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FROM DISCRETION TO EXPERT JUDGEMENT: RECASTING SEDIMENTED CONCEPTS IN ADMINISTRATIVE LAW

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ABSTRACT. *This article re-examines the traditional account of administrative decision-making under wide conferrals of statutory power. The received wisdom in such cases is that public officials exercise "discretion", usually defined as freedom of choice. Based on a doctrinal study of the English planning system and related case law, this paper contends that the notion of discretion as choice obscures one of the defining characteristics of modern government. That is, the making of public decisions tackling practical problems with intelligent and expert judgement under legal standards set out in legislation and further developed by the courts. More widely, the paper discusses the foundational role of tacit knowledge and decision-making expertise in public administration.*

KEYWORDS: *judicial review*, *planning law*, *expertise*, *planning judgement*, *administrative discretion*.

I. INTRODUCTION

Administrative discretion has for a long time been a prominent theme in traditional accounts of public government. As one commentator put it a hundred years ago, discretion "is of the essence of the modern State".[1] Similarly, Lord Cooke famously argued that administrative law – the area of law tasked with constituting, structuring and limiting public administration[2] – could easily be given the name of "public law of discretions".[3] It is not surprising, therefore, that much of the scholarly debate in this discipline has centred on whether discretion in public

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[1] H.J. Laski, "The Growth of Administrative Discretion" (1923) 1 Public Administration 92, 92.

[2] E. Fisher and S.A. Shapiro, *Administrative Competence: Reimagining Administrative Law* (Cambridge 2020), 15.

[3] R. Cooke, "The Discretionary Heart of Administrative Law" in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford 1998), 211.

government should be promoted or discouraged,[4] the ways it can be confined or structured,[5] how the courts can control discretionary powers,[6] or how the judicial review of discretion would safeguard the Rule of Law.[7]

Despite the prominent character of administrative discretion in administrative law discourse, little is known about what this legal category is supposed to mean or what type of government activities it is intended to describe. As Martin Shapiro has noted, discretion is treated as "a single analytic concept",[8] that is, a term that would encapsulate all administrative behaviour deployed by public authorities under wide legislative grants of power. In this unsatisfactory scenario, the consensus amongst most commentators seems to be that discretion would amount to freedom of choice between equally valid courses of action.[9] This view, also advanced by Lord Diplock in *Tameside*,[10] would capture the idea that in such cases a decision maker is not legally obliged to make one decision rather than another.

Against that background, this paper has three main aims. Its first aim is to offer a richer account of administrative decision-making under broad conferrals of statutory power. I advance the argument that the conventional view of discretion, which emphasises the idea of freedom to make choices, obscures one of the defining characteristics of modern government. That is, the exercise of "expert judgement"[11] in public administration, which is shaped by multiple legal standards set out in legislation and further developed by the courts.[12] Accordingly, this paper shifts the focus of attention away from ideas of freedom and choice, which are often associated with administrative discretion, to ideas of

[4] See C. Harlow and R. Rawlings, *Law and Administration*, 4th ed. (Cambridge 2022), ch. 6. On rules vs discretion, see J.L. Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Port Washington, NY 1975), 11–24.

[5] See e.g. P. Cane, *Administrative Law*, 5th ed. (Oxford 2011), 140; K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana, IL 1971); A. McHarg, "Administrative Discretion, Administrative Rule-Making, and Judicial Review" (2017) 70 Current Legal Problems 267; A. Perry, "The Flexibility Rule in Administrative Law" [2017] C.L.J. 375.

[6] T. Endicott, *Administrative Law*, 5th ed. (Oxford 2021), 239–86; M. Elliott and J.N.E. Varuhas, *Administrative Law: Text and Materials*, 5th ed. (Oxford 2016), ch. 7; P. Craig, *Administrative Law*, 9th ed. (London 2021), ch. 19.

[7] J. Jowell, "The Rule of Law" in J. Jowell, D. Oliver and C. O'Cinneide (eds.), *The Changing Constitution*, 8th ed. (Oxford 2015), 29.

[8] M. Shapiro, "Administrative Discretion: The Next Stage" (1983) 92 Yale Law Journal 1487, 1489.

[9] See e.g. Jowell, *Law and Bureaucracy*, 156. A detailed analysis of the relevant literature is offered in Section II.

[10] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1064F (H.L.).

[11] See e.g. in the listed buildings context, *Braun v Secretary of State for Transport, Local Government and the Regions and another* [2002] EWHC (Admin) 2767, at [38] (Ouseley J.); conservation of wildlife, *R. (Fisher and others) v English Nature* [2003] EWHC (Admin) 1599, [2004] 1 W.L.R. 503, at [19], [21] (Lightman J.); civil aviation, *R. (on the application of Lasham Gliding Society Ltd.) v Civil Aviation Authority* [2019] EWHC (Admin) 2118, at [64] (Thornton J.); or education, *C v London Borough of Brent* [2006] EWCA Civ 728, [2006] E.L.R. 435, at [52] (Laws L.J.).

[12] See Section IV below.

expertise, intelligent reasoning and legal standards, which are inherent in expert judgements demanded by the law.

This article examines these issues through an analysis of the development control regime set out in the Town and Country Planning Act 1990 (TCPA 1990) and related case law. Planning administration provides an ideal context for the study of the above matters because it is often characterised as being extremely discretionary in the traditional sense of this term.[13] By conducting a vertical case-law analysis[14] involving judicial review and statutory challenges to planning decisions, this study reveals that, despite the broad character of the statutory framework governing development control, the courts have interpreted planning legislation as establishing a *legal duty* to exercise expert *planning judgement*. Crucially, this paper articulates this legal duty, unpacking some of the main features of this key form of administrative reasoning. I discuss how the courts have recognised five forms of specialist planning knowledge and expertise underpinning the duty to exercise judgement, how this duty is based on relevant evidence, and how it is delineated by planning law and administrative law requirements. Notably, this examination demonstrates that administrative decision-making in broadly defined statutory contexts is far more guided than it first appears.[15]

The second aim of this article is to advance a broader normative argument, which is built on the case-law analysis described above. When all the legal requirements on decision-making are considered, both statutory and judicial, one can appreciate that the law promotes and demands a form of administrative reasoning marked by what John Dewey called "intelligent judgement".[16] This involves an attitude of mind which is informed, conscientious, responsive to context, pragmatic and open to new ideas and information.[17] In this mode of reasoning about public problems, expertise occupies a key place – Dewey also noted the crucial role of "expert intelligence"[18] in public government. Nonetheless, in using the adjective "intelligent" to describe the type of professional judgement expected from administrators, this article seeks to

[13] P. Booth, "The Control of Discretion: Planning and the Common-Law Tradition" (2007) 6 Planning Theory 127, 127; C. Mackie, "Planning, Discretion and the Legacy of Onshore Wind" (2023) 43 Legal Studies 499; T. Amodu, "Revisiting the Rules. The Pervasiveness of Discretion in the Context of Planning Gains: The Case of the Community Infrastructure Levy" [2020] P.L. 643.

[14] F. Frankfurter, "The Task of Administrative Law" (1927) 75 University of Pennsylvania Law Review 614, 620.

[15] It notes how, in the late 1980s, in the planning context, "the area of discretionary power beyond the purview of the courts has diminished dramatically": see M. Grant, *Urban Planning Law* (London 1982), 641.

[16] J. Dewey, "Creative Democracy: The Task Before Us" in E.T. Weber (ed.), *America's Public Philosopher: Essays on Social Justice, Economics, Education, and the Future of Democracy* (New York 2021), 63.

[17] J. Dewey, *How We Think* (Boston, MA 1933), 123–24.

[18] J. Dewey and J.H. Tufts, *Ethics* (London 1909), 473. I have attributed the quote to John Dewey, given that it is contained in chapter XXI, "Civil Society and the Political State", which was wholly written by him, as Dewey and Tufts stated in the introduction to *Ethics*.

highlight that the law is not only concerned with ensuring the application of expertise in public administration. The law is fundamentally preoccupied with *how* expert reasoning and judgements are carried out in practice. By this I mean that they ought to be exercised in an intelligent way in the sense described earlier.

Finally, the third aim of this paper is to show what can be learned from a study on how broad statutory powers are exercised in the specific context of planning administration. As Joanna Bell has observed, the often-convoluted character of planning legislation and case law can sometimes make this subject slightly "off-putting".[19] However, as Bell has also pointed out, planning case law can offer significant insights into wider administrative law issues, including the potential direction of the common law in other areas.[20] Relatedly, my analysis can help us improve our comprehension of administrative law in at least two additional ways.

In the first place, the refocusing on expert judgement renders visible the foundational and multifaceted character of the high-level expertise that public administration brings to bear on public decision-making. Planning cases evidence that most professional judgements made by public officials involve the application of "tacit knowledge"[21] and "decision-making expertise",[22] which are central to the delivery of good public administration. These are key notions sustaining recent case law, for example the Supreme Court decision in *Hopkins Homes*.[23] Yet as Liz Fisher has recently observed, their analysis remains relatively absent from contemporary administrative law scholarship.[24] In the second place, more widely, this paper demonstrates that the combined effect of existing legal requirements on decision-making is to displace the notion of discretion as mere freedom of choice. For Edward Rubin, the persistent way of understanding discretion in terms of choice is associated with "the poor fit between our legal categories and the realities of our modern administrative state".[25] My analysis clarifies how existing explanations of decision-making under broad grants of legal authority have ossified and

[19] J. Bell, "Embracing the Unwanted Guests at the Judicial Review Party: Why Administrative Law Scholars Should Take Planning Law Seriously" in M. Lee and C. Abbot (eds.), *Taking English Planning Law Scholarship Seriously* (London 2022), 229–30, 242.

[20] Ibid.; see e.g. A. Mills, "The Interpretation of Policies in Administrative Law: The Significance of Audience" (2023) Legal Studies 1.

[21] H. Collins and R. Evans, *Rethinking Expertise* (Chicago 2007), 6, 14, 24.

[22] See S.A. Shapiro, "The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences" (2015) 50 Wake Forest Law Review 1097, 1099.

