



Neutral Citation Number: [2024] EWCA Civ 1603

Case No: CA-2024-000193

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Mr Justice Eyre
[2023] EWHC 3474 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2024

Before :

SIR KEITH LINDBLOM
(The Senior President of Tribunals)
LORD JUSTICE BAKER
and
LORD JUSTICE HOLGATE

Between :

MARC JONES

Appellant

- and -

- (1) WREXHAM COUNTY BOROUGH COUNCIL**
(2) THE WELSH MINISTERS
(3) BDW TRADING LIMITED
(4) BLOOR HOMES LIMITED
(5) REDROW HOMES LIMITED
(6) HARWORTH ESTATES INVESTMENTS
LIMITED
(7) RUSSELL HOMES (UK) LIMITED
(8) CASTLE GREEN HOMES LIMITED
(9) SG ESTATES LIMITED

Respondents

Andrew Parkinson and Barney McCay (instructed by **Richard Buxton Solicitors**) for the
Appellant

Martin Carter (instructed by **Legal Services, Wrexham County Borough Council**) for the
First Respondent

Timothy Corner KC (instructed by the **Director of Legal Services for the Welsh**
Government) for the **Second Respondent**

Morag Ellis KC and Charles Merrett (instructed by Gateley Legal) for the Third to Sixth Respondents

The Seventh to Ninth Respondents did not appear and were not represented.

Hearing dates : 15 and 16 October 2024

Approved Judgment

This judgment was handed down remotely at 3pm on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holgate :

Introduction

1. In England and Wales, a local planning authority (“LPA”) determining an application for planning permission must have regard to the relevant provisions of the statutory development plan (s.70(2) of the Town and County Planning Act 1990 – “TCPA 1990”). That determination must be made in accordance with the development plan unless material considerations indicate otherwise (s.38(6) of the Planning and Compulsory Purchase Act 2004 – “PCPA 2004”).
2. For any area in Wales, by s.38(4) of the PCPA 2004 the development plan comprises:
 - (1) the National Development Framework for Wales (“NDFW”);
 - (2) any strategic development plan which includes all or part of that area;
 - (3) the local development plan for that area (“LDP”)

Each LPA in Wales must “prepare” a LDP for their area (s.62(1) of the PCPA 2004).

3. A draft LDP is subject to public consultation and reconsideration in the light of responses from the public and consultees. When the LPA considers that the draft LDP is ready, they must submit it to the Welsh Ministers (“WM”) for independent examination by one or more Planning Inspectors, to determine whether the draft satisfies certain legal requirements and is “sound”. A person who has made representations seeking to change the draft LDP is entitled to be heard at the examination held by the Inspector. Many parties and statutory consultees may be involved in this process. At the conclusion of the examination, the Inspector must make recommendations as to whether or not the plan should be adopted, with or without modifications. He must also give reasons for those recommendations (s.64 of the PCPA 2004).
4. Section 67 of the PCPA 2004 deals with the adoption of a LDP. In summary:
 - (1) The LPA “may” adopt a LDP as “originally prepared” if the examining Inspector makes a recommendation to that effect, that is with no modifications (s.67(1)); or
 - (2) The LPA “may” adopt a LDP with modifications if the examining Inspector so recommends (s.67(2)).

If the LDP is adopted it immediately becomes part of the statutory development plan for the purposes of s.38.

5. The central issue in this appeal is whether s.67 confers a power, or imposes a duty, on a LPA to adopt the LDP if the Inspector recommends adoption.
6. The appellant contends that s.67(1) and (2) confer a power on the LPA. It can decide whether or not to adopt the plan, but it may only adopt the plan in accordance with the recommendations of the Inspector. So, for example, it can only adopt the plan as originally prepared if the Inspector so recommends.

7. The first respondent, Wrexham County Borough Council (“WCBC”) is the relevant LPA responsible for plan-making in their area. The second respondents, the Welsh Ministers (“WM”), are the central planning authority for Wales. The third to ninth respondents are developers who took part in the examination process in this case. All the respondents (save for the seventh to ninth respondents who did not take part in this appeal) contend that s.67(1) and (2) impose a duty on the LPA to adopt a LDP in accordance with the recommendations of the Inspector.
8. The language of s.67(1) and (2) is identical to the provisions for England in s.23(2) and (3) as originally enacted. Paragraph 45 of the Explanatory Notes for the PCPA 2004 stated that under the English provisions a LPA could only adopt a development plan document in accordance with the recommendations of the examining Inspector. It is accepted that in England a LPA has a power, not a duty, to adopt a DPD if the Inspector should so recommend.
9. Despite the use of the word “may” in s.67(1) and (2), the question is whether s.67 and other relevant parts of the statutory code, read as a whole, have the effect of requiring a LPA in Wales to adopt a LDP if the Inspector so recommends. The respondents do not suggest that the answer is to be found in s.67 itself. So the question becomes: is there a sufficient basis elsewhere in the legislation for implying such an obligation in s.67?
10. According to its ordinary and natural meaning, the word “may” is apt to confer a discretion or power. But sometimes it may be inferred from the statutory scheme that a power is coupled with an implicit obligation to exercise that power, for example, for the making of secondary legislation without which the purpose of the primary legislation would be undermined, or for the purposes of enforcing a right (see e.g. *Pelling v Families in Need Limited* (2001) EWCA Civ 1280; [2002] 2 All ER 440; Craies on Legislation (12th ed.) paras. 12.2.2 to 12.2.5; Bennion, Bailey and Norbury on Statutory Interpretation (8th ed.) section 3.8).

Factual background

11. In February 2005 WCBC adopted the Wrexham Unitary Development Plan under the TCPA 1990. It was intended to cover the period 1996-2011.
12. In 2012 WCBC began the preparation of a LDP, including the assembly of an evidence base, the drafting of objectives and policies and the consideration of candidate sites for development. Public consultation was carried out in 2016 and 2018.
13. On 18 April 2019 WCBC submitted its LDP to the WM for independent examination. The examination was conducted by two Inspectors and began in September 2019.
14. The Inspectors produced their report on the examination on 27 February 2023. They recommended the adoption of the LDP with the modifications set out in their report. On that basis they considered that the plan would be “sound”. They also advised that it would meet the other requirements of s.64(5) of the PCPA 2004.
15. WCBC received advice from counsel that, on a proper reading of the legislation, the authority was obliged to adopt the LDP in the form recommended by the Inspectors.

That advice was contained in the officers' report to the meeting of the Full Council on 19 April 2023. The members were advised that they could not adopt the plan omitting any of the modifications recommended by the Inspectors. They were warned that if they should "elect" not to adopt the LDP, the WM might intervene under s.71 of the PCPA 2004 and adopt the plan, passing on to WCBC the costs incurred in doing so. The members were also warned that a decision not to adopt would expose the authority to the risk of judicial review. Accordingly, officers recommended to the members of the authority that they adopt the LDP as recommended by the Inspectors to be modified.

16. By 27 votes to 23 the Full Council resolved not to adopt the LDP. Various concerns were raised about the plan, including the level of housing growth and the proportion of affordable housing to be provided.
17. On 25 May 2023 the third to ninth respondents brought a claim for judicial review against the decision not to adopt the LDP. They are a consortium of developers with interests in sites allocated in the version of the LDP recommended for adoption. They asked the High Court to quash the decision dated 19 April 2023, to grant a declaration that WCBC's failure to adopt the LDP in accordance with the Inspector's recommendations was unlawful and to make a mandatory order requiring WCBC to adopt the LDP forthwith.
18. On 14 June 2023 the Full Council met to reconsider their decision of 19 April 2023 in the light of the claim for judicial review. Once again, the officers' report recommended the members to adopt the LDP. The report stated that, following advice from counsel, the authority had "no plausible option but to concede that an unlawful decision had been made on 19th April". Members were advised that the Court would order WCBC to adopt the plan.
19. In its acknowledgement of service WCBC stated that it did not intend to contest the claim for judicial review. The WM, an interested party, did likewise.
20. On 14 June 2023 the Full Council again resolved not to adopt the plan. The developers amended their claim to include a challenge to this second decision.
21. Neither WCBC nor the WM filed any material or legal argument in opposition to the judicial review.
22. The substantive hearing of the developers' claim came before Eyre J on 29 November 2023. The claimants were represented by leading counsel. The judge did not have the benefit of any opposing argument, or of the helpful, detailed analysis and submissions provided to this court.
23. In an *ex tempore* judgment delivered that day, the judge allowed the claim. In his order the judge:
 - (1) quashed WCBC's decisions on 19 April and 14 June 2023 not to adopt the LDP;
 - (2) remitted the adoption of the LDP to WCBC with a direction to reconsider the matter in accordance with the judgment of the court;

- (3) gave permission to the claimants to apply to the court if by 14 December 2023 WCBC had not summonsed members to a meeting of the Full Council within a reasonable time.

