39 Essex Chambers

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INTRODUCTION

CELINA COLQUHOUN
Call **1990**

CHRISTOPHER MOSS
Call **2021**

Welcome to our Winter 2026 edition of the Planning, Environment & Property Newsletter. No one could have missed MHCLG's big early Christmas present – publication of a substantially revised draft of the NPPF, with a consultation on the changes open until 10 March 2026. If you haven't fancied wading through the full 123 pages in detail no need to worry, members of our PEP team have provided their analysis of the draft in bitesize videos which can be accessed here.

From the 3rd – 5th March we will be hosting our inaugural Planning Environment and Property Week. This week will see three half day seminars covering: Planning & Infrastructure (3rd March), Property (4th March) and Environment & Energy (5th March). Further information and RSVP details are available on our website.

We kick off this edition with an article from **John Pugh Smith** where he looks at one of the challenges facing the Government's quest to build 1.5m homes, namely stalled sites where there are existing consents linked to section 106 agreements which remain unviable to develop. He explores this issue as it arose in the recent planning appeal at Chilmington Green, Ashford and concludes by offering some possible solutions to the issue pending MHCLG's awaited "full reset" of Section 106 obligations.

In addition, we have articles covering:

- **Matthew Wyard** considers *Maher v Investalet Limited* [2025] EWHC 3133 (Ch) which addresses whether a company administrator can seek vacant possession against trespassers under s.234 of the Insolvency Act 1986.
- **Dan Kozelko** looks at the decision in *R (on the application of Luton and District Association for the Control of Aircraft Noise ("LADACAN") v Secretary of State for Transport* [2025] EWHC 3206 (Admin). A challenge to the Development Consent Order granting consent for expansion of Luton Airport and provides an important analysis of the proper assessment of carbon emissions as part of the environmental impact assessment following the Supreme Court's decision in Finch [2024] UKSC 20.
- **Christopher Moss** covers *R (Halton Borough Council) v Secretary of State for Housing, Communities and Local Government* [2025] EWCA Civ 1566 in which the Court of Appeal considered whether a Local Planning Authority had behaved unreasonably in withdrawing its support for a planning application in the course of a called-ininquiry following answers given by its expert in cross-examination.
- Lastly, **Ella Grodzinski** addresses *Epping Forest District Council v Somani Hotels Ltd* [2025] EWHC 2937 (KB), Mould J's decision on whether to grant a final injunction restraining the owners of the Bell Hotel from using it to house asylum seekers.

We do hope you enjoy this edition of the PEP newsletter and look forward to seeing many of you during our Planning Environment and Property Week.

RELEASING STALLED HOUSING SITES

JOHN PUGH-SMITH
Call **1997**

Introduction

A primary objective of the replacement NPPF (Dec. 2025), specifically stated on page 30 of the consultation draft, is to *"support the delivery of a substantial increase in the supply of homes"*. Indeed, the Secretary of State, The Rt Hon Steve Reed MP, has said that he remains committed to leaving *'no stone unturned'* in the Government's quest to build 1.5 million homes. That includes "stalled sites" where there are existing consents, linked to Section 106 agreements, which remain unviable to develop. However, there remains a significant tension between governmental delivery aspirations and developer realities; for the current legislative framework does not sensibly permit pragmatic and holistic consideration of development viability. This issue has been highlighted by the recent appeal decisions letter dated 20 January 2026 concerning land at Chilmington Green, Ashford.[1] This article looks at these challenges and some possible solutions, pending MHCLG's awaited "full reset" of Section 106 obligations.

The Current Position

Pending that anticipated "full reset" in Spring 2026, the Government's current stance on modifying existing consents has been explained in a suite of three letters issued by MHCLG on 18 December 2025 to coincide with the publication of the consultation draft NPPF. That included a letter from the Housing Minister, Matthew Pennycook MP, to the PINS Chief Executive, released into the public domain in mid-January.Though specifically titled "Modifying Planning Obligations" it was the same message; and I quote the following extracts from the PINS letter:

> *"... the proper process for modifying or discharging planning obligations is set out in section 106A of the Town & Country Planning Act 1990. The government expects local planning authorities to adopt a pragmatic approach when responding to requests to renegotiate Section 106 planning obligations, in order to facilitate timely decisions.*
>
> *We also recognise the practical constraints associated with the existing, statutory route to modify or discharge planning obligations via section 106A (effected by a 'deed of variation'), and the limits that any policy or guidance reforms can achieve. The consultation on the draft National Planning Policy Framework ... therefore seeks views on the efficacy and use of existing statutory routes, to inform ongoing work to ensure there is an appropriate mechanism to modify or discharge existing planning obligations that provides confidence to both authorities and developers.*
>
> *... as a general rule, attempts to revisit fundamental issues of viability or planning obligations through Section 73 applications should be scrutinised carefully, and the applicant should provide a robust justification for any changes proposed for planning obligations associated with the original permission beyond those linked to the specific variation of condition being sought.*
>
> *Where developers submit a Section 73 application that seeks to reduce affordable housing provision based on a new viability assessment, the decision maker should have regard to the harm that such a reduction may cause and give this appropriate weight in the overall planning balance, alongside the wider merits of the scheme."*

Each of the letters goes on to refer to the Government's commitment to implement Section 73B (legislated by the Levelling-up and

1 Appeal decision 3333923 and 3334094.pdf

Regeneration Act 2023) through secondary legislation which:

> *"should become the key mechanism for dealing with legitimate variations in a pragmatic way in response to changing circumstances over time, but it is not intended to allow developers more easily to reduce planning obligations already entered into, including for affordable housing, and Section 73B(5) will affect the extent to which that can be done"*.