[23] *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government and another; Cheshire East Borough Council v Secretary of State for Communities and Local Government and another* [2017] UKSC 37, [2017] 1 W.L.R. 1865.

[24] See E. Fisher, "Expert Executive Power, Administrative Constitutionalism and Co-Production: Why They Matter" in M. Weimer and A. de Ruijter (eds.), *Regulating Risks in the European Union: The Co-Production of Expert and Executive Power* (Oxford and Portland, OR 2017), 42.

[25] E.L. Rubin, "Discretion and Its Discontents" (1997) 72 Chicago-Kent Law Review 1299, 1299.

how the notion of expert judgement offers a more accurate representation of current administrative and judicial praxis.

The rest of the article is structured as follows. In Section II, the paper juxtaposes the mainstream view of discretion as choice with the notion of judgement, discussing the extent to which this distinction has been recognised in administrative law scholarship and judicial pronouncements. Sections III and IV analyse planning decision-making and related case law, elucidating how the law demands the exercise of expert and intelligent judgement. Section V discusses the link between the types of expertise identified in this paper and the principle of good public administration. Section VI reflects on why ideas of freedom and choice have dominated the debate on decision-making under broadly defined powers. The final section offers concluding remarks on the legal significance of expert judgement and intelligent reasoning in administrative law.

II. Discretion or Judgement?

In administrative law, the main source of broad grants of power is Parliament.[26] In some cases, when creating public bodies and administrative regimes, Parliament may lay down specific criteria or rules defining *ex ante* what decision is to be made before individual cases arise.[27] In others, Parliament may enact framework legislation setting out broad powers and functions, leaving it to the decision maker to make individual decisions *ex post* on a case-by-case basis.[28] The point is that, when legislation empowers a public body without laying down specific criteria or rules predetermining what concrete decision is to be made in individual cases, a public official is said to have been granted administrative discretion to make decisions.[29] Various reasons may inform Parliament's decision to adopt a particular legislative design, including political, technical, or pragmatic considerations. In *Alconbury*, Lord Hoffmann spoke of taxation as a "good example" of a case where predetermined rules are appropriate.[30] Parliament decides what taxation is required on public interest grounds and the rules according to which it should be levied. By contrast, he mentioned town and country planning and road construction as "archetypal examples" of cases where general rules cannot be formulated because every decision is in some respects different.[31]

[26] D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford 1992), 207–08.
[27] C.R. Sunstein, "Rules and Rulelessness" (1994) Coase-Sandor Institute for Law & Economics Working Paper No. 27, 1, 5–6.
[28] Ibid.
[29] See Cane, *Administrative Law*, ch. 6.
[30] *R. (Alconbury Developments Ltd. and Others) v Secretary of State for the Environment, Transport and the Regions; R. (Holding & Barnes plc) v Secretary of State for the Environment, Transport and the Regions; Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd.* [2001] UKHL 23, [2003] 2 A.C. 295, at [69].
[31] Ibid.

In those situations, what the general interest requires is determined on a case-by-case basis. For present purposes, the lack of predefined criteria determining the outcome of decision-making in fields like town planning is associated with discretion, a term which is traditionally associated with the notion of choice.

A. Discretion as Choice

Most accounts of discretion view this concept as freedom to make choices, that is, a leeway that the law gives to decision-makers to decide what decision to make in concrete cases.[32] Judicially, this approach was propounded by Lord Diplock in *Tameside*.[33] He maintained that "[t]he very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred".[34] Legal scholars have also advanced an analogous explanation of discretion. Kenneth Davis, for example, maintained that public authorities have discretion when the limits on their powers leave decision-makers "free to make a choice among possible courses of action or inaction".[35] An exercise of discretion would take place when an official "decides what is desirable in the circumstances after the facts and law are known".[36] The sense of freedom present in Davis's characterisation is also implicit in the work of Jeffrey Jowell. He has argued that discretion refers to "the room for decisional manoeuvre", contending that discretion is high when decision-makers are guided by vague standards, and low when public official are limited by rules that reduce scope for interpretation.[37] Similarly, Peter Cane has maintained that "the essence of discretion is choice"[38] – a view which is also shared by Timothy Endicott, for whom "discretion is a choice that the law leaves up to a decision maker".[39]

In all these accounts, discretion is often regarded as an empty area or, as Ronald Dworkin would put it, as "the hole in a doughnut" which would only exist surrounded by a belt of legal restrictions.[40] Here, the function of the courts is that of defining the contours of discretion. As Denis Galligan explained, discretion in a "central sense" would exist when the courts recognise that freedom or room for manoeuvre granted to decision-makers.[41] From this perspective, the effect of wide statutory powers, as Lord Greene M.R.

[32] On how most commentators associate discretion with "choice", see J. Bell, "Discretionary Decision-Making: A Jurisprudential View" in K. Hawkins (ed.), *The Uses of Discretion* (Oxford 1995), 93.
[33] *Secretary of State v Tameside MBC* [1977] A.C. 1014 (H.L.).
[34] Ibid., at 1064.
[35] Davis, *Discretionary Justice*, 4.
[36] Ibid.
[37] Jowell, *Law and Bureaucracy*, 156.
[38] Cane, *Administrative Law*, 56–57.
[39] Endicott, *Administrative Law*, 256.
[40] R. Dworkin, *Taking Rights Seriously* (first published 1977, London and New York 2013), 48.
[41] Galligan, *Discretionary Powers*, 23.

observed in *Wednesbury*, is "not to set up the court as an arbiter of the correctness of one view over another".[42]

Before going any further, it is important to be clear that, in this article, I do not claim that the preceding understandings of discretion are wrong. The central issue is that, as my case-law analysis demonstrates, the significance of choice and freedom in the exercise of loosely defined powers has been overemphasised. When the respective scheme has not predetermined a concrete outcome before individual cases arise, so the argument goes, a decision maker has discretion and can choose which final decision to make. My objection is that this interpretation seems to divorce an administrative decision from the reasoning process whereby a decision is reached. The reality is that a final decision and its underlying reasoning are interdependent; they are not disconnected or hermetically sealed.[43] I will return to this point in the final sections when addressing the legal fundamentality of intelligent administrative reasoning and judgement.

B. Judgement

Administrative discretion is often contrasted with the notion of judgement. In *Croydon*, Lady Hale examined this point when discussing the scope of the duty imposed on local authorities to provide accommodation for any child in need within their area. Pursuant to section 20(1) of the Children Act 1989, such a duty arises when in the view of the local authority a child in need appears to require accommodation in light of three listed circumstances: (1) there being no person who has parental responsibility for the child; (2) their being lost or having been abandoned; or (3) the person who has been caring for the child being prevented from providing the child with suitable accommodation or care. Lady Hale sustained that any entitlement under that section depends upon "an evaluation of some very 'soft' criteria rather than specific rules".[44] She said that, "once the qualifying criteria are established, the local authority has no discretion under section 20(1): the accommodation must be provided", emphasising that "[t]he existence of the criteria is a matter of judgment, not discretion".[45] Implicit in Lady Hale's view was the idea that judgement would be required in situations where the legal framework demands a professional evaluation to be carried out on the basis of predefined

[42] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, 230–31 (C.A.).
[43] Also noting this point, see *R. (on the application of Davison) v Elmbridge Borough Council* [2019] EWHC (Admin) 1409, [2020] 1 P. & C.R. 1, at [47] (Thornton J.).
[44] *R. (A) v Croydon London Borough Council (Secretary of State for the Home Department and another intervening); R. (M) v Lambeth London Borough Council (Secretary of State for the Home Department and another intervening)* [2009] UKSC 8, [2009] 1 W.L.R. 2557, at [40].
[45] Ibid., at [35].

criteria, whereas discretion would operate where no clear criteria are provided.[46]

A similar strand of thinking is observed in cases discussing the role of discretion in judicial contexts. For example, in *Viscount De L'Isle v Times Newspapers Ltd.*, May L.J. contrasted discretion with judgement, emphasising that the latter requires a judge to "weigh up the conflicting considerations" based on the material evidence.[47] Comparably, in *R. v Tower Hamlets, ex parte Tower Hamlets Combined Traders Association*,[48] Sedley J. stated that, in the adjudication of disputes, "the entire exercise" including "the gauging of differences of degree" is "a matter of judgment according to the legal principles and not of discretion".[49] Christopher Forsyth also contended that, in judicial settings, discretion and judgement should not be conflated, arguing that many times what appears to be remedial discretion is in reality an exercise of a judgement.[50] The same reasoning was buttressed extrajudicially by Sir Thomas Bingham, who stated that the courts are often called to exercise evaluative judgements in their decision-making functions.[51] Such is the case, for example, when judges have to determine what evidence to accept or reject in order to decide a legal dispute, where the court "must exercise a judgment not a discretion".[52] He emphasised that "most so-called discretions depend on the making of a prior judgment which, once made, effectively determines the course to be followed, and leaves no room for choice".[53]

An important theme that can be drawn out from this discussion is that, in some cases, the judges are reluctant to use the term "discretion" to describe the making of certain decisions. In the administrative context, this occurs in situations where the legal framework requires a decision maker to conduct an assessment on the basis of "soft criteria", as Lady Hale affirmed in *Croydon*. In those cases, the term "judgement" appears to be preferred. An analogous conclusion was reached by Dworkin, who emphasised that, when an official must apply standards that demand the use of judgement, the official exercises a discretion only in a weak sense.[54]

[46] Also distinguishing an exercise of judgement in administrative contexts, see *Devon County Council v George* [1989] A.C. 573, 604F, 605H–06A (H.L.).
[47] *Viscount De L'Isle v Times Newspapers Ltd.* [1988] 1 W.L.R. 49, 57 (C.A.) (May L.J.), 62 (Balcombe L.J.).
[48] [1994] C.O.D. 325 (Q.B.).
[49] Ibid.
[50] C. Forsyth, "The Rock and the Sand: Jurisdiction and Remedial Discretion" (2013) 18 Judicial Review 360, 376.
[51] T. Bingham, *The Rule of Law* (London 2010), 51. See also T. Bingham, "Should Public Law Remedies Be Discretionary?" [1991] P.L. 64, and, similarly, F.A.R. Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford 2009), chs. 13, 14.
[52] Bingham, *Rule of Law*, 51.
[53] T. Bingham, "The Rule of Law" [2007] C.L.J. 67, 72.
[54] Dworkin, *Taking Rights Seriously*, 49.