In his judgment at [54] Eyre J said “To be clear: the only decision which would be capable of being a decision in accordance with the judgment of the court would be the passage of a resolution adopting the LDP as modified.”

24. A meeting of the Full Council was held on 20 December 2023. Members were advised that they had no choice but to adopt the LDP and that a failure to do so could expose the individuals concerned to punishment for contempt of court. The members resolved to adopt the LDP.
25. On 31 January 2024 the appellant, Marc Jones, who is a member of WCBC and leader of one of the political parties in the Council, applied to be added as a party to the proceedings, for permission to appeal and for an extension of time for filing the appellant’s notice.
26. On 7 May 2024 Lewison LJ granted the application of Mr. Jones to be joined as a party, permission to appeal and the necessary extension of time.
27. The appellant has brought a challenge under s.113 of the PCPA 2004 to the adoption of the LDP. The High Court granted permission to bring the claim, but stayed the proceedings pending the determination of the present appeal.

Statutory framework

Welsh provisions

28. Part 6 of the PCPA 2004, which includes s.67, is dedicated to Wales. In several places the statute refers to the Welsh Assembly, now the Senedd¹, but the functions of that body have subsequently been transferred to the WM (Government of Wales Act 2006 sched. 11 para. 30).
29. Section 60 requires the WM to prepare and publish a plan setting out their policies on the development and use of land in Wales, the NDFW. Sections 60A to 60C set out the procedure for the preparation and final publication of the Framework, including public participation, consultation, taking into account the views of the Senedd and an obligation to keep the document under review. Page 8 of the current Framework states that LDPs must be kept up to date to ensure that they and the Framework operate together effectively.
30. Section 60M deals with the preparation of strategic development plans. There are no such plans at present.
31. Section 61 requires each LPA to keep under review matters affecting the development of their area or the planning of such development.

¹ By virtue of an amendment to s.1(1) of the Government of Wales Act 2006 made by s.2 of the Senedd and Elections (Wales) Act 2020.

32. Section 62 deals with LDPs:

“(1) The local planning authority must prepare a plan for their area to be known as a local development plan.

(2) The plan must set out—

- (a) the authority’s objectives in relation to the development and use of land in their area;
- (b) their general policies for the implementation of those objectives.

(3) The plan may also set out specific policies in relation to any part of the area of the authority.

(3A) The plan must be in general conformity with—

- (a) the National Development Framework for Wales, and
- (b) the strategic development plan for any ... area that includes all or part of the area of the authority.

(3B) The plan must specify the period for which it is to have effect.

(4) ...

(5) In preparing a local development plan the authority must have regard to-

- (a) current national policies;
- (b) the National Development Framework for Wales;
- (ba) the strategic development plan for any ... area that—
 - (i) includes all or part of the area of the authority, or
 - (ii) adjoins that area;

...

(8) A plan is a local development plan only so far as it—

- (a) is adopted by resolution of the local planning authority as a local development plan;
- (b) is approved by the Assembly under section 65 or 71.

(9) ...”

33. Section 63 deals with requirements for preparing a LDP:

“(1) A local development plan must be prepared in accordance with—

- (a) the local planning authority’s community involvement scheme;
- (b) the timetable for the preparation and adoption of the authority’s local development plan.

...”

34. Section 64 deals with the independent examination of a LDP:

“(1) The local planning authority must submit their local development plan to the Assembly for independent examination.

(2) But the authority must not submit a plan unless—

- (a) they have complied with any relevant requirements contained in regulations under this Part, and
- (b) they think the plan is ready for independent examination.

(3) The authority must also send to the Assembly (in addition to the local development plan) such other documents (or copies of documents) and such information as is prescribed.

(4) The examination must be carried out by a person appointed by the Assembly.

(5) The purpose of the independent examination is to determine in respect of a local development plan—

- (a) whether it satisfies the requirements of sections 62 and 63 and of regulations under section 77;
- (b) whether it is sound.

(6) Any person who makes representations seeking to change a local development plan must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

(7) The person appointed to carry out the examination must-

- (a) make recommendations;
- (b) give reasons for recommendations.

- (8) The local planning authority must publish the recommendations and the reasons.”

35. Section 65 gives the WM powers to intervene:

- “(1) If the Assembly thinks that a local development plan is unsatisfactory—
- (a) It may at any time before the plan is adopted by the local planning authority direct them to modify the plan in accordance with the direction;
 - (b) if it gives such a direction it must state its reasons for doing so.
- (2) The authority—
- (a) must comply with the direction;
 - (b) must not adopt the plan unless the Assembly gives notice that it is satisfied that they have complied with the direction.
- (3) But subsection (2) does not apply if the Assembly withdraws the direction.
- (4) At any time before a local development plan is adopted by a local planning authority the Assembly may direct that the plan is submitted to it for its approval.
- (5) The following paragraphs apply if the Assembly gives a direction under subsection (4)—
- (a) the authority must not take any step in connection with the adoption of the plan until the Assembly gives its decision;
 - (b) if the direction is given before the authority have submitted the plan under section 64(1) the Assembly must hold an independent examination and section 64(4) to (7) applies accordingly;
 - (c) if the direction is given after the authority have submitted the plan the person appointed to carry out the examination must make his recommendations to the Assembly.
 - (d) the plan has no effect unless it has been approved by the Assembly.

- (6) The Assembly must publish the recommendations made to it by virtue of subsection (5)(b) or (c) and the reasons of the person making the recommendations.
- (7) In considering a plan submitted under subsection (4) the Assembly may take account of any matter which it thinks is relevant.
- (8) It is immaterial whether any such matter was taken account of by the authority.
- (9) The Assembly—
 - (a) may approve, approve subject to specified modifications or reject a plan submitted to it under subsection (4);
 - (b) must give reasons for its decision under paragraph (a)
- (10) ...”

36. Section 66 gives the WM power to direct a LPA to withdraw a LDP:

- “(1) The Welsh Ministers may, at any time before a local development plan is adopted under section 67, direct the local planning authority to withdraw the plan.
- (2) If the Welsh Ministers give a direction under subsection (1), they must state their reasons for doing so.
- (3) The authority must withdraw the plan in accordance with the direction.”

37. Under s.66A the LPA has a power to withdraw a LDP subject to the restrictions set out:

- “(1) This section applies where a local planning authority are not required to withdraw their local development plan under section 66.
- (2) Subject to the provisions of this section, the authority may withdraw the plan at any time before adopting it under section 67.
- (3) A local planning authority may not withdraw their local development plan when the Welsh Ministers have—
 - (a) directed the authority to submit the plan for approval under section 65(4), or
 - (b) taken any step under section 71 in connection with the plan.

- (4) A local planning authority may withdraw a local development plan that has been submitted for independent examination under section 64 only if—
- (a) the person carrying out the independent examination recommends that the plan is withdrawn, and
 - (b) the recommendation is not overruled by a direction given by the Welsh Ministers.
- (5) A local planning authority may withdraw a local development plan to which subsection (6) applies only if—
- (a) The authority have given notice to the Welsh Ministers of their intention to withdraw the plan, and
 - (b) the notice period has expired.
- (6) This subsection applies to a local development plan if the local planning authority—
- (a) have not yet submitted the plan for independent examination under section 64, but
 - (b) have taken steps in connection with the preparation of the plan that are specified in regulations made by the Welsh Ministers.
- (7) Where a local planning authority have given notice under subsection (5)(a), the Welsh Ministers may, by direction to the authority, do either or both of the following-
- (a) Require the authority to provide further information;
 - (b) Extend the notice period.
- ...”

38. Section 67 deals with the adoption of a LDP:

- “(1) The local planning authority may adopt a local development plan as originally prepared if the person appointed to carry out the independent examination of the plan recommends that the plan as originally prepared is adopted.
- (2) The authority may adopt a local development plan with modifications if the person appointed to carry out the

independent examination of the plan recommends the modifications.

