

**IN THE MATTER OF THE SOUTH DOWNS NATIONAL PARK  
AND IN THE MATTER OF PARAGRAPH 116 OF THE NPPF**

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**OPINION**

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**INTRODUCTION**

1. At paragraph 62 of his judgment in *Wealden DC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 39, Lindblom LJ held that paragraph 116 of the NPPF was a policy for development control. In light of that observation, I am asked for my opinion on whether the major development test in paragraph 116 is relevant at the site allocations stage of development of a Local Plan or whether it is only relevant to development control.
2. The National Park Authority has previously been advised on this point by James Maurici QC, in an advice dated 3 October 2014. Mr Maurici QC advised as follows:

*“It seems to me that para.116 would have to be considered in this context. Para.14 of the NPPF says that Local Plans should seek to “meet the development needs of their area” and to “meet objectively assessed needs” unless “specific policies in this Framework indicate development should be restricted”. Footnote 9 then refers to a number of policies including those on AONBs and National Parks. That must include para.116 which provides the relevant restriction on major development in such areas. That seems to me to mean that the matters in the bullet points in para.116 would have to be addressed in the plan making process. It seems to me likely also that a test of exceptionality needs to be applied. Such tests exist elsewhere in the NPPF in plan-making terms, see e.g. para.83 which is concerned with amending Green Belt boundaries and which was considered in *Gallagher Homes Limited v Solihull Metropolitan Borough Council* [2014] EWHC 1283 (Admin) at para.125. *Hickinbottom J* there went on to say that “each case is fact-sensitive and the question of whether circumstances are exceptional for these purposes requires an exercise of planning judgment” albeit that “what is capable of amounting to exceptional circumstances is a matter of law, and a plan-maker may err in law if he fails to adopt a lawful approach to exceptional circumstances.*

*Of course other parts of the NPPF would also be relevant, e.g. the first bullet in para.157”*

3. I agree with that advice and I do not consider that the judgment of Lindblom LJ requires that advice to be reconsidered. Mr Maurici QC's opinion explains why paragraph 116 is relevant at the site allocations stage, notwithstanding the fact that it is a development control policy: paragraph 14 of the NPPF and footnote 9 requires it. Lindblom LJ's judgment does not disturb that reasoning.
4. I also note, for instance, that the June 2016 Inspector's Report on the Examination into the Tunbridge Wells Site Allocations Local Plan considered it appropriate to apply the paragraph 116 test to allocations that arguably amounted to major development: see paragraph 75.
5. In my opinion, it would arguably amount to an error of law to fail to consider paragraph 116 at the site allocations stage of plan making for the National Park. The consequence of doing so would be to risk allocating land for major development that was undeliverable because it was incapable of meeting the major development test in the NPPF.
6. Unless there is anything further I can clarify or address, and on account of the fact that my advice coheres with that of Mr Maurici QC, I do not consider that it is necessary to say anything further. However, I am happy to provide further advice if the National Park Authority wants further reassurance or if there is anything else arising that I can assist with.

**10 October 2017**

**TOBY FISHER**  
**Landmark Chambers**