So far, my analysis has remained relatively conceptual. Hence, in the next two sections, I shall delve into the workings of the English planning system and related case law with a view to examining how broad statutory powers are exercised on the ground and how the courts review the legality of decision-making in planning cases. The main aim is to show how, in this field, which is too often labelled as discretionary, the conventional view of discretion as an empty space where public officials make choices fails to capture appropriately the realities of decision-making.

III. Administrative Decision-Making in Development Control

Development proposals are ordinarily determined by a local planning authority, as set out in section 70 of the TCPA 1990. In practice, planning decisions are taken by a planning committee, or a planning officer acting under delegated powers.[55] Planning appeals can be brought by disappointed applicants before the Secretary of State, though in practice they are decided by a planning inspector from the Planning Inspectorate exercising delegated functions.[56] The Secretary of State may make a final decision in the case of called-in applications and recovered appeals.[57]

The process by which planning applications are determined, also denominated development control, is usually characterised as a remarkably discretionary area of public decision-making.[58] This is the case for various reasons. First, planning permission is required for the carrying out of any development of land.[59] The term "development", in turn, is defined in wide terms as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land".[60] This means that most activities involving the use and transformation of land require prior planning permission by the respective planning authority. Secondly, planning decisions must be made in accordance with the local plan unless "any other material

[55] Whether a planning decision has to be made by a Planning Committee or an officer action, on the basis of delegated powers depends on the specific arrangements adopted by each local authority.

[56] See Town and Country Planning Act 1990, s. 78, sched. 6; The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997, SI 1997/420; The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, SI 2000/1625.

[57] See Town and Country Planning Act 1990, ss. 77, 79.

[58] See e.g. Grant, *Urban Planning Law*, ch. 7; P. Booth, "From Regulation to Discretion: The Evolution of Development Control in the British Planning System 1909–1947" (1999) 14 Planning Perspectives 277; J.P.W.B. McAuslan, "Discretion and Development Control: The United Kingdom Experience" (1985) 16 University of Western Australia Law Review 276; Mackie, "Planning, Discretion and the Legacy of Onshore Wind".

[59] Town and Country Planning Act 1990, s. 57(1).

[60] Ibid., s. 55(1).

considerations" indicate otherwise.[61] No definition is given in the planning Acts of the expression "material considerations", nor do the Acts lay down any criteria by which a planning authority may determine what factors that expression is intended to include. The statutory framework vests in planning authorities power to identify planning considerations that are material to a particular development proposal (subject to judicial oversight) and power to determine their weight.[62] The legislative scheme, consequently, leaves much open for the determination of planning authorities, which will decide whether permission should be granted on the basis of their findings and assessments.

From a statutory standpoint, it is evident that planning authorities have been bestowed relatively broad powers to assess development proposals and to grant or refuse permission to develop land, which explicates why this field is usually seen as discretionary. Nonetheless, when the case law is brought into the analysis a somewhat different picture emerges, for two reasons. First, the courts have construed the statutory framework as establishing a *legal duty* to exercise expert *planning judgement* in the determination of development proposals. Secondly, the courts have given further substance to the statutory framework by developing legal standards guiding the exercise of expert judgement. I will examine these propositions below.

IV. Planning Judgement as an Instance of Expert Reasoning

Planning judgement constitutes a key concept or term crafted by the courts in the adjudication of judicial review claims and statutory challenges to planning decisions. It is worth mentioning that nowhere in the planning Acts is this concept explicitly mentioned or defined. Nor is it described in secondary legislation or in planning policy. The term, however, is amply used in judicial practice.[63] The making of planning decisions, the

[61] See ibid., s. 70; Planning and Compulsory Purchase Act 2004, s. 38. Currently, section 38 establishes what is known as the presumption in favour of the development plan: see *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640, [2020] 1 P. & C.R. 9, at [31] (Lindblom L.J.). The Levelling-up and Regeneration Act 2023 introduced important reforms to development control and related areas. Section 93 empowers the Secretary of State to designate national development management policies (NDMPs), which will constitute a new factor to be taken into account in planning decisions. The same provision establishes that planning decisions should be made in accordance with local plans and the new NDMPs unless material considerations *strongly* indicate that those policies should not be followed. In case of conflict between local plans and NDMPs, the conflict must be resolved in favour of the latter. These changes will come into force on such day as the Secretary of State may by regulations appoint: see Levelling-up and Regeneration Act 2023, s. 255(3).

[62] When planning obligations are considered as material considerations, the planning authority must observe the tests in The Community Infrastructure Levy Regulations 2010, SI 2010/948, regs. 122, 123.

[63] This concept can be found in judicial pronouncements dating back at least to 1967, when it was used by Russell L.J. in *Lord Luke of Pavenham v Minister of Housing and Local Government and another* [1968] 1 Q.B. 172, 187 (C.A.). The ample use of "planning judgement" in the courts can be seen through a simple keyword search of this term in the British and Irish Legal Information Institute (BAILII) database, which shows 262 judgments handed down by the Court of Appeal containing that concept between 1971 and 2024. The same keyword search, in the case of the Administrative Court, throws up 1,010 judgments containing the same term between 1997 and 2024.

courts have recurrently said, "involves, largely, an exercise of planning judgment",[64] a point that has also been underscored by legal scholars.[65] Whilst the courts have often emphasised that Parliament has provided a "comprehensive code of planning control",[66] which would imply a limited role for judicial creativity, in practice the common law has supplemented the planning code in various ways.[67]

It is important to note that the courts have not defined this important planning term. Nonetheless, based on how it is used in the case law, it can be argued that planning judgement constitutes a form of reasoning. That is, to paraphrase Henry Richardson, a process or way of thinking "that sifts reasons and arguments".[68] In this reasoning process, planning authorities are expected to employ their expertise in the assessment and determination of development proposals, considering various planning law and administrative law requirements substantiated by the courts. The significance of reasoning in the planning field can be seen in *South Somerset District Council and the Secretary of State for the Environment v David Wilson Homes (Southern) Ltd.*,[69] where the issue was whether an inspector had materially misunderstood the relevant policy framework. To determine whether or not the inspector had gone wrong in law, Hoffmann L.J. maintained that "[o]ne must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy".[70] Hoffmann L.J. spent various paragraphs closely examining "the reasoning of the inspector", looking at the steps taken in their process of thinking and analysis of the policy at hand. Thus, it is the reasoning process usually expressed through a resolution or decision letter which is the focus of the court's inquiry.[71]

As shall be seen, planning judgement as a form of reasoning presents at least four main characteristics, which can be observed in the case law: its exercise constitutes a *legal duty* derived from the legislative framework; it is founded on various forms of specialist knowledge and expertise; it is

[64] *Barwood Strategic Land II LLP v East Staffordshire Borough Council and another* [2017] EWCA Civ 893, [2017] E.G.L.R. 33, at [50] (Lindblom L.J.).
[65] See E. Fisher, "Law and Energy Transitions: Wind Turbines and Planning Law in the UK" (2018) 38 O.J.L.S. 528.
[66] See e.g. *Pioneer Aggregates (U.K.) Ltd. v Secretary of State for the Environment and Others* [1985] A.C. 132, 141 (H.L.) (Lord Scarman); *Hillside Parks Ltd. v Snowdonia National Park Authority* [2022] UKSC 30, [2022] 1 W.L.R. 5077, at [37].
[67] See e.g. the principles on planning policy interpretation: Section IV(D) below.
[68] H.S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford 2002), 76, 83.
[69] (1993) 66 P. & C.R. 83, 84 (C.A.) (Hoffmann L.J.).
[70] Ibid., at 85.
[71] When the decision is made by a collective body, or when a planning committee disagrees with its professional advisers, it can be difficult to identify the reasoning underlying the planning decision: see A. Mills, "Committees Giving Reasons: Attribution and Sufficiency" [2025] P.L. (forthcoming).

based on relevant evidence; and it is subject to planning law and administrative law requirements. It should be emphasised that this analysis does not intend to offer a complete characterisation of planning judgement. Nor is it the goal of this article to advance a rigid structure explaining this key term. Planning is a flexible enterprise,[72] and different decision-makers will decide how to perform their duties in different ways, on a case-by-case basis.

A. Legal Duty to Exercise Planning Judgement

Although the existing legislative framework governing development control is designed in broad terms, planning authorities cannot choose whether or not to exercise their judgement in the assessment of development proposals. The courts have construed the powers granted upon planning administration as establishing a legal *duty* to exercise planning judgement.[73] In *R. (on the application of Jayes) v Flintshire County Council*, the Court of Appeal emphasised that, "[w]hen a planning authority determines a planning application, [section] 70(2) of the Town and Country Planning Act 1990 requires it to exercise its planning judgment".[74] Equally, restoring a planning inspector's decision, the court concluded that "[t]he issues that arise can and should be viewed in the context of a classic exercise of planning judgment by a decision maker in discharging his duty under section 38(6) of the 2004 Act".[75] The fact that decision-makers are expected to exercise their judgement has been stressed in various instances, for example in relation to the application of the law of bias in the planning context. In *R. v Secretary of State for the Environment and another, ex parte Kirkstall Valley Campaign Ltd.*, Sedley J. stated that the decision of a body will be revoked if the outcome has been predetermined, inter alia, "by the effective surrender of the body's independent judgment".[76] In general terms, the duty to exercise planning judgement is an illustration of the wider judicial view expressed by the House of Lords in *Julius v Lord Bishop of Oxford and another*, where Earl Cairns L.C. maintained that a power may sometimes be coupled with a duty, a legal construction which the courts will determine considering the specific statutory context of the respective case.[77]

[72] *Barwood v East Staffordshire BC* [2017] EWCA Civ 893, at [50] (Lindblom L.J.).
[73] See *Lisle-Mainwaring v Carroll; Secretary of State for Communities and Local Government v Carroll* [2017] EWCA Civ 1315, [2018] J.P.L. 194, at [71] (Lindblom L.J.); *Chichester DC v Secretary* [2019] EWCA Civ 1640, at [51], [52] (Lindblom L.J.); *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508, [2020] J.P.L. 1277, at [26] (Lindblom L.J.).
[74] *R. (on the application of Jayes) v Flintshire County Council* [2018] EWCA Civ 1089, [2018] E.L.R. 416, at [12] (Hickinbottom L.J.).
[75] *Lisle-Mainwaring v Carroll* [2017] EWCA Civ 1315, at [71] (Lindblom L.J.).
[76] *R. v Secretary of State, ex parte Kirkstall Valley Campaign* [1996] 3 All E.R. 304, 321H (Q.B.).
[77] See *Julius v Lord Bishop of Oxford and another* [1874–80] All E.R. Rep. 43, 46 (H.L.).

