INTRODUCTION

Jonathan Darby

Welcome to this week's bumper edition of our Planning, Environment and Property newsletter. We hope that you are all keeping safe as we become more accustomed to new ways of working and collaborating.

As well as our ongoing webinars, this week also saw the launch of our online bulletin summarising the key documents from the UK's plannig and environmental regulators and government agencies regarding their responses to the COVID-19 pandemic[1]. Our intention is twofold: first, to maintain an online summary; second, to provide regular updates via this newsletter, which will highlight any changes to the attached summary and, we hope, will develop into a reference resource for those working in related fields as the pandemic (and associated restrictions) develop.

This week's edition comprises contributions from: Richard Wald QC and Ruth Keating (the second of their articles looking at another key aspect of the Environment Bill); Peter Village QC (discussing a decision of the Supreme Court on the meaning

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1 https://www.39essex.com/response-from-environmental-regulators-and-government-agencies-to-covid-19/

of "openness" in national Green Belt policy); Paul Stinchcombe QC (considering permitted development and barn conversions); Simon Edwards (on the forfeiture of deposits during the present crisis); and John Pugh-Smith (on a range of ways to creatively ease 'The Lockdown' in a Planning Context).

ENVIRONMENTAL TARGET PROVISIONS: MEETING THE MARK

Richard Wald QC and Ruth Keating

Overview

In last week's PEP Bulletin we discussed the new Office for Environmental Protection ("OEP") established by the Environment Bill (the "Bill"). In this issue we consider another key aspect of the Bill, its environmental target provisions.

The Queen's Speech of 2019 reiterated her government's commitment to an environment bill thus:

> *"My government will continue to take steps to meet the world-leading target of net zero greenhouse gas emissions by 2050. It will continue to lead the way in tackling global climate change, hosting the COP26 Summit in 2020. To protect and improve the environment for future generations,* ***a bill will enshrine*** *in law environmental principles and* ***legally-binding targets****, including for air quality.*[2]*"* (emphasis added)

These environmental targets form a core part of the Bill. The relevant draft provisions and key potential issues are as follows.

Draft provisions relating to environmental targets

Part 1 of the Bill sets out the framework for legally-binding targets. The main provisions, as currently drafted are Clauses 1-6:[3]

- **Clause 1 – environmental targets:** provides that the Secretary of State may by regulations set long-term targets in respect of any matter which relates to (a) the natural environment, or (b) people's enjoyment of the natural environment. Under Clause 1 the priority areas are identified as (a) air quality; (b) water; (c) biodiversity; and (d) resource efficiency and waste reduction. A target set under this section must specify (a) a standard to be achieved, which must be capable of being objectively measured, and (b) a date by which it is to be achieved.
- **Clause 2 – particulate matter:** provides that the Secretary of State must by regulations set a target ("the PM2.5 air quality target") in respect of the annual mean level of PM2.5 in the ambient air.
- **Clause 3 – process:** before making regulations under section 1 or 2 the Secretary of State must seek advice from persons the Secretary of State considers to be independent and to have relevant expertise. The Secretary of State may make regulations which revoke or lower a target (the "existing target") only if satisfied that (a) meeting the existing target would have no significant benefit compared with not meeting it or with meeting a lower target, or (b) because of changes in circumstances since the existing target was set or last amended the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits. Before making regulations, which revoke or lower a target the Secretary of State must lay before Parliament, and publish, a statement explaining why.

2 Queen's Speech (19 December 2019): <https://hansard.parliament.uk/lords/2019-12-19/debates/C9EB1C3B 3551-473B-8C30-864B8B020409/Queen%E2%80%99SSpeech accessed> 12 May 2020.

3 A tracked changed version of the Bill dated 6 March 2020 can be accessed at: <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf> accessed 12 May 2020.

- **Clause 4 – effect:** it is the duty of the Secretary of State to ensure that targets set under section 1 (currently Clause 1) are met, and (b) the PM2.5 air quality target set under section 2 (currently Clause 2) is met.
- **Clause 5 – reporting duties:** on or before the reporting date the Secretary of State must lay before Parliament, and publish, a statement containing the required information about the target i.e. whether the target has been met or not and if the Secretary of State is not yet able to determine whether the target has been met, the reasons for that.
- **Clause 6 – review:** the Secretary of State must review targets set under section 1 (currently Clause 1) and the PM2.5 air quality target set under section 2 (currently Clause 2) in accordance with this section. The purpose of the review is to consider whether the "significant improvement test" is met. The significant improvement test is met if meeting (a) the targets set under sections 1 and 2, and (b) any other environmental targets which meet the conditions in subsection (8) and which the Secretary of State considers it appropriate to take into account, would significantly improve the natural environment in England. The conditions in subsection (8) are that (a) the target relates to an aspect of the natural environment in England or an area which includes England, (b) it specifies a standard to be achieved which is capable of being objectively measured, (c) it specifies a date by which the standard is to be achieved, and (d) it is contained in legislation which forms part of the law of England and Wales.

Commentary on the draft provisions

The environmental target provisions were introduced in the version of the Bill published on 15 October 2019. Previously, in the draft Bill (December 2018), there was a conspicuous absence of any legally binding targets and therefore a conspicuous presence of a significant gap in environmental protection.[4]

However, even the new draft provisions contain a number of significant weaknesses in terms of environmental protection. These include:

- No set targets: As quoted above, the Queen's speech emphasised that the purpose of the Bill would be to *"protect and improve the environment for future generations…[and] enshrine in law environmental principles and legally-binding targets, including for air quality"*. Most fundamentally in respect of the targets, the Bill does not itself introduce any legally binding targets and so that work is left to later stages. Indeed, much of the emphasis in the draft provisions is unsurprisingly on targets being 'met'. The effect of this might be that unambitious targets are set precisely with this outcome in mind, so that targets will tend to be less progressive or protective of the environment than many hope for.
- The process: Clause 3 of the Bill requires the Secretary of State to seek advice from persons s/he considers to be independent and to have relevant expertise. Notably this requirement extends only to seeking advice but not necessarily to following it.
- Changes in circumstances: as outlined above under Clause 3(3):

  "[t]he Secretary of State may make regulations under section 1 or 2 which revoke or lower a target (the "existing target") only if satisfied that – (a) meeting the existing target would have no ***significant*** *benefit compared with not meeting it or with meeting a lower target, or (b) because of changes in circumstances since the existing target was set or last amended the environmental, social, economic* ***or*** *other costs of meeting it would be disproportionate to the benefits."* (emphasis added).