- (3) A plan is adopted for the purposes of this section if it is adopted by resolution of the authority.
- (4) But the authority must not adopt a local development plan if the Assembly directs them not to do so.”

39. By s.68A, following the publication of the NDFW, or a revised Framework, a LPA must consider whether to carry out a review of their LDP. Under s.69 a LPA is under a duty to review their LDP if they consider under s.68A that it should be reviewed, and at such other times as the WM may prescribe. Under s.70(2) a LPA is under a duty to revise their LDP if following a review under s.69 they consider that the plan should be revised, or if directed by the WM to do so.

40. Section 71 confers on WM a default power to deal with failures or omissions by a LPA regarding the preparation, revision or adoption of a LDP:

- “(1) This section applies if the Assembly thinks that a local planning authority are failing or omitting to do anything it is necessary for them to do in connection with the preparation, revision or adoption of a local development plan.
- (2) The Assembly must hold an independent examination and section 64(4) to (7) applies accordingly.
- (3) The Assembly must publish the recommendations and reasons of the person appointed to hold the examination.
- (4) The Assembly may—
 - (a) prepare or revise (as the case may be) the plan, and
 - (b) approve the plan as a local development plan.
- (5) The Assembly must give reasons for anything it does in pursuance of subsection (4).
- (6) The authority must reimburse the Assembly for any expenditure it incurs in connection with anything—
 - (a) which is done by it under subsection (4), and
 - (b) which the authority failed or omitted to do as mentioned in subsection (1).”

41. By s.77 the Welsh Assembly was empowered to make regulations in relation to the functions exercisable under Part 6, including “(i) the time at which anything must be done for the purposes of this Part.” The relevant regulations are the Town and

Country Planning (Local Development Plan) (Wales) Regulation 2005 (SI 2005 No.2839) (“the 2005 Regulations”).

42. Regulation 25 of the 2005 Regulations deals with the adoption of a LDP:

- “(1) The LPA must adopt the LDP within eight weeks of receipt of the recommendations and reasons given by the person appointed to carry out the examination unless otherwise agreed in writing by the National Assembly.
- (2) As soon as reasonably practicable after the LPA adopts an LDP, it must—
- (a) make available for inspection during normal office hours at the places at which the pre-deposit proposals documents were made available under regulation 15-
- (i) the LDP;
 - (ii) an adoption statement, and
 - (iii) the sustainability appraisal report;
- (b) publish the adoption statement on its website;
- (c) ...;
- (d) send the adoption statement to any person who has asked to be notified of the adoption of the LDP; and
- (e) send four copies of the LDP and the adoption statement to the National Assembly.
- (3) Where an LDP is adopted by resolution of the LPA or is approved by the Welsh Ministers under section 65 or 71, it supersedes any existing LDP which ceases to have effect.”

43. Regulation 26 of the 2005 Regulations deals with the withdrawal of a LDP:

- “As soon as reasonably practicable after an LDP is withdrawn under section 66, the LPA must—
- (a) publish a statement of that fact on its website;
- (b) ...;
- (c) notify any body to which notification was given under regulation 15(c) of that fact; and

- (d) remove any copies, documents, matters and statements made available or published under regulations 15(a) and (b), 17(a) and (b), 19(2)(a) and (b); and
- (e) notify any person who has made (and not withdrawn) a representation in accordance with regulation 18 of this fact.”

English provisions

- 44. In England the National Planning Policy Framework (“the NPPF”), published by the Secretary of State for Housing, Communities and Local Government, does not form part of the development plan and is not a statutory document.
- 45. By s.38(3) of PCPA 2004, the development plan for the area of a LPA outside Greater London generally comprises the development plan documents (“DPDs”) prepared by that authority in accordance with its local development scheme (s.15 of PCPA 2004), together with any neighbourhood development plans.
- 46. Each LPA must identify the strategic priorities for the development and use of land in their area (s.19(1B)). The DPDs of a LPA, taken as a whole, must set out policies to address those priorities (s.19(1C)). In preparing a DPD the LPA must have regard to *inter alia* “national policies and advice contained in guidance issued by the Secretary of State” (e.g. the NPPF) (s.19(2)(a)).
- 47. Section 20 deals with the requirements for independent examination of a DPD:
 - “(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.
 - (2) But the authority must not submit such a document unless—
 - (a) They have complied with any relevant requirements contained in regulations under this Part, and
 - (b) they think the document is ready for independent examination.
 - (3) The authority must also send to the Secretary of State (in addition to the development plan document) such other documents (or copies of documents) and such information as is prescribed.
 - (4) The examination must be carried out by a person appointed by the Secretary of State.

- (5) The purpose of an independent examination is to determine in respect of the development plan document—
- (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
 - (b) whether it is sound; and
 - (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.
- (6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.”

Section 33A imposes a duty on a LPA when preparing a DPD to co-operate with other LPAs and bodies in relation to “strategic matters”.

48. As originally enacted, an Inspector’s responsibilities when reporting on the examination of a DPD in England were expressed in s.20(7) in the same terms as in relation to Wales (s.64(7)). It was an obligation to make recommendations, with reasons therefor, which carried with it an implicit power to recommend modifications (as in Wales). The functions of the LPA at the adoption stage in England (in s.23(2) and (3) as originally enacted) were the same in England as in Wales (s.67(1) and (2)) and reflected the Inspector’s functions in s.20(7) to make recommendations on adoption.
49. However, in England the Localism Act 2011 (“the 2011 Act”) substituted s.20(7) to (7C) for the original s.20(7):

- “(7) Where the person appointed to carry out the examination—
- (a) has carried it out, and
 - (b) considers that, in all the circumstances, it would be reasonable to conclude—
 - (i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and
 - (ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

- (a) has carried it out, and
- (b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination—

- (a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but
- (b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

- (a) satisfies the requirements mentioned in subsection (5)(a), and
- (b) is sound.”

50. In summary:

- (1) If the Inspector considers the plan sound and in compliance with the other statutory requirements, he must recommend adoption (s.20(7));
- (2) If the Inspector is not so satisfied, he must recommend non-adoption (s.20(7A) subject to (3) below);
- (3) Provided that the Inspector considers that the duty to co-operate in s.33A has been satisfied, the Inspector must recommend modifications to make the plan sound, if requested by the LPA to do so (s.20(7B) and (7C)). These are referred to in s.23 as “main modifications.”

51. The changes contained in s.20(7) to (7C) are also reflected in alterations made by the 2011 Act to s.23 for the adoption of a DPD, which now reads as follows:

- “(1) The local planning authority may adopt a local development document (other than a development plan document) either as originally prepared or as modified to take account of—

- (a) any representations made in relation to the document;
 - (b) any other matter they think is relevant.
- (2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document—
 - (a) as it is, or
 - (b) with modifications that (taken together) do not materially affect the policies set out in it.
- (2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—
 - (a) recommends non-adoption, and
 - (b) under section 20(7C) recommends modifications (“the main modifications”).
- (3) The authority may adopt the document—
 - (a) with the main modifications, or
 - (b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.
- (4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).
- (5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority.”

Subject to any “non-material” modifications introduced by the LPA, the authority may adopt the DPD as recommended by the Inspector, either as submitted for examination or with “main modifications”, so long as it follows the recommendations of the Inspector. Section 23 reflects the Inspector’s functions for making recommendations on adoption following the examination.

52. Section 22 deals with the withdrawal by the LPA of its local development documents, which include DPDs. As originally enacted, there was no material difference between the English provision in s.22 and the Welsh provision in s.66 (the latter now contained partly in a new s.66 and partly in s.66A). In other words, the LPA’s power to withdraw a DPD did not apply once the plan had been submitted for examination unless the Inspector recommended that the document be withdrawn (subject to any contrary direction by the Secretary of State) or the Secretary of State directed

withdrawal. But the 2011 Act repealed s.22(2), so that the restriction on an English LPA withdrawing a DPD once submitted for examination under s.20 no longer applies.

53. Section 21 gives the Secretary of State powers to intervene in the plan-making process before a DPD is adopted, in terms similar to the equivalent provision for Wales (s.65).
54. Section 27 gives the Secretary of State default powers to deal with failures or omissions by a LPA regarding the preparation, revision or adoption of a LDP similar to those of the WM in s.71.