A central feature of the duty to exercise planning judgement is that it involves undertaking an overall "evaluative assessment",[78] which concludes with the striking of a "planning balance" between competing material considerations.[79] Hence, a planning authority will have to weigh "a range of potential benefits" against "a range of incommensurable potential detriments"[80] including an "assessment of the balance of view within the local community as a whole" considering "those who do not make representations but who can be presumed to be reasonable members of the public".[81] This weighing process forms one of the most important principles of planning law. In *Tesco Stores Ltd. v Secretary of State for the Environment and others*,[82] it was held that the weight to be attached to a material consideration "is a question of planning judgment, which is entirely a matter for the planning authority".[83] This was identified as a principle of planning law "more firmly settled than any other".[84] In this context, attaching weight to a material consideration means defining the relative importance of the consideration in the decision-making process.[85]

The *Samuel Smith* case exemplifies how this balancing exercise operates in practice.[86] This case involved a planning application for an extension of a limestone quarry in the Green Belt, under paragraph 90 of the "National Planning Policy Framework" (in its 2012 version), which defined forms of development that are not considered inappropriate if they, inter alia, preserve the openness of the Green Belt. When assessing whether the loss of visual quality would affect the openness of the Green Belt, the planning officer considered various factors. The officer made clear that the project involved the extension of an existing quarry, that the proposed development was a temporary use, and that the site will be restored upon completion of the mining operations. Based on those considerations, the officer performed a balancing process, concluding that "the proposed development would not materially harm the character and openness of the Green Belt".[87] The weighing up of competing considerations permits

[78] *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466, [2017] 2 P. & C.R. 1, at [27] (Sales L.J.).

[79] See *Connors and others v Secretary of State for Communities and Local Government and others; Mulvenna and another v Secretary of State for Communities and Local Government and another (Equality and Human Rights Commission intervening)* [2017] EWCA Civ 1850, at [65] (Lindblom L.J.); *R. (on the application of Bates) v Maldon District Council* [2019] EWCA Civ 1272, at [22] (Hickinbottom L.J.); *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government and another* [2018] EWCA Civ 1808, at [66] (Lindblom L.J.).

[80] See *R. (on the application of Holder) v Gedling Borough Council* [2018] EWCA Civ 214, [2018] P.T.S.R. 1542, at [23] (Lord Burnett C.J.).

[81] Ibid., at [27].

[82] [1995] 1 W.L.R. 759 (H.L.).

[83] Ibid., at 780F (Lord Hoffmann).

[84] Ibid., at 780H.

[85] See D. Herling, "Weight in Discretionary Decision-Making" (1999) 19 O.J.L.S. 583.

[86] *R. (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council* [2020] UKSC 3, [2020] 3 All E.R. 527, at [19] (Lord Carnwath).

[87] Ibid., at [20].

decision-makers to decide whether planning permission should be granted. This is only an illustration of a case where expert assessment was needed. Generally, the number and type of issues that may fall to be considered within a planning judgement are "potentially many and varied".[88] These may include, for example, whether an asset has sufficient heritage importance to merit consideration,[89] whether a policy is out of date,[90] the effectiveness of mitigation measures,[91] whether a proposal would affect the setting of listed buildings,[92] whether there is a real prospect of a fallback development being carried out,[93] or when a need for affordable housing can arise.[94]

Overall, it can be argued that the duty to exercise planning judgement entails, by implication, that decision-makers are required to reason actively, using their intellectual abilities and applying their specialist knowledge and expertise to the making of planning decisions. More widely, at least three ideas stem from the previous discussion regarding the nature of this mode of reasoning. First, planning judgement constitutes an exercise of practical reasoning, that is reasoning about what to do in a concrete case,[95] in the real world. Secondly, it represents a mode of "public reasoning about ends", by which is meant a form of reasoning that revises which ends matter in public decision-making.[96] This mode of reasoning is central to planning because it enables decision-makers to translate competing reasons and arguments for and against a grant of planning permission, as well as existing local and national planning policies, into a final public decision. More specifically, through a planning judgement, planning authorities can respecify the policy ends that will prevail in land development, in the determination of concrete proposals. For example, in *Samuel Smith*, the granting of permission for an extension of an operational limestone quarry in the Green Belt entailed privileging mineral policies over Green Belt policies in that case.

Finally, the fact that planning authorities are expected to hierarchise various planning policy ends in competition in land development also

[88] *South Bucks District Council v Porter and another; Chichester District Council v Searle and others; Wrexham County Borough Council v Berry* [2003] UKHL 26, [2003] 2 A.C. 558, at [68] (Lord Clyde).
[89] *R. (Khodari) v Kensington and Chelsea Royal London Borough Council* [2017] EWCA Civ 333, [2018] 1 W.L.R. 584, at [14] (Lewison L.J.).
[90] *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805, at [33] (Lewison L.J.).
[91] *Gladman Developments Ltd. v Secretary of State for Communities and Local Government and others* [2019] EWCA Civ 1543, [2020] P.T.S.R. 128, at [52], [53] (Lindblom L.J.).
[92] *Catesby Estates Ltd. v Steer (Historic England as intervener)* [2018] EWCA Civ 1697, [2019] 1 P. & C.R. 5, at [24] (Lindblom L.J.).
[93] *R. (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2019] P.T.S.R. 1452, at [27] (Lindblom L.J.).
[94] *Jelson Ltd. v Secretary of State for Communities and Local Government and another* [2018] EWCA Civ 24, [2018] J.P.L. 790, at [53] (Lindblom L.J.).
[95] H.S. Richardson, *Practical Reasoning about Final Ends* (Cambridge 1994), 22.
[96] Richardson, *Democratic Autonomy*, 99.

corroborates that planning administration is expected to undertake an intelligent approach to assessing development proposals. That is, as Dewey would put it, an attitude that requires the use of thought and reflection to project new ends, as opposed to accomplishing fixed ends already given.[97] To put it differently, what is expected is a flexible disposition on the face of practical problems, an eagerness to rethink previous aims in light of new available information and changing circumstances.[98] This is hardly surprising because open-mindedness is key to judgement processes. As Dewey also noted, "true judgments" are generally "based on intelligent selection and estimation, with the solution of a problem as the controlling standard".[99] Along the same lines, the courts have recurrently highlighted that planning "is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic".[100]

B. Planning Judgement Is Grounded in Specialist Knowledge, Skills and Expertise

For the courts, planning judgement is a distinctive mode of reasoning. This is so because it is grounded in specialist knowledge, skills and ultimately expertise. Before I explain the meaning of these terms and how they are used by the courts, it is important to note upfront that an exercise of judgement is not based solely on expert assessments. It may also involve, to varying levels, wider political considerations. In *R. (Morge) v Hampshire County Council*, the Supreme Court noted that planning decisions are adopted by democratically elected councillors who are "responsible to, and sensitive to the concerns of, their local communities".[101] Local councillors are politicians and as such they are entitled and expected to consider "views on planning policy they will have formed when seeking election or when acting as Councillors".[102] It has been stressed that in the planning context "the very process of democratic decision making" involves "weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance".[103] This does not mean, however, that planning decisions should be purely political decisions. Various legal obligations

[97] J. Dewey, "The Need for a Recovery of Philosophy" in J. Dewey, A.W. Moore, H.C. Brown, B.H. Bode, H.W. Stuart, J.H. Tufts and H.W. Kallen, *Creative Intelligence: Essays in the Pragmatic Attitude* (New York 1917), 63–64.
[98] Richardson, *Democratic Autonomy*, 121.
[99] Dewey, *How We Think*, 124.
[100] *Barwood v East Staffordshire BC* [2017] EWCA Civ 893, at [50] (Lindblom L.J.).
[101] *R. (Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 W.L.R. 268, at [36] (Baroness Hale).
[102] *R. (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, [2009] 1 W.L.R. 83, at [62], [66] (Pill L.J.), [94]–[99] (Rix L.J.).
[103] *Bovis Homes Ltd. v New Forest District Council; Alfred McAlpine Developments Ltd. v Secretary of State for the Environment, Transport and Regions* [2002] EWHC (Admin) 483, at [112] (Ouseley J.).

seek to ensure that expertise will inform a planning judgement. For example, as it will be elucidated in a moment, planning authorities are legally obliged carefully to consider the totality of the evidence before them, including expert assessments by planning officers and statutory consultees. And, in general, they must avoid approaching development proposals with a "closed mind".[104]

Thus, the expectation is that planning decisions will be the result of an administrative process infused with specialist knowledge, skills and expertise. These concepts are all very similar yet somewhat distinct. According to the *Cambridge Dictionary*, expertise is defined as "a high level of knowledge or skill".[105] Relatedly, the same dictionary describes knowledge as "understanding of or information about a subject that you get by experience or study", whereas skill is conceptualised as "an ability to do an activity or job well, especially because you have practised it". Two main ideas spring from those brief definitions. First, expertise rests on knowledge and/or skill since it requires "a high level" of them (individually or together). Secondly, knowledge and skill, though similar, represent different components of expertise. Knowledge has an intellectual connotation, as it relates to the level of comprehension of a specific area or the level of information learned about it. By contrast, skill is concerned mainly with the ability to do things in practice.