In the context of this article, it needs to be borne in mind that Section 73B is intended to allow both the description of development and the conditions to be varied in a single process, but, the amended development cannot be *"substantially different"* from the existing development. That also still leaves the related section 106 obligations and how those should be addressed.

An indicator of the direction of travel is also to be found in MHCLG's release on 28 January 2026 of its *Policy Statement: a roadmap for Section 106 delivery in England.*[2] This sets out a new framework within which LPAs will be expected to consider and agree deeds of variations for sites which have stalled due to a lack of interest in the Section 106 secured affordable housing stock. It contains a policy expectation that LPAs should be open to renegotiating affordable housing provisions in existing agreements, if certain prescribed conditions have been met including: (a) that the uncontracted S106 homes have been uploaded onto the Homes England Clearing Service by 1 June 2026; (b) that they have been live on the Clearing Service for a period of six weeks from the date of the unit being uploaded ("the Clearing Service period") without attracting any reasonable offers; and (c) that they are due for completion on or before 1 December 2027, with completion defined as being when a home is ready for occupation or when a completion certificate is issued. Where these conditions are met, LPAs are encouraged to negotiate any deeds of variation quickly, within twelve weeks of the end of the Clearing Service period. Such deeds should include a requirement that if the affordable housing units are not completed by the 1 December 2027, then the units will automatically revert to the original tenure mix set out in the original Section 106 agreement, including for phased developments.

The Policy Statement further advises: *"In instances where there is a dispute between the LPA and developer over whether bids received are reasonable, they may also wish to seek a third-party view to support a resolution, as per an existing Alternative Dispute Resolution ("ADR") procedure."* While, like the Civil Procedure Rules, the words "ADR" are not defined, I anticipate that, contextually, that chosen process will either be mediation or neutral evaluation/opinion.

Such recognition, at this stage, is welcome albeit in the context of *"a time-limited, emergency intervention"* with the *"full (S106] re-set being in force in Spring 2026"*.[3] Again, it is to be hoped that similar, hopefully more forceful, advice will be included; for the challenge remains that without a degree of ADR compulsion an LPA can continue to hold its position without independent determination or practical resolution. This is because of the way in which Section 106A is currently framed; for section 106A provides, in effect, that within the first five years, a planning obligation may not be modified or discharged except by agreement with the LPA. While susceptible to judicial review the LPA's discretion is broad and essentially unchallengeable.[4] Thereafter, the application can only be successfully appealed if the applicant can demonstrate that the obligation no longer serves a *"useful purpose"* or the purpose would be served equally well through the modification. This is where the Chilmington appeals foundered.

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2 Policy statement: a roadmap for Section 106 delivery in England - GOV.UK

3 Written statements - Written questions, answers and statements - UK Parliament

4 *R (Millgate Developments Ltd) v Wokingham BC* [2011] EWCA Civ 1062

The Chilmington appeals

These Section 106B appeals concerned obligations entered into with Ashford Borough Council and Kent County Council by Hodson Developments and others in a Section 106 agreement dated 27 February 2017. The 122 requests were in connection with an outline planning permission for a large development of up to 5,750 homes together with industrial, retail, education and other and other uses. Preceding the appealed Section 106A application, made on 20 October 2022, there had been earlier attempts by Hodson to discharge or modify the obligations, including unsuccessful judicial review.

After a nine day inquiry and two site visits, the Inspector (Grahame J. Kean), a solicitor, essentially dismissed both appeals, disagreeing with the Appellants' main contention that if the effect of an obligation (whether alone or in combination with other obligations) renders a development incapable of being carried out or completed (because it is not viable) then the decision maker may conclude that it does not serve a useful purpose.

The Decision Letter is a useful articulation of the relevant Section 106A legal principles and their outworking in the Section 106B appeal context. It is a salutary reminder as to how restricted is the statutory ability under this provision. I draw attention to the following:

> *"37. The existence of an obligation, in the context of a development scheme, is to make development acceptable in planning terms. That is its quintessential purpose. The statutory criteria are simple and do not refer to the viability of the development. The obligations have a contractual nature, albeit statutorily based, which it is in the interests of the parties to be able to enforce, the one against the other, and subject only to limited exceptions set out in s106 that allow discharge or modification. Since they are limited exceptions that derogate from the principle of contractual enforceability, it also seems arguable that exceptions should be strictly applied.*
>
> *38. An obligation can have a useful purpose of preventing development or further development until performed. This may make it inherently impossible, for financially viability reasons, to carry out or complete a development, but that does not necessarily deny the usefulness of the purpose in preventing a development that would otherwise be unacceptable in planning terms. Circumstances may throw light on whether the purpose continues to be "useful" but viability issues would not transcend the basic question of whether the obligation continues to meet any useful purpose."*
>
> *43. … The tests do not involve a merits-based approach based on the benefits or otherwise of the development. That would introduce an over-arching planning balance within the process. Appraisal of planning benefits and balance should not override the s106A process.*
>
> *45. Therefore, as to financial viability, I do not find that it can be an overriding factor when considering the tests to be applied …*
>
> *53. … I agree with ABC's counsel that if the public interest (in the form of agreed planning obligations), has to yield in favour of development viability, "the extent of flexibility granted should be no more than is necessary to facilitate delivery" which suggests to me that the fulcrum point of change required in the s106 Agreement needs to be identified and related to the financial appraisal, which has not been demonstrated.*
>
> *59. I do not therefore see how I could find viability to be a relevant factor, even if I agreed with the Appellant, and still assess it in a meaningful way that enabled me to give it appropriate weight to the issue of usefulness of a given obligation. Scheme-wide financial considerations, certainly where it cannot be shown that the sum total of the changes sought will turn a project currently financially unviable into a project that would clearly be financially viable, cannot justify the discharge or modification of an individual obligation as this would make the statutory criteria meaningless."*

These findings may all have been justified on the particular material before that Inspector; but it makes depressing reading. However, none of the court cases referenced by him deal with whether viability is relevant to whether there is a useful purpose, or restrict the ability to say that an obligation which alone or in combination hinders the ability to carry out the development through cost or delay reasons does not serve a useful purpose. So, the High Court or another Inspector could disagree with the Chilmington decision.

Nonetheless, as part of MHCLG's "full re-set", a specific Governmental policy statement that viable delivery can be a "useful purpose" would help achieve swifter and more pragmatic outcomes. It could also give added bite to the Section 106A appeal process, including potential costs awards for refusing to engage in meaningful ADR.

It also needs to be borne in mind that a Section 73 application brings with it additional risks and further costs and contributions. More fundamentally, it can only be granted if a condition should be changed. There is also the issue whether the LPA can consider whether the planning obligations should be modified or changed. In any event, some obligations will be automatically carried over to Section 73 permissions by their wording. While it is to be hoped that the implementation of Section 73B might make life easier, the same constraints could still apply to the related planning obligations because of the *"substantially different"* requirement.

The role of ADR

Therefore, how can sensible re-negotiation be achieved? Here, realistic ADR deployment, embraced at a much earlier stage, could become a game-changer. This might be by way of, solely or in combination, neutral chairing, formal mediation, neutral evaluation or even independent determination. The scope might be in respect of the totality or relevant parts of the dispute.

Professional expertise would be crucial, drawing not only from valuation surveyors but also planning lawyers and other relevant disciplines. Support from co/assistant mediators, technical assessors and advisers are all common features now of a maturing ADR world. Equally, early independent assessment of the best form of ADR is increasingly common and to be recommended. Formalisation of the process would be through the inter-parties ADR agreement linked, perhaps, to a planning performance agreement.

Indeed, this Government's tentative embrace in January's Re-set Policy Statement follows a route trodden by a previous administration. Because of the continuing effects of the early 2000s economic recession, the then Secretary of State for Communities and Local Government, (Lord) Eric Pickles, perhaps on the advice of his then Planning Minister, (Sir) Bob Neill,[5] introduced a "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, including myself, over a period of 12 months. 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 self-funding method can be provided without the need for legislative or policy changes and without delay.

Nevertheless, selling the deployment of Section 106 ADR, and, more effectively, will require the formal backing of MHCLG and its articulation in Ministerial Statements. Despite this Government's growing recognition of the role of ADR this initiative will require specific articulation. Experience within the civil justice system shows that it will, almost certainly, be necessary to

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

adopt the incentivisation model, namely, the use (or threat) of cost sanctions for parties that unreasonably refuse ADR. Indeed, even a small and swift change to the PPG advice on "appeal costs" (including Section 106B appeals) would, in itself, be an easy solution as well as considerably help change current mindsets.

It will also require education, such as training run by experienced ADR practitioners through webinars and seminars.

Finally, so as to ensure the delivery of high-quality ADR, a public list of qualified, experienced mediators with planning law experience will need to be maintained by, say, PEBA, the RICS or The Law Society.

Concluding Remarks

As a practising planning and ADR professional it has been my experience that the deployment of ADR, particularly mediation to facilitate better dialogue, can achieve positive outcomes in even the most protracted and ill-tempered disputes. Without a fresh approach the build-out of those stalled sites will remain. So, why not become an active supporter and participant?

***JOHN PUGH-SMITH FCIArb** is a recognised specialist in the field of planning law with related disciplines acting for both the private and public sectors. He is also an experienced mediator, arbitrator and dispute 'neutral'. He is on the panel of the RICS President's appointments for non-rent review references, a committee member of the Bar Council's Alternative Dispute Resolution Panel and has served on various ADR working groups for the Planning and Environment Bar Association. Although his 39 Essex Chambers colleagues, **Richard Harwood OBE KC** and **Jonathan Darby**, – represented the Appellants in the Chilmington appeals the views expressed in this article are the author's own.*

Maher v Investalet Limited & anr [2025] EWHC 3133 (Ch)

Matthew Wyard
Call **2014**

*Can a company administrator seek vacant possession against trespassers under s234 of the Insolvency Act 1986? No, said the High Court in **Maher v Investalet Limited** – the correct procedure to follow is an application under CPR 55 for possession.*

The decision in *Maher v Investalet Limited* was published at the end of 2025 and is of important, practical, significance, to those acting as, or on behalf of, administrators seeking to recover possession of land under s234 of the Insolvency Act 1986 (**"the IA 1986"**).