Legal challenges to the adoption of a development plan

55. Section 113 provides for statutory review in the High Court of the legality of *inter alia* a DPD in England and a LDP in Wales. The legislation lays down an absolute time limit for making an application for leave to bring a claim, measured from the date when the plan is adopted by the LPA (or in the case of Ministerial intervention, approval by the relevant Minister).

The judgment in the High Court

56. The judge accepted the developers' submission that s.67 imposes a duty on a LPA to adopt a LDP which has been through examination, as well as a power "as to the way in which the plan is to be adopted" ([43], [45] and [50]).
57. The judge considered that the default powers of the WM are not inconsistent with a LPA being under an obligation to adopt a LDP which has completed the examination process ([46] and [49]).
58. He was of the view that there are a number of features of the PCPA 2004 which point towards the LPA being under a duty to adopt the plan: the requirements that a plan be prepared (s.62) and that it be subjected to independent examination (s.64), the WM's power to direct withdrawal of a plan, the restrictions in s.66A on the power of a LPA to withdraw its plan and the language of s.67 ([47]).
59. The words "may adopt" refer to the two different forms in which a plan may be adopted, that is either as originally prepared, or with the Inspector's modifications. Section 67 "does not suggest that the authority has any true discretion as to whether or not the plan should be adopted and certainly does not indicate a discretion to decline to adopt." It is a necessary implication in s.67 that the LPA must adopt the LDP in one or other of the ways set out, as governed by the Inspector's recommendations ([48]).
60. The judge reached his decision without relying upon reg. 25 of the 2005 Regulations. He said that this provision regulates the performance of a duty which is assumed to exist under s.67. The judge had reservations as to whether reg. 25 would be effective to impose a duty if one did not already exist under the PCPA 2004 ([51]). He said, however, that reg. 25 is a "potent indication" of the Welsh Assembly's understanding of the meaning of s.67 when it enacted the 2005 Regulations ([52]).

A summary of the respondents' submissions

61. The respondents support the judge's reasoning. In addition, they have served respondents' notices in which they also rely upon reg. 25 of the 2005 Regulations as supporting his interpretation of s.67 of the PCPA 2004.
62. The respondents submit that by implication s.67 imposes an obligation on a LPA to adopt a LDP if so recommended by an Inspector, because s.62(1) obliges the authority to prepare a plan for their area and to submit it to the WM for examination and thereafter s.66A significantly limits the authority's power to withdraw the plan.
63. In addition, s.62(2) sets out what a LDP must contain and s.62(3A) requires the plan to be in general conformity with the NDFW and any relevant strategic development plan. In preparing a LDP the authority must have regard to the matters set out in s.62(5) and a sustainability appraisal must be carried out (s.62(6) and (6A)).
64. A LDP "must be prepared" in accordance with the LPA's timetable for the preparation and adoption of the plan (s.63(1)(b)). Section 62(1) requires a LPA to "prepare" a plan to be known as a LDP, but s.62(8) provides that a plan is a LDP only in so far as it is adopted by resolution of the authority. Such a plan does not have the primacy conferred by s.38(6), nor does time for bringing a statutory review under s.113 of the PCPA 2004 start to run unless and until adopted. It is submitted that the obligation to prepare a LDP connotes a further obligation to adopt that plan.
65. The word "may" in s.67(1) and (2) simply governs the form in which a LDP is adopted, and does not indicate that the LPA has a discretion as to whether to adopt that plan.
66. The respondents submit that the mandatory nature of the statutory scheme continues in s.64. Having submitted a draft plan to examination (s.64(1)), the Inspector must give those seeking changes to the plan an opportunity to be heard (s.64(6)) and the Inspector must make recommendations arising out of his examination of the plan, which must be published by the LPA (s.64(7) and (8)).
67. Section 66A provides that a LPA may withdraw its draft LDP at any time before adoption. But their power is restricted in three situations:
 - (1) The power may not be used if the plan has been "called in" by the WM for them to consider whether they should approve it, or if the WM have intervened under s.71 (s. 66A(3));
 - (2) Where the plan has been submitted for independent examination, the LPA may not withdraw it unless the Inspector recommends that that be done, subject to any contrary direction by the WM (s.66A(4)); and
 - (3) After initial statutory steps have been taken in relation to a draft plan, but before submission under s.64, the LPA can only withdraw the document if they give notice to the WM and the "notice period" has expired (s.66A(5) to (7)).
68. The respondents say that if the LPA has a discretion not to adopt a LDP following the Inspectors' report on the examination, that would undermine those restrictions on

the ability of a LPA to withdraw the document. Furthermore, the plan would be left in limbo. There would be no up-to-date LDP and the LPA would have no power to withdraw the plan. The legislature did not intend that WM should have to intervene, either under s.65 or under s.71, in order for the examined plan to be adopted. Instead, the LPA is obliged to adopt that plan in accordance with the Inspector's recommendations.

69. Section 65(5) sets out certain consequences of the WM having given a direction under s.65(4) calling in a plan for their approval. If the direction is given before submission of the plan for examination under s.64, then the WM must hold an examination (s.65(5)(b)). If the direction is given after the plan has been submitted under s.64, the Inspector holding the examination must make his recommendations to the WM. (s.65(5)(c)). But the respondents say it is significant that s.65(5) does not provide for a situation where a LPA fails or refuses to adopt a LDP after an Inspector reports to them recommending adoption. The legislature did not contemplate any need for the giving of a call-in direction under s.65(4) once the Inspector has reported to the LPA, because implicitly the LPA is obliged to adopt the plan if the Inspector so recommends. Furthermore, Parliament would not have envisaged intervention by the WM at that stage under s.71, because that would involve an obligation to hold a second, and unnecessary, examination.
70. The requirement in s.67(3) that a LDP be adopted by a resolution of the LPA does not imply that the authority has a discretion whether or not to adopt the plan. Instead, this is simply a requirement for a formal act which determines the start of the time limit for the bringing of a legal challenge under s.113 and the point at which the presumption in s.38(6) is engaged.
71. The respondents also rely upon explanatory notes for the PCPA 2004 as supporting their interpretation of s.67.
72. The respondents acknowledge that a number of the statutory provisions upon which they rely as pointing to the imposition of a duty on a LPA to adopt a LDP are also to be found in the English code governing the preparation, examination and adoption of DPDs. Their arguments potentially have implications therefore for English law. But the respondents say that there are the following differences between the two regimes:
 - (1) Planning is a devolved responsibility in Wales;
 - (2) In Wales the NDFW forms part of the statutory development plan, whereas national policy in England, such as the NPPF, does not;
 - (3) Section 22 of the PCPA 2004 does not impose restrictions on the ability of an English LPA to withdraw a DPD, in contrast to the position in Wales;
 - (4) In England, the Inspector can only recommend modifications to a DPD if the LPA asks him to do so (s.20(7C)), whereas in Wales the Inspector is obliged to make recommendations, regardless of whether the LPA requests that to happen (s.64(7)(a));

- (5) In England, there is no equivalent provision to reg. 25 of the 2005 Regulations.

Discussion

Section 67

73. There are a number of reasons as to why the language of s.67 points to the LPA having a discretionary power whether to adopt a LDP, rather than being subject to a duty to do so.
74. Section 67(1) and (2) sets out two conditional powers. First, the LPA may adopt the LDP as “originally prepared” (or in practice as submitted for examination) only if the Inspector so recommends. Second, the LPA may adopt the LDP with modifications, but only in the form as recommended by the Inspector to be modified.
75. The word “may” in s.67(1) and (2) is not used in connection with the form in which a LPA may choose to adopt a LDP. On any view, s.67 does not allow a LPA to choose between the two forms for adoption of a LDP described in those subsections. Instead, those provisions are mandatory as to the form in which the LDP may be adopted, depending on what recommendation is made by the examining Inspector. Accordingly, Mr. Andrew Parkinson was correct to submit on behalf of the appellant that if Parliament had intended that the LPA should be under an obligation to adopt the plan, there is no reason why the word “must” could, indeed would, not have been used in s.67(1) and (2). Contrary to the respondents’ case, s.67 is not an example of a duty coupled with a discretion as to how that duty may be performed.
76. Section 67 interlocks with s.64(7). The Inspector is under a duty to make “recommendations.” A recommendation is advisory. It indicates a course of action, which is judged to be appropriate or desirable. The recipient of that advice is not obliged to follow it. In the present context, the recommendation is concerned with whether the certain statutory requirements are met and with the suitability of the policies of the submitted plan for adoption as an LDP. It would be a misuse of language to say that an authority which receives a recommendation to adopt the LDP is compelled to comply with it. The term strongly indicates that the LPA has a discretion as to whether or not to adopt the examined plan, albeit that it may only do so in the form laid down by the Inspector.
77. Sometimes at the end of an examination an Inspector may conclude or recommend that a LDP should not be adopted. In those circumstances, there is no need for the LPA to decide whether to agree with the Inspector. Instead, the effect of his conclusion or recommendation is that the conditions in neither s.67(1) nor (2) are satisfied, so that the LPA has no power to adopt the LDP.
78. In s.67(1) and (2) the use of the word “may” in conjunction with “recommends” stands in marked contrast to s.67(4). If the WM “direct” the LPA not to adopt the LDP they “must” not do so. If the legislature had intended that the LPA should be under an obligation to accept the recommendations of the Inspector, so that they must adopt the LDP if he should so recommend, it would have said so.