These are simple definitions, and it is worth mentioning that commentators have spent a great deal of time examining the nature of expertise, both from legal and non-legal perspectives. For example, Adam Perry and Farrah Ahmed have discussed the link between expertise and reason-giving in judicial review, and Jeff King has clarified various types of administrative expertise, analysing how these influence the courts' attitude in judicial review.[106] More widely, Harry Collins and Robert Evans have developed the idea of "specialist expertises", referring to skills that are not possessed by the general public, which are gained through experience in a specific domain.[107] For now, I will follow the definitions discussed above for two pragmatic reasons. First, the purpose of this section is to discuss how ideas related to expertise surface in planning case law, rather than delving into the vast academic literature. Secondly, both knowledge and skill as described have been identified as two conditions which are key to expertise.[108]

[104] *Lewis v Redcar and Cleveland BC* [2008] EWCA Civ 746, at [63] (Pill L.J.).
[105] See "expertise", available at https://dictionary.cambridge.org/dictionary/english/expertise (last accessed 1 March 2024).
[106] See A. Perry and F. Ahmed, "Expertise, Deference and Giving Reasons" [2012] P.L. 221; J. King, *Judging Social Rights* (Cambridge 2012), 21–29.
[107] See Collins and Evans, *Rethinking Expertise*, 17. Discussing various understandings of expertise, see e.g. A.I. Goldman, "Expertise" (2018) 37 Topoi 3; A.I. Goldman, "Experts: Which Ones Should You Trust?" (2001) 63 Philosophy and Phenomenological Research 85.
[108] Goldman, "Expertise".

In the planning context, the courts have explicitly referred to specialist knowledge and expertise, in at least five ways.[109] The first, and perhaps the most common, type of expertise that arises in planning law adjudication involves "local knowledge".[110] This is described as an awareness that local councillors possess of the physical characteristics of the local area where a particular development is intended to be carried out, for example the location of the main roads or buildings in the town[111] or the extension of protected areas.[112] Planning officials exercising delegated powers have also been said to possess this type of knowledge,[113] which is used in the assessments of every application and, in some cases, it can determine the fate of a particular proposal. A typical example where this conceptualisation of planning knowledge arose was *R. (on the application of Corbett) v Cornwall Council*.[114]

In *Corbett*, one of the issues was whether the proposed development adjoined the area occupied by the settlement of Trevarrian. This was an important point because the relevant local plan policy promoted development of "previously developed land within or immediately adjoining" the existing settlement.[115] The claimant argued that Trevarrian Hill road constituted the boundary of the settlement to the west, but was not within the settlement, which meant that land the other side of the road, including the site involved in the planning application, was not "immediately adjoining" the town.[116] The judge held that the relevance of the road for the determination of the precise location of the settlement boundary involved the application of local knowledge.[117] Given that settlement boundaries are not fixed in time,[118] an understanding of their evolution was required to decide the issue. In line with this reasoning, the courts have usually accepted that committee members are "well-versed in local affairs and local factors".[119]

The second type of expertise that emerges in planning disputes is related to planning law and policy knowledge and professional planning

[109] This article focuses on types of knowledge and expertise in planning case law. For other understandings of knowledge in planning, see M. Lee, "Knowledge and Landscape in Wind Energy Planning" (2017) 37 Legal Studies 3.

[110] See *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, at [42] (Lindblom L.J.); *Oxton Farm v Harrogate BC* [2020] EWCA Civ 805, at [34] (Lewison L.J.); *R. (Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 152, [2018] P.T.S.R. 43, at [22] (Lindblom L.J.).

[111] *R. (on the application of Corbett) v Cornwall Council* [2021] EWHC (Admin) 1114, at [38], [45] (Jefford J.).

[112] *R. (on the application of Hewitt) v Oldham Metropolitan Borough Council* [2020] EWHC (Admin) 3405, at [195] (Knowles J.).

[113] *R. (Devonhurst Investments Ltd.) v Luton Borough Council* [2023] EWHC (Admin) 978, [2023] P.T.S.R. 1787, at [41] (Steyn J.).

[114] See *Corbett v Cornwall Council* [2021] EWHC (Admin) 1114; upheld, *Corbett v Cornwall Council* [2022] EWCA Civ 1069.

[115] *Corbett v Cornwall Council* [2021] EWHC (Admin) 1114, at [3] (Jefford J.).

[116] Ibid., at [41]–[45].

[117] Ibid., at [45].

[118] Ibid., at [44].

[119] *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, at [63] (Sir Geoffrey Vos C.).

knowledge. It has been emphasised that planning committees are assisted by planning officers, who are professional advisers who exercise their own advisory judgement with a view to helping the committee in making the planning decision.[120] In addition, the courts have said that local planning authorities have an understanding of the framework governing their decision-making, including a firm grasp of planning legislation and planning policy. Though the accuracy of this view has not been empirically examined, it has been expressed in cases involving criticisms levelled at planning officer reports. The courts have pointed out that officer reports are addressed to committee members "who can be expected to have substantial local knowledge and an understanding of planning principles and policies".[121] Equally, it has been held, the courts should recognise that committee members "have been trained in planning practice and law".[122] Thus an officer report does not necessarily have to rehearse "well-known principles of national and local planning policy".[123] Committee members are entitled to contribute "their own opinions and reasoning to the process" where "they may well debate the merits of a proposal" without being confined to the contents of officer reports.[124] Committee members normally act within their area of "specialist expertise".[125]

A third type of expertise involves the role of statutory consultees in the planning application process. According to The Town and Country Planning (Development Management Procedure) (England) Order 2015,[126] before a grant of planning permission a local authority must consult certain statutory bodies, as specified in Schedule 4 to the Order. This schedule includes a long list of situations where planning authorities must request the advice of statutory consultees, such as the National Park Authority, Historic England, or the Environment Agency. These administrative bodies offer additional specialist knowledge and expertise in their fields, helping planning authorities to make decisions based on up-to-date expert knowledge in a specific domain. The courts have held that "statutory consultees play an important part in ensuring that planning decision-making is informed, fair and effective".[127]

[120] *R. (on the application of Whitley Parish Council) v North Yorkshire County Council and another* [2023] EWCA Civ 92, [2023] J.P.L. 1081, at [35], [36] (Lindblom L.J.). Similarly, the courts have given attention to the formal academic training in a subject relevant to planning undertaken by "appeal planning officers" who assist planning inspectors in the determination of planning appeals: see *Secretary of State for Levelling Up, Housing and Communities v Smith* [2023] EWCA Civ 514, [2023] 2 P. & C.R. 11, at [20] (Lewis L.J.).

[121] *R. (on the application of Leckhampton Green Land Action Group Ltd.) v Tewkesbury BC* [2017] EWHC (Admin) 198, [2017] Env. L.R. 28, at [25] (Holgate J.); *R. v Mendip District Council* (2000) 80 P. & C.R. 500, at [81] (Q.B.) (Sullivan J.).

[122] *Leckhampton) v Tewkesbury BC* [2017] EWHC (Admin) 198, at [25] (Holgate J.).

[123] Ibid., at [51].

[124] Ibid.

[125] Ibid., at [25].

[126] SI 2015/595.

[127] *R. (on the application of Swainsthorpe Parish Council) v Norfolk County Council* [2021] EWHC (Admin) 1014, at [70] (Lang J.); see also *Shadwell Estates Ltd. v Breckland District Council* [2013] EWHC (Admin) 12, at [72] (Beatson J.).

Their function is particularly relevant in this area of decision-making because of the technical character of planning problems. The result is that "a decision-maker is required to give the views of statutory consultees great or considerable weight".[128]

Arguments of expertise are also found in cases involving the application of local and national policies by planning inspectors, who perform various functions including the consideration of appeals against planning decisions from local planning authorities. In *Hopkins Homes*, Lord Carnwath stressed that "the courts should respect the expertise of the specialist planning inspectors".[129] Further, he highlighted that inspectors work within an institutional structure, the Planning Inspectorate, staffed with specialist professionals who contribute with their expertise to the making of planning decisions. He maintained that, "[w]ith the support and guidance of the planning inspectorate", planning inspectors "have primary responsibility for resolving disputes between planning authorities, developers and others".[130] This emphasises that planning expertise, as Liz Fisher and Sid Shapiro would put it, "is a complex set of institutional knowledge practices".[131]

In sum, planning judgement is informed with various forms of specialist knowledge underpinning the expertise of decision-makers. These are expected to be used by planning officers, councillors, planning inspectors and the Secretary of State to arrive at a final planning decision. Likewise, the use of knowledge and expertise facilitates intelligent decision-making by enabling planning authorities to give proper consideration to development proposals which often involve complex planning problems.

