TO WHAT EXTENT DOES PLANNING LAW LISTEN TO COMMUNITIES AFFECTED BY LARGE-SCALE INNER-CITY REDEVELOPMENT PROJECTS?

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ABSTRACT

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This thesis uses case study methodology to analyse how the planning system listens to local communities affected by large-scale inner-city redevelopment projects. It analyses both the scope of the participation mechanisms, and the extent to which the law and policy shaping decision-making enables the planning committee to listen to the communities. This analysis shows that an absence of law and policy on developer consultation enables developers to shape their consultation to their needs. Planning actors are unable to recognise this whilst the community is left feeling the consultation is top down. Moreover, the consultation by the local planning authority is shown to be inaccessible and restrict the scope of community contributions by channelling their inputs into pre-defined support and object binaries. It is also identified that planning policies' framing of affordable housing disinhibits the planning committee from listening to the local community on this issue. On the one hand, the extensive numerical framing of affordable housing minimises scope for debate. At the same time, gaps in planning policy on viability assessments have enabled developers to set key metrics within these assessments themselves in ways which restrict planning committees' scope to listen to local communities. Overall, two key reflections emerge from this research that are of broader relevance to legal planning scholars. First, unless the complexity of the planning system is seriously confronted, the planning system will remain opaque to many lay users. Planning scholars have a role in sifting this complexity and identifying avenues for simplification. Second, to understand the planning system, legal scholars must invest time unpicking the role of different characters within the planning system. Most notably, planning officers play a significant role in planning decisions and the implementation of policy but are often overlooked in scholarship.

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INTRODUCTION

In the shadows of Canary Wharf, you will find brightly coloured six-foot billboards. The eye-catching yellow, pink, orange and blue abstract shapes on the billboards sit between images of smiling faces and shiny shops. This rosy image of a future hides a demolition site. From the street you can just about see the piles of concrete and brick that sit behind. Next to the billboards is an empty, grey market square surrounded by shop fronts and old housing covered with graffiti. At the edge of the market square stands the old festival tower, now abandoned. The juxtaposition between the bright colours of the billboards and the faded old market is noticeable, as is the new glass housing block just two streets over.

This small corner of London is the heart of this thesis: it is the case study which underpins the rest. The aim of this research is to explore the extent to which planning law listens to the voices of the local community affected by a large-scale inner-city redevelopment. It does this by analysing in detail the process by which the redevelopment project at Chrisp Street was granted planning permission.

This introduction discusses the following matters. First, the decision to use case study methodology, and why Chrisp Street was chosen as the case study. Second, some background to Chrisp Street and the planning decision. Third, a summary of the project's place in the existing literature and what it aims to contribute. Fourth, a brief introduction to planning law and the nature of planning law scholarship. Fifth, the structure of the rest of the thesis. Finally, some preliminary caveats are made.

Methodology: Why a case study?

Discussion of methodology does not always feature in legal scholarship.[1] However, reflecting upon and explaining one's chosen methodology is necessary for the creation of rigorous scholarship.[2] This is especially true in qualitative empirical methodology which is "interested in credibility, trustworthiness, authenticity and dependability."[3] This section thus explains and justifies the methodological choices made in this research project.

Planning is a difficult area of law to study using doctrinal methods which focus on analysing statutes and case law alone. There are several reasons for this. First, there are many moving parts to the planning system, and it can be difficult to truly grasp how they all fit together by reading the relevant statues and policies. For instance, in relation to consultation, although there are legal and policy requirements that the local planning authority ('LPA') consult the local community, it is difficult to understand how effective these mechanisms are at capturing community voices and sentiment without studying how a consultation operates *in practice*. Second, much of how the planning system operates is dependent upon the development project to which it is being applied. The peculiarities of the site, project, and the communities in which it is located will heavily influence what aspects of the planning system are engaged and how they operate.

Consequently, it is helpful to study planning law *in situ*. Case study methodology is one way of doing this. It is a way of investigating "a contemporary phenomenon within its real-life

[1] See, Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213; Steven Vaughan, 'We Need To Talk About Method: A Call for More and Better Empirical Environmental Law Scholarship' (forthcoming in) Journal of Environmental Law.

[2] David Feldman, 'The Nature of Legal Scholarship' (1989) 52 Modern Law Review 498, 503.

[3] Vaughan (n 1), p. 3.

context and address[ing] a situation in which the boundaries between the phenomenon and context are not clearly evident."[4] Case study research involves a detailed analysis of the phenomenon, whether that be through observation, interviews or, as chosen for this project document analysis, in an attempt to obtain a full understanding of what is happening.[5] A decision was taken to not undertake interviews for this project, but rather to conduct a document review of the publicly available information. Local planning decision-making is largely a paper-based exercise. This means the research is conducted from a perspective which is in a comparable position to the relevant planning actors when they were considering the project.

Of course, there are potential drawbacks of adopting case study methodology. One such potential limitation is the difficulty in drawing generalisations, especially when using a limited sample size. However, as Helen Simons highlights the particularisation of case study methodology and the richness with which the researcher engages with the singular case is also one of the greatest strengths of case study methodology.[6] It can enable the scholar to illuminate aspects about law and policy that are not visible when deploying doctrinal analysis or other quantitative methods. In particular, the granular analysis of a singular case study can enable a researcher to unravel some of the complexity associated with how planning law and policy interacts with society that is not possible with other methods.

Another potential drawback of case study methodology is that it does not produce objectively verified results and that the analysis is dependent upon the researcher's subjective judgment. However, it should be acknowledged that the aims of case study methodology are

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4 Robert Yin, *Case study research : design and methods* (Fifth edn, Sage 2013), p. 14.

5 Steven Vaughan and Brad Jessup, 'Backstreet's back alright: London's LGBT+ nightlife spaces and a queering of planning law and planning practices'' in Maria Lee and Carolyn Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022), p. 37.