4 December 2018 version of the Bill: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849 /draft-environment-bill-governance-principles.pdf> accessed 12 May 2020.

There is a clear conflict which arises between these factors based on the current drafting of Clause 3(3).

- First, under (a) in order to retain the more ambitious existing target it must offer a "significant" benefit. It is not clear either what the meaning of the word significant would be in this context or by which the benchmark such an improvement would fall to be judged.
- Second, the preconditions of sub clause (b) i.e. environmental, social, economic or other costs are expressed to be disjunctive rather than conjunctive. This means that an existing target may be abandoned where it would result in any of these types of costs which are considered to be disproportionate to the benefits. Given how easy it is likely to be to argue one or other of these forms of disproportion, the current drafting will offer precious little protection against the loss of ambitious targets.

Conclusion

The Bill itself is silent on the content of environmental target provisions and therefore on how ambitious they will be. Furthermore the current drafting which allows targets to be revoked or lowered relatively easily because of social and economic costs may mean that environmental protection will continue to be viewed as a luxury in times where it can be afforded rather than the necessity it actually is. Overall the latitude permitted to the discretion of the Secretary of State in the setting and maintenance of environmental targets, in marked contrast to the position which has prevailed hitherto with environmental standards which derive from EU legislation or those contained in domestic legislation such as in the Climate Change Act 2008, will leave the door wide open to the regressive weakening of environmental standards where the politics of the day support such a course..

YORKSHIRE BITTER IN THE GREEN BELT

Peter Village QC

In these unprecedented times, one wonders how things could get stranger? Well hold my beer, here is an article by a barrister on a case he lost. Spoiler alert! It's bitter.

R (on the application of Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council[2020] UKSC 3 is a decision of the Supreme Court on the meaning of "openness" in paragraphs 79and 90 of the NPPF 2012 (now paras 133 and 146 NPPF 2019).

SSOBT, a small independent brewer based in the market town of Tadcaster, challenged the grant of planning permission by NYCC which, as mineral planning authority, granted planning permission for the 6ha extension of a limestone quarry on land on the outskirts of Tadcaster, which lies within the Green Belt. The focus of the decision was the officer's report to committee which resolved that permission should be granted. I mention this because, unfortunately, Lord Carnwath JSC, giving the only substantive judgment of the court - the other four agreed with him - refers in his judgment to the decision being by an Inspector: see para 32.

Any reader of this article can be assumed to have a good familiarity with national Green Belt policy the thrust of which (as Lord Carnwath found, para 3) has not really changed over the years. Openness is (together with permanence) identified as an essential characteristic of the Green Belt (NPPF para 79). At the heart of Green Belt policy is the requirement to keep land permanently open. Lord Carnwath's reasoning is short. Remarkably so given it was reversing the careful and detailed judgment of Lord Justice Lindblom in the court below **[2018] EWCA Civ 489]**, which had quashed the permission. The CA found that NYCC's officer's report to committee had failed to assess the visual impact of the proposed 6ha quarry extension when assessing the effect on openness. In the High Court and the CA, there was no dispute but that

there had been no separate assessment of visual impact on openness (although there had been an assessment of visual impact on the landscape). However, much of the one day hearing before the SC focused on a new and very different contention by the Council, that NYCC *had* considered visual impact on the question of openness. This proved a significant and unwelcome distraction, as evidenced by the fact that it formed no part of the findings of the SC in due course. But that argument seems to have obscured the central issue.

At the heart of the CA's judgment (and SSOBT's case in the SC) was the finding that the officer's report was inconsistent with the CA judgment of Sales LJ in the case of *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466 and in particular the paragraphs cited below:

> "14. The concept of "openness of the Green Belt" is not narrowly limited to the volumetric approach suggested by [counsel]. The word "openness" is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs…and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.
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> 15. The question of visual impact is **implicitly part of the concept of "openness of the Green Belt" as a matter of the natural meaning of the language used in para.89** of the NPPF. I consider that this interpretation is also reinforced by the general guidance in paras 79-81 of the NPPF, which introduce section 9 on the protection of Green Belt Land. There is an important visual dimension to checking "the unrestricted sprawl of large built-up areas" and the merging of neighbouring towns, as indeed the name "Green Belt" itself implies. Greenness is a visual quality: part of the idea of the Green Belt is that the eye and the spirit should be relieved from the prospect of unrelenting urban sprawl. Openness of aspect is a characteristic quality of the countryside, and "safeguarding the countryside from encroachment" includes preservation of that quality of openness. The preservation of "the setting…of historic towns" obviously refers in a material way to their visual setting, for instance when seen from a distance across open fields. Again, the reference in para.81 to planning positively "to retain and enhance landscapes, visual amenity and biodiversity" in the Green Belt makes it clear that the visual dimension of the Green Belt is an important part of the point of designating land as Green Belt.
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> 16. The visual dimension of the openness of the Green Belt does not exhaust all relevant planning factors relating to visual impact when a proposal for development in the Green Belt comes up for consideration. … But it does not follow from the fact that there may be other harms with a visual dimension apart from harm to the openness of the Green Belt that the concept of openness of the Green Belt has no visual dimension itself.
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> ……
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> 25. This [i.e. paragraph 37 of Sullivan J.'s judgment in *Heath and Hampstead Society*] remains relevant guidance in relation to the concept of openness of the Green Belt in the NPPF. The same strict approach to protection of the Green Belt appears from [paragraph 87] of the NPPF. **The openness of the Green Belt has a spatial aspect as well as a visual aspect, and the absence of visual intrusion does not in itself mean that there is no impact on the openness of the Green Belt as a result of the location of a new or materially larger building there. But, as observed above, it does not follow that openness of the Green Belt has no visual dimension.**" (emphasis added).