C. The Evidentiary Basis of an Expert Judgement

Another important element of planning judgement is that it is supported by evidence. As Laws L.J. emphasised in *Grafton Group (UK) plc and another v Secretary of State for Transport*, "[t]here must be evidence to provide the factual materials upon which the planning decision-maker will form his conclusions".[132] Hence, he continued, "the familiar concept of planning judgment may be said to involve two stages: sufficiency of the evidence and conclusion on the merits".[133] The evidence relied upon by planning authorities is usually obtained from the materials submitted by applicants,[134] technical reports offered by

[128] *Swainsthorpe PC v Norfolk CC* [2021] EWHC (Admin) 1014, at [70] (Lang J.).
[129] *Hopkins Homes v Secretary* [2017] UKSC 37, at [25].
[130] Ibid.
[131] Fisher and Shapiro, *Administrative Competence*, 50.
[132] *Grafton Group (UK) plc and another v Secretary of State for Transport* [2016] EWCA Civ 561, [2017] 1 W.L.R. 373, at [30].
[133] Ibid.
[134] *R. (Hillingdon London Borough Council) v Secretary of State for Transport and another* [2020] EWCA Civ 1005, [2021] P.T.S.R. 113, at [10].

statutory bodies,[135] professional advice provided by consultants,[136] or expert opinions by planning officers.[137] In terms of content, the evidence that can be used by planning authorities varies considerably, ranging from archaeological assessments[138] to housing needs reports[139] and analysis of development proposals on human health[140] or air quality.[141]

The case of *Gladman Developments Ltd. v Secretary of State for Communities and Local Government and others* illustrates the basic role of evidence in an exercise of planning judgement.[142] In this case, the claimant challenged a decision made by a planning inspector determining an appeal, on the ground that the inspector had failed to deal lawfully with the likely effects of a housing development on air quality. The judge dismissed the challenge.[143] On appeal, the court examined carefully the evidence presented by the parties, which had included information produced by five expert witnesses and two academics. The court asserted that "[t]he salient features of the evidence were that local monitoring showed exceedances of the annual mean objective for NO2 [. . .], and that the proposed development would be likely to bring about a worsening of those exceedances".[144] It added that, in the inspector's view, "the proposed mitigation had not been shown to be effective by 'clear evidence'".[145] Further, the court concluded that the inspector "had to form his own judgment on these questions".[146] These statements not only show that an exercise of judgement must be based on existing evidence but also that the courts will assess how such evidence entered into the decision maker's reasoning process. In addition, the court emphasised that a decision maker is expected to consider real evidence before her "rather than evidence that might have been produced but was not".[147] The available evidence, accordingly, will determine the scope of a planning judgement.

[135] *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9, [2018] Env. L.R. 18, at [87] (Lindblom L.J.).
[136] See *Secretary of State v Wealden DC* [2017] EWCA Civ 39, [2018] Env. L.R. 5, at [11], [12] (Lindblom L.J.).
[137] *Lisle-Mainwaring v Carroll* [2017] EWCA Civ 1315, at [33] (Lindblom L.J.).
[138] *Hillingdon LBC v Secretary of State* [2020] EWCA Civ 1005, at [7], [26], [27].
[139] *CPRE Surrey v Waverley Borough Council; POW Campaign Ltd. v Waverley Borough Council and another* [2019] EWCA Civ 1826, [2020] J.P.L. 505, at [48], [49] (Lindblom L.J.); *Oadby and Wigston Borough Council v Secretary of State for Communities and another* [2016] EWCA Civ 1040, [2017] J.P.L. 358, at [11] (Lindblom L.J.).
[140] *Preston New Road Action Group v Secretary of State* [2018] EWCA Civ 9, at [92] (Lindblom L.J.).
[141] *Gladman Developments v Secretary of State* [2019] EWCA Civ 1543, at [20], [21] (Lindblom L.J.).
[142] Ibid.
[143] *Gladman Developments Ltd. v Secretary of State for Communities and Local Government and another* [2017] EWHC (Admin) 2768, [2018] P.T.S.R. 616.
[144] *Gladman Developments v Secretary of State* [2019] EWCA Civ 1543, at [38] (Lindblom L.J.).
[145] Ibid.
[146] Ibid., at [39].
[147] Ibid., at [40].

Another critical point concerning the evidential basis of planning decisions is that planning authorities are not entitled to ignore the evidence adduced in the planning application process. They must assess the expert advice and opinions provided by the parties, the public and statutory bodies, such that if these are not given proper consideration in favour or against the proposed development, the final decision may be questioned in court. This point was underscored by the Court of Appeal in *Secretary of State for Communities and Local Government v Wealden DC*.[148] The case concerned an inspector's decision to grant permission for a development of housing and its potential ecological effects on the Ashdown Forest Special Area of Conservation. The court noted that the inspector "said nothing" about the council's evidence and submissions regarding the effectiveness and consequences of heathland management.[149] The inspector, the court continued, "ought to have dealt with them explicitly".[150] In raising these points, the court was not demanding that the council's approach should have been necessarily followed. Whether the available evidence supports one or another view regarding the grant of permission is always a matter of judgement for the planning authority.[151] And, similarly, whether the existing evidence is sufficient to reach a judgement at all, one or another way, is also a matter for the decision maker.[152] What was required, the court said in *Wealden*, was "a reasoned conclusion" showing that the inspector "had got to grips with the council's evidence and explaining why he preferred that given on behalf of Knight Developments".[153] The court held that "[t]hat reasoned conclusion is lacking".[154]

In sum, the previous discussion indicates that planning authorities are bound to engage their specialist knowledge and expertise in a reasoning process which is expected to consider carefully existing evidence. Thus, the evidence offered by applicants, statutory consultees, or third parties indirectly shapes the making of a planning decision. Additionally, by demanding that decision-makers explain how and why existing evidence might support an exercise of planning judgement, the courts energise planning administration, fostering the conscientious use of their intellectual skills in the assessment of development proposals.

[148] [2017] EWCA Civ 39.
[149] Ibid., at [38] (Lindblom L.J.).
[150] Ibid.
[151] Ibid.
[152] *Jayes v Flintshire CC* [2018] EWCA Civ 1089, at [46] (Hickinbottom L.J.).
[153] *Secretary of State v Wealden DC* [2017] EWCA Civ 39, at [38] (Lindblom L.J.).
[154] Ibid.

D. Subjecting Planning Judgement to Planning and Administrative Law Standards

So far, I have showed that, whilst the legislative framework governing development control is relatively broad, planning authorities are subject to a *duty* to apply their professional judgement in light of the available evidence. Further, planning authorities are expected to adopt a particular path when exercising their expert judgement which is defined by additional legal requirements derived expressly or by implication from the TCPA 1990 and related planning legislation. Section 70 of the TCPA 1990 includes the provisions of the development plan, any local finance consideration and "any other material consideration". Equally, according to section 38 of the Planning and Compulsory Purchase Act 2004, planning decisions must be made in accordance with the local plan unless other "material considerations" indicate otherwise.[155] In this broad statutory context, the courts have specified how an exercise of judgement is expected to consider local and national planning policies, as well as material considerations at stake in development proposals.

In the first place, the existing law establishes a presumption in favour of the local plan,[156] which contains a set of statutory policies guiding land development at the local level. Local plans can be hundreds of pages long, including statements regarding land uses that the planning authority intends to encourage, and detailed development management policies involving a wide range of issues such as transport, housing, climate change and heritage. These policies structure the determination of planning applications considerably. This is so because the starting point in the decision-making process is the local plan and the extent to which a development proposal accords with it as a whole. Further, planning authorities must also consider national planning policy,[157] which also guides the exercise of planning judgement. For example, national policy sets outs in detail the steps to be taken by decision-makers to assess the effect of a planning application on the significance of a designated heritage asset.[158] Consequently, in many cases, both local and national policy will specify not only what policy objectives should be pursued but also how these should be delivered in concrete development proposals.[159]

[155] Town and Country Planning 1990, s. 70(2); Planning and Compulsory Purchase Act 2004, s. 38.

[156] *Chichester DC v Secretary* [2019] EWCA Civ 1640, at [34] (Lindblom L.J.); though this presumption will cease to exist once section 93 of the Levelling-up and Regeneration Act 2023 comes into force.

[157] *R. v Bolton Metropolitan Council* (1998) 76 P. & C.R. 548 (Q.B.).

[158] Ministry of Housing, Communities and Local Government, "National Planning Policy Framework" (2023), [205]–[214], available at https://assets.publishing.service.gov.uk/media/669a25e9a3c2a28abb50d2b4/NPPF_December_2023.pdf (last accessed 30 June 2024).

[159] On the relationship between local and national planning policies, see also M. Lee, "Slippery Scales in Planning for Housing" in Lee and Abbot (eds.), *Taking English Planning Law Scholarship Seriously*, 185–91.

In addition, the judges have stressed that the interpretation of local and national planning policies is a matter of law, which means that the courts will decide whether or not the interpretation adopted by the planning authority can be legally accepted.[160] To this end, the courts have articulated "general principles governing the interpretation of planning policy".[161] For example, it has been held that policy interpretation should not adopt "the same linguistic rigour" as interpretation of a statutory or contractual provision.[162] The courts' interpretation, in turn, will be "straightforward, without undue or elaborate exposition".[163] Likewise, once the meaning is ascertained, the courts will assess if the policies have been "properly understood".[164] Additionally, the importance of context is continuously emphasised. In a policy document, different statements may "pull in different directions"[165] and thus these must be "read as a whole",[166] in their context, including the wider legislative and policy context.[167] These are just a few examples of how the courts guide the interpretation of policies and subsequent exercise of planning judgement. All of this means that planning authorities are bound to consider both national and local policy statements as well as the legal principles governing the interpretation of those policies. This point further demonstrates how the legal framework in this area, in practice, is not as broad as it first appears.

In the second place, the courts have held that, prior to an exercise of expert judgement, planning authorities must employ their expertise to establish specific considerations or factors which are material to a particular development proposal. Here, the judges have recurrently emphasised that whether something is a material consideration is a matter of law,[168] that is, a question to be determined ultimately by the courts. Even though the range of permissible considerations is relatively broad, there are legal limits, for material considerations must be connected to the use and development of land.[169] Only after all planning policies and material considerations related to the application at hand

[160] *Tesco Stores Ltd. v Dundee City Council (Asda Stores Ltd. and another intervening)* [2012] UKSC 13, [2012] P.T.S.R. 983. Explaining the role of the courts in the interpretation of local and national planning policy, see S. Ruiz-Tagle, "*Samuel Smith* and Judicial Review of Policy Interpretation: A Middle Way in the Law and Policy Divide" (2020) 32 Journal of Environmental Law 577; A. Mills, "The Interpretation of Planning Policy: The Role of the Court" (2022) 34 Journal of Environmental Law 419.

[161] *Keep Bourne End Green v Buckinghamshire Council (formerly Wycombe District Council) and another* [2020] EWHC (Admin) 1984, [2021] J.P.L. 181, at [77] (Holgate J.).

[162] *Monkhill Ltd. v Secretary of State for Housing, Communities and Local Government and another* [2021] EWCA Civ 74, [2021] P.T.S.R. 1432, at [26] (Sir Keith Lindblom SPT).

[163] *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, at [41] (Lindblom L.J.).