The judgment followed the final hearing of an application made under section 234 of the IA 1986 by joint administrators of Pocket Renting Limited (**"the Company"**). The Company sought an order for *"vacant possession"* of five properties owned by the Company in London. The properties were let by the Company to the respondent by means of five tenancy agreements entered into before the commencement of the administration. The identity of the occupants of the properties was unclear, although appeared to be tenants of the respondent's sub tenants.

The respondent failed to pay rent in respect of the properties. The administrators served notice and then a winding up petition. The winding up petition was subsequently withdrawn by consent following a settlement being agreed in respect of the debt owing by the respondent to the Company. That debt went largely unsettled and led to the application before the court.

The issue before the court was whether the administrator, in applying for vacant possession,

was seeking to compel the trespasser to deliver, convey, surrender or transfer the property to the administrator, rather than seeking an order that the trespasser cease to occupy the property.

The High Court dismissed the application for vacant possession, finding that the Company (and therefore the administrator) did not have a right to compel the trespasser to deliver up the property for the purposes of section 234 IA 1986. Although the trespasser had an interest in the land that could be asserted against those with inferior rights, they could not assert it against the Company who had a superior right to the property.

The correct course of action was confirmed as being to pursue possession proceedings under CPR 55.

R (on the application of Luton and District Association for the Control of Aircraft Noise ("LADACAN")) v Secretary of State for Transport [2025] EWHC 3206 (Admin)

Daniel Kozelko
Call **2018**

Background

In *LADACAN* the High Court considered a challenge to the Development Consent Order (**DCO**) granting consent for expansion of Luton Airport. The expansion is a significant one, proposed to increase overall passenger capacity at the airport from 19 million passengers per annum (**mppa**) to 32 mppa. This would be done by the construction of a new passenger terminal, additional aircraft stands, and other facilitating work. As a DCO, the application was examined via the Planning Act 2008 (**PA 2008**) procedure, and assessed against the Airports National Policy Statement as an "important and relevant" consideration (s.105 PA 2008). As part of that process the examining authority recommended to the Secretary of State for Transport (**SST**) that development consent be withheld. The SST disagreed and granted the DCO on 24 April 2025.

The judicial review

Six grounds were advanced, of which the first three related to the proper assessment of carbon emissions as part of the environmental impact assessment under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (**EIA Regulations**). It is those issues, and the judgment in *R (Finch) v Surrey CC* [2024] UKSC 20, that are considered here.

Ground 1

In Ground 1 the Claimant argued that the Interested Party had unlawfully failed to assess in the Environmental Statement the significance of inbound flight emissions contrary to the EIA Regulations and the judgment in *Finch*. Following the judgment in *Finch* and while the examination was ongoing, the Interested Party quantified inbound flights by doubling the outbound emissions. It had previously not done so because it considered excluding these emission was appropriate, as including them risked double counting (as outbound flight emissions would also be counted at the departing airport), and the UK Carbon Budgets did not include such emissions. Ultimately, the SST concluded that there could not be a meaningful assessment of inbound flight emissions because of the absence of a sufficiently justified benchmark.

Lang J rejected the Claimant's challenge to the SST's conclusion. She accepted the argument that it was inappropriate to compare inbound flight emissions to the UK's Carbon Budgets because the budgets did not account for such emissions, and therefore it would not be comparing like with like [64]. Ultimately, the assessment of significance and the selection of an appropriate benchmark against which to assess that significance is a matter of judgment [65]. Importantly, Lang J considered that Lord Leggatt's conclusion in

Finch that *"material should be included in the environmental statement and taken into account in the procedure only if it is information on which a reasoned conclusion could properly be based"* concerned not only the issue of causation of effects but also the nature and extent of the assessment of significance of an effect [70]. That mattered because, absent an appropriate benchmark, it was lawful to conclude that the significance of such emissions was not *"capable of meaningful assessment"* [72].

Lang J then went on to accept, as a secondary position, that it was lawful for the SST to conclude that, insofar as it was possible to conclude, the emissions would not themselves have been significant in any event. That meant, in line with *Finch*, such emissions were not required to be assessed anyway ([74], quoting *Finch* at [138]). Thus, overall, Lang J considered the conclusions reached by the SST were lawful, and in doing so emphasised the important point that the sufficiency of an environmental statement (and the entire EIA process) is ultimately a matter of judgment.

Ground 2

In Ground 2 the Claimant argued that the SST had unlawfully failed to take account of how inbound flights were addressed by the examining authority considering the application for development consent for the expansion of Gatwick Airport. That was because, in the report of the Gatwick examining authority (which had been published by the SST with a "minded to" letter, due to the novel way in which that examining authority had dealt with the application), they had identified the same difficulties of quantification with inbound flights, but had then gone on to take them into account. The SST, while having regard to this approach in her decision letter, rejected an assessment conducted in this way.