79. Similarly, under the current version of s.66, which was inserted by the Planning (Wales) Act 2015 (“the 2015 Act”), the WM may direct the LPA to withdraw a LDP at any time before the plan is adopted under s.67. Then the authority “must” withdraw the plan in accordance with that direction. This Ministerial power to direct the withdrawal of a plan was previously contained in s.66(2)(b) of the PCPA 2004 as originally enacted.
80. Under s.66A(2) of the PCPA 2004 (s.66(1) as originally enacted) the LPA “may” withdraw their LDP at any time before it is adopted. There can be no doubt that that is a discretionary power. Section 66A(4) (s.66(2) as originally enacted) provides that where a LDP has already been submitted for examination under s.64, that power may only be exercised if the examining Inspector recommends withdrawal (and that recommendation is not overruled by a direction from the WM). Once again, the recommendation of the Inspector relates to the exercise of a power by the LPA.
81. The use of the word “may” in s.67(1) and (2) also contrasts with the use of the word “must” in a number of other provisions, such as ss.62 and 64 (see below).
82. The requirement in s.67(3) that a LDP be adopted by a resolution of the LPA points to their having a discretion as to whether or not to adopt the plan. A “resolution” refers to an act of resolving or determining something, or finding the answer to a question, or a formal decision, determination or expression of opinion of a legislative assembly or an authority (Oxford English Dictionary). In the same vein, sched.12 para.39(1) to the Local Government Act 1972 provides:
- “all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority.”
83. Section 67(3) provides no support for the respondents’ case. No doubt it is necessary to have a formal act which can be used to mark the moment when a LDP becomes part of the statutory development plan and the beginning of the time limit for the bringing of a challenge under s.113 of the PCPA. But if a LPA is no more than a cipher at the adoption stage, as would be the effect of the respondents’ arguments, there was no need for that moment to be defined in the legislation by reference to a meeting of the LPA to pass a resolution to adopt the LDP. It could have been marked by the date when the Inspector’s report is published, or by the date when the LDP is published in accordance with that report.
84. Section 67, read as a whole, clearly indicates that the LPA is not under any obligation to adopt a LDP following independent examination. Notwithstanding a recommendation from the Inspector that it should adopt the LDP, the authority may decide not to do so.

Explanatory Notes

85. The respondents relied upon para. 6 of the Explanatory Notes for the PCPA 2004. That paragraph states that in relation to Wales, the Act gives effect to the Welsh Government’s policy announced by the Minister in November 2002 in the light of responses to the consultation document “Planning: Delivering for Wales” (January 2002).

86. Paragraph 35 of the consultation document said that LPAs “would be required to publish an adopted version of the plan, incorporating any changes from the scrutiny process, within a fixed period. The plan could automatically be adopted after a set period for legal challenge.” The last part of that extract is plainly inconsistent with the legislation. The first part simply refers to an obligation to publish the plan as adopted. That is consistent with there being an *obligation to publish* that plan, if a *power to adopt* is in fact exercised. The Ministerial Statement takes this aspect no further. The passages cited by the respondents do not assist their case.
87. Regulation 25(2) of the 2005 Regulations is to the same effect. As soon as practicable after the LPA adopts a LDP, it must *inter alia* make the adopted plan available for inspection on its website. That is consistent with the LPA having a power rather than a duty to adopt the LDP.
88. By contrast para. 45 of the Explanatory Notes for the PCPA 2004 directly addresses s.23(2) and (3) in relation to England, which as originally enacted was identical to s.67(1) and (2) in relation to Wales:

“An authority may adopt an LDD which is not a development plan document with or without changes. But it can only adopt a development plan document in accordance with the recommendations of the person appointed to hold the independent examination.”

That explanation supports the view that s.23(2) and (3) are *conditional powers* to adopt, not *duties* to adopt. Paragraph 100 of the Explanatory Notes, dealing with s.67, is consistent with para. 45 and so the same explanation applies to s.67(1) and (2).

89. Like the WM, LPAs are democratically accountable authorities. Subject to statutory requirements as to *inter alia* general conformity with the NDFW, soundness and the outcome of the examination process, a LDP is to contain the objectives *of the LPA* in relation to the development and use of land in their area and *their* general policies for implementing those objectives. It is common ground that under the regime which pre-existed the PCPA 2004, LPAs in England and Wales alike had a discretion as to whether to adopt the development plan they had prepared following receipt of the Inspector’s report on the local plan inquiry into representations on that draft plan. If the Government had intended in the PCPA 2004 to alter that power to a duty, it is surprising, to say the least, that this was never mentioned in any consultation document, or during the passage of the legislation, or in the Explanatory Notes. The absence of any such reference lends further support to the appellant’s interpretation of s.67 (see *Jepsen v Rakusen* [2023] UKSC 9; [2023] 1 WLR 1028 at [36] and [51]-[56]).

The statutory scheme in Wales

90. The respondents accept that the implication of a duty on the part of a LPA to adopt an examined LDP must depend upon provisions in the PCPA 2004 outside s.67.
91. A LPA in Wales must “prepare” a LDP (s.62(1)). The plan must be in “general conformity” with the NDFW (s.62(3A)). That is a matter of degree or planning judgment for the planning authorities involved, in accordance with their functions

under the legislation and subject to review on public law principles (*Persimmon Homes (Thames Valley Limited) v Stevenage Borough Council* [2006] 1 WLR 334; *R (Kebbell Developments Limited) v Leeds City Council* [2018] 1 WLR 4625). There may nonetheless be a specific conflict between the policies of those documents. In that event, the conflict must be resolved in favour of the policy in the last document to become part of the development plan (s.38(5)).

92. The principle of general conformity with the NDFW operates alongside s.62(2) and (5). In preparing a LDP the LPA is obliged both to have regard to the NDFW and to include *the authority's* objectives for the development and use of land in their area and *their* general policies for implementing those objectives.
93. Accordingly, a LPA's obligation to prepare a LDP is accompanied by a broad discretion for the authority as to the content of that plan. The plan contains the policies of a locally elected, democratically accountable public authority.
94. The draft LDP has to be submitted by the LPA for independent examination under s.64. That ensures that an Inspector determines whether the plan meets certain legal requirements and whether it is sound, looking at the justification for individual policies and their relationship with the NDFW.
95. Following that process of scrutiny, it is only if the Inspector recommends that the plan be adopted with or without modifications that it can be adopted by the LPA and form part of the statutory development plan. At that stage the plan returns to the local democratic authority whose policies were the subject of that examination process. The plan is adopted by that body, not by the examining Inspector. All this indicates that the LPA has a discretion whether to adopt a plan, in the light of the Inspector's report and the prevailing circumstances at the point of adoption.
96. Ms. Morag Ellis KC for the developers submitted that the obligation in s.62(1) is for a LPA to prepare a plan which will become known as its LDP upon the authority passing a resolution to adopt (s.62(8)). Thus, she says that the obligation to prepare a LDP includes an obligation to adopt that plan. In addition, s.63(1)(b) requires a LDP to be prepared in accordance with the timetable for the "preparation and adoption" of the LDP. That timetable is to include a "definitive date" for each stage of the LDP process up to the deposit of the document (under reg.17 of the 2005 Regulations) and thereafter "indicative dates" up to adoption (reg.8). But in my judgment, these provisions are only dealing with the preparation of an emerging plan. They do not connote a legal obligation on the part of the LPA to adopt the plan once it has been through the examination process. Even if the Inspector recommends adoption of the LDP, the LPA may not lawfully be able to do so. The WM may issue a direction that the LPA withdraws the plan (s.66(2)(b)), or the WM may call in the plan for their own determination (s.65). Alternatively, the report of the examining Inspector may conclude that the plan should not be adopted. Ms Ellis also pointed to the absence of any express obligation for a LPA to give reasons at the adoption stage, suggesting that it had no discretionary power not to adopt the LDP. But I accept the submission of Mr Parkinson that this is not a significant consideration, because where a LPA differs from an Inspector by deciding not to adopt the LDP, the common law would require them to give reasons for their decision (*R (CPRE Kent) v Dover District Council* [2017] UKSC 79; [2018] 1 WLR 108; *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71; [2017] 1 WLR 3765).