It was therefore fundamental to Sales LJ's judgment in *Turner* that visual impact on the Green Belt was *implicitly* part of the concept of openness of the Green Belt. This conclusion was supported

by Lindblom LJ in the CA in this case. Needless to say, Lindblom LJ is an extremely experienced judge and former practitioner in this area.

And as has been emphasised very often by the Courts of the highest authority (for example *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13) the interpretation of policy is for the Courts. Although Lord Carnwath quoted para 14 of Sales LJ's judgment in *Turner* (above), those subsequent paragraphs which emphasised that visual impact is *implicitly part of the concept of openness* are not included. The analysis does not explain them at all or how they can be reconciled with the eventual decision.

The analysis went down a well-trodden road which those familiar with Lord Carnwath's approach in this area of law will recognise: there is a distinction between considerations which *must* be taken into account, and those considerations which may be taken into account. He quoted from Cooke J in in the New Zealand Court of Appeal, in *CreedNZ Inc v Governor General* [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of Lords in In re Findlay [1985] AC 318, 333-334):

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision ..."

In approving this passage, Lord Scarman noted that Cook J had also recognised, that –

> "… in certain circumstances there will be some matters **so obviously material** to a decision on a particular project that anything short of direct consideration of them by the ministers …would not be in accordance with the intention of the Act." (In re Findlay at p 334) (emphasis added).

Notwithstanding the above paragraphs in Turner, Lord Carnwath's view was that visual impact *fell far short* of being so obviously material a factor that failure to address it expressly was an error of law (para 41).

Returning to what was the agreed central point in the appeal, the meaning of openness, it was key to SSOBT's argument that, as both Sales LJ found in *Turner*, and Lindblom LJ found in the Court of Appeal below, *visual impact is implicitly part of the concept of openness* in the Green Belt, where there is both a spatial and visual dimension. Thus, the *CreedNZ* line of authority was not engaged given that any consideration of the effect on openness necessarily imported an assessment of the visual impact.

Why Sales LJ (who formed part of the constitution in the SC in this case) and Lindblom LJ were apparently wrong about that, we are left guessing.

As mentioned, Lord Carnwath's reasoning was very short. Indeed, at para 38 he asked for forgiveness in not referring in detail to our arguments. With respect, it is hardly for me to forgive. But for those of us who have to deal with Green Belt cases day in, day out, it would have been helpful to know why visual impact is no longer to be treated as implicitly part of the concept of openness in the Green Belt. Instead, we are left staring into our beer.

This was one of the last judgments of Lord Carnwath, and Lady Hale (who hails from Yorkshire), both of whom have since retired. I wish them well in their retirement and recommend a daily pint of Yorkshire bitter. Preferably Sam Smiths.

PERMITTED DEVELOPMENT: WHEN IS A BARN CONVERSION REALLY A NEW BUILD?

Paul Stinchcombe QC

Permitted development rights for barn conversions have been afforded and then expanded in an endeavour to address the shortfall in housing. However, many homes built under these rights barely resemble barns, but present as modernist houses in which little of the original barn survives. That begs the question posed above: *When, in law, is a "barn conversion" really a "new build"?*

Seeking the answer to that question, the observant lawyer or planner is soon confronted with an unusual difficulty. It must, after all, be a rare thing for the Government to defend a legal challenge on permitted development rights; win the case by reference to a passage in the Planning Practice Guidance (PPG) on the General Permitted Development Order (GPDO); revise the PPG to refer to the judgment; and then simultaneously delete from the PPG the very passage that the Judge relied upon. But that is precisely what has happened.

So where does it leave us?

Permitted Development Rights and Prior Approval – Residential Barn Conversions

Section 57 (1) of the Town and Country Planning Act 1990 (TCPA 1990) requires planning permission to be granted for any development of land. However, section 58(1)(a) TCPA 1990 provides that planning permission may be granted by a Development Order made by the Secretary of State. The GPDO is the principal Development Order made pursuant to that statutory power and Article 3 grants planning permission for those classes of development described as "permitted development" in Schedule 2 to the Order, subject to any relevant specified exception, limitation or condition.

The permitted development right to convert agricultural buildings to Class C3 residential is afforded by Class Q of Schedule 2. Subject to obtaining prior approval for the design or external appearance of the building, Class Q grants permitted development as follows, unless one of the limitations within the GPDO applies:

"Q. Permitted development
Development consisting of –

a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order; or

b) development referred to in paragraph (a) together with building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwellinghouses) of that Schedule."

The limitations include as follows so far as the type of building operations by which the conversion can be executed is concerned:

"(i) the development under Class Q(b) would consist of building operations other than –

(i) the installation or replacement of –

(aa) windows, doors, roofs, or exterior walls, or

(bb) water, drainage, electricity, gas or other services, to the extent reasonably necessary for the building to function as a dwellinghouse; and

(ii) partial demolition to the extent reasonably necessary to carry out building operations allowed by paragraph Q.1(i)(i) …"

It follows that the permitted development right afforded by Class Q is restricted to such building operations as are "reasonably necessary to convert" the agricultural building into a Class C3 dwellinghouse; and that development is not permitted if it would consist of building operations other than those specified above However, that all begs a question: *When do qualifying works which are reasonably necessary for the building to*

function as a dwelling house become so extensive that they no longer amount to conversion at all, but to new build?

Moreover, it is hard to answer that question by reference to the GPDO itself: whilst Article 2 sets out many definitions, there is no definition of the word "convert". One must look elsewhere, therefore. Luckily, there is formal guidance on the issue in the PPG.