[164] *Gladman Developments v Secretary of State* [2019] EWCA Civ 1543, at [46] (Lindblom L.J.).

[165] *R. (Cooper Estates Strategic Land Ltd.) v Wiltshire Council* [2019] EWCA Civ 840, [2019] P.T.S.R. 1980, at [29] (Lewison L.J.).

[166] *Preston New Road Action Group v Secretary of State* [2018] EWCA Civ 9, at [28] (Lindblom L.J.).

[167] *Holder v Gedling BC* [2018] EWCA Civ 214, at [20] (Lord Burnett C.J.).

[168] *Tesco Stores v Secretary of State* [1995] 1 W.L.R. 759, 780 (H.L.) (Lord Hoffmann).

[169] *Stringer v Minister of Housing and Local Government and Another* [1970] 1 W.L.R. 1281 (Q.B.).

have been identified can the planning authority exercise their expert planning judgement and proceed to "the striking of the planning balance"[170] concluding with a planning decision. In exercising this function, a decision maker is expected to use their specialist knowledge and judgement to attach weight to material considerations involved in a development proposal. This is a pivotal administrative function, though in exceptional cases the weight to be attached to certain factors is mandated by legislation.[171]

Finally, planning administration, as is well known, is not only subject to the requirements set out by the planning Acts. Planning authorities are also expected to follow general administrative law requirements, which are tailored to planning decisions. For example, the courts repeatedly remind decision-makers that a planning judgement must not lapse into *Wednesbury* unreasonableness.[172] This constitutes the main legal standard against which the substance of a planning judgement will be legally assessed. In addition, planning authorities are expected to respect legitimate expectations when these arise,[173] to follow fair procedures,[174] to consider the principle of consistency,[175] and to offer reasons for their decisions when these are legally required.[176]

To summarise, in this section, I have delved into the English planning system and related case law because it constitutes a traditional area of public decision-making where Parliament has bestowed relatively wide statutory powers upon decision-makers. Based on the relatively vague nature of the statutory planning framework, this field has often been characterised as extremely discretionary, as explained in Section III. And, influenced by this interpretation, development control is commonly viewed as "a process beset by risk and uncertainty".[177] Nonetheless, such a depiction of planning decision-making is to some extent incomplete because it overlooks the myriad of legal standards guiding decision-makers in this field, which considerably reduce the vagueness of the legislative framework. In this multilayered legal and policy context, it

[170] *Connors v Secretary* [2017] EWCA Civ 1850, at [65] (Lindblom L.J.).
[171] Planning (Listed Buildings and Conservation Areas) Act 1990, s. 66.
[172] *Associated Provincial Picture Houses v Wednesbury* [1948] 1 K.B. 223; *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408, [2004] 2 P. & C.R. 14, at [51] (Dyson L.J.).
[173] *R. (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137, [2019] 1 W.L.R. 929, at [41] (Coulson L.J.).
[174] *Hopkins Developments Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470, [2014] P.T.S.R. 1145, at [50] (Jackson L.J.); *Secretary of State for Communities and Local Government v Engbers* [2016] EWCA Civ 1183, [2017] J.P.L. 489, at [5], [6] (Lewison L.J.).
[175] *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P. & C.R. 137 (C.A.). In some cases, it can be unreasonable for the Secretary of State not to take into account a previous appeal decision: see *DLA Delivery Ltd. v Baroness Cumberlege of Newick and another* [2018] EWCA Civ 1305, [2018] P.T.S.R. 2063, at [34] (Lindblom L.J.).
[176] *R. (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 W.L.R. 108.
[177] Ministry of Housing, Communities and Local Government, *Planning for the Future* (White Paper, August 2020), [1.3], available at https://assets.publishing.service.gov.uk/media/601bce418fa8f53fc149bc7d/MHCLG-Planning-Consultation.pdf (last accessed 30 June 2024).

seems slightly odd to say that planning authorities enjoy a wide discretion to make planning decisions when, in practice, they are subject to multiple legal and policy obligations guiding their expert judgement. As Rubin has argued more generally, the "cumulative effect" of legal and policy standards like these is to remove the idea of freedom to make choices that the term "discretion" often entails.[178]

In addition, in this section, I have also explained the normative argument advanced in this article, namely that the legal standards examined earlier, from a wider perspective, encourage what Dewey called intelligent judgement. They guide a decision-maker's reasoning process, ensuring that development proposals will be assessed with an open mind, flexibly, conscientiously and on the basis of the material evidence and expert considerations available to them.

V. Expertise and Good Public Administration

In the preceding section, I have articulated some of the main legal components of planning judgement. I also explained that expertise has featured in planning case law to a significant extent. In this and the following section, I intend to demonstrate that these debates are relevant not only to planning law but also, more generally, to administrative law. As Bell has remarked, "administrative law scholars have a lot to gain from becoming lingual in planning law".[179] The judicial developments in the law relating to planning judgement, and the various types of specialist knowledge and expertise sustaining it, can be seen as an illustration of this point. Before proceeding, I should note that the argument here is not that expertise has not featured in English administrative or public law scholarship. As discussed in Section IV, commentators have spent considerable time engaging with the legal role of expertise in these fields. The issue is that in most accounts expertise is often seen in monolithic terms as explicit knowledge possessed by public officials in specific domains, which might justify judicial deference towards administrators.[180] Take, for example, King's typology of expertise, which was developed in order to "explain why judicial deference to expertise is variable in accordance with the type of decision-maker under review".[181] A similar stance is followed by Jowell, who has used the notion of

[178] E.L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton and Oxford 2005), 87.
[179] Bell, "Embracing the Unwanted Guests", 230.
[180] See e.g. King, *Judging Social Rights*, 21–29; Endicott, *Administrative Law*, 245; Perry and Ahmed, "Expertise, Deference and Giving Reasons"; A. Perry, "*Wednesbury* Unreasonableness" [2023] C.L.J. 483, 497. Presenting a substantive view of expertise, see E. Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford 2007), 20.
[181] King, *Judging Social Rights*, 211.

expertise to determine in what cases it is appropriate for the courts to acknowledge their own limitations and recognise that expert officials may be better placed to make a decision.[182] Both commentators concentrate on how the expertise of public decision-makers in its various forms influences the approach adopted by the courts when reviewing government decisions. There is, of course, nothing wrong in adopting that perspective since it furthers understanding of current judicial practices. The argument here, however, is that approaching this issue only from that perspective runs the risk of losing sight of the bigger picture. Importantly, it leaves unnoticed the enabling role that different forms of knowledge and expertise play in public decision-making, particularly in the delivery of good public administration. Two strands of reasoning underlying recent planning case law, which I examined in Section IV, illustrate this argument.

First, planning case law foregrounds that the high-level expertise of public administration depends largely on the acquisition and use of "tacit knowledge".[183] That is, skills or specialist knowledge that can be learned only through experience by using the human capacity to absorb specific social knowledge and rules from the surrounding social or physical environment.[184] This type of knowledge is "the deep understanding" that can be obtained through immersion in groups of experts,[185] which "comes in the form of rules that cannot be explicated and are known only through their expression in action".[186] It is contrasted with "explicit knowledge", which is related to "formal rules and facts gained through reading and instruction" in a particular domain.[187]

The centrality of tacit knowledge to public decision-making can be observed in cases like *Corbett*, which I discussed above.[188] Here, the court maintained that defining the precise location of settlement boundaries presupposes an understanding of their evolution over time. It necessitates the application of local knowledge, a high level of familiarity with the local area which can be attained principally by continuous exposure to its physical surroundings. This idea is often stressed by the courts in the planning context. Planning decisions are made by local councillors who are "well-versed in local affairs and local factors".[189] Similarly, in *Newsmith Stainless Ltd. v Secretary of State for the Environment, Transport and the Regions and another*, it was

[182] J. Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] P.L. 592.
[183] H. Collins, *Tacit and Explicit Knowledge* (Chicago 2010), ch. 6; Collins and Evans, *Rethinking Expertise*, 14.
[184] Collins, *Tacit and Explicit Knowledge*, 124.
[185] Collins and Evans, *Rethinking Expertise*, 6.
[186] Ibid., at 28.
[187] Ibid., at 19, 29.
[188] *Corbett v Cornwall Council* [2021] EWHC (Admin) 1114.
[189] *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, at [63] (Sir Geoffrey Vos C.).

underscored that planning inspectors make their evaluative judgements, taking into account not only the information submitted by interested parties but also considering "the impressions received on the site inspection", this latter point being of "crucial importance".[190] Again, this shows that very often the expertise needed to address a practical problem hinges on tacit knowledge obtained through experience, for example by inspecting a site and its surrounding environment in *Newsmith Stainless*.

Secondly, in *Hopkins Homes*, the Supreme Court held that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".[191] In this statement, the court explicitly referred to expertise as an attribute which is possessed by individual planning inspectors, which is in line with the mainstream view of expertise in legal scholarship previously analysed. But that was not the end of the matter. The court went on to assert that, "[w]ith the support and guidance of the Planning Inspectorate", inspectors have primary responsibility for resolving planning disputes.[192] Here, the Supreme Court not only recognised the skills and specialist knowledge enjoyed by individual planning inspectors but also the institutional expertise of the Planning Inspectorate. This case stresses the most characteristic, and perhaps unique, type of expertise found in public administration, that is, decision-making expertise. This is defined as "expertise in reconciling and accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands",[193] which is different from the expertise possessed by individual officials.