97. Section 64 is not an indication that a LPA is under a duty in s.67 to adopt an examined plan in accordance with the Inspector's recommendations. Instead, a LPA's obligation to submit a plan for examination is to ensure that a LDP cannot be adopted without being subjected to that independent scrutiny and can only be adopted in accordance with the recommendations of the Inspector.
98. It became clear during oral submissions that the respondents' case primarily rests on their argument that to read s.67(1) and (2) as conferring a discretion whether to adopt an LDP, would be incompatible with the limitations on the power of a LPA to withdraw a draft LDP. They also say that this would result in a draft plan being left in limbo and a gap in the adoption of LDPs throughout Wales, contrary to the statutory scheme. However, that intention must depend upon the language used in the legislation.
99. By s.66A(3), a LPA may not withdraw its draft LDP if the WM have called in the plan under s.65(4) or have intervened using their default power under s.71. That is hardly surprising. Withdrawal in such circumstances would conflict with the decision of the WM to take control of the plan-making process in the authority's area.
100. Section 66A(5) to (7) does not remove a LPA's power to withdraw a draft plan. Instead, where the LPA has begun the statutory process of preparing a LDP but has not yet submitted it for examination under s.64, the authority may only withdraw the plan if they give notice to the WM of their intention to do so and the notice period expires. This provision enables the WM to decide whether to intervene under s.65(4) or s.71.
101. Section 66A(5) to (7) therefore serves a similar purpose to s.66A(3). These provisions cannot be read as indicating that a LPA has a duty under s.67 to adopt an examined plan in accordance with recommendations made to them by the Inspector.
102. Accordingly, this part of the respondents' case really turns on the purpose and effect of s.66A(4). Once a draft LDP is ready to be examined (s.64(2)) and has been submitted for independent examination under s.64, the LPA cannot withdraw the document unless the Inspector recommends withdrawal, subject to any contrary direction by the WM. The plan-making process will not continue if the Inspector agrees to the withdrawal of the LDP, unless the ultimate authority, the WM, takes a contrary view. Even if the Inspector does not agree to the plan being withdrawn, the WM may still direct withdrawal under s.66.
103. Thus, once the draft LDP has been submitted for examination, s.66A(4) determines whether the examination process does or does not continue. One possible outcome is that the plan may be withdrawn, so that the adoption stage will not be reached. But even if the LPA is not allowed to withdraw the plan and the examination process has to be concluded, that does not imply that s.67(1) and (2) are duties, rather than powers, to adopt. The only implication of s.66A(4) is that the examination process should continue for the purposes set out in s.64(5), leading to the production of the Inspector's report, so that informed decisions on the plan may be reached by the LPA, or in default by the WM, in the light of that report.
104. To summarise, the objects of the restrictions in s.66A on withdrawal of a LDP by the LPA are firstly, to enable the examination of a plan submitted under s.64 to be

concluded and considered by the LPA and secondly, to prevent the LPA's power of withdrawal frustrating the possible exercise of the WM's powers to call-in the plan under s.65 or to intervene under s.71. Treating s.67(1) and (2) as conferring conditional powers and not obligations to adopt does not conflict with those objects.

105. Furthermore, I do not accept that a decision by the LPA not to adopt a LDP leaves a draft plan in limbo. The WM can intervene under ss.65 or 71 and proceed to adopt the plan, with or without modifications, if that is considered appropriate. A decision by a LPA not to adopt a plan is fundamentally different from a decision by the authority to withdraw the plan. A decision not to adopt a plan leaves the powers of the WM intact. A decision to withdraw a plan prevents those powers from being exercised.
106. I turn to deal with the implications of s.65(5). If the WM call in a draft LDP before the LPA has submitted the plan for examination, the WM must themselves hold an examination and s.64(4) to (7) will apply. The Inspector will be required to make recommendations in a reasoned report to the WM who must publish that document (s.65(5)(b) and (6)). If the WM call in the plan after it has been submitted by the LPA for examination, the Inspector appointed to carry out the examination must make his recommendations in a report to the WM, which will then be published (s.66(5)(c) and (6)).
107. The WM also have the power to call in a draft LDP after the examining Inspector has submitted his report and recommendations to the LPA but before the authority has adopted the plan, a point with which the respondents agree. I cannot accept their submission that the absence of any further provision in s.65(5) to deal with that situation indicates that the legislature considered that to be unnecessary because the LPA is subject to a duty under s.67(1) or (2) to adopt the LDP following the Inspector's recommendations. This argument is contrary to the statutory scheme for a number of reasons.
108. The WM may consider that there are good grounds for intervening under s.65(4) after the Inspector has reported to the LPA under s.64(7). For example, the WM may be concerned about an Inspector's conclusion that the plan should not be adopted at all. In that situation the LPA would have no power, let alone a duty, to adopt the plan under s.67. But the WM may disagree with issues raised by the Inspector, or may consider that they could and should be cured by modifications to the plan, even where the Inspector has rejected that approach. Alternatively, the WM might be concerned about modifications that the Inspector has recommended and that the LPA intend to accept because they wish to adopt the LDP. In other circumstances, the WM might be concerned about a decision by the Inspector to recommend adoption of the LDP without modifications which had been discussed during the examination. If the LPA are intending to adopt the LDP, they would have no power to incorporate those modifications into the plan, even if they wished to do so. Other examples may arise.
109. Under s.65(9) the WM have a broad power to approve the LDP, or to approve it subject to no modifications, or to reject the plan. The form in which the WM may adopt a LDP is not restricted by the recommendations made by the examining Inspector, as in the case of a LPA's decision under s.67(1) or s.67(2) (see also reg.31 of the 2005 Regulations).

110. If the WM exercise their undoubted power to call in a draft LDP between the Inspector reporting to the LPA and the authority's decision on adoption, s.65(5)(a) provides that the LPA must not take any step in connection with the adoption of the LDP until the WM reach their decision on the issue of the plan's adoption. On the respondents' approach to s.65(5) there would be a statutory impasse, which would be absurd. The solution lies in s.65(5)(c), which expressly applies to *any* time between the submission of the draft plan for examination under s.64 and a decision by the LPA to adopt the LDP. Section 65(5)(c) has not been expressed so as to restrict its operation to the period between submission of the LDP for examination and the sending of the Inspector's report to the LPA. Accordingly, even if that report has already been sent to the LPA, and by virtue of s.65(5)(a) the authority may not act upon it, s.65(5)(c) requires that, following the call-in, the report be sent also to the WM, so that they may act upon it (s.65(6) to (10)).
111. There was therefore no need for the legislature to add a further paragraph in s.65(5) dealing with the period following the conclusion of the examination process. The absence of any such provision is not an indication that the LPA is under a duty to adopt the LDP, whether under s.67(1) or s.67(2).
112. In any event, the respondents' argument cannot support its case on the interpretation of s.67(1) and (2). Where the call-in power is used after the Inspector has reported on his examination of the plan to the LPA: (i) the LPA must not take any action in connection with the adoption of the plan (s.65(5)(a)); and (ii) the plan is of no effect unless and until it is approved by the WM (s.65(5)(d)). In other words, in those circumstances, the LPA has neither a power nor a duty under s. 67(1) or (2) to adopt the LDP. Accordingly, this call-in scenario does not assist the court to resolve the issue in this appeal.
113. There is also no merit in the respondents' contention that the legislature did not envisage that the s.71 default power would be used by WM once an Inspector had reported to the LPA recommending adoption of the plan because the LPA would be under a duty to adopt it. It is said that in those circumstances it would make no sense for the Ministers to have to hold a further examination of the plan in order to comply with s.71(2).
114. Once again, this line of argument wrongly treats the Ministerial power to intervene in such circumstances as nugatory. Yet it is plain that the s.71 power is available where the WM considers that a LPA is failing or omitting to do anything that is necessary for them to do in connection with *inter alia* the adoption of a LDP. That could only arise once an Inspector has submitted his report to the LPA on the examination. As with s.65, the WM can intervene to deal with a refusal by a LPA to adopt a LDP under s.67(1) or (2) in accordance with the Inspector's recommendations. In part, that is what the powers in s.65 and s.71 are for. There may be circumstances where the WM consider that a second examination should be held, in which case the requirement in s.71(2) would not inhibit the use of the power to intervene under s.71. If, on the other hand, a second examination was considered unnecessary, the WM could instead call in the plan under s.65(4).
115. Finally, when the WM call in a plan or intervene under s.71 they have to consider a report and recommendations by an Inspector who has examined a draft LDP against the criteria in s.64(5). But the WM are not under any obligation to adopt the LDP,