The Guidance in the PPG

Originally, that guidance stated as follows [at Paragraph Reference ID: 13-105-20150305, issued on 5 th March 2015]:

> *"Building works are allowed under the change to residential use. The permitted development right under Class Q assumes that the agricultural building is capable of functioning as a dwelling. However, it recognises that for the building to function as a dwelling some building operations which would affect the external appearance of the building, which would otherwise require planning permission, should be permitted. The right allows for the installation or replacement of windows, doors, roofs, exterior walls, water, drainage, electricity, gas or other services to the extent reasonably necessary for the building to function as a dwelling house; and the partial demolition of the extent reasonably necessary to carry out these building operations.* ***It is not the intention of the permitted development right to include the construction of new structural elements for the building. Therefore it is only where the existing building is structurally strong enough to take the loading which comes from the external works to provide for residential use that the building would be considered to have the permitted development right****."* [Emphasis Added]

It was in the light of the above guidance that many Local Planning Authorities started asking for structural reports to assess the building works against the ability of the building to take the additional loads.

However, the PPG was amended on 15 th June 2018 and now states as follows [at Paragraph: 105 Reference ID: 13-105-20180615]:

> *"The right … assumes that the agricultural building is capable of functioning as a dwelling. The right permits building operations which are reasonably necessary to convert the building, which may include those which would affect the external appearance of the building and would otherwise require planning permission. This includes the installation or replacement of windows, doors, roofs, exterior walls, water, drainage, electricity, gas or other services to the extent reasonably necessary for the building to function as a dwelling house; and partial demolition to the extent reasonably necessary to carry out these building operations.*
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> ***It is not the intention of the permitted development right to allow rebuilding work which would go beyond what is reasonably necessary for the conversion of the building to residential use. Therefore it is only where the existing building is already suitable for conversion to residential use that the building would be considered to have the permitted development right.***
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> *For a discussion of the difference between conversions and rebuilding, see for instance the case of* ***Hibbitt and another v Secretary of State for Communities and Local Government (1) and Rushcliffe Borough Council (2)*** *[2016] EWHC 2853 (Admin)."* [Emphasis Added]

The following points should be noted:

a. First, the words *"It is not the intention of the permitted development right to include the construction of new structural elements for the building. Therefore only where the existing building is structurally strong enough to take the loading which comes with the external works to provide for residential use that the building would be considered to have the permitted development right"* have been deleted.

b. Second, the following new words replace them: *"It is not the intention of the permitted development right to allow rebuilding work which would go beyond what is reasonably necessary for the conversion of the building to residential use. Therefore it is only where the existing building is already suitable for conversion to residential use that the building would be considered to have the permitted development right"*.

c. Third, the case to which the PPG refers (*Hibbitt*) was decided ***before*** the above amendments were made, and yet that judgment relied upon those deleted words [at 31] (having earlier emphasised them [at 8]). The case of *Hibbitt* must, therefore, now be read with those amendments in mind.

The Case of Hibbitt

Mr Justice Green held as follows in *Hibbitt* when addressing the question as to when works crossed the threshold of conversion into new build:

> "23 … The essence of the dispute concerns whether the proposed "conversion" amounts to a "rebuild" and, if it does, whether that is relevant.
>
> 24. The question boils down to (i) whether inherent in the concept of "conversion" in Class Q is a limit introduced by the concept of a "rebuild"; and (ii) whether even if there is that limit it is already incorporated into Class Q by virtue of the other limitations in the Order.
> …
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> 27. Second, a conversion is conceptually different to a "rebuild" with (at the risk of being over simplistic) the latter starting where the former finishes. … In my view whilst I accept that a development following a demolition is a rebuild, I do not accept that this is where the divide lies. In my view it is a matter of legitimate planning judgment as to where the line is drawn. The test is one of substance, and not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition. … There will be numerous instances where the starting point (the "agricultural building") might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild. In fact a more apt term than "rebuild", which also encapsulates what the Inspector had in mind, might be "fresh build" since rebuild seems to assume that the existing building is being "re" built in some way. In any event the nub of the point being made by the Inspector, in my view correctly, was that the works went a very long way beyond what might sensibly or reasonably be described as a conversion. The development was in all practical terms starting afresh, with only a modest amount of help from the original agricultural building. …
>
> 28. Third, … the lack of a definition is not an indication that the concept lacks substantive meaning or content. The Order is directed towards a professional audience and the persons who have to make an assessment of whether works amounted to a conversion are experts, such as Inspectors, who are well able to understand what the term means in a planning context … It is not a term that can be plucked without more directly from a dictionary. …
> …
>
> 31. Fifth, the distinction between a conversion and a rebuild is implicit in paragraph 105 NPPG which states in relation to Class Q that it is not the "… intention of the permitted development right to include the construction of new structural elements for a building". It can be said that one reason for this conclusion is that a development that includes "new structural elements" is one that involves a degree of rebuild and is not a conversion.
>
> 32. Sixth, … an "agricultural building" can, at one end of the extreme, be a very minimalist or skeletal structure indeed. To convert such a building into a dwelling might involve a very great deal of fundamental work which in terms of its nature and extent is much closer to a rebuild than a more traditional conversion.

> Unless it can be said that there is some compelling policy reason why permission should be accorded automatically to such skeletal structures (and none has been advanced) then a purposive construction would tend to stray away from using the concept of an "agricultural building" as an outer marker for conversion and as a proxy for the divide between a conversion and a rebuild."

The Correct Approach

Reading *Hibbitt* in the light of the revisions thereafter made to the PPG, the following points can be derived:

a. A distinction is to be drawn between "new build" (or "fresh build") and "conversion" for the purposes of Class Q of the GPDO – see *Hibbitt* [at 27];

b. The deletion from the PPG of the words "Therefore it is only where the existing building is structurally strong enough to take the loading which comes with the external works …" must mean, that the structural strength of the original building is no longer a determinative factor (although it would be relevant to the issues identified immediately below);

c. The question as to whether the works amount to new or fresh build is one of substance and planning judgment, looking at:

   i. The nature of the original agricultural building (whether it is skeletal/minimalist etc.); and

   ii. Whether the extent of works needed to alter the use of that building to a dwelling would be of such a magnitude that, in practical reality, what is proposed to be undertaken is a rebuild – see *Hibbitt* [at 27 and 32].

