

# Local Development Plans

## Possibilities and Pitfalls

William Orbinson QC

Legal Associate of the Royal Town Planning Institute

Affiliate of the Irish Planning Institute

NI Associate of PEBA: The Specialist Bar Association  
for Planning, Environment & Local Government

For EPLANI 26 March 2018

'Without Responsibility'





**CONTENT**

## Local Development Plans

### Possibilities and Pitfalls

Where are we now?

The importance of early engagement

Strategic Environmental Assessment: In Memoriam?

Soundness of the Development Plan Document

A new role for the LDP in planning decisions

Interpretation of the LDP

The return of Prematurity as a reason for refusing permission

## Local Development Plans

Where are we now?

ABC – POP April

CCG – POP June

NMD - POP June

Belfast – Plan Strategy April

LCC – Plan Strategy May

MU – Plan Strategy May/June



# Local Development Plans

The importance of early engagement



# Local Development Plans

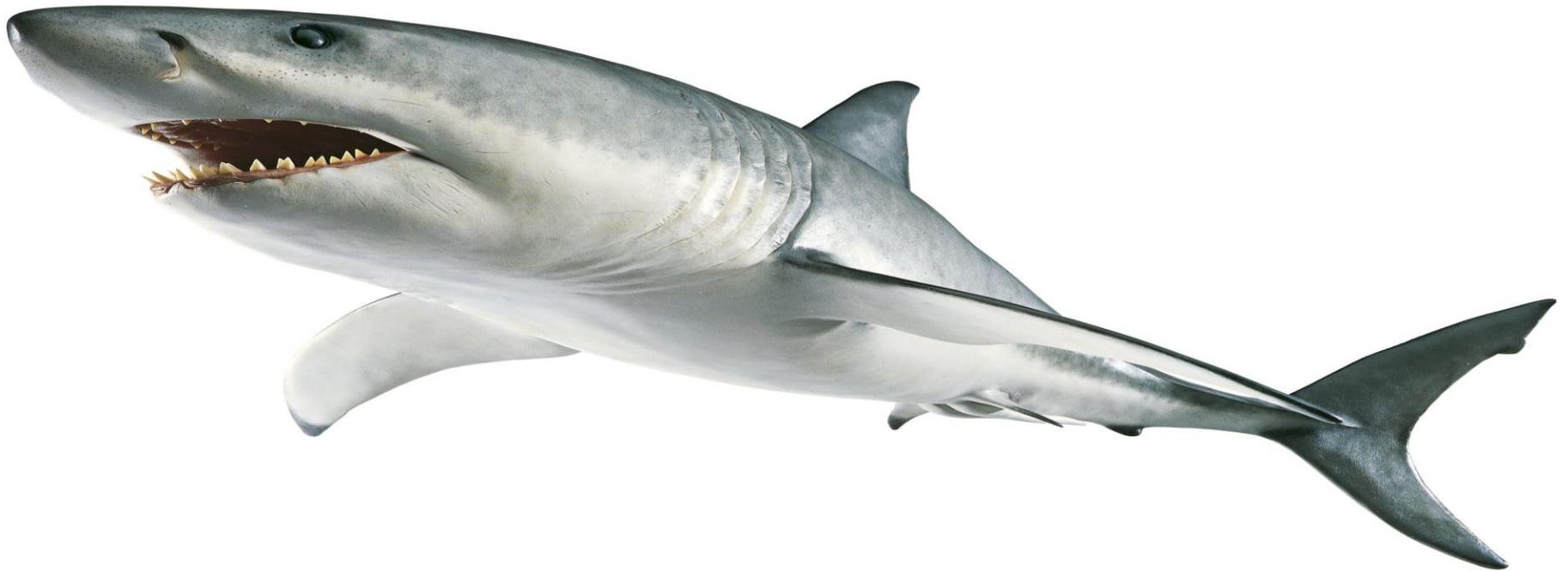
The importance of early engagement



Crumbos!

Just when you thought it was safe to get back into the water ...