The discussion on tacit knowledge sheds light on the importance of human intellect and practical experience in the acquisition of the expertise required for the performance of public functions and the proper discharge of legal duties. Similarly, the idea of decision-making expertise also clarifies that expertise consists of more than explicit technical knowledge possessed by individual officials. As *Hopkins Homes* renders visible, it involves institutional capacities, resources and interactions between professionals trained in similar and/or different disciplines within an institution. In addition, decision-making expertise is also built on practical experience, since it hinges significantly on "knowing how" rather than "knowing that".[194] In essence, grasping the legal role that various forms of specialist knowledge and expertise play in public administration, what James Landis called "the need for expertness",[195] is

[190] *Newsmith Stainless Ltd. v Secretary of State for the Environment, Transport and the Regions and another* [2001] EWHC (Admin) 74, [2017] P.T.S.R. 1126, at [7] (Sullivan J.).
[191] *Hopkins Homes v Secretary of State* [2017] UKSC 37, at [25] (Lord Carnwath).
[192] Ibid.
[193] Shapiro, "Failure to Understand Expertise", 1099.
[194] Ibid., at 1114.
[195] J.M. Landis, *The Administrative Process* (New Haven, CT 1938), 24.

important not only because it helps us understand the way the courts review the lawfulness of government action. It also matters because expert decision-making is more likely to facilitate good public administration. As Sir John Donaldson M.R. explained in *R. v Monopolies and Mergers Commission*, good public administration requires "proper consideration" of the legitimate public and private interests involved in public government.[196] It is difficult to see how "proper consideration" can be given to a particular problem involving complex issues when expertise in the relevant subject, in the sense outlined above, is lacking or ignored.

The wider significance of such expertise can be appreciated when considering the potential impact of recent transformations in administrative law, for example those concerning the use of automated decision-making in the public sector. Automation entails the total or partial removal of human intellect and expertise from administrative decision-making.[197] Consequently, it involves the total or partial elimination of the tacit knowledge and practical experience needed to make public decisions in the areas where it is implemented. When the adoption of a decision requires tacit knowledge acquired through human experience, as in the planning field, the use of automation may have a detrimental effect on good administration. This is just one example of how planning law issues, as Bell has perceptively argued, can inform and anticipate wider administrative law debates.

VI. Administrative Discretion as a Sedimented Concept

I shall now return to the larger question of administrative discretion in public administration. The above analysis of planning decision-making emphasises that, whilst the planning code has broadly defined how planning powers should be exercised, the courts have crafted various principles and interpretations steering decision-making. Particularly, the courts have established that planning authorities are under a duty to exercise planning judgement. In legal terms, planning judgement carries a set of legal expectations about what the reasoning process involved in planning decision-taking should look like. Specifically, when evaluating development proposals, planning authorities are required to apply their professional knowledge and expertise intelligently, through a reasoning process incorporating all the planning and administrative law requirements discussed above. A planning judgement that does not consider all those legal obligations could not be regarded as a legally valid planning

[196] *R. v Monopolies and Mergers Commission* [1986] 1 W.L.R. 763, 774 (C.A.).

[197] See A. Le Sueur, "Robot Government: Automated Decision-Making and Its Implications for Parliament" in A. Horne and A. Le Sueur (eds.), *Parliament: Legislation and Accountability* (Oxford 2016), 183–202; J. Cobbe, "Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making" (2019) 39 Legal Studies 636.

judgement. Accordingly, the concept of judgement sits uncomfortably with the deep-seated idea of wide discretion that is commonly relied on by commentators and judges when characterising the planning field.[198]

The ideas that I have been developing are hardly surprising. Fisher and Shapiro have recently contended that administrative lawyers commonly describe exercises of judgement as "discretion" and use this label to suggest that public bodies have freedom to make choices.[199] These authors rightly consider that the portrayal of expert public decision-making in that way constitutes "a woefully inadequate description".[200] My case-law analysis corroborates their views. The question thus arises as to why there seems to be a mismatch between most accounts of decision-making under broad grants of authority and actual administrative practice. One way of explaining this mismatch has been offered by Rubin. For him, the term "discretion" "is simply too coagulated to capture the complex realities of modern government".[201] Rubin has argued that the principal concepts used in current political and legal theory, including terms such as discretion (and others like democracy, branches of government and rights) constitute metaphors rather than empirical, observable features of the world.[202] For Rubin, commentators have been employing these terms for several centuries in ways that "make these concepts seem like naturally occurring categories".[203] And, given their ubiquitous usage, those concepts have become "reified metaphors",[204] "historically sedimented" categories.[205] Rubin's analysis is particularly fitting in the present context. Administrative discretion has been described in terms of freedom of choice for so many decades that those words have become a mantra for legal scholars. The same argument can be advanced in the planning context, which is often depicted as extremely discretionary when, in fact, public officials are subject to a legal duty to apply their expert reasoning and judgement under a myriad of legal and policy standards.

The notion of expert judgement better coheres with the reasoning process carried out by public officials in practice and reflects more fully the legal demands on decision-making when wide powers are conferred. It represents a more robust understanding of administrative decision-making, as it better captures two main ideas that the view of discretion as mere choice overlooks. First, the extent to which administrative

[198] See e.g. *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC (Admin) 792, [2013] J.P.L. 1383, at [68] (Hickinbottom J.); see the academic commentary in Section II above.
[199] Fisher and Shapiro, *Administrative Competence*, 44.
[200] Ibid.
[201] Rubin, *Beyond Camelot*, 86.
[202] Ibid., at 15.
[203] Ibid., at 16.
[204] Ibid.
[205] Ibid., at 17.

decision-making involves substantive reasoning, which is shaped by multiple legal requirements entering the reasoning process whereby administrative decisions are made. And secondly, it better captures how public administration relies on various types of expertise which underpin the evaluative reasoning leading to the making of such decisions.[206] To put it more graphically, in its celebrated metaphor, Dworkin argued that discretion was "like the hole in a doughnut", for it exists only "as an area left open by a surrounding belt of restriction".[207] Judgement, as a reasoning process, fills in the hole in the doughnut with expertise and intelligent thinking which are demanded by the law.

VII. Final Remarks

Administrative discretion is one of the most prominent topics in administrative law. Unsurprisingly, it has captivated a part of the scholarly and judicial imagination in this field. In this vein, this study suggests that current interpretations of this legal category have overemphasised the degree to which the exercise of broad grants of legal authority entails freedom to make choices. I relied on the planning field to demonstrate that, in practice, public decision-making in loosely defined statutory contexts requires conscientious reasoning and careful judgement, which are underpinned by specialist knowledge, skills and expertise. In turn, I showed that this administrative reasoning is not carried out in a legal vacuum since the entire exercise is shaped by legal and policy standards.

The shifting of attention from freedom and choice to reasoning and judgement makes visible how administrative decision-making is concerned with the way public officials think about concrete public problems and solutions, how they reason and reflect to arrive at a practical decision, and what factors enter their thinking process. More importantly, this article illuminates the degree to which this is the result of legal commands. While my case-law analysis confirms these ideas in the planning field, the importance of careful administrative reasoning and judgement is not exclusive to planning. When one considers the main legal standard used by the courts to assess the substance of administrative decisions both in the planning context and in other areas of public administration, that is, *Wednesbury* review, the fundamentality of diligent and thoughtful reasoning becomes evident.

In *R. (Law Society) v Lord Chancellor*, it was discussed how *Wednesbury* review is not only concerned with whether the decision is outside the range of reasonable decisions available to public authorities. The court noted that "[t]he second aspect of irrationality/unreasonableness is concerned with the

[206] See Shapiro, "Failure to Understand Expertise".
[207] Dworkin, *Taking Rights Seriously*, 48.

process by which the decision was reached".[208] And, by "process", what was meant was reasoning process. The court stated that "[a] decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error".[209] All these situations are examples of flawed administrative reasoning. Indeed, the Supreme Court has recently stressed the legal significance of cogent administrative reasoning in *R. (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others*, where *R. (Law Society) v Lord Chancellor* was cited with approval.[210] In other words, what really matters is how the process of administrative reasoning and judgement was conducted in a particular case. Hence, as Lord Carnwath has commented extrajudicially, "[t]he hallmark of a sound administrative decision" is "informed judgment".[211]

The renewed focus on reasoning and judgement also accentuates how, when wide powers have been granted to administrators, the law requires the use of public authorities' intellectual abilities and expertise and the adoption of intelligent ways of thinking about public problems.[212] A similar idea underpins other areas of administrative law. For example, in *R. v North and East Devon Health Authority, ex parte Coughlan*, Lord Woolf M.R. expressed that a consultation must meet basic legal requirements in order to enable the consultees "to give intelligent consideration and an intelligent response".[213] In turn, the responses of a consultation "must be conscientiously taken into account when the ultimate decision is taken".[214] The need for an intelligent and conscientious approach in consultation cases was endorsed by the Supreme Court in *R. (Moseley) v Haringey London Borough Council*, which cited with approval Lord Woolf M.R.'s reasoning.[215] Another example is related to the *Tameside* duty or duty of enquiry established in *Tameside*, which requires decision-makers to take reasonable steps to

[208] *R. (Law Society) v Lord Chancellor* [2018] EWHC (Admin) 2094, [2019] 1 W.L.R. 1649, at [98] (Carr J.); see also *R. (on the application of Law Society of England and Wales) v Lord Chancellor* [2024] EWHC (Admin) 155, at [226], [227] (Singh L.J. and Jay J.).

[209] Ibid.

[210] *R. (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others* [2024] UKSC 20, at [56] (Lord Leggatt).

[211] R. Carnwath, "From Judicial Outrage to Sliding Scales – Where Next for Wednesbury?" (2013), 4, available at https://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf (last accessed 1 March 2024).

[212] On the link between broad standards and intelligence, see also J. Waldron, *Thoughtfulness and the Rule of Law* (Cambridge, MA and London 2024), ch. 1.

[213] *R. v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213, at [108].

[214] Ibid.

[215] *R. (Moseley) v Haringey London Borough Council; R. (Stirling) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 W.L.R. 3947, at [25] (Lord Wilson).

acquaint themselves with the relevant material.[216] This duty, Lord Carnwath held in *R. (CPRE Kent) v Dover District Council*, includes the need to allow the time reasonably necessary to acquire the relevant information and also "to understand and take it properly into account".[217] The requirements on consultations and the *Tameside* duty can be viewed as legal standards which seek to ensure that decision-makers use their reasoning capacity to address intelligently the issues at stake in a given case.

[216] *Secretary v Tameside MBC* [1977] A.C. 1014, 1065B (H.L.) (Lord Diplock).
[217] *CPRE Kent v Dover DC* [2017] UKSC 79, at [62], [63].