6 Helen Simons, 'Case Study Research: In-Depth Understanding in Context' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (2nd edn, Oxford University Press 2020), p. 695-696.

not necessarily that the research can be repeated, but to understand contextualised knowledge.[7] On this view, there is no objective knowledge, rather it is all "dispersed, contingent and constructed"[8] and the researcher is merely a reflective part of this process. When seen in this light, the concerns of objectivity are less significant.

Methodology: Why this case study?

The case study chosen is a large redevelopment project in the London Borough of Tower Hamlets. This development project has been mainly pursued by Poplar Harca, a social housing provider, together with the development company, Telford Homes. Poplar Harca was granted planning permission to demolish the existing Chrisp Street town centre and build 19 new buildings, ranging from 3 to 25 storeys in 2019. The new development, which is still being constructed, will include 643 residential units, including the re-provision of 124 affordable homes. The project will also provide improvements to the market structure that exists and reconfigure the existing shops.[9]

There are four main reasons for choosing this case study. First, the size of the project. The scale of the proposals at Chrisp Street render it a 'comprehensive redevelopment'[10] project which means that it entails the complete demolition and rebuild of an existing area. Such projects have become increasingly common in London and elsewhere, and are often

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7 Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 Utrecht Law Review, p. 103.

8 Chiara Armeni, 'Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 Journal of Environmental Law 415, 419.

9 Tower Hamlets Borough Council, 'Chrisp Street Planning application' <https://development.towerhamlets.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=DCAPR_118254&fbclid=IwAR3rZ5SPluX7oFyh4nNDNkl60h6vX8aWtp0B94Xd8cMPeBycj_UMHdayKW8> accessed 22 February 2024.

10 See the description in the planning application: ibid.

controversial as they result in the displacement of the existing population and tend to have transformative impacts on the character of the local area.[11] Considering this, unpicking how the law creates spaces for the voices of the local community to be heard is important.

The second reason that Chrisp Street was chosen is that the process of securing planning permission did not involve the use of some of the less common planning mechanisms. Thus, neither the Mayor of London nor Secretary of State 'called in' the planning application.[12] Had this occurred, it would have changed some aspects of the legal framework relating to how the planning decision was taken.[13] Whilst this framework is interesting to study, there is also something to be said for focusing on unpicking how community voices are heard in the 'ordinary' planning process.

Third, there has been a relatively large amount of local news coverage of the community reaction to the redevelopment project at Chrisp Street. In any case study, it is important that there is sufficient information available to enable a thorough analysis of the case study chosen. For this research project, which is aiming to understand how different community voices are captured in the planning process, it was especially important that there was adequate information to understand the variety of community responses to the redevelopment project.

Fourth, the development project itself has received a mixed response from the community. On the one hand, there is recognition that the area is in need of investment and

[11] Paul Watt, *Estate Regeneration and its Discontents: Public Housing, Place and Inequality in London* (Bristol University Press 2021); Antonia Layard, 'Property and planning law in England: facilitating and countering gentrification' in Loretta Lees and Martin Phillips (eds), *Handbook of Gentrification Studies* (Edward Elgar Publishing 2018), p. 450.

[12] See, The Town and Country Planning (Mayor of London) Order 2008, Article 7; Town and Country Planning Act 1990, s 77.

[13] Where an application is 'called in', the Secretary of State or Mayor of London makes the determination instead of the LPA. Where an application is called in, there will be a public inquiry undertaken by a planning inspector who then makes a recommendation to the Secretary of State or Mayor.

regeneration.[14] On the other hand, the local press has also reported opposition from both traders and residents.[15] Such a complex factual matrix is typical for such a large scale redevelopment project that is likely to impact peoples' lives significantly.[16] In this way, the conclusions drawn, although tailored to the project, will nevertheless be valuable for understanding how planning law creates room for some and excludes others more generally.

Background to Chrisp Street

The proposals at Chrisp Street aim to completely redevelop the existing town centre area. The project is a mixed-use development project, meaning it is providing both new residential buildings and redeveloping the existing commercial buildings.

The development site includes a local market as well as 212 residential units. The market square, including the famous Festival of Britain building, was designed by Frederick Gibberd in 1951, and in 2018 was given listed status.[17] The market area was last refurbished in

[14] Officer's Report, *Chrisp Street Market* (2018), pp. 10.15.

[15] See, Naomi Ackerman and Daniel O'Mahony, ''Gentrification' fear puts plan for Chrisp Street Market revamp on hold' (2018) <https://www.standard.co.uk/news/london/gentrification-fear-puts-plan-for-market-square-revamp-on-hold-a3769906.html> accessed 12 September 2023; Oli Mould, 'Chrisp Street Market shows that London is finally fighting back against gentrification' (2018) <https://citymonitor.ai/government/chrisp-street-market-shows-london-finally-fighting-back-against-gentrification-3733> accessed 12 September 2023; Ian Mansfield, 'Chrisp Street market set for controversial redevelopment' (2021) <https://www.ianvisits.co.uk/articles/chrisp-street-market-set-for-controversial-redevelopment-41323/> accessed 12 September 2023; Chrisp Street Market Regeneration 2018 - Market Traders' Forum, 'Chrisp Street Market Regeneration 2018 - Market Traders' Forum' (7 June 2018) <https://www.facebook.com/profile.php?id=100066932658262> accessed 12 September 2023.

[16] Loretta Lees and Mara Ferreri, 'Resisting gentrification on its final frontiers: Learning from the Heygate Estate in London (1974–2013)' (2016) 57 Cities 14.

[17] Planning (Listed Buildings and Conservation Areas) Act 1990.

the 1990s when the London Docklands Development Corporation invested £1.3 million in its rejuvenation.

