

PLANNING BULLETIN - AIR QUALITY AND THE REQUIREMENT FOR EFFECTIVE MITIGATION

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On 12 September 2019, the Court of Appeal upheld a planning inspector's decision to refuse planning permission on air quality grounds for two residential and extra care developments in an air quality management area (**AQMA**) (an area designated by a local planning authority (**LPA**) where nationally set air quality standards are not being met or are not likely to be met). With a growing focus on air quality issues in planning applications and appeals, the judgment in *Gladman Developments Ltd v Secretary of State for Communities and Local Government and others* [2019] EWCA Civ 1543, highlights the increasing onus on developers to provide sufficient evidence to demonstrate the effectiveness of proposed mitigation measures.

BACKGROUND

In January 2017, a planning inspector upheld the LPA's decision to refuse planning permission for two residential and extra care developments on the basis it would have an unacceptable impact on air quality and public health, despite the fact that:

- the LPA had not objected to the developments on air quality grounds; and
- the developer had covenanted to pay financial contributions under section 106 of the Town and Country Planning Act 1990, to mitigate the impact of the developments on air quality.

DECISION

Notwithstanding the proposed mitigation under section 106, the Court of Appeal found the inspector had been entitled to conclude the developments were likely to have an adverse effect on air quality in the AQMA. The developer had failed to evidence how the financial contributions would actually reduce the use of private petrol and diesel vehicles and decrease emissions in the AQMA. The inspector was entitled to rely on the (lack of) evidence put before him and on this basis was found to have formed conclusions within the range of reasonable planning judgement. The inspector did not have to accept that, because an approved arithmetical method had been used to calculate the level of financial contributions, the mitigation measures themselves would be effective. In the Court's words:

It was not the methodology that was in contention. It was the likely effectiveness of the financial contributions themselves when translated into practical measures (53).

IMPACT OF THE DECISION

Market commentary suggests this is the first time a planning appeal has been refused due to concerns over air pollution and public health. The case illustrates the increasing relevance of air quality issues to planning decision making.

It is unclear what evidence would have been sufficient for the developer to demonstrate how the proposed financial contributions would prevent the development from adversely affecting air quality. Nonetheless, developers and LPAs alike should be mindful that a financial contribution in itself is unlikely to be enough to demonstrate effective mitigation.