even if they have been responsible for preparing it, and even if the Inspector recommends in favour of adoption. They have a discretion whether or not to adopt the plan (s.65(9) and s.71(4)). If they decide not to adopt the plan, it will follow that there will be a gap in the coverage of the country by LDPs and a delay before a different plan is prepared and considered through the examination process. But it is common ground that the WM are not subject to an implied obligation under either provision to adopt the plan.

116. Sections 65(9), 67(1) and (2) and 71(4) all use the word “may”. LPAs, like the WM, are subject to democratic accountability. If Parliament had intended to impose an obligation on LPAs in Wales to adopt a LDP in accordance with the recommendations of the Inspector, it would have said so expressly.

117. There is no reason why the word “must”, or some equivalent expression, could not have been used in s.67(1) and(2). For the reasons set out above, Part 6 of the PCPA 2004 does not provide any basis for implying into those provisions an obligation on the part of LPAs in Wales to adopt a LDP.

Comparing Welsh and English legislation

118. It is common ground that in England a LPA has a discretion as to whether to adopt a DPD which the examining Inspector has recommended for adoption. Do differences between the statutory schemes for the two countries justify the imposition of an obligation to adopt in one country and the conferment of a power to adopt in the other, bearing in mind that the relevant provisions are contained in the same primary legislation?

119. Although, following the Government of Wales Act 2006, planning is a devolved responsibility in Wales and has been the subject of the 2015 Act enacted by the Welsh Assembly, the TCPA 1990 and the PCPA 2004 were passed by the UK Parliament. The PCPA 2004 lays out the main codes for the preparation and adoption of LDPs in Wales and DPDs in England. Although Part 6 of the PCPA 2004 deals separately with Wales, it is relevant to consider similar or identical language in the Welsh and English regimes enacted by the same legislature.

120. The provisions in the PCPA 2004 that the NDFW forms part of the statutory development plan, and that the LDP is subject to a requirement of general conformity with the NDFW, tell us nothing about whether a LPA’s function of adopting a LDP is a duty or a power.

121. There is no material distinction between the requirements applicable in England and in Wales that a LPA prepare either a DPD or LDP and that the draft plan must undergo independent examination.

122. The overall effect of s.15(1) – (2) and (7), 17(3) and s.19(1) and (1B) – (1D) is that a LPA in England must prepare a local development scheme which includes DPDs and it must then prepare DPDs in accordance with that scheme. The DPDs must identify strategic priorities for the development and use of land in the LPA’s area and policies to address those priorities. DPDs (along with other Local Development Documents) must, taken as a whole, set out the LPA’s policies relating to the

development and use of land in their area. So, as in Wales, a DPD sets out the policies of a locally elected, democratically accountable authority.

123. Under the PCPA 2004 as originally enacted, there was no difference between Wales and England as regards the obligation of an Inspector at the reporting stage. In both cases he was required simply to make recommendations with reasons.
124. Although s.20(7) to (7C) of the PCPA 2004 now sets out a more specific approach for England, it is still based on a LPA having conditional powers, not a duty, to adopt a DPD. If the Inspector concludes that the relevant statutory criteria, including soundness, are met, he must recommend adoption of the DPD (s.20(7)). But if, for example, the Inspector concludes that the DPD is not sound, he must recommend that it not be adopted. In that event, the LPA is not obliged to accept that recommendation. Instead, it may request the Inspector to recommend “main modifications” which, in his judgement, would make the plan sound. If such a request is made, the Inspector must identify and recommend such modifications (s.20(7C)). The English code still operates on the basis that a LPA may only adopt a DPD in accordance with a recommendation to adopt the plan as it is or subject to “main modifications” recommended by the Inspector (s.23(4)). But it has added to that discretionary power an ability for the LPA to trigger a “main modifications” procedure to overcome a flaw in the plan which would otherwise preclude its adoption.
125. The PCPA 2004 is less prescriptive for Wales. The Inspector is obliged simply to make recommendations, but he has a broad discretion as to what recommendations to make. The statute does not state, for example, what recommendations are to be made in defined circumstances. If the Inspector concludes that the plan submitted for examination is unsound he may decide to recommend modifications which would make that document sound. His implicit power to do this may be exercised irrespective of whether he is requested by the LPA to take that course. Alternatively the Inspector may decide to recommend non-adoption of the submitted plan, rather than recommending modifications. Either way, the Inspector must give reasons for his recommendations. The Inspector may conclude that there are sound planning or policy reasons as to why it is not possible, or would be inappropriate, to identify and recommend modifications so that the LDP can be adopted. The PCPA 2004 does not impose any obligation on the Inspector to recommend modifications so that the plan can be adopted. The submission for the first respondent to the contrary is incorrect.
126. If an Inspector in Wales recommends non-adoption of a draft plan, there is no provision in the legislation empowering, let alone requiring, the LPA to adopt the document. The conditions in neither s.67(1) or (2) would be met. Accordingly, the statutory scheme in Wales for the preparation and examination of a LDP proceeds on the basis that the plan submitted for examination under s.64 may not reach the stage where it can be adopted by the LPA.
127. The nature of the scrutiny in the examination process in England and Wales is such that it is unlikely in practice that an Inspector would recommend adoption in the form in which the plan was submitted for examination. Most plans require modifications during that process. In England the recommending of “main modifications”, so as to make a draft plan sound, depends upon the LPA requesting the Inspector to follow that procedure. The authority may choose not to do so, in which case the Inspector will have to recommend non-adoption (s.20(7)) and the LPA will be unable to adopt

the plan (s.23(4)). In Wales, if the Inspector finds a draft LDP to be unsound, he may recommend non-adoption or he may recommend modifications to achieve soundness. In both countries the LPA's legal ability to adopt the plan depends upon the Inspector's recommendations.

128. For all these reasons, the manner in which the Welsh and English regimes differ on the outcome of the examination process and its effect on the adoption stage does not support the implied imposition of a duty on a Welsh LPA to adopt a LDP if the Inspector so recommends.
129. The respondents have placed considerable emphasis upon the constraints on the exercise by a Welsh LPA of the power to withdraw a draft LDP. In England a LPA has a broad power under s.22 to withdraw a DPD at any time before it is adopted under s.23. The constraints on withdrawal by a Welsh LPA are set out in s.66A ([37] above). Although the power to withdraw a draft plan in England is not subject to the constraints which apply in Wales, the purpose and effect of those constraints (see [99] to [104] above) are insufficient to imply that a Welsh LPA is under a duty to adopt a LDP if the Inspector so recommends.
130. Standing back, the differences between the Welsh and English codes, viewed as a whole, do not justify treating the Welsh legislation as imposing a duty to adopt on LPAs in contradistinction to the position under the English legislation.