Strategic Environmental Assessment bites back



## Remember ...

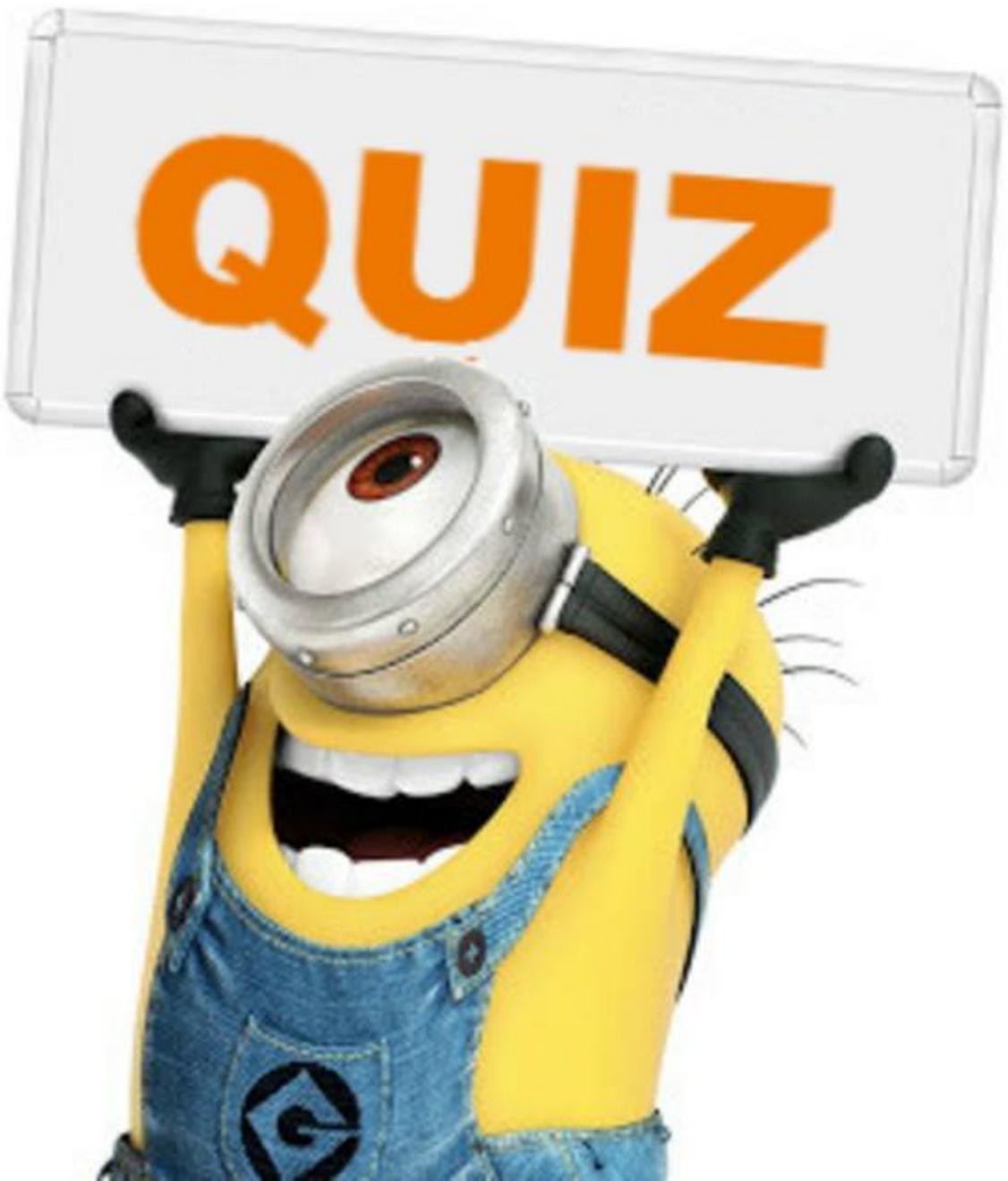
SEA challenges to anti-development draft plans in the mid- to late-Noughties, brought on behalf of pro-development interests

For example

- Draft Northern Area Plan
- Draft Magherafelt Area Plan
- Draft Craigavon Retail Plan

Brought the development plan system to a halt for years – Minister imposed a moratorium

So Councils need to get SEA right



NOBLE.