Lang J concluded that the approach the SST adopted was lawful. She considered that an examiners report was a recommendation to the SST and did not have the status of a decision [93]. Further, the Gatwick DCO application concerned a different application at a different airport with much higher overall passenger capacity (with its proposed expansion, Gatwick Airport would hit 80.2 mppa) and thus the question of resulting emissions was qualitatively different [94]. In any event, Lang J accepted that the reasoning of the Gatwick examining authority was internally inconsistent, a point recognised by the SST in the Luton decision letter (and, ultimately, also recognised in the decision on the Gatwick DCO) [95]-[96]. For those reasons, she considered it was wrong to say that the Gatwick examining authority report was an "obviously" material consideration that it would be irrational not to take into account.

Ground 3

In Ground 3 the Claimant argued that the Interested Party had unlawfully excluded and failed to assess in the ES the effect of non-CO_2 emissions on the climate. This claim included an important additional step over inbound flight assessment: not only was it said there was no appropriate benchmark against which to measure the significance of such effects, there was also a dispute about whether the effects of non-CO_2 emissions could be quantified at all. The Interested Party argued that such emissions could not be quantified because there was no scientific consensus, and particularly no multiplier to quantify non-CO2 effects was available. The SST accepted both that there was no meaningful way to quantify the emissions, but also that there was not an appropriate benchmark against which to assess in any event.

Lang J accepted the approach of the SST as lawful. She accepted the conclusion that there was no consensus over a way to quantify such emissions, and in doing so approved of the judgment of Lane J in the earlier *R (on the application of Bristol Airport Action Network Co-ordinating Committee) v SSLUHC* [2023] EWHC 171 (Admin) (***BAAN***) [127]. While there were many multipliers available, there was no such consensus (as arguments before the examining authority had demonstrated), and there was no room to apply a multiplier on a precautionary basis.

However, she also went on to accept that the high level qualitative assessment which had been made was lawful, concluding: *"[t]hey were properly taken into account, but on a qualitative and high-level basis because of significant scientific uncertainty about the sale of their effects, and the lack of any relevant benchmark against which to contextualise their effect"* [125]. Overall, she considered there was no legal obligation to embark on an attempt to quantify that would only ever be indicative, and that what the EIA Regulations actually called for was assessment *"in an appropriate manner, in light of each individual case"*. The SST had done this and that was lawful [126].

The remaining grounds

In the remaining grounds, Lang J then went on to conclude that the SST lawfully relied upon the Climate Change Act 2008 as a "pollution control regime" (again approving of *BAAN*), and rejected an argument that the SST had failed to further the purpose of conserving and enhancing the natural beauty of the Chilterns National Landscape. She did not address Ground 6 which was stayed as it relied upon on a successful appeal against *R (Possible (the 10:10 Foundation) v SST* [2025] EWHC 1101 (Admin) (***Possible***). This mattered because Ground 6 challenged the SST's reliance on the Jet Zero Strategy, which the Claimant argued was unlawful. In *Possible* Lang J had concluded the Jet Zero Strategy was lawful; and Ground 6 of *LADACAN* was dropped once permission to appeal in *Possible* was refused.

Consequences

LADACAN is a key case for practitioners in the planning and environmental law fields. The application of *Finch* to not only the question of causation of effects but also the assessment of significance is an important conclusion which constrains the scope of "meaningful assessment" in an EIA. It is particularly pertinent for airport expansions such as Luton because, currently, various aspects of emissions are difficult to quantify or are not included in carbon budgets against which effects are contextualised.

An application for permission to appeal is currently pending in *LADACAN* before the Court of Appeal. In addition, in the recent challenges to the Gatwick DCO *(R (on the application of CAGNE) v SST* and *R (on the application of Barclay) v SST)* materially similar issues were argued before Mould J, and judgment is awaited. It would seem Lang J's judgment in *LADACAN* is unlikely to be the last word on these important issues.

James Strachan KC and **Victoria Hutton** acted for the Secretary of State in *LADACAN*.

In the recent challenges to the Gatwick DCO:

- **Nigel Pleming KC, Rose Grogan,** and **Daniel Kozelko** acted for the Secretary of State.
- **James Strachan KC** and **Victoria Hutton** acted for Gatwick Airport.
- **Gethin Thomas** acted for the Claimant in *R (on the application of Barclay) v SST.*

R (Halton Borough Council) *v* Secretary of State for Housing, Communities and Local Government [2025] EWCA Civ 1566

Christopher Moss
Call **2021**

Introduction

Parties in planning appeals and other planning proceedings normally meet their own expenses, however, where a party has behaved unreasonably and caused another party to incur unnecessary or wasted expense, they may be subject to an award of costs. 'Unreasonable' is used in its ordinary meaning and may cover procedural or substantive unreasonableness.

In *R (Halton Borough Council) v Secretary of State*

for Housing, Communities and Local Government [2025] EWCA Civ 1566 the Court of Appeal considered whether a Local Planning Authority had behaved unreasonably in withdrawing its support for a planning application in the course of a called-in inquiry following answers given by its expert in cross-examination.

Factual Background & First Instance

In September 2017, a developer submitted a planning application to Halton Borough Council ("the Council") for 139 dwellings. The site was located within the vicinity of the Runcorn Chemicals Complex. The Health and Safety Executive ("HSE") objected to the application on safety grounds. The Council considered the HSE's objections but judged the proposal to be in line with its own adopted development plan, which had been approved by two local plan inspectors who had not endorsed the HSE's objections at the time, and resolved to grant the application. In the light of the HSE's objections the Secretary of State called in the application and listed a public inquiry.