The redevelopment project is being pursued by Poplar Harca, a housing and regeneration community association that operates in East London, and Telford Homes, a development company.[18] Over the late 1990s and early 2000s Tower Hamlets slowly transferred a large number of its social housing stock to Poplar Harca. The association currently owns and manages approximately 9000 homes in the Tower Hamlets area.[19]

Poplar Harca has been intending to redevelop Chrisp Street for over a decade. In 2009, a Tower Hamlets Cabinet meeting noted that Poplar Harca was planning to redevelop Chrisp Street and this formed part of a broader regeneration plan created by Poplar Harca called ‘Reshaping Poplar’.[20] There are also repeated references to Polar Harca’s regeneration plans for the area in Tower Hamlets policy documents dating from the early 2010s. The Council’s Core Strategy, published in 2010, notes that “large scale regeneration plans are underway in Poplar. By working in partnership with Poplar Harca and other stakeholders, coordinated and lasting regeneration will occur.”[21] Similarly, Tower Hamlets’ Managing Development Document, published in 2013, allocated Chrisp Street as a ‘regeneration’ site.[22]

Poplar Harca applied for planning permission for the scheme in June 2016. As the proposals included the development of more than 150 homes, it was a site of ‘potentially strategic importance' which gave the Mayor of London the power to direct the LPA to refuse

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[18] This research does not discuss the role of housing associations like Poplar Harca in regeneration and their relationship with LPAs though this would be an interesting dynamic to explore.

[19] ‘Poplar Harca Website’ <https://www.poplarharca.co.uk> accessed 22 February 2024.

[20] Tower Hamlets Borough Council, *Agenda for meeting of Wednesday 4 November* (2009), p. 7.

[21] London Borough of Tower Hamlets, *Core Strategy Development Plan Document* (2010), p. 118.

[22] London Borough of Tower Hamlets, *Managing Development Document* (2013), p. 120.

planning permission.[23] In December 2016, the Greater London Authority ('GLA') advised Tower Hamlets that the original application did not comply with the London Plan in five ways.[24] The London Plan is a regional spatial planning document issued by the Mayor of London and sets out the economic, environmental, social and transport framework for London.[25]

Throughout 2017 changes were made to the proposals, including an increase in affordable housing provision from 25% to 35%.[26] Tower Hamlets' Strategic Development Committee considered the planning application in February 2018. A number of issues relating to the development were raised at this meeting. These included concerns of insufficient affordable housing provision, limited consultation by Popar Harca, increases in drinking establishments, the possible closure of the post office and the plans to remove the car park.[27] Consequently, the Committee determined to defer their decision until Polar Harca and Telford Homes could provide more information on these issues.[28] At the time, this was reported in local London press as an example of London "finally fighting back against gentrification".[29]

The planning application came before the Committee again in July 2018. In this meeting, the application had to be considered afresh as there had been local council elections in May 2018 which changed the composition of the Committee. At this meeting, the Strategic

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23 The Town and Country Planning (Mayor of London) Order 2008, s 5.

24 This related to affordable work spaces, affordable housing, the energy strategy, cycle parking and legibility of the urban spaces. See, Greater London Authority, *Chrisp Street Market: Strategic Planning Application Stage I Report* (December 2016).

25 The statutory basis for the London Plan is Greater London Authority Act 1999, s 334.

26 Savills, 'Planning Statement Addendum: Chrisp Street Market'.

27 Tower Hamlets' Strategic Development Committee, *Minutes (15 February 2018)* (2018).

28 ibid.

29 Mould (n 15). See also, Emma Snaith, 'Meet the Londoners fighting for more affordable housing' <https://www.eastlondonlines.co.uk/2018/04/meet-the-londoners-fighting-for-more-affordable-housing/> accessed 23 January 2023.

Development Committee resolved to approve the project subject to the agreement of planning obligations in a contract between Poplar Harca, Telford Homes and the LPA.[30]

In February 2019, the London Mayor indicated that he had no objections to the development so long as a number of planning obligations were included in the s 106 agreement.[31] Poplar Harca, Telford Homes and the LPA signed a s 106 agreement in March 2019 and planning permission was formally granted on 27 March 2019. Construction started in 2021.

Situating the research

There is relatively little *legal* scholarship that analyses the planning system. Yet, understanding the role of law in the planning system is important. Planning law regulates not only the built environment, but the natural environment, and our experience of the natural environment *within* the built environment. For example, it is routine for the loss of light as a result of a new development to be considered a 'material consideration' by local planning authorities deciding planning applications.[32] This is just one example of how much of our daily life is determined by planning law.

Although planning decisions are ultimately highly factual assessments, influenced by the actions of multiple actors, all planning decisions take place within a legal framework. However, as Phillip Booth describes it would be a mistake to think "the legal framework [as]

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30 Town and Country Planning Act 1990, s 106.

31 Greater London Authority, *Planning Report GLA/3707/02: Strategic planning application stage II referral* (February 2018).

32 For instance, *R (McLennan) v Medway Council* [2019] EWHC 1738 (Admin).

just a scaffolding to support a process".[33] Rather, planning law shapes what factors are relevant and irrelevant, what is a material consideration, and in turn, whose voices are heard.

This has been well-documented in the environmental law context.[34] For example, Chris Hilson has demonstrated that planning law determines which 'frames' are legally relevant in planning decisions relating to fracking. 'Frames' are the outcome of 'framing' which is "an active and iterative process where actors engage in the selection, interpretation, production and maintenance of meaning".[35] Frames tend to be static and provide a "categorising or taxonomising structure, a central organising idea, narrative, or interpretative schema"[36] which allows actors to make sense of a particular complex problem. In relation to fracking, Hilson highlighted that planning policy limits the relevance of frames relating to global greenhouse gas emissions in the assessment of whether to grant permission to investigate a site's fracking potential.[37] In turn, this excludes environmental groups from the planning process as their contributions are implicitly devalued by the planning law framework.

Legal scholarship has also started to address planning law's relevance to issues of social justice.[38] For example, Brad Jessup and Steven Vaughan in their analysis of attempts to close

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33 Philip Booth, 'The control of Discretion: Planning and the Common-Law tradition' (2007) 6 Planning Theory 127, 143.

34 For example, Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 Journal of Environmental Law 139; Chiara Armeni and Maria Lee, 'Participation in a time of climate crisis' (2021) 48 Journal of Law and Society 549; Elizabeth Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (2018) 38 Oxford Journal of Legal Studies 528.

35 Carrie Bradshaw, 'England's fresh approach to food waste: problem frames in the Resources and Waste Strategy' (2020) 40 Legal studies (Society of Legal Scholars) 321, 323.

36 ibid, p. 323.

37 Chris Hilson, 'Framing Fracking: Which Frames Are Heard in English Planning and Environmental Policy and Practice?' (2015) 27 Journal of Environmental Law 177, 190.

38 There is a significant amount of scholarship that addresses social inequity in the planning and housing system more broadly, but *legal* scholars have not always engaged with this when studying planning law. Examples of research by *non-lawyers* includes Nick Blomley, 'Property, Pluralism and the Gentrification Frontier Le Pluralisme Juridique/Legal Pluralism' (1997) 12 Can JL & Soc 187; Loretta Lees and Phil

three LGBTQ+ nightclubs in London demonstrate how the failure to include the significance of queer spaces to the queer community in planning policy makes it harder to protect these spaces in the planning process. This is because the importance of these spaces to the queer community is not necessarily a 'material consideration' relevant to the planning decision.[39] In a similar vein, Antonia Layard has argued that the listed buildings regime, which does not just allow for the protection of buildings for their aesthetic but also their cultural significance, can entrench dominant cultures and offers insufficient protection to minority ones.[40]

Nevertheless, as Maria Lee notes, the role played by legal frameworks in determining what matters is *still* under-explored.[41] The aim of this research is to address part of this lacuna by drawing on some of the insights in environmental law scholarship about how law shapes avenues for participation in connection to inner-city development. As touched upon above, such redevelopment can be hugely disruptive, changing the nature of a *place*,[42] as well as resulting in the displacement of the community.[43] Consequently, understanding how the voices of those affected by such development is important.

Hubbard, '"So, Don't You Want Us Here No More?" Slow Violence, Frustrated Hope, and Racialized Struggle on London's Council Estates' (2022) 39 Housing, theory, and society 341; Richard Gale and Huw Thomas, 'Race at the margins: A Critical Race Theory perspective on race equality in UK planning' (2018) 36 Environment and Planning C, Politics and space 460.

39 Vaughan and Jessup (n 5), p. 50.

40 Layard (n 11), p. 460.

41 Maria Lee, 'The importance of taking English planning law scholarship seriously' in Maria Lee and Carolyn Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022), p. 4.

42 The term place is used to describe the experiential meaning attached to a physical space. It often exists in the collective consciousness of a community. For discussion, see Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 Journal of Law and Society 412; Michel de Certeau, *The practice of everyday life* (University of California Press 1984).

43 There is a wealth of literature on this. For a flavour see, Loretta Lees and Hannah White, 'The social cleansing of London council estates: everyday experiences of 'accumulative dispossession'' (2020) 35 Housing Studies 1701; Adam Elliott Cooper, Phil Hubbard and Loretta Lees, 'Sold out? The right-to-buy, gentrification and working-class displacements in London' [2020] The Sociological Review; Lees and Hubbard; Paul Watt, 'Housing Stock Transfers, Regeneration and State-Led Gentrification in

Structure of the thesis

The first chapter explains why it is important to have participation in the planning system. As Arnstein identifies, public participation is "a little like eating spinach: no one is against it in principle".[44] However, underlying some debates associated with planning is a scepticism of the value of participation.[45] Consequently, this chapter is necessary to justify the premise that those affected by large-scale inner-city redevelopment projects should be listened to, and able to participate in the decision-making process.

The second and third chapters are similar in the sense that they both seek to understand the space in planning consultation mechanisms to listen to local communities. Chapter Two looks at the law and policy in relation to developer consultation for large scale redevelopment projects. It identifies that there is no *legal* requirement for such developers to consult the local community even though policy encourages this. The effect of this is that developers can shape the consultation process to meet their own needs. At Chrisp Street this resulted in tick-box consultation exercises that looked more like evidence-gathering than inclusive participation.

Chapter Three analyses the law and policy in relation to participation undertaken by the LPA both before the planning meeting and during the planning committee meeting. There are two arguments in this Chapter. First, it is argued that the volume of documentation, and complexity of the planning system inhibits community participation. Second, from analysing

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London' (2009) 27 Urban policy and research 229; Juliet Davis and Andy Thornley, 'Urban regeneration for the London 2012 Olympics: Issues of land acquisition and legacy' (2010) 1 City, culture and society 89; Phil Hubbard and Loretta Lees, 'The right to community?: Legal geographies of resistance on London's gentrification frontiers' (2018) 22 City 8.

[44] Sherry Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216, 216.

[45] For instance, the language of NIMBY-ism frames community contributions as inherently negative and as a barrier to development.

in detail the Planning Officer's Report and the minutes of the Planning Committee meetings, it is apparent that the Planning Officer plays a significant role in mediating and channelling community voices. This creates a risk that the nuance and range of community views is lost in the decision-making process.

The fourth chapter analyses participation from a different angle. Rather than looking at the participation mechanisms themselves, this Chapter assesses what space planning law and policy creates to listen to community voices once they have been captured. The chapter focuses on the issue of affordable housing and analyses to what extent the development plan and planning policy on viability assessments leaves room to take account of community concerns on this issue at Chrisp Street. Two reflections emerge from this analysis. First, the numerical framing of planning policy minimises scope for debate and for the local planning authority to take into account community concerns in relation to affordable housing. Second, gaps in planning policy on certain issues, such as how viability assessments ought to be undertaken, creates room for other actors, namely developers, to shape these mechanisms in a manner that suits them.

The final chapter ties together some of the threads in the previous chapters to identify two more general reflections about the planning system. First, the complexity and denseness of the planning system, combined with a technocratic turn, acts as a barrier to participation. Second, it is argued that the role of different characters in planning has been overlooked in planning law scholarship. One of the lessons from this project is that the Planning Officer plays a significant role in the planning system, and yet there does not appear to be any legal literature analysing how they influence the legal mechanisms.

Caveats

Before turning to the substantive chapters, there are three caveats points to be made. First, this thesis analyses one type of planning decision through a single lens – local community participation. The planning system, however, must balance a multitude of different values and objectives that pull in different directions. The planning system is "levelling up",[46] "delivering a sufficient supply of homes",[47] "meeting the challenge of climate change",[48] "powering up Britain",[49] and a site for democratic participation. Resolving these tensions has not been the focus of this research;[50] rather, the aim has been to illuminate how the planning system listens to local communities. Whilst this rather narrow focus may limit the implications of the research it is nevertheless important to thoroughly interrogate how even one value is delivered upon by the planning system.

Second, some legal scholars may be surprised by the extent to which analysis of planning policy features in this thesis. Policy is not the mainstay of most legal scholars, but in the study of *planning law* it is practically impossible to understand the law and how it operates without engaging with planning policy.[51] Consequently, a large part of the analysis in the

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46 Levelling Up and Regeneration Act 2023.

47 Department for Levelling up Communities & Local Government, *NPPF* ((Dec) 2023), p. 17.

48 ibid, p. 46.

49 Department for Energy Security and Net Zero, *Powering Up Britain* (March 2023).

50 Such a task would be monumental. Some have attempted to offer such theories, but they are not without criticism. See, Patrick McAuslan, *The ideologies of planning law*, vol 22 (Pergamon Press 1980). For a critique see, Kim Bouwer and Rachel Gimson, 'Provoking McAuslan: Planning law and property rights' in Maria Lee and Carolyn Abbot (eds), *Taking English planning law scholarship seriously* (UCL Press 2022).

51 Maria Lee, 'English Planning Law: An Outline', in Maria Lee and Carolyn Abbot (eds), Taking English planning law scholarship seriously (UCL Press 2022). p. 22-23. See also, Elizabeth Fisher, 'Why doctrinal administrative lawyers need to think more about policy' (2022) 29 Australian Journal of Administrative Law 254.

following chapters seeks to understand how law and policy work together and the influence that this has for the voices of local communities in the planning process.

The final caveat is about language. A deliberate choice has been made to avoid using the terms 'gentrification' and 'Nimby-ism'. Both terms are politically charged and contested. They also convey assumptions regarding community attitudes to development which were not reflected in the varied and multi-dimensional community views on the redevelopment at Chrisp Street. To avoid the unhelpful baggage that comes with these terms, it is simpler to avoid using them.

The thesis also uses the term 'developer' to refer to both Poplar Harca and Telford Homes. Although there are interesting legal questions to explore in relation to the differences between the two organisations; the relationship between community housing associations and LPAs; and the role that community housing associations are taking on in redeveloping cities up and down the country, to have brought these issues within the remit of this research project would have significantly changed its focus. No longer would the focus be on from public participation and listening to communities. As a consequence of not exploring these issues, the term of developer has been chosen to refer to both Poplar Harca and Telford Homes because it captures the general category of organisations which propose to redevelop areas like Chrisp Street.

CHAPTER 1: THE VALUE OF PARTICIPATION IN PLANNING

The underlying premise of this research is that the planning system should listen to, and include the voices of, those affected by large-scale inner-city redevelopment in the decision-making process. The aim of this section is to explore this premise. It starts by identifying some of the normative rationales for participation in public decision-making. Throughout the analysis the implications of these various justifications are also considered. At the end of the section, there is an exploration of some of the reasons why the reality of public participation often falls short of the ideal.

There are a range of overlapping and interlocking justifications for public participation in public decision-making. Some of these are described by Lord Wilson in *R (Moseley) v Haringey LBC* [2014] UKSC 56, drawing on Lord Reed's judgment in *R (Osborn) v Parole Board* [2013] UKSC 61. Lord Reed sets out two justifications for participation: first, that consultation can result in better decisions.[52] This is sometimes referred to as the 'substantive' value of participation.[53] The second rationale articulated by Lord Reed was a non-instrumental, dignitarian value of procedural fairness.[54] This was explained by Lord Reed as "the sense of injustice which the person who is the subject of the decision will otherwise feel" if they are excluded from the decision-making process.[55] In addition to Lord Reed's two rationales, Lord Wilson added a third which he called the "democratic principle at the heart of our society".[56] This is a 'procedural' value of participation which considers part of the legitimacy of a decision

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52 *R (Moseley) v Haringey LBC* [2014] UKSC 56, [24].

53 This is the language used by Armeni (n 8). It is also used in discussions of reason-giving; see Michael Fordham, 'Reasons: The Third Dimension' (1998) 3 Judicial Review 158.

54 Mark Elliott, *Osborn: The common law, the Convention, and the right to an oral hearing* (10 October 2013). See also, Fordham (n 53), 158.

55 *R (Osborn) v Parole Board* [2013] UKSC 61, [68].

56 *R (Moseley) v Haringey LBC* (n 52), [24].

as stemming from the participation of those affected by it. On this justification for participation, 'representative' and 'direct' participation both have a role of ensuring the legitimacy of decision-making.[57] In unpacking these different rationales in the context of planning, it is possible to start building a vision of what public participation should look like.

The idea that participation results in better decisions, or the substantive rationale of public participation, has different strands to it. One view is that public participation enhances the quality of decision-making by bringing more information to the attention of the decision-maker. Beyond information, the public's knowledge and experience of issues and factors beyond that of the decision-maker should not be overlooked. As Armeni identifies, knowledge is "dispersed, contingent and constructive [meaning] decisions based on wider values and experiences tend to be qualitatively superior".[58] In the context of planning decisions, this supports local participation, both in setting the agenda at a strategic level for local areas, and in individual planning decisions. Local communities have unique knowledge of *places* which is valuable to decision-makers. A 'place' is a "space to which meaning has been ascribed by a community".[59] The knowledge of *place* is experiential as opposed to being defined by the physical characteristics of the space. Including this type of knowledge in planning decisions is particularly important for development projects such as Chrisp Street which propose 'comprehensive regeneration' of an existing area.[60] It should not be forgotten that this

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57 Maria Lee and others, 'Public Participation and Climate Change Infrastructure' (2013) 25 Journal of Environmental Law 33, 37.

58 See Armeni (n 8), 419. For similar ideas see, Sheila Jasanoff, *States of knowledge: the co-production of science and the social order* (Routledge 2006); Clare Haggart, ''Planning and Persuasion': Public Engagement in Rewable Energy Decision-making' in Patrick Devine-Wright (ed), *Renewable Energy and the Public: From NIMBY to Participation* (Taylor & Francis Group 2010); Arpitha Kodiveri, 'The Delicate Task of Including Different Voices in Environmental Law Making in India' (2021) 33 Journal of Environmental Law 495.

59 Certeau (n 42), p. 117. There is a rich literature on the meaning of 'place'; e.g., Layard, 'Shopping in the Public Realm: A Law of Place' (n 42); Mark Davidson and Loretta Lees, 'New-build gentrification: its histories, trajectories, and critical geographies' (2010)16 Population, Space and Place 395.

60 For discussion on the uniqueness of "comprehensive regeneration" projects, see Watt (n 11).

regeneration occurs within an existing community, and that the development imposes itself upon them. Including the local knowledge of the place in the development design and decision is thus important to ensure the plans captures the unique knowledge of the community.

Furthermore, this information-gathering rationale of participation suggests that participation mechanisms ought to ensure that traditionally excluded or hard-to-reach communities are sought out for participation. The voices of such groups are unlikely to be reflected in national policy,[61] and so collecting their voices in local planning processes is important to enhance the quality of the decision. This is particularly relevant for Chrisp Street due to its location in Tower Hamlets, one of the most deprived boroughs in the country.[62] The link between socio-economic deprivation and exclusion from political power structures is well-documented.[63] Consequently, following the rationale of the substantive justification for participation, it is even more important that the planning system endeavours to capture these voices in the decision-making process.

Another aspect to the substantive limb contends that, separate to the range of views brought into decision-making by participation, public participation enhances problem-solving of intractable problems.[64] An implication of this rationale, is that participation must be more

61 Exclusion in decision-making frameworks often means the interests or view of a particular group are neglected. Recognition of this was memorialised in a footnote of a US Supreme Court decision; see *Carolene Products Co.* 304 U.S. 144, 152n.4 (1938) (Stone J). See also Sandra Fredman, 'Substantive equality revisited' (2016) 14 International Journal of Constitutional Law 712, 731-732, Christian Houle, 'Does economic inequality breed political inequality?' (2018) 25 Democratization 1500. This has also been documented in different contexts; eg, Amy Bristow, *Meeting the housing needs of BAME households in England: the role of the planning system* (2021); Shreya Atrey, 'Structural Racism and Race Discrimination' (2021) 74 Current Legal Problems 1.

62 Tower Hamlets was the third most deprived local authority in the county, see London Borough of Tower Hamlets, *Core Strategy Development Plan Document*, pp. 129.

63 United Nations System Chief Executives Board for Coordination, *Leaving No One Behind: Equality and Non-Discrimination at the Heart of Sustainable Development* (2017).

64 For example, J. Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach'(2021) 21 Oxford Journal of Legal Studies 415.

than an aggregation of preferences or interests but be based on collective deliberation or discursive engagement.[65] In other words, the voices and views of those consulted must play a role *in* the decision-making process, and not be collected only to be side-lined or discarded.[66] In emphasising the value of deliberation and discussion, this rationale also suggests that it is important participation takes place when a meaningful range of options are open to discussion, and the contribution of participants should have an impact on the decision.[67]

The second rationale identified by Lord Wilson was the non-instrumental, dignitarian value of participation.[68] This emphasises the importance of treating people affected by decisions with respect by taking seriously their views.[69] This places pressure on decision-makers to sincerely engage with the arguments put forward by the public. This too has important implications for participation in planning decisions. It suggests that participation that is performative, 'illusory',[70] or aimed at generating public acceptance of a planning project[71] is inadequate for it fails to treat those individuals with respect. Such approaches to public participation are also likely to generate mistrust in the planning system as they often result in a mismatch between public expectations of participation and a reality of limited involvement.[72]

The 'democratic' rationale of participation, as Lord Wilson put it, suggests that the legitimacy of a decision depends on those affected by it having a say in the decision-making

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[65] On deliberative democracy generally see, John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press 2002).

[66] Steele (n 64).

[67] Armeni (n 8), 419. See also, *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168, 189.

[68] This dignitarian value has been discussed in the context of reason-giving. For example, Mark Elliott, 'Has the common law duty to give reasons come of age yet?' 1 Public Law 56, 62.

[69] For discussion of the dignitarian value see, Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 Oxford Journal of Legal Studies 497.

[70] Arnstein (n 44).

[71] Armeni (n 8).

[72] On trust see, Haggart (n 58), p. 23.

process.[73] The importance of a connection between decision-making and the people affected by a decision is alluded to in the Ministerial foreword to the NPPF where Greg Clark MP commented that planning has "tended to exclude, rather than include, people and communities, [as]…decisions [are] taken, by bodies remote from them".[74]

The justifications for participation outlined above paint a rough picture of what participation ought to look like. However, the exact contours of participation and how the interlocking justifications fit together is not uniform across public decision-making,[75] and certainly not within planning. Different developments affect different groups of people, meaning the extent of participation is likely to differ. For instance, large scale infrastructure projects have clear direct impacts on the local community, but also more indirect impacts on the wider population. This may justify a different participation regime when compared to smaller developments with less far-reaching impacts. Moreover, some developments such as infrastructure projects or large-scale regeneration are more likely to pose policy debates about intractable problems. This means that the so-called problem-solving benefits of enhanced participation are likely to be more valuable.

Having outlined rationales that sit behind public participation, it is necessary to highlight that the reality of participation in planning often fails to take seriously the demands of public participation.[76] Indeed, exploring the role of law in why this is the case for inner-city

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73 There is a wealth of literature on democracy and participation. Different models of democracy – representative, direct, deliberative – will have different implications for the shape that participation will take. For a flavour of different positions, see Dryzek (n 65), Geoffrey Brennan and Alan Hamlin, *Democratic Devices and Desires* (Cambridge University Press 2000); Philip Pettit, 'Varieties of Public Representation' in S Stokes I Shapiro, E Wood and A Kirshner (ed), *Political Representation* (Cambridge University Press 2010).

74 Department of Communities and Local Government, *NPPF* (2012), Ministerial Foreword.

75 Janet McLean, 'Participation and the Duty to Consult' in Leighton McDonald, James Goudkamp and Mark Lunney (eds), *Taking Law Seriously* (Hart Publishing 2021). See also, *R (Moseley) v Haringey LBC* (n 52), [26].

76 See, Arnstein (n 44), Armeni and Lee (n 34).

redevelopment is the aim of this project. Armeni has described how all too often participation ends up focused on public acceptance or aimed at "mere validation of decisions already made and as a way to enhance social awareness and support to accelerate implementation",[77] as opposed to inclusive participation. Such description mirrors Arnstein's identification of participation mechanisms in planning that are often "illusory" as opposed to giving "real power to the public".[78]

The failure of the planning system to live up to the ideal of participation has many sources. One lies in the fact that participation is not the only value that the planning system tries to deliver upon. Values such as efficiency and sustainability also play a role,[79] and delivering on these values can make it difficult to improve participation in the system. However, the relationship between these values is not necessarily linear and there is scope to concurrently deliver upon many of the values that underpin planning. This might require some imagination and craft.[80]

Another source of the limited success to live up to the ideal of participation is the tension over the role of public participation in planning. On the one hand, as Arnstein identifies, public participation is "a little like eating spinach: no one is against it in principle".[81] Indeed, as the ministerial foreword to the 2012 NPPF states, planning should be a "collective enterprise".[82] This suggests inclusivity and expansive involvement of different individuals and

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77 Armeni (n 8), 416.

78 Arnstein (n 44).

79 Reading the NPPF gives a helpful overview of some of the values in planning; see, n 74.

80 For discussion of this see, Elizabeth Fisher and Sidney Shapiro, *Administrative competence : reimagining administrative law* (Cambridge University Press 2020).

81 Arnstein (n 44), 216.

82 Department of Communities and Local Government, (n 74).

groups in the various planning processes. Equally, the localism agenda, espoused in the Localism Act 2011, presented itself as supporting local participation in the planning process.[83]

At the same time, there is often a hostility or a suspicion of participation in planning. This is seen in the NIMBY-ism narrative that assumes local participation is a barrier to the national objective of house-building, or the green transition.[84] This narrative encourages the side-lining of local communities in the decision-making process on the assumption that they are necessarily hostile to development. However, as the statutory consultation in this case study shows, this is not necessarily the case. Indeed, it is possible that a local community may want redevelopment with lots of affordable housing, despite the NIMBY-ism narrative suggesting otherwise. In a similar vein, a shift towards technocratic decision-making,[85] which emphasises the role of experts and expertise in decision-making, casts doubt on the role that a lay public ought to play in planning.[86] This is seen in relation to the issue of affordable housing at Chrisp

83 For analysis of the Localism Act 2011 see, Martin Field and Antonia Layard, 'Locating community-led housing within neighbourhood plans as a response to England's housing needs' (2017) 37 Public money & management 105; Kat Salter, Gavin Parker and Matthew Wargent, 'Localism and the will to housing: neighbourhood development plans and their role in local housing site delivery in England' (2023) 38 Planning Practice & Research 253.

84 Haggart (n 58), p. 22. In the context of climate change, see Lee and others (n 57). For wind energy specifically see, Maarten Wolsink, 'Wind Power and the NIMBY-myth: Institutional Capacity and the Limited Significance of Public Support' (2000) 21 Renewable Energy 49, 52; Patrick Devine-Wright, 'Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy' (2005) 8 Wind Energy 125.

85 Elizabeth Fisher, *Risk regulation and administrative constitutionalism* (Hart 2007), p. 70-71.

86 See Frank Fischer, *Citizens, experts, and the environment the politics of local knowledge* (Duke University Press 2000); Scott Lash, Bronislaw Szerszynski and Brian Wynne, 'May the Sheep Safely Graze? A Reflexive View of the Expert—Lay Knowledge Divide' in, vol 40 (Sage Publications, Limited 1996); Jason Corburn, 'Bringing Local Knowledge into Environmental Decision Making: Improving Urban Planning for Communities at Risk' (2003) 22 Journal of planning education and research 420, 422; Armeni and Lee (n 34); Fisher, *Risk regulation and administrative constitutionalism* (n 85).

Street. As explored in Chapter Four, reliance on technical viability assessments limits the scope for the planning committee to listen the range of community concerns over housing provision.[87]

This tension over the role that the public ought to play in planning decisions contributes a complex and confused reality of public participation in the planning system.[88] To understand this confusion, the following sections explore both the mechanisms for inclusion – the consultation mechanisms – and the space left by planning law and policy to *listen* to the voices and views captured.

Before turning to those sections, it is important to emphasise the 'limits of law' in ensuring meaningful participation.[89] As Lee and Armeni identify, "law cannot guarantee 'good' participation".[90] There are costs associated with participation and barriers that are hard to solve merely through changing the legal structures.[91] However, as Yvonne Rydin and Mark Pennington explain, law and policy can help create the incentives that generate the social capital needed for greater demand for participation.[92] Consequently, we should not abandon law when thinking about how to improve participation.

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[87] See Chapter Four.

[88] Armeni and Lee (n 34), Armeni; (n 8).

[89] Armeni and Lee (n 34), 570.

[90] ibid, 566.

[91] Arnstein (n 44).

[92] Yvonne Rydin and Mark Pennington, 'Public Participation and Local Environmental Planning: The collective action problem and the potential of social capital' (2000) 5 Local Environment 153.

CHAPTER 2: DEVELOPER-LED CONSULTATION

In the documents submitted to Tower Hamlets as part of Poplar Harca's planning application you will find a slick document called Poplar's 'State of Community Involvement'. The document was compiled by 'Your Shout', a specialist community consultation group.[93] It contains photos of members of the community smiling at consultation events run by Poplar Harca, and coloured pie charts analysing their responses. Despite being under no obligation to conduct this pre-application consultation, the document demonstrates that over several years Poplar Harca has attempted to engage the community in the "evolution" of the proposals.[94] At first glance, this form of sustained communication seems like it can only be a good thing – like eating spinach[95] – but on a deeper dive, it is apparent that things are more complex. It seems that the results of this consultation are not as inclusive of community views as the glossy document suggests.

This chapter starts by summarising the law and policy on developer consultation before outlining Poplar Harca's consultation with the local community. The final section to the chapter reflects on Poplar Harca's consultation and the role of law and policy in shaping it. This part identifies a disconnect between negative local perceptions of the consultation with the positive evaluation of the engagement process expressed in the Officer's Report. It is argued that the general absence of law and policy on developer engagement leaves space for planning applicants, such as Poplar Harca, to fill this space and design pre-application consultation exercises that meet their needs. Whilst Poplar Harca can demonstrate engagement, their

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93 Your Shout, *Chrisp Street Market: Statement of Community Involvement* (2016), p. 4.

94 ibid p. 4.

95 Sherry Arnstein makes the observation that like eating spinach, we can all agree participation is a good thing, but that the reality of it often fails to realise the benefits for local communities as the mechanisms do not allow them to have a voice in the process. This section explores this idea in relation to the applicant – Poplar Harca's – consultation. See, Arnstein (n 44).

community consultation appears to have had limited impact on the design of the development proposals. This is problematic as it undermines the rationales for public participation explored in the previous chapter and creates mistrust between communities and developers.

Legal and policy framework

There is surprisingly little planning law and policy setting out requirements for pre-application consultation for large scale redevelopment projects by planning applicants. Whilst there is a legal obligation requiring applicants to consult the local communities when proposing nationally significant infrastructure projects,[96] and on proposals to build more than two wind turbines or a turbine over 15 meters tall,[97] there is no comparable obligation for large scale regeneration projects such as that at Chrisp Street. The impact assessment for the Localism Act 2011, which introduced the consultation requirement for wind turbines, considered the effect of applying a consultation duty to all developments with over 200 residential homes.[98] However, no Management Development Procedure Order was introduced to this effect.

The lack of a consultation obligation for large residential developments is noted in the NPPF and the Officer's Report for Chrisp Street. Both highlight that an LPA cannot require a developer to consult on its planning application.[99] There are some vague references to the value of a developer engaging early with a local community in planning policy. For instance, the NPPF states that LPAs should "encourage applicants…to engage with the local community

96 Planning Act 2008, s 31, s 37, s 41, s 42, s 47.

97 Localism Act 2011, s 122, Part 2(3) Town and Country Planning Act (Development Management Procedure) (England) Order 2015.

98 Department of Communities and Local Government, *Localism Bill: compulsory pre-application consultations between prospective developers and local communities (Impact Assessment)* (January 2011), p. 6.

99 Department of Communities and Local Government (n 74) ,pp. 189, Officer's Report (n 14), p. 41.

before submitting their applications".[100] Interestingly, these references to developer engagement with the community place it in the context of ensuring 'efficiency'. This framing is likely to have consequences for the function that planning actors, such as developers and planning officers, see pre-application consultation by a developer to have, namely, that it is about speeding up the application process.

The London Plan is equally non-committal, stating that development on sites of more than five hectares or capable of accommodating more than 500 dwellings should "take place with the engagement of local communities and other stakeholders".[101] The Tower Hamlets' Statement of Community Involvement ('SCI'), which they are required at law to publish,[102] also does not set clear expectations of the consultation expected by developers. The SCI suggests that for large scale developments, or developments that give rise to local controversy, pre-application consultation with the community may be encouraged, but stresses that this cannot be required.[103] Nothing else regarding developer consultation is