**No conferring**

**Nobody involved in the cases**

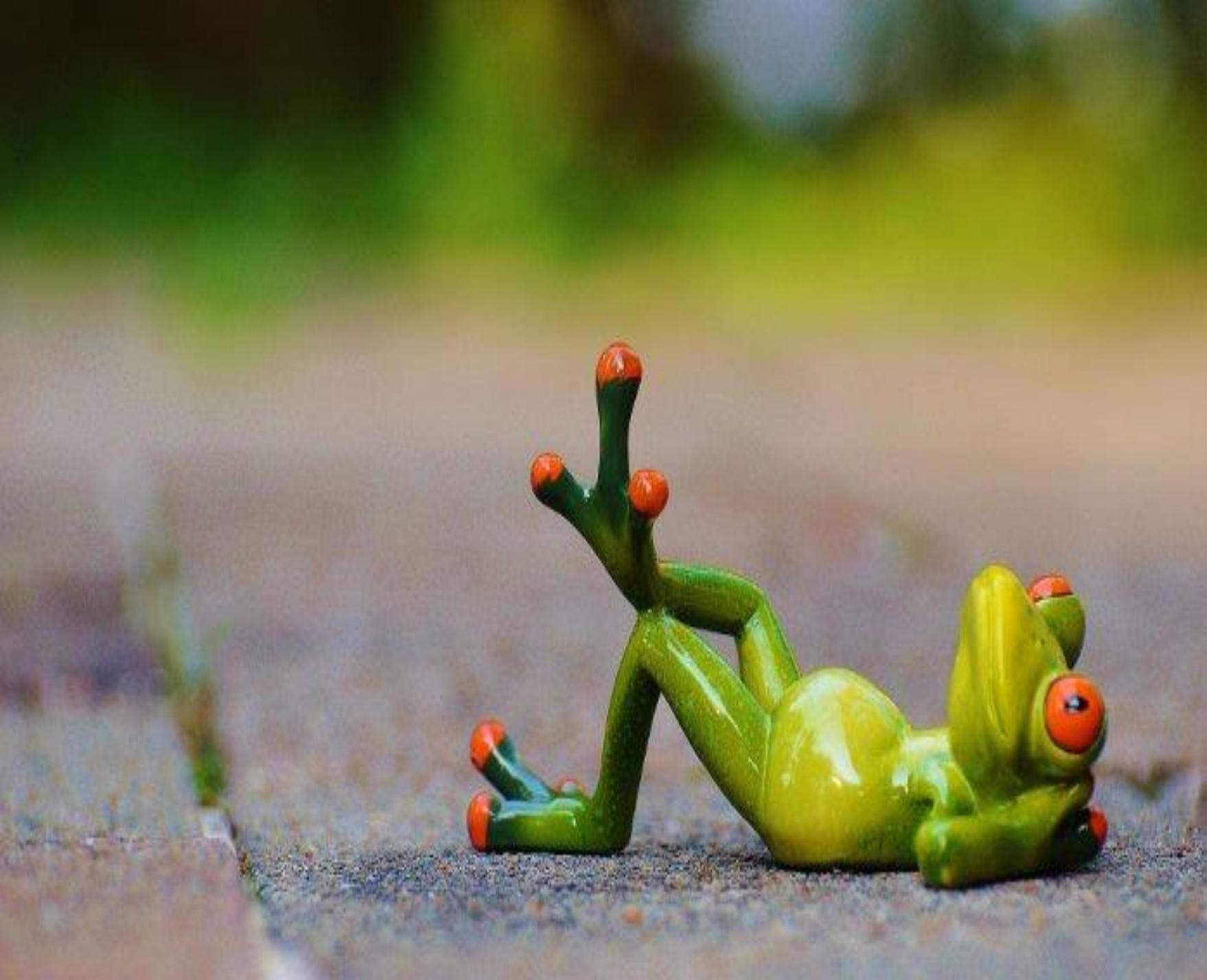
**First person to get it right wins  
the prize**

**Need a comprehensive answer**

**Q: Who remembers *all*  
the SEA mistakes  
Weatherup J found the  
DOE made in *Seaport*?**

**All of them. Because  
repeating *just one* mistake  
would be enough ...**







## Alternatives – a key battleground for SEA

Must assess all reasonable alternatives to the LDP's preferred option, not just a selection, but identification of reasonable alternatives is a matter for the decision-taker, subject to public law principles *Friends of the Earth 2015 Ashdown Forest Economic Development 2015*

The most helpful approach to what was a 'reasonable alternative' is to identify alternative options that are capable of meeting the objectives of the plan, as determined by the relevant decision-maker *Friends of the Earth 2015*

An option which the decision-maker considered viable, having regard to the full planning context, was also a helpful and appropriate way to identify a 'reasonable alternative' *Friends of the Earth 2015*

It was primarily for the decision-taker to identify objectives, give each objective appropriate weight, and determine whether they were met by a given option. If a particular plan was incapable of meeting the identified objectives so that realistically it would never be pursued, there was no point in subjecting it to SEA *Friends of the Earth 2015*

## Alternatives – a key battleground for SEA

Must give outline reasons for selecting the alternatives considered, and for declining to consider other possible alternatives (unless they are obvious non-starters) *Heard v Broadland District Council* 2012