The historical perspective

131. It is common ground that under the regime which existed immediately before the PCPA 2004 was enacted, LPAs in both England and Wales had a discretion, not a duty to adopt development plans following examination. But the parties differ as to what happened thereafter.
132. The appellant says that LPAs in both Wales and England continued to have a discretion to adopt development plans, notwithstanding various changes in the legislation.
133. The respondents say that the changes introduced by the PCPA 2004 (as originally enacted) had the effect of imposing a duty to adopt development plans on both Welsh and English LPAs. They say that the position in England was altered when Parliament made changes to the PCPA 2004 by the 2011 Act. English LPAs then gained the freedom to decide whether to adopt their development plans. They finally say that the position in Wales was reinforced by the 2015 Act.
134. I agree with the appellant's analysis.
135. The TCPA 1990 applied to both England and Wales. A LPA which was a unitary authority was under a duty to prepare a unitary development plan ("UDP") for their area (chapter I of Part II of the TCPA 1990). Welsh local authorities became unitary authorities by virtue of the Local Government (Wales) Act 1994 and came under a duty to prepare UDPs. The Planning and Compulsory Purchase Act 1991 amended the TCPA 1990 with effect from March 2002. Outside unitary areas, LPAs became obliged to prepare structure and local plans containing their planning policies. LPAs had discretionary powers to decide whether to accept the recommendations of the

Inspector who examined the draft plan and whether to adopt that plan. The legislation provided that a LPA “may by resolution adopt” the plan.

136. The TCPA 1990 contained express powers for a LPA to withdraw a UDP or a structure plan at any time before the adoption of the plan (ss.14 and 34). However, the legislation contained no express power for the withdrawal of a local plan. *In R (Persimmon Homes (Thames Valley) Limited v North Hertfordshire District Council* [2001] EWHC Admin 565; [2001] 1 WLR 2393 it was accepted that a LPA could decide not to adopt a local plan following its examination [18]. Collins J held that it was necessarily implicit in the statutory scheme that a LPA also had a power to abandon or withdraw a local plan at any time before its adoption. Such a power was necessary, for example, to avoid the time and cost of a local public inquiry into the plan where the LPA had no intention of adopting the document at the end of the process ([23]). In that case there had been a substantial change in circumstances.
137. The PCPA 2004 came into force in England on 28 September 2004 and in Wales on 5 October 2005. Section 23(2) and (3) and section 67(1) and (2) introduced identical powers in both countries enabling a LPA to adopt a LDP or DPD, provided that they did so in the form recommended by the Inspector. The provisions for the adoption of a plan continued to be expressed in terms of a discretionary power, albeit in a conditional form. Parliament did not impose on LPAs an obligation to adopt an examined plan.
138. The PCPA 2004 included identical powers for LPAs in both England and Wales to withdraw a plan (ss. 22 and 66). These powers were subject to the limitations summarised in [52] above. For the reasons previously explained, those limitations on the power to withdraw do not provide any proper basis for implying a duty to adopt in s.23 or s.67 (see [102] to [104] above).
139. In England, the 2011 Act introduced the changes to the PCPA 2004 summarised in [49] to [52] above.
140. The substitution in 2011 of s.20(7) to (7C) for s.20(7) of the PCPA 2004 and the consequential changes to s.23 (see [49] to [51] and [124] above) have not altered the essential legal nature of s.23(2) and (3). They remain conditional powers to adopt.
141. The removal in England of the limitations in s.22 of the PCPA 2004 on the power to withdraw were insufficient to substitute a power to adopt for a duty to adopt.
142. The inclusion or exclusion of the limitations on a LPA’s power to withdraw its plan before adoption were legally insufficient to convert the authority’s function at the adoption stage from a power to adopt to a duty to adopt, or vice versa, *a fortiori* given that Parliament left the essential legal nature of a LPA’s adoption functions in s.23(2), (2A) and (3) unchanged. They remained as conditional powers to adopt a LDP. It is absurd to suggest that something as important as the legal ability of a democratic authority to choose whether to adopt policy could be either created or expunged in such an indirect manner by the use of such inadequate language. Those words, whether they appear in or disappear from the statute, cannot bear the weight or import which the respondents seek to place upon them.

143. Turning to the Welsh code, for the reasons already given, the PCPA 2004 conferred upon LPAs a conditional power, not a duty, to adopt an examined plan. The alterations to s.66 of the PCPA 2004 introduced by the 2015 Act were incapable of changing that express power into an implicit duty, whether read in isolation or in the context of the scheme as a whole. The limited effect of s.66A(3) and s.66A(5) to (7) has been explained in [99] to [101] above.

Regulation 25 of the 2005 Regulations

144. The respondents submit that reg.25(1) indicates that a LPA is subject to a duty under s.67(1) or (2) to adopt a LDP which must be satisfied within 8 weeks of receiving the Inspector's recommendations.

145. Bennion, Bailey and Norbury say at 24.18:

“Delegated legislation made under an Act may be taken into account as persuasive authority on the legal meaning of the Act's provisions, especially where the delegated legislation is roughly contemporaneous with the Act.”

146. In *Hanlon v The Law Society* [1981] AC 124 Lord Lowry stated at pp.193-194 that subordinate legislation may be used to construe the parent Act where, for example, the meaning of that Act is ambiguous. Such regulations may provide a contemporary explanation of the statute, but they do not decide or control its meaning. Instead, regulations which are consistent with a particular interpretation of the statute “tend to confirm that interpretation.”

147. The respondents cited *Scottish & Newcastle plc v Raguz* [2008] 1 WLR 2494 and *R v McCool* [2018] 1 WLR 2431. But for the purposes of this appeal, they do not add materially to the established principles on using secondary legislation as an aid in the interpretation of primary legislation. For example, *Raguz* was decided on the basis that the primary legislation in that case should be construed so as to avoid absurd consequences which Parliament could not have intended. That conclusion did not depend upon the language of the secondary legislation.

148. The PCPA 2004 received Royal Assent on 13 May 2004. The 2005 Regulations were enacted by a different legislature, the Welsh Assembly, in 11 October 2005, well over a year later. There is no suggestion that anything resembling reg.25(1) was before the UK Parliament, even as draft regulations, when it considered the Bill that led to the PCPA 2004.

149. There is no material to suggest that the 2005 Regulations were enacted under a power to amend primary legislation. Instead, those parts of the regulations which are relevant to this appeal were authorised to be made essentially under s.77 of the PCPA 2004, which includes making provision as to “the time at which anything must be done for the purposes of this Part” (s.77(2)(i)).

150. Rightly, the respondents do not suggest that the 2005 Regulations were capable of imposing a freestanding obligation on LPAs to adopt a LDP in accordance with the recommendations of the Inspector. Any such obligation, if it exists, has to be found in the PCPA 2004.

151. However, for the reasons given above, there is no ambiguity in the PCPA 2004. The Act confers conditional powers on a LPA to adopt a LDP. It does not impose a duty to do so. The 2005 Regulations cannot be used to create an ambiguity in the PCPA 2004 where none exists.
152. Happily, reg.25(1) can be construed consistently with the PCPA 2004. Adoption involves a decision by the LPA to exercise its power to adopt a LDP by resolution. The regulation means that any decision to adopt, if that is what the LPA resolves to do, must be made within the 8 weeks' time limit (or any extended time limit agreed with the Welsh Ministers).
153. Contrary to the respondents' submission, this interpretation of reg.25(1) does not render the regulation futile. Whether the LPA's decision be in favour of or against adoption, reg.25(1) is intended to avoid delay in the process at that stage, so as to remove or reduce uncertainty for the many parties with an interest in the plan and for the wider public. This is consistent with the approach taken under s.63(1)(b) of the PCPA 2004 (see [96 above]). The making of any decision to adopt within the time limit will also trigger the beginning of the period allowed by s.113 of the PCPA 2004 for the bringing of a claim for statutory review in the High Court.
154. I should add, finally, that the obligation reg.25(1) is qualified by the words "unless otherwise agreed in writing by the National Assembly". That demonstrates that that obligation is only concerned with the imposition of a time limit for taking a decision on whether or not to adopt a LDP. As a matter of language, it would make no sense to treat reg.25(1) as supporting the interpretation that the primary legislation, the PCPA 2004, imposed a duty on a LPA to adopt a LDP, while the same regulation would also allow the Assembly to agree to disapply that duty.

Conclusion

155. For the reasons set out above, the PCPA 2004 does not impose a duty on a LPA in Wales to adopt a LDP which, following the examination process, the Inspector has recommended for adoption. It follows that the resolutions passed by WCBC on 19 April 2023 and 14 June 2023 were not unlawful. I would therefore allow this appeal and dismiss the third to ninth respondents' claim for judicial review.

Jonathan Baker LJ

156. I agree.

The Senior President of Tribunals

157. I also agree.