Conclusions

In many cases the above points can be easily applied – for example to the kind of minimalist and skeletal agricultural structures that Mr Justice Green had in mind. But what of the barn conversions with which this article started? All cases depend upon their own individual facts, of course. However, very cannily, most of these grand redesigns are presented so as to pass the tests to which Hibbitt, the PPG and the GPDO give rise:

a. Far from being skeletal and/or minimalist agricultural buildings, the original barns are usually large and structurally sound, with substantial and strong concrete or steel frames;

b. Although the pre-existing sides and roofs are largely (in some cases entirely) removed, in most (if not all) cases the substantial pre-existing frames are retained and the new elevations and roofs are structurally dependent on those frames; and

c. So far as the prerequisite of prior approval of design and external appearance is concerned, to many eyes a grand redesign of an industrial-scale, modern, barn is a thing to be welcomed.

Moreover, it is difficult to conceive that a legal challenge could successfully made by an aggrieved defender of the traditional landscape to any decision to approve such a barn under permitted development rights, given the deference afforded by Judges to decision makers on matters of planning judgement. After lockdown ends and building resumes, we can therefore expect the rural landscape to continue to change, and radically.

FORFEITURE OF DEPOSITS IN THE TIME OF CORONAVIRUS

Simon Edwards

The type of deposits with which this article is concerned is those arising under a contract for sale of land. Deposits, of course, occur in many other contracts, but are ubiquitous in relation to contracts for the sale of land.

There is no need, in this article, to consider the distinction between a deposit and a part payment because contracts for the sale of land will almost inevitably make the distinction clear. It is only with deposits, properly so called, that this article deals.

Very many contracts for the sale of land are governed by the *Standard Conditions of Sale (5 th Edition).* Clause 2.2.1 provides for the buyer to pay or send a deposit of 10 percent of the purchase price no later than the date of the contract. That sets a *"standard"* rate of deposit at 10 percent, although parties are free to choose a larger or smaller one.

Parties are also able to provide for only part of the deposit to be payable on the date of the contract and the rest to become payable at a later date. After some uncertainty, it is now settled that where this occurs and the contract is rescinded through the fault of the buyer, the seller can sue the buyer in debt for the balance of the deposit (see *Hardy v Griffiths* [2014] EWHC 3947).

Going back to the Standard Conditions of Sale, clause 7.4.2 provides that if the buyer fails to complete in accordance with a notice to complete, the seller may forfeit and keep any deposit and accrued interest, re-sell the property and any contents included in the contract, and claim damages. There is nothing in the Standard Conditions of Sale that is in the nature of a *"force majeure"* clause which would bring the contract to an end in exceptional circumstances.

Starting from the position in a standard contract, therefore, if, currently, a buyer became unable to complete a contract for the purchase of land by reason of a matter connected with the coronavirus, the seller would be entitled to rescind the contract and forfeit and keep any deposit and, indeed, if part of the deposit remained unpaid, would be able to sue the buyer for the remaining part as a debt. In addition, of course, if the seller suffered loss as a result of the failure of the buyer to complete the purchase in excess of the deposit, the seller could sue for damages.

Such an unpalatable set of consequences would probably persuade the buyer to consider what remedies he had that might possibly mitigate his losses.

The first question that might come to mind is whether or not he could say that the contract had become frustrated.

The doctrine of frustration has been applied to a contract to grant a long lease of a flat in Hong Kong, see *Wong Lai Ying v Chinachem Investment Company Limited* 13 BLR 81. In that case, the buyers had bought flats *"off plan"* in a development in Hong Kong, paying the full purchase price. During construction there was a major land slip and the whole area where the flats were to be built was obliterated. Sometime later, the flats were built and the buyers sought specific performance, but the developers contended that the contract had been frustrated. The Privy Council held that the land slip was a frustrating event of such a character and duration as to make the contract, when resumed, a different contract from when broken off.

A more pertinent example of where a contract for the sale of land might be frustrated is if the contract had, by supervening legislation, become illegal. In these circumstances, the source of any illegality would be the Health Protection (Coronavirus Restrictions) (England) Regulations 2020. Those regulations do not, in themselves, say anything about the sale and purchase of land. Regulation 6 concerns restrictions on movement

and provides that no person may leave or be outside of the place where they are living without reasonable excuse. There is a non-exclusive list of possible reasons, which until 13 May included at (l) the need to move house where reasonably necessary. From 13 May that has been expanded to read:

> "to undertake any of the following activities in connection with the purchase, sale, letting or rental of a residential property –
>
> (i) visiting estate or letting agents, developer sales offices or show homes;
>
> (ii) viewing residential properties to look for a property to buy or rent;
>
> (iii) preparing a residential property to move in;
>
> (iv) moving home;
>
> (v) visiting a residential property to undertake any activities required for the rental or sale of that property;"

Regulation 7 concerns restrictions on gatherings and prohibits the participation in a gathering in a public place of more than two people except at (d)(i) where reasonably necessary to facilitate a house move.

Both the Government and the Law Society have issued guidance about home moving. The guidance issued by the Government, in relation to residential moves, states that there is no need to pull out of a transaction and that if a property is vacant then the move can take place following the guidance in the document on home removals. Where the property is occupied, the Government encourages all parties to do all they can amicably to agree alternative dates to move, but in the event that a new date is unable to be agreed, the guidance implies that a move in those circumstances would be an exempt purpose for the purposes of the Regulations.

So far as the Law Society is concerned, its guidance mirrors that from the Government and states:

> *"If you are acting for someone who has exchanged contracts and has a completion date within the next few days, and you, your client and the other side are able to proceed, which may be very difficult given the position with removal firms, there is currently nothing to prevent you doing so."*

It is unlikely, therefore, that it could be said that performance of a contract would, technically, be illegal. It could perhaps be argued that performance has become impossible. Such impossibility would arise from the inability of the seller to give vacant possession and the inability of the buyer to take possession.