The developer submitted a position statement which said that, although it remained committed to the development, the primary public safety matter was between the HSE and the Council, and it did not intend to provide evidence at the inquiry. The Council, as a rule 6 party, submitted a statement of case in support of the application. The HSE and Viridor (an operator of a nearby energy-from waste plant) submitted statements of case objecting to the application, also as rule 6 parties.

The Council's proof of evidence on public safety matters was the expert evidence of Mr Hopwood of DNV (the consultants who had been advising the Council). It contained an expert evidence declaration conforming with the Planning Inspectorate guidance. Multiple conferences were held with Mr Hopwood involving counsel, both before and after the exchange of evidence, at which the merits of both parties' positions and their evidence were discussed extensively.

During the public inquiry, Mr Hopwood was cross-examined by leading counsel on behalf of the HSE. During cross-examination he agreed that the development plan policy on which the Council relied, failed to follow the principles in the National Planning Policy Guidance. When those principles were followed the outcome was to advise strongly against the grant of planning permission. Thus, Mr Hopwood accepted that if he were in the inspector's position he would advise the Secretary of State strongly against the grant of planning permission. These were answers which, according to the Council, were inconsistent with the advice that Mr Hopwood had previously given.

In light of Mr Hopwood's answers, the Council withdrew its support for the application. In consequence, the developer withdrew the application and the inquiry came to an "abrupt halt".

The HSE and Viridor applied for their costs against the Council. These applications were considered by a member of the Costs & Decisions Team at the Planning Inspectorate, Mr Parsons. He concluded that the Council's decision to withdraw their support for the application had been unreasonable, and that a costs award should be made from the dates on which the HSE and Viridor submitted their rule 6 statements. In particular, Mr Parsons held:

> *"It was incumbent upon the Council, as the call-in inquiry process progressed, to continue to appraise their position ensuring that their original grounds for resolving to approve the planning application remained. Instead, the Council changed their previous stance at the inquiry, but it is evident that there had been no material change in the planning circumstances or evidence sufficient to justify such a volte face. In the circumstances, it is difficult not to conclude that the situation that the Council found themselves in at the inquiry was of their own making."*

The Council applied to judicially review the costs award made against them.[6] At first instance, the Council's application was dismissed by Fordham J [7] who held that Mr Parsons' decision was an evaluative judgment within the range of reasonable decisions open to him, and that there was no demonstrable flaw in his reasoning.

The Council appealed against Fordham J's judgment on two grounds:

i) Mr Parsons' reasons for finding that the Council were responsible for the situation it found itself in after Mr Hopwood gave evidence were demonstrably flawed and unsound.

ii) Mr Parsons gave inadequate reasons to explain why he concluded that the Council were responsible for that situation.

The Court of Appeal's judgment

The Court of Appeal allowed the Council's appeal, Lewison LJ gave judgment with which Asplin LJ and Coulson LJ agreed.

Lewison LJ first addressed what Mr Parsons' had identified as the Council's unreasonable behaviour. At [58] he noted that Mr Parson's reasoning *"appears to be that the Council should have tested Mr Hopwood's evidence and satisfied themselves that it could withstand cross-examination. The carrying out such an exercise was a normal procedural requirement and a failure to do so was unreasonable."* Lewison LJ held at [59] that this *"sets the bar too high"*. In any case in which there is a difference of expert-opinion *"the decision-maker is likely to resolve the difference in favour of one expert rather than another"* and in that sense the losing party's expert evidence *"will not have stood up to scrutiny following cross-examination. But that of itself cannot rationally be regarded as unreasonable behaviour"*.

Lewison LJ went on to hold at [61] that *"testing the evidence of an expert to see whether it would stand up to cross-examination cannot be described as a "normal procedural requirement" even if it is permissible procedural option";* an instructing party should not be expected to second guess its expert as a matter of routine.

At [62] he held that *"the Council cannot tell from Mr Parsons' decision what it did wrong"*. Further, if it had been *"unreasonable conduct on the part of the Council to continue to rely on Mr Hopwood's expert evidence, it would not have mattered whether the Council withdrew its support for the development or soldiered on to the bitter end. So the link between the withdrawal of the Council's support and the finding of unreasonable conduct is tenuous, to say the least"*.

It was also relevant, Lewison LJ noted at [66], that the matters on which Mr Hopwood made the crucial concessions were on the validity of policy, not themselves a matter of public safety (his expert discipline). Accordingly, *"I cannot see how it could reasonably have been anticipated that questions about the validity of the policy were to be put to the expert on public safety."*

The appeal was allowed and at [67] Lewison LJ concluded:

> *"If Mr Parsons regarded the Council's withdrawal of support for the proposed development following the change in Mr Hopwood's evidence as being "without good reason" I consider that his conclusion in that regard is untenable. If he meant to suggest that it is a "normal procedural requirement" to go beyond the Council's extensive discussion of the parties' positions before Mr Hopwood's cross-examination, I can see no rational basis for that conclusion. If, on the other hand, he meant to identify some other "normal procedural requirement" with which*

6 The claim proceeded by way of judicial review, rather than statutory review, as a result of the earlier decision in this case by HHJ Stephen Davies in [2023] EWHC 293 (Admin). HHJ Stephen Davies held that a costs order made on the withdrawal of an application where there had been no final decision following an inquiry was not a decision made "in connection with" a relevant decision under s284 TCPA 1990 and therefore any challenge had to be made by judicial review.

