



NEWS

Town centres & retail planning news, May 2018

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Headline news

Government's design quality conference

On 25 April, MHCLG hosted a conference, 'Achieving Well-Designed Places', which brought together 'key stakeholders' from the Government and practice

to design quality. The Secretary of State and the Housing Minister both delivered speeches at the event.

The conference follows the Housing White Paper's references to driving up the quality and character of new development', supporting custom build homes, encouraging 'better use of Local Development Orders and area-wide design codes', and good design being 'fundamental to creating healthy and attractive places'. These policy approaches are reflected in the draft NPPF, which has a chapter devoted to 'Achieving well-designed places'.

Prior to the conference, MHCLG issued a press release which said Ministers would:

'[...] call on industry to embrace the latest innovations to make sure we are building the good quality homes that our country needs.'

It was intended that the conference attendees, including local authority planners, developers and design professionals would 'share their expertise to ensure how homes look becomes just as important as the number delivered'.

The Housing Minister focused on the importance of good design and it being intrinsic to the success of a scheme rather than being solely about appearance, and referred to the Government's view that well-designed schemes, brought forward with community support, are less likely to be opposed by that community.

He also emphasised that high quality design need not necessarily cost more, which he considered to be:

'[...] one of the key points that we need to demonstrate through research as government, and you need to demonstrate in your practice in terms of rolling out and deploying modern methods of construction.'

The Minister referred to high density schemes that have good community facilities being associated with increasing positive social interaction. He also promoted examples of international design policy, including the New South Wales 'Better Placed' policy:

'[...] it is quite similar with our view that design is not just what a place look like, but also how it works and feels to the people already living in it.'

[Ministry of Housing, Communities & Local Government, Government champions innovation in bid to build well-designed homes](#)

[Ministry of Housing, Communities & Local Government, speech delivered by Secretary of State for Housing Communities and Local Government at the Design Quality Conference](#)

[Ministry of Housing, Communities & Local Government, speech delivered by Housing Minister Dominic Raab at the Design Quality Conference](#)

[Government Architect New South Wales, Integrated Design Policy 'Better Placed'](#)

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Quote of the month



We want to see development guided by what people want locally, not some dull homogenous design that has been pulled out of a bureaucratic top drawer in an office miles away from the community where the people affected are actually going to live it.

Housing Minister, Dominic Raab, speaking at the Design Quality Conference, 25 April 2018

Lichfields Use Classes Order table update reflects April 6 permitted development rights' amendments

Lichfields' 'Guide to Use Classes Order in England' has been updated.

As reported in the April edition of the England Planning News and in force since 6 April, the principle changes made by the latest amendment Order for permitted development rights (PDRs) relate to the extension of the change of use right from Class B8 to residential, and to Class Q for changing the use of agricultural buildings to residential.

[Lichfields, Guide to Use Classes Order in England](#)

[The Town and Country Planning \(General Permitted Development\)\(England\)\(Amendment\) Order 2018](#)

[The Town and Country Planning \(General Permitted Development\)\(England\)\(Amendment\) Order 2018, Explanatory Memorandum](#)

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Legislation now in force requiring councils to review local plans every five years

Since 6 April, local planning authorities (LPAs) have been required to review their local plans (and statements of community involvement) every five years, starting from the date of adoption.

The Town and Country Planning (Local Planning)(England)(Amendment) Regulations 2017 (see Reg. 4) are accompanied by a lengthy Explanatory Memorandum. It states:

- the amendment Regulations set a period of five years within which an authority should undertake an assessment of whether its development plan documents (and its Statement of Community Involvement) remain up to date - 'this will help ensure that plans are kept up to date';
- where an authority reviews a document but decides not to update it, they must publish their reasons;

- 'moving' the policy expectation in the National Planning Policy Framework (NPPF) and in the national Planning Practice Guidance (PPG) - that authorities should regularly review their plans to respond flexibly to changing circumstances - into legislation 'will strengthen existing expectations, ensuring that all areas have up-to-date plans in place which address the needs of the local community and accurately reflect changes to local circumstances'; and
- The changes build on the Local Plans Expert Group (LPEG) report (March 2016) and the subsequent Housing White Paper consultation (February 2017) and responses.