Taking possession, however, is not a necessary incident of completion of the purchase of a property. The giving of vacant possession, however, is. It is, however, probably far more likely that it is the buyer who will want to withdraw from a transaction, rather than a seller, particularly in the light of the fact that property values will very probably fall significantly as a result of the coronavirus.

If the contract is not frustrated, then there is the possibility that the buyer could apply to court under section 49(2) of the Law of Property Act 1925 for the repayment of any deposit. That section provides:

> *"Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."*

This section gives the court an apparently wide discretion. Appearances, however, can be deceptive. A restricted view of the circumstances in which the court can order repayment of the deposit is now the prevailing view, as set out in Omar v El Wakil [2001] EWCA Civ 1090. The approach is as given by Arden LJ at paragraph 35, as follows:

> *"The starting point must be that although section 49(2) is expressed in open textured terms, leaving it to the courts to determine the organising principles, the court must bear in mind that the payment in question was a*

> *'deposit' that is an earnest for performance and that accordingly there should not be relief simply because the … contract never took place. The meaning of 'fairness' … in any given situation is context specific … the context here is of a conveyancing transaction. It is common knowledge that if a purchaser pays a deposit, he is likely to forfeit it if he does not fulfil the contract. Moreover, deposits are very usual features of conveyancing transactions and conveyancing transaction are common. It is important that there should be certainty attaching to the consequences of paying a deposit."*

In *TBAC Investments Limited v Valmar Works Limited* [2015] EWHC 1213, Kevin Prosser QC (sitting as a deputy High Court judge) said, at paragraph 75:

> *"I note that: (i) the discretion should not be exercised in the absence of something special or exceptional to justify overriding the ordinary contractual expectations of the parties."*

What is happening now is, of course, in any ordinary use of language, both special and exceptional, one might say extraordinary. If, therefore, a buyer was not able to complete for reasons plainly connected with the coronavirus, and if the seller did not suffer any loss thereby (quite probably a rather big *"if"*), then it might be that that is the type of case which would so excite the *"sympathy"* of the court as to persuade it to exercise its discretion under section 49(2). Because it is the exercise of a discretion and every case would depend on its precise facts, it is probably not possible to give guidance that goes beyond that generality.

We have, so far, been considering the circumstances where the deposit is a *"standard"* deposit. If the deposit is a very significant one, then there would be open to the buyer the argument that it is not a true deposit but, rather, a penalty.

In *Workers Trust &; Merchant Bank Limited v Dojap Investments Limited* [1993] AC 573, Lord Browne-Wilkinson, at 579, said this in relation to a 25 percent deposit:

> *"It is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money. The question therefore is whether or not the deposit of 25 percent in this case was reasonable as being in line with the traditional concept of earnest money or was in truth a penalty intended to act in terrorem."*

If the seller was not able to justify the larger deposit as a reasonable deposit, then it would be an unlawful penalty and would have to be repaid, although the seller could, of course, pursue the defaulting buyer in damages.

The law of penalties was reviewed in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172. The approach in the *Workers Trust* case was broadly approved, although the use of the phrase *"in terrorem"* was not. At paragraph 16, their Lordships held:

> *"The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are 'unconscionable' or (which will usually amount to the same thing) 'extravagant' by reference to some norm."*

As we have seen, the *"norm"* is a ten percent deposit. Departures from that norm would have to be justified if they are not to be seen as penalties and, therefore, refundable, subject to the seller's right to pursue the defaulting buyer in damages.

The Supreme Court has also recently reviewed the law as regards forfeiture of interests in land. In *Vauxhall Motors Limited (formerly General Motors UK Limited) v Manchester Ship Canal Company Limited* [2019] UKSC 46; [2019] 3 WLR 852, the Supreme Court allowed an extension of the right to seek relief from forfeiture from interests in land to licenses in relation to land, so long as those

licenses granted possession to the licensee. It is clear, however, from the judgment of Lord Briggs (who gave the leading judgment) that there is little room for an extension of the general jurisdiction to relieve from forfeiture to relieve from forfeiture of deposits.

The court was referred to *Union Eagle Limited v Golden Achievement Limited* [1997] AC 514, where in an appeal from Hong Kong, the Privy Council rejected a claim for relief from forfeiture where a purchaser had been ten minutes late in tendering the purchase price under a contract which made time for completion of the essence.

At page 523, Lord Hoffman stated:

> *"Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene."*

Lord Briggs, at paragraph 30, characterised that statement as follows:

> *"This decision is not of significant assistance for present purposes. It was a case in which a contract for the purchase of legal title to land was found to have been repudiated by the failure by the purchaser to comply with a time of the essence provision. Thus, the property the subject matter of the contract never became subject to the vendor's obligation to convey."*

In any event, in that case, what the licensee had been seeking to do was not to recover any loss deposit but, rather, regain the licence which had been forfeited by virtue of his breach.

Concluding Remarks

The most promising possible arguments available to a buyer who cannot complete by virtue of circumstances relating to coronavirus will be, it is thought, frustration or the use of the discretion given to the court by section 49(2), Law of Property Act 1925. We are, here, in completely new territory and the circumstances, generally speaking, may be described as truly exceptional. Both the doctrine of frustration and the use of section 49(2) are difficult for a buyer in these circumstances, but not impossible if the right circumstances occurred.

DOING DIFFERENT & DOING BETTER: HOW, MORE CREATIVELY, TO EASE 'THE LOCKDOWN' IN A PLANNING CONTEXT

John Pugh-Smith

There is a saying in Norfolk that we "do different". On the humorous side it may have prompted a recent BBC TV series about an eccentric landowner[5] but on the more serious it has led to collaborative workings between the local planning authorities which have included not just shared services but, for example, the construction of the Northern Distributor Road facilitating greater access to the new urban extensions around Norwich through Joint Development Plan making.