Must give an adequate explanation of the reasons for choosing the preferred option and must undertake a critical examination of the evidence supporting the reasons for that choice  
*Heard v Broadland District Council* 2012

Must adopt an examination of the reasonable alternatives equal to that applied to the preferred option *Heard v Broadland District Council* 2012

**Free**



**What is Planning?**   
**Long-Term Planning**   
**Short-Term Planning**   
**Essentials of Sound**   
**Plan**

## Soundness of the Development Plan Document

Section 10(6), Planning Act (Northern Ireland) 2011

*“The purpose of an independent examination is to determine in respect of the development plan document ... whether it is sound”*

A Council must not submit the DPD to the Department unless it is confident the DPD will be shown to be sound at independent examination

Soundness is not to be presumed in the absence of evidence to the contrary, and the independent examiner and the Department need to be persuaded of soundness *Persimmon Homes v Blyth Valley Borough Council 2008*

Imperative that a Council takes all necessary steps to incorporate and assess for soundness throughout the process, rather than leaving it to the final stages of preparation

Those who want to make representations should focus on why the DPD is not sound and how any proposed changes will make it sound

## Soundness of the Development Plan Document

Soundness is not defined in the Act, so what does soundness mean?

Development Plan Practice Note 6 (drawn from English PPS 12) explains that

*“in* Soundness requires the LDP document to be tested at the independent examination *terms of content, conformity and the process by which it is produced” (1.1)*

*with* *“The tests of soundness are based upon three categories which relate to how the development plan document (DPD) has been produced, the alignment of the DPD central government regional plans, policy and guidance, and the coherence, consistency and effectiveness of the content of the DPD” (1.1)*

*“... it may be considered ... within its ordinary meaning of ‘showing good judgement’ and ‘able to be trusted’ and within the context of fulfilling the expectations of legislation” (5.1)*

## Soundness of the Development Plan Document

Development Plan Practice Note 6 sets out Tests of Soundness (3.1)

### *Procedural tests*

P1 Has the DPD been prepared in accordance with the council's timetable and the Statement of Community Involvement?

P2 Has the council prepared its Preferred Options Paper and taken into account any representations made?

P3 Has the DPD been subject to sustainability appraisal including Strategic Environmental Assessment?

P4 Did the council comply with the regulations on the form and content of its DPD and procedure for preparing the DPD?

## Soundness of the Development Plan Document

Development Plan Practice Note 6 sets out Tests of Soundness (3.1)

### *Consistency tests*

C1 Did the council *take account* of the Regional Development Strategy?

C2 Did the council *take account* of its Community Plan?

C3 Did the council *take account* of policy & guidance issued by the Department?

C4 Has the plan *had regard* to other relevant plans, policies and strategies relating to the council's district or to any adjoining council's district?

Compare the position in England, where the plan has to be consistent with the NPPF

## Soundness of the Development Plan Document

Development Plan Practice Note 6 sets out Tests of Soundness (3.1)

### *Coherence and effectiveness tests*

CE1 The DPD sets out a coherent strategy from which its policies and allocations logically flow and where cross-boundary issues are relevant it is not in conflict with the DPDs of neighbouring councils

Plan Strategy and Local Policies Plan have to be consistent with each other (5.5.3)

CE2 The strategy, policies and allocations are realistic and appropriate having considered the relevant alternatives and are founded on a robust evidence base

Note the linkage to SEA requirement to assess all reasonable alternatives

## Soundness of the Development Plan Document

Development Plan Practice Note 6 sets out Tests of Soundness (3.1)

*Coherence and effectiveness tests*

CE3 There are clear mechanisms for implementation and monitoring

CE4 It is reasonably flexible to enable it to deal with changing circumstances

## Soundness of the Development Plan Document

Development Plan Practice Note 6 provides detailed guidance on how to demonstrate that these tests are satisfied

Appendix 1 includes a useful sample checklist from Wales



## Soundness of the Development Plan Document

What happens if the development plan document is found to be unsound?