7 [2024] EWHC 2030 (Admin)

> *the Council did not comply, I do not understand what it was."*

Comment

Lewison LJ's judgment is a sensible and thoroughly reasoned one with the key takeaway being that it is not a normal procedural requirement for a party to test whether its expert's evidence will withstand cross-examination. At [63]-[65] he also addressed the interesting issue of how far a party could permissibly go in testing their expert's evidence, noting at [64] that *"[a]ny discussion with witnesses must, of course, steer clear of coaching the witness"* but that *"[w]here discussion ends and practising begins is clearly a matter of judgment"*.

Costs awards following a planning appeal are, largely, a matter of judgment for the decision maker but their reasoning must still stand up and be lawful. If you are on the receiving end of a costs award, it is always worth considering whether the decision and its reasoning come up to scratch. If you do identify any grounds on which to challenge an award hopefully it won't, like for Halton Borough Council, require a circuitous trip to the Court of Appeal for a positive outcome.

Epping Forest District Council v Somani Hotels Ltd [2025] EWHC 2937 (KB) (11 November 2025)

Ella Grodzinski
Call **2022**

Introduction

One case which repeatedly hit the national news headlines in 2025 was that of the asylum seekers housed in the Bell Hotel in Epping. This case became a political flashpoint, as well as being legally significant.

The Bell Hotel ("the Bell") had been used for housing asylum seekers since 2020. This came to national attention in 2025 after protests outside the hotel against such usage turned ugly, particularly after a series of arrests were made of asylum seekers who had been housed at the Bell. The Claimant, being the local planning authority, sought to put an end to the housing of asylum seekers at the Bell and contended that this usage constituted a breach of planning control. The Claimant applied for relief from the court in the form of (a) an injunction to restrain the Defendant, being the owner of the Bell, from using the Bell to house asylum seekers, and (b) a declaration that the use of the Bell to so house asylum seekers did not constitute use of the Bell as a hotel (within the meaning of Use Class C1).

Proceedings

An interim injunction was granted by the High Court on 19 August 2025. The Court of Appeal granted the Defendant's appeal against the interim injunction on 01 September and joined the Secretary of State for the Home Department (**"SSHD"**) as an intervener. The High Court heard the case on the final injunction on 13-15 October; judgment was handed down on 11 November.

Discussion

Mould J approached the question of whether it was appropriate to grant a final injunction pursuant to section 187B of the Town and Country Planning Act 1990 ("the 1990 Act") in accordance with the guidance given in *South Bucks District Council v Porter* [2003] 2 AC 558 ("South Bucks"). At [206], Mould J set out a set of principles to be drawn from *South Bucks,* the fifth and sixth of which were that *"Injunctive relief is unlikely to be granted unless it is a "commensurate" remedy in the circumstances of the case"* and that *"It is the court's task to strike the balance between competing interests, weighing one against the other."* [206]

In so weighing the competing interests, of particular relevance was the first principle drawn from *South Bucks,* which was that that *"the need to enforce planning control in the general interest is a relevant consideration".* As part of this, both the *"degree and flagrancy"* of the breach and the extent to which enforcement has already been attempted will likely be key – *"Where conventional enforcement measures have failed over a prolonged period the court may be more ready to grant an injunction. The court may be more reluctant where enforcement action has never been taken."* [206] In the present case, although Mould J accepted that the Claimant had at least a reasonable basis for alleging that the present usage was in breach of planning control (see [187], [218] and [221]-[226]), the alleged breach was not *"flagrant"* but contested and long-standing, and the Claimant had previously taken no real enforcement action (see [221]-[226]).

The fourth principle was also key: *"While it is not for the court to question the correctness of planning decisions which have been taken (e.g. decisions to refuse a planning permission or to dismiss an appeal), the court should come to a broad view as to the degree of environmental damage resulting from the breach and the urgency or otherwise of bringing it to an end."* Mould J accepted that housing asylum seekers could potentially increase the burden on local amenities such as local health and community services. However, there was no good evidence that there was such an increased burden in this case [236]-[237]. Similarly, he accepted that, in the light of arrests and convictions for sexual assault by three asylum seekers housed in the Bell, local residents had a reasonable basis to be concerned about crime [251], but it was necessary to *"distinguish between the actions of particular individuals and actions or behaviour which arise from the use of land itself."* [253] The actions of three asylum seekers did not mean that criminal or anti-social behaviour could be said to be a characteristic of the use of the Bell as asylum accommodation. Mould J thus accepted the validity of the local concerns regarding potential social and environmental harm but gave them only limited weight in striking the balance between competing interests.

He also rejected the suggestion that the existence of disruptive local protests ipso facto should be factored into the balance. The approach he took (at [259]) was to *"set the protests in the context of the established principles by which local objections to controversial development are considered through the development control process."* As he explained at [260]-[269], any relevant factors highlighted by the protests, such as potential increased burdens on local amenities, would be material considerations which the planning authority should already be taking into account. Mould J agreed with the Court of Appeal in saying that the existence of protests should not be treated as a material planning or environmental harm, as this could incentivise further protests. Control of the extant protests was a matter for policing, not planning [270].