With growing and ever more strident calls for relaxing section 106 obligations in the wake of "The Lockdown"[6] and the publication of the MHCLG's *Coronavirus (COVID-19) Planning update* and associated *Coronavirus (COVID-19) Community Infrastructure Levy guidance* on 13th May 2020[7] where can these calls and their current Governmental responses be sensibly taken next? Under the heading 'Community Infrastructure Levy' the MHCLG's Planning update states the following:

> *The Community Infrastructure Levy regulations*

5 http://www.wivetonhall.co.uk/normal-for-norfolk/

6 Planning 07.05.20: https://www.planningresource.co.uk/article/1682513/pros-cons-relaxing-section-106-obligations-wake-lockdown?bulletin=planning-weekly-edition&utm_medium=EMAIL&utm_campaign=eNews%20Bulletin&utm_source=20200507&utm_content=Planning%20Email%20Edition%20(48)::&email_hash=

7 https://www.gov.uk/guidance/coronavirus-covid-19-planning-update
https://www.gov.uk/guidance/coronavirus-covid-19-community-infrastructure-levy-guidance

> *provide only limited flexibility to local authorities to defer payments. Both local authorities and developers have expressed concerns over the impact this may have on developer cashflow at the present time. In view of this, we intend to help small and medium sized developers by introducing amendments to the Community Infrastructure Levy Regulations 2010 to enable charging authorities to defer payments, to temporarily disapply late payment interest and to provide a discretion to return interest already charged where they consider it appropriate to do so. The easements can be applied to developers with an annual turnover of less than £45 million. It is intended that these easements will not be open-ended and will be removed when the economic situation has recovered. CIL regulations are subject to an affirmative resolution procedure, which requires debate in Parliament. However, existing flexibilities and the Government's clear intention to legislate should give authorities confidence to use their enforcement powers with discretion and provide some comfort to developers that, where appropriate, they will not be charged extra for matters that were outside of their control. Further guidance for local planning authorities on the use of developer contributions under the current circumstances has been published.*

The associated CIL Guidance advises that until such amendment regulations[8] are able to take effect:

- CIL charging authorities are encouraged to consider making use of the ability to introduce an instalment policy (or amend an existing instalment policy); and
- noting the government's clear intention to introduce legislation to permit deferral of CIL payments and disapply late payment interest for SMEs, CIL collecting authorities are encouraged to use their discretion in considering what, if any, enforcement action is appropriate in respect of unpaid CIL liabilities; and
- CIL authorities should take a positive approach to their engagement with SME developers, to ensure CIL liabilities do not cause undue burdens over the period of disruption caused by the coronavirus.
- CIL authorities should note the existing flexibilities they have around enforcing CIL for larger developers, including flexibilities over the imposition of surcharges. Late payment interest will remain mandatory where such flexibilities are used.

In respect of Section 106s the CIL Guidance optimistically also states:

> *There are greater flexibilities within s106 planning obligations than CIL. Where the delivery of a planning obligation, such as a financial contribution, is triggered during this period, local authorities are encouraged to consider whether it would be appropriate to allow the developer to defer delivery. Deferral periods could be time-limited, or linked to the government's wider legislative approach and the lifting of CIL easements (although in this case we would encourage the use of a back-stop date). Deeds of variation can be used to agree these changes. Local authorities should take a pragmatic and proportionate approach to the enforcement of section 106 planning obligations during this period. This should help remove barriers for developers and minimise the stalling of sites.*

However much that advice, like that underlying the Prime Minister's statement last Sunday, 10th May 2020, expects the application of common sense, and, now commercial pragmatism, without the continuing adoption of a "stick and carrot" approach how is it really going to work in practice?

It may be recalled that a former Secretary of State for Communities and Local Government, (Lord) Eric Pickles, perhaps on the advice of his then Planning Minister, (Sir) Bob Neill,[9] introduced a

8 The CIL Guidance states: "CIL regulations are subject to an affirmative resolution procedure, which requires debate in Parliament. However, existing flexibilities and the government's clear intention to legislate should give authorities confidence to use their enforcement powers with discretion and provide some comfort to developers that, where appropriate, they will not be charged extra for matters that were outside of their control".

9 See Bob Neill's Foreword to "Mediation in Planning: A Short Guide" (June 2011)

"Section 106 Brokers" service to unlock "stalled sites" in August 2012. Administered by the Homes & Communities Agency, it operated a panel of "planning professionals" including lawyers and surveyors. They dealt with referrals in both formal and informal "mediation" sessions concerning residential, commercial and mixed use schemes, and, with a fair degree of success despite the scheme's effective operation being hampered by Central Government funding restrictions and cumbersome "triaging" procedures. In short, a pragmatic and potentially either self-funding or certainly "kick-started" method of providing, again, both the "opportunities" and the "mechanisms" without the need for legislative or policy changes and without delay.

Partly based upon the identified benefits of the "Section 106 brokers" initiative but also in response to growing cries for specific legislation about affordable housing relaxations, legislation then ensued with Sections 106BA to BC were inserted by the Growth and Infrastructure Act 2013 into the Town and Country Planning Act 1990 with effect from 25 th April 2013 but with a "sunset provision" of 30th April 2016. Although there were shortcomings in the published DCLG Guidance[10] and the consequent need for parties to rely both on RICS Professional Guidance[11] and a series of appeal decision letters, and, the occasional High Court challenge[12] the mandatory system worked reasonably effectively, if frustratingly in terms of delay and resulting costs from having to engage a statutory review process. So, again, there already exists a statutory solution surely which could be reintroduced swiftly.

Next, by way of necessary historic review, is the use of Section 106 "adjudication procedures". It had been intended for new Sections 106ZA to ZB of the 1990 Act to be brought into operation under the Housing and Planning Act 2016[13] . However, like several initiatives under the 2016 Act they have remained unimplemented. As well as a shift in government policy the reason may have been in part due to yet another change in Planning Minister[14] but also concerns expressed by the RICS and others during the overlapping technical guidance consultation phase, regarding the need to avoid cumbersome procedures if the scheme was to be attractive to the development industry and workable. Nevertheless, these were not insoluble problems. Again, this alternative process could yet offer a "third way" to provide "the stick".

