoria's main areas of practice are planning, environmental and administrative law. Victoria acts in a wide range of planning and environmental law matters for developers, local authorities and other interested parties. She is also a qualified mediator and is able to mediate between parties on any planning/environmental dispute. Victoria is rated as one of the top planning barristers under 35 (Planning Magazine 2015). To view full CV click [here](#).



### **Philippa Jackson**

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Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents and challenges in the High Court. She acts for developers, local authorities, individuals and interest groups, and she has been listed for the past three years as one of the top planning juniors under 35 by Planning Magazine (2013, 2014 and 2015). Examples of recent cases include an appeal relating to an enabling development scheme for the restoration of a nationally important collection of historic buildings and a judicial review challenge to a local authority's decision to designate a sports stadium as a conservation area. To view full CV click [here](#).



### **Daniel Stedman Jones**

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Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. Daniel is a member of the Attorney General's 'C Panel' of Counsel. Before coming to the bar, Daniel completed a PhD at the University of Pennsylvania including an Urban Studies Certificate. To view full CV click [here](#).

## CONTRIBUTORS



### Stephen Tromans QC

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Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click [here](#).



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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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