Independent examiner will recommend that the DPD should be withdrawn

If Department agrees, it will direct the Council to withdraw per Section 12, 2011 Act and Regulation 23 of the LDP Regulations

Council then must amend the DPD and repeat the statutory requirements

Only once that has been done may the Council resubmit the DPD for Independent Examination

**DELAYED**

**COSTS**

**STRESS**





**Get it**

**right**





## A new role for the Local Development Plan in planning decisions

Section 6(4), Planning Act (NI) 2011

*“Where, in making any determination under this Act, regard is to be had to the local development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise”*

Section 6(1) makes clear that for the purposes of Section 6(4), the local development plan is the adopted/approved LDP, and not the draft plan *Nottingham City Council and Browstowe Borough Council v Secretary of State for the Environment, Transport and the Regions* 1999, *North Dorset District Council v Secretary of State for the Environment* 1993

What does Section 6(4) mean, exactly?

## A new role for the Local Development Plan in planning decisions

*City of Edinburgh Council v Secretary of State for Scotland* 1997 confirms the correct approach

Consider the plan, identify any provisions in it which are relevant to the determination, and make a proper determination of them

Reach a clear and explicit conclusion on whether the proposal does or does not accord with the plan

Identify other material considerations and assess the weight to be given to them

Decide whether other material considerations are of such weight as to displace the priority normally given to the LDP

## A new role for the Local Development Plan in planning decisions

The conclusion on whether a proposal accords with the LDP must be reached in the light of the whole plan, adopting a purposive approach, rather than focussing on individual policies *Islington London Borough Council v Secretary of State for Communities and Local Government* 2012, *City of Edinburgh Council v Secretary of State for Scotland* 1997

So breach of one LDP policy does not necessarily mean that the proposal is not in accord with the LDP *R (Cummins) v Camden London Borough Council* 2001

LDPs will contain policies that pull in different directions, so for example a proposal may be in accord with LDP policies encouraging development for employment purposes, but contrary to LDP policies seeking to protect the open countryside - What then?

There may be no clear-cut answer on whether the proposal accords with the LDP, so the planning authority will have to make a judgement bearing in mind such factors as the importance of the respective policies, and the extent of compliance or breach *R (TW Logistics Ltd) v Tendring District Council* 2013, *R v Rochdale Metropolitan Borough Council, ex parte Milne* 2001

## A new role for the Local Development Plan in planning decisions

There is a presumption in favour of the LDP, to which the planning authority must have regard *St Albans District Council v Secretary of State for the Environment* 1993

It is not enough for the planning authority to have regard to the LDP, regard must be had to the presumption in favour of the LDP *Secretary of State for Communities and Local Government v Calderdale Metropolitan Borough Council* 2011, *R v Canterbury City Council, ex parte Springimage Ltd* 1994

The planning authority need not state expressly that it has had regard to the presumption – *Spelthorne Borough Council v Secretary of State for the Environment* 1994 - but it must indicate in some way that it has considered Section 6(4) and make clear the outcome of applying the presumption by indicating whether the proposal is or is not in accordance with the LDP *Jones v Secretary of State for the Environment* 1997

The presumption can be displaced by material considerations indicating otherwise *St Albans District Council v Secretary of State for the Environment* 1993

what  
does  
it all  
mean ?

## Interpretation of the LDP

Before the Planning Authority can carry out the Section 6(4) exercise, it must properly interpret the LDP

Not a matter of planning judgement

An objective matter of law, on which the courts have the final decision  
*Tesco Stores v Dundee City Council* 2012

The Planning Authority will be guilty of an error of law if it adopts an interpretation different to that of the court

Importantly, the court will be prepared to quash a decision based on an interpretation different to that of the court even if the Planning Authority's interpretation is not judged perverse or grossly unreasonable



**Turning, finally, to a delicate subject ...**





## The return of Prematurity as a reason for refusing permission

A huge battleground during the property boom, as developers fought to secure permissions contrary to draft area plans

Tests for refusal set out in the Joint Ministerial Statement of January 2005 and repeated in the SPPS – essentially, significant individual or cumulative prejudice to the draft plan or draft plan process

Given the conservative line taken historically by the PAC, lots of scope for planning stasis until the LDPs are adopted

JMS is silent on the relationship between the plan-led system and prematurity, because in 2005 we didn't have a plan-led system – SPPS doesn't help

Will the introduction of the plan-led system make it harder to secure approvals contrary to a draft LDP?

It shouldn't – the plan-led system is based on the *adopted* plan, not the *draft* plan



## Contact details

M +44 7860 245324

T +44 2890 426751

E [williamorbinson@planning.demon.co.uk](mailto:williamorbinson@planning.demon.co.uk)

W <http://www.barofni.com/directory/william-orbinson>

Legal Associate of the Royal Town Planning Institute

Affiliate of the Irish Planning Institute

NI Associate of PEBA: The Specialist Bar Association for Planning, the Environment and Local Government