The fourth, and an easy "win" for overworked MHCLG officials, would be an addition to the "appeal costs" section of the Planning Policy Practice Guidance[15] covering e.g. a refusal to allow facilitated negotiations of planning obligations as another example of unreasonable behaviour. Although last officially recommended in the National Planning Forum / Planning Inspectorate Joint Report *"Mediation in Planning"* (June 2010),[16] this obvious sanction, clearly reflected in all forms of procedure and protocol emanating through the Ministry of Justice[17] and even within the Arbitration

10 *Section 106 affordable housing requirements: Review and appeal* (April 2013) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192641/Section_106_affordable_housing_requirements_-_Review_and_appeal.pdf

11 https://www.local.gov.uk/sites/default/files/documents/document-fdc.pdf (2012) now extensively revised and updated by the RICS with a new Professional Statement effective from 1 st May 2019: https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/building-surveying/financial-viability-in-planning-conduct-and-reporting-rics.pdf

12 Including the last "throw of the dice" as to the retrospective effect of the legislation in *York City Council v One (Leeds) Ltd* [2018] EWCA Civ 1883

13 Sections 158 & 159 of the 2016 Act

14 The initiative had been actively promoted by Brandon Lewis, then Planning Minister

15 https://www.gov.uk/claim-planning-appeal-costs

16 https://www.ihbc.org.uk/news/docs/Final%20Report%20-%20Mediation%20in%20Planning%20- %20PDF020710.pdf

17 Civil Procedure Rules CPR 44.2: Upper Tribunal (Lands Chamber) Practice Direction 2010; Pre-Action Protocol for Judicial Review, and, regular judicial pronouncements, most recently *DSN Ltd v Blackpool Football Club Ltd* [2020] EWHC 670 (QB) @ 28:"
" …. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought …. ."

Act 1996[18] yet lies effectively "untaken" within the planning process. Surely, it is now time to include such a reference.

Finally, and more holistically, Westminster could follow the approach taken by Holyrood within the Planning (Scotland) Act 2019 and include a specific statutory provision promoting and using mediation. Section 40 of the 2019 Act introduces a new Section 268A into the Town and Country Planning (Scotland) Act 1997:

268APromotion and use of mediation etc.

1) The Scottish Ministers may issue guidance in relation to the promotion and use of mediation in relation to the following –
   a) the preparation of local development plans and related evidence reports under Part 2,
   b) a prospective applicant's compliance with any requirements in respect of pre-application consultation imposed under or by virtue of section 35B,
   c) assisting in the determination of an application for planning permission,
   d) any other matter related to planning that they consider appropriate.
2) Guidance under subsection (1) may include provision about—
   a) the form of mediation that is to be used in a particular circumstance, and
   b) the procedure to be followed in any such mediation.
3) Local authorities must have regard to any guidance issued under subsection (1).
4) Before issuing any guidance under subsection (1), the Scottish Ministers must consult –
   a) planning authorities, and
   b) such other persons that the Scottish Ministers consider appropriate.
5) The Scottish Ministers must make any guidance issued under subsection (1) publicly available.
6) The power under subsection (1) to issue guidance includes power to –
   a) issue guidance that varies guidance issued under that subsection, and
   b) revoke guidance issued under that subsection.
7) For the purposes of this section, "mediation" includes any means of exploring, resolving o reducing disagreement between persons involving an impartial person that the Scottish Ministers consider appropriate.
8) The Scottish Ministers must issue guidance under subsection (1) within the period of two years beginning with the date on which the Planning (Scotland) Act 2019 received Royal Assent."

At its recent evidence session, held online, on 4th May 2020 the All Party Parliamentary Group on Alternative Dispute Resolution heard from a number of expert witnesses, including myself, on the subject: Land-use assembly, planning, compensation and ADR: lessons learned and next steps.[19]

Among the panel speakers was Graham Boyack, the Director of Scottish Mediation, whose organisation, supported by the Planning Advisory Service, has been at the forefront of promoting and now helping outwork the provisions of new Section 268A. He explained that as there is a particular focus in the 2019 Act on collaboration, consensus and frontloading the system there

18 Section 61(2)

19 The Session recording and the slides can be viewed on the following link: https://www.ciarb.org/policy/uk-appg-on-adr/appg-projects/ A separate article will follow in due course.

are real opportunities for mediation[20] to support this pro-active approach and to seek to deal with and mitigate potential conflict at an early stage, before more entrenched conflict has the chance to become established. While mediation has been adopted in some planning systems in other countries but predominantly this has been at the later stages, mainly at appeal where disagreement is fully established and it will be more difficult to find common ground to reach mutually agreeable solutions. Now, Scotland has the opportunity here to be forward thinking and innovative in its approach and therefore we have taken a conscious decision to focus upon the more formative stages of the planning process as well as mediation processes for planning applications, for example, should there be a threshold number of objections after which a mediation style event must be offered within the community?

So, by way of conclusion, there are a number of tried mechanisms by which we can "do different" as we ease the land-use planning system out of the effects of The Lockdown". Indeed, there is more than a degree of irony that, seemingly, the Chinese characters for the word "Crisis" also can spell "danger" and "opportunity" Surely, now is the time to start actively seizing those opportunities both from the "top down" and "bottom up" if we are going to achieve lasting beneficial changes from the far reaching effects of this Pandemic.

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20 **What do we mean by Mediation in this context?** While a more traditional view of mediation would see (usually two) parties coming together across a table in a formal setting, mediation can in fact be carried out through a variety of approaches and these other approaches may be better suited to certain areas of the planning system. Mediation can be woven into public engagement processes within the planning system as a means to promote greater dialogue, understanding and consensus – which supports the Scottish Government's aim to 'front-load' early and meaningful engagement. Examples include the use of a mediative approach to wider public engagement activities, including workshops, charrette-style processes and also a civic mediation style approach where the conflict can involve a large group of people each with different thoughts and ideas. The use of mediation has the potential to support a more inclusive planning system by enabling more people to express and contribute their ideas in decision-making.

See also the joint article by John Howell MP and John Pugh-Smith: *Mediation and Planning Disputes* (Feb. 2020): https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/42910-mediation-and-planning-disputes

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