[The Town and Country Planning \(Local Planning\)\(England\)\(Amendment\) Regulations 2017 and Explanatory Memorandum](#)

[Local Plans Expert Group \(LPEG\) report](#)

[Department for Communities & Local Government, Housing White Paper, 'Fixing our broken housing market'](#)

[Government response to the Housing White Paper consultation: 'Fixing our broken housing market'](#)

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Chief Planner's 'Planning Update Newsletter' announces upward extension permitted development right summer consultation

The Government is to carry out a consultation this summer on a new PDR to extend existing buildings upwards to create new homes, according to the most recent planning update newsletter to chief planning officers.

The Planning Directorate Newsletter summarises this proposal alongside the Government's recent programme of planning reforms covering: changes to policy & law; consultations; and local plan interventions.

The current NPPF consultation had already announced that there would be a consultation on such a PDR; there is already proposed policy support for such upwards extensions in the draft Framework. Upward extensions were also mentioned in the Housing White Paper. That proposal itself flowed from an even earlier consultation regarding potential ways in which upwards extensions in London might be supported through policy and/ or legislative changes. These moves are all clearly giving an indication of the Government's growing interest in making it easier for such extensions to obtain express or deemed planning permission throughout England.

[Ministry of Housing, Communities & Local Government, Planning Update Newsletter \(Planning Directorate Newsletter\), April 2018](#)

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Six-year-old planning permission quashed by High Court

In *Thornton Hall Hotel Ltd, R (On the Application Of) v Wirral Metropolitan Borough Council*, a planning permission issued in error six years ago by Wirral Metropolitan Borough Council was quashed by the High Court. The interested party had erected and retained three marquees within the Thornton Manor Estate leading to enforcement proceedings and an eventual

planning application; the claimant was in effect a competing business.

In December 2011, the LPA had granted unconditional planning permission for the erection of three marquees in the grounds of Thornton Manor, without a time-limiting condition. Both the claimant and the LPA said that this omission was a mistake; the planning permission should have been subject to a condition of removal before the expiry of five years that had been decided on by Committee (meaning that the marquees would have had to be taken down not later than 19 December 2016). This condition had been omitted in error from the decision notice; nine other conditions which the Committee had decided to impose were omitted too.

The claim was brought long out of time therefore the issues were whether:

1. an extension of time should be granted;
2. if the time to appeal were extended, the merits of the claim were 'properly arguable'; and
3. the claim should be allowed and appropriate relief granted.

Mr Justice Kerr on the first issue concluded:

'I think justice requires that the extension of time be granted so that the interest of the public in the integrity of the planning process is not excluded from consideration by this court. The public interest lies in the court having power to rectify the error.

That public interest is represented by the statutory planning powers of the LPA. On judicial review of the exercise of those powers where a mistake has led to illegality, its guardian is the Administrative Court.'

On the second, he concluded:

'The correct analysis is that the permission, while not wholly void, was flawed by the erroneous absence of the conditions the committee had decided upon and, subject to a valid challenge by a qualified challenger, susceptible to quashing [...] the court should now exercise its power to rectify the error by quashing the permission.'

His reasons included:

- an error had been made;
- as a Green Belt site, unconditional and permanent planning permission to erect the three marquees and keep them there would not have been granted and would not have been considered as being in the public interest;
- if he did not grant the relief sought, the marquees 'need not be removed, ever', which again would be contrary to the public interest;
- the interested party was aware of the error but chose to remain silent; and
- the interested party had signed a section 106 agreement 'embodying the omitted conditions including the five-year time limit'. But the interested party proceeded in this litigation 'as if it were not bound by the terms of that agreement'. The judge commented:

'That seems to me only to compound the unconscionability of its position. It undertook in private law the same obligations as it denies in public law.'

The judge's concluding comment on quashing the planning permission was that 'the claim succeeds, though neither the LPA nor the interested party emerges with much credit'.

What is not clear from the judgment is why the LPA did not pursue a revocation or modification order to rectify their mistake.

[Thornton Hall Hotel Ltd, R \(On the Application Of\) v Wirral Metropolitan Borough Council](#)

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Inaccurate and inadequate Committee Report leads to quashing of planning permission

In R on the Application of Rainbird v The Council of the London Borough of Tower Hamlets, heard in the High Court, a planning permission for a 62-home development was quashed as a consequence of a local resident seeking judicial review. She was concerned about the impact that the new buildings proposed would have, given their scale, on 'the sunlight and daylight enjoyed by her house and others'.

The judge considered:

- the validity of objections and how they are dealt with by officers and committees (grounds 1 and 2); and
- the specifics of daylight/ sunlight reports (ground 3).

Her challenge only succeeded on the third ground, that reports to members about the effect on sunlight and daylight of nearby properties 'contained a number of flaws'. These flaws included the Committee being misled, them not being told about properties that would suffer a significant adverse effect on the daylight that they enjoyed, and the Planning Officer setting out conclusions that were not supported by analysis undertaken using vertical sky component (VSC) guidelines.

The conclusion that should have been reported to members was that there were 15 rooms in 11 properties that would suffer a significant adverse effect on the daylight which they enjoyed assessed in accordance with the VSC guideline. The development proposed would in total have had a detrimental impact on 23 rooms in 12 dwellings. Because this was not pointed out, no further investigation had been undertaken into e.g. what these rooms were used for, in order to understand the severity or otherwise of the impact and whether scheme changes could ameliorate the situation. It was therefore not known what conclusion the members would have reached in determining the application, if such matters had been considered and reported on.

[Rainbird, R \(On the Application Of\) v The Council of the London Borough of Tower Hamlets](#)

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High Court judge confirms uncertainty must be overcome on how viability assessment should properly be carried out

In a long-running saga regarding residential redevelopment proposals for the former Territorial Army Centre site in Parkhurst Road, Islington, London, Holgate J has dismissed a High Court challenge relating to viability issues, following a June 2017 decision dismissing the appeal. There had also been a dismissed appeal for the site in 2015, which although it had been dismissed on other grounds, LB Islington at the time had been very concerned about the approach taken by the Inspector to viability assessment in order to determine whether the maximum reasonable amount of affordable housing was being provided. The Council had contemplated making an application for judicial review; pre-action protocol correspondence was exchanged but proceedings were not commenced.

In the 2017 appeal, the main issues had related to the amount of affordable housing and 'suitable planning obligations'. The Inspector had concluded:

'The proposed residential development would accord with a number of development plan policies and objectives, particularly those that promote the delivery of housing. However, the appeal proposal would not provide the maximum reasonable level of affordable housing and the submitted planning obligation does not provide a suitable means for a viability review.'

Widely differing approaches had been taken by the parties to viability at the 2017 inquiry; LB Islington had submitted that the site was 'exactly the type of site that should be making a substantial contribution towards affordable housing' - the existing use was redundant therefore the existing use value (EUV) was 'negligible'. There was no alternative form of development which could generate a higher value for an alternative use (AUV) than the development proposed by Parkhurst Road Ltd. (PRL), and there were no abnormal constraints or costs; therefore there was 'considerable headroom in the valuation of such a site enabling it to provide a substantial amount of affordable housing in accordance with policy requirements'. Their view was that the achievement of that objective was however being frustrated by PRL's use of 'a greatly inflated' benchmark land value (BLV) for the site, which failed properly to reflect those requirements; PRL had used a figure updated from the purchase price it had paid for the site as an input into its viability analysis, representing 'a fixed acquisition cost' (Paragraph 8).

Three grounds of challenge were considered in the High Court, all of which necessitated detailed analysis of the 2017 inquiry proceedings, and particularly the methods of valuation that had been employed each party and how these had led the Inspector to take the view that PRL's approach 'had failed to give adequate effect to policy requirements for affordable housing' (Paragraph 24). Tellingly, the Inspector had concluded:

'I do not accept the appellant's position that the level of affordable housing provision is not relevant to determining land value, as any notional willing land owner is required to have regard to the requirements of planning policy and obligations in their expectations of land value.'

Because the two appeal decisions had since 'generated a good deal of interest

amongst planning professionals' – they had been used by different parties ever since, as if they provided guidance of more general application on the approach to be followed where development viability and affordable housing contributions were in issue – Holgate J underlined how this was inappropriate (in Paragraph 27):

'The Inspector's task is to resolve the issues which have been raised on the evidence produced in that appeal. The Inspector is not giving guidance on what course should generally be followed, even in cases raising the same type of issue. First, the application of policy often involves a good deal of judgment and second, the circumstances of an appeal (and the evidence produced) may differ quite considerably from one case to another [...] There is a risk of attaching too much importance to the decisions of individual Inspectors, particularly where their conclusions were heavily dependent upon the circumstances of the cases before them and the nature of the evidence and submissions they received, with all their attendant strengths and weaknesses specific to that appeal.'

Following a detailed analysis of how the parties' rival valuation contentions were addressed at the 2017 inquiry – particularly by LB Islington in relation to national policy and guidance, the Mayor's and LB Islington's planning policies and supplementary planning documents/ guidance, and the 'RICS Professional Guidance: Financial Viability in Planning' – the judge rejected all of PRL's grounds of challenge, first on the basis that the Inspector had correctly understood the way in which LB Islington had used the EUV Plus valuation method in accordance with the RICS Guidance Note, leading to his endorsement of it (he had in parallel criticised PRL's 'purely market based approach'). Secondly, although the 2017 decision letter did contain a legal error relating to LB Islington's valuation case made (their witness's approach did not overcome the problem of comparison between land prices affected by differences in the levels of affordable housing provided, or by assumptions and circumstances affecting other sites which were inapplicable to the appeal site), Holgate J concluded that the decision letter was untainted by the legal error he had identified. The Inspector's decision to reject the adequacy of the proportion of affordable housing proposed would 'inevitably have been the same if he had not made that error' (Paragraph 121). He also found that the Inspector had given adequate reasons for his decision.

As an important postscript to his ruling, Holgate J categorically pronounced on the ongoing issues arising from uncertainty as to how viability assessment should properly be carried out. He stated the following, concluding too that he 'hoped that the court is not asked in future to look at detailed valuation material as happened in these proceedings':

'One of the key objectives in our planning system is efficiency in decision-making, in order to avoid delay in bringing about necessary or beneficial development. In this context the present case strikingly illustrates the importance of seeking to overcome uncertainty on how viability assessment should properly be carried out. Similar schemes on the same site have been approached by two different Inspectors in very different ways. That is not in itself unlawful, but from a practical perspective it does make it more difficult for practitioners and participants in the planning process to predict the likely outcome and to plan accordingly. It also leads to a proliferation of litigation

[...] Appeal decisions which are said to support rival positions are seized upon as part of an increasingly adversarial process. Decisions of the High Court are also subjected to intense scrutiny and added to the forensic palette, whilst overlooking the point that the court's role is limited to review on public law principles, and not to determine whether a decision was right or wrong on its merits.

[...]

According to the basic principles set out in the NPPF and the NPPG, it is understandable why a decision-maker may, as a matter of judgment, attach little or no weight to a developer's analysis which claims to show a "market norm" for BLV by doing little more than averaging land values obtained from a large number of transactions within a district. If those values are inflated by, for example, a misjudgement about a site's development capacity and/or by a failure to factor in appropriate planning requirements, such an exercise does not establish a relevant "norm" for the purposes of paragraph 023 of the PPG. Such data should be adjusted (subject to any issues about reliability and cross-checking). A failure to obtain adequate information about comparables relied upon (including the planning context and circumstances influencing bids and the transacted price) would not be acceptable where development appraisal or viability is dealt with in the Lands Chamber or in an arbitration, and it is difficult to see why the position should be different where the same type of issue arises in the present type of case.

On the other hand, it is understandable why developers and landowners may argue against local policy statements that BLV should simply conform to an "EUV plus a percentage" basis of valuation, especially where the document has not been subjected to independent statutory examination prior to adoption.

[...]

It might be thought that an opportune moment has arrived for the RICS to consider revisiting the 2012 Guidance Note, perhaps in conjunction with MHCLG and the RTPI, in order to address any misunderstandings about market valuation concepts and techniques, the "circularity" issue [this being developers recovering the excess paid for a site through a reduced level of affordable housing provision] and any other problems encountered in practice over the last 6 years, so as to help avoid protracted disputes of the kind we have seen in the present case and achieve more efficient decision-making. The High Court is not the appropriate forum for resolving issues of the kind which the Inspectors dealing with the Parkhurst Road site had to consider.' (Paragraphs 142 to 147)

[Parkhurst Road Limited v Secretary of State and LB Islington](#)

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The Lichfields perspective



The various court judgments reported this month not only include an important ruling on land value and viability assessment, but also demonstrate the importance of the applicant monitoring - and where necessary querying - the development management procedures of local planning authorities.

Jennie Baker, Associate Director

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