The countervailing factors relied on by the Defendant included the need for the SSHD to provide sufficient accommodation for asylum seekers who would otherwise be destitute (to comply with her duties under the Immigration and Asylum Act 1999) [273]-[278], and the possible impact of the injunction on the Defendant in running a hotel [282].

Weighing the above factors against each other, Mould J concluded that a final injunction would not be a commensurate response to the alleged breach of planning control.

Since it had been unnecessary to determine whether or not the use of the Bell for asylum accommodation constituted a use of it as a hotel, Mould J also declined to make the declaration sought by the Claimant. Further, he commented on the propriety of doing so: the relevant statutory scheme of the 1990 Act provided for the local planning authority, or on appeal the Secretary of State, to determine whether an existing use of land was lawful because it did not involve development (sections 191 and 195 of the 1990 Act). The court's role is limited to hearing a challenge to the validity of that determination; it would *"rarely be appropriate"* for a court to predetermine the substantive answer by granting declaratory relief [298]-[299].

Conclusion

This is just the latest in the trend of planning cases overlapping with political controversy and protests, after a series of cases of protests at universities over the past two years. In this case, Mould J's judgment underscores the need to clearly separate planning decisions from political disputes and give proper weight to the relevant factors without allowing fear of social unrest to unduly influence the process of decision-making.

Contributors

John Pugh-Smith
Call **1997**

John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues.

john.pugh-smith@39essex.com

Celina Colquhoun
Call **1990**

Celina regularly acts for and advises local authority and private sector clients in all aspects of Planning and Environmental law including the Community Infrastructure Levy (CIL) regime, Highways Law, Sewers and Drains and National Infrastructure. She appears in Planning Inquiries representing appellants; planning authorities and third parties as well as in; the High Court and the Court of Appeal in respect of statutory review challenges and judicial review cases. She also undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown Courts as well as Enforcement Notice appeals. She specialises in all aspects of Compulsory Purchase and compensation, acting for and advising acquiring authorities seeking to promote such Orders or objectors and affected landowners. Her career had a significant grounding in national infrastructure, airports and highways projects and she continues those specialisms today – *"dedicated, very analytical and keen for precision… She is very much considered to be a leading figure in the legal planning world."* Chambers Directory 2023. She was awarded Legal 500 Planning and Land Use Junior of the Year 2024.

celina.colquhoun@39essex.com

Matthew Wyard
Call **2014**

Matthew specialises in matters concerning mental capacity/Court of Protection and public law. He deals with all matters that come before the Court of Protection with particular expertise in property and financial affairs disputes.
He maintains a deliberately broad public law practice and has experience encompassing commercial judicial review, community care, education, healthcare, human rights, immigration, information, pharmaceuticals, procurement and planning. Matthew regularly represents individuals, companies, Governments and other interested parties across the range of his practice areas and has experienced at every level of court and tribunal including the Supreme Court. He has appeared both led and unled in the Court of Appeal.

matthew.wyard@39essex.com

Contributors

Daniel Kozelko
Call **2018**

Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. In 2019-2020 Daniel was a judicial assistant to Lord Carnwath and Lady Ardenat the Supreme Court of the United Kingdom. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20.

daniel.kozelko@39essex.com

Christopher Moss
Call **2021**

Christopher has a particular interest in planning and environmental work and is ranked in the 2026 Legal 500 as a Rising Star. He regularly appears in court, inquiries and hearings as sole or junior counsel and acts for local authority, private sector, and third sector clients. His recent instructions have included representing a local authority at a multi-day enforcement inquiry covering 4 linked appeals, advising claimants and local authorities on matters including rights of way and related issues as well as s.73 applications raising *Hillside* problems. Christopher has also gained experience advising on the intersection of planning, public, and contract law by working with Jonathan Seitler KC to advise a local authority on potential challenges to the tabling of a commercial offer to purchase a significant parcel of land.

christopher.moss@39essex.com

Ella Grodzinski
Call **2022**

Ella joined 39 Essex Chambers as a tenant in September 2023, following successful completion of her pupillage. She accepts instructions across all the Chambers' practice areas, with a particular interest in environmental, planning and public law cases. She has already been involved in matters ranging from judicial review of planning decisions to the registration of town and village greens.

ella.grodzinski@39essex.com

KEY CONTACTS

ANDREW POYSER
Director of Clerking
+44 (0)20 7832 1190
+44 (0)7921 880 669
andrew.poyser@39essex.com

ELLIOTT HURRELL
Director of Clerking
+44 (0)20 7634 9023
+44 (0)7809 086 843
elliott.hurrell@39essex.com

Chief Executive Officer: **Lindsay Scott**
Director of Clerking: **Andrew Poyser**

39essex.com
020 7832 1111

LONDON
81 Chancery Lane
London
WC2A 1DD
DX: London/Chancery Lane 298
+44 (0)20 7832 1111

SINGAPORE
28 Maxwell Road
#04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
+65 6320 9272

KUALA LUMPUR
#02-9
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
+60 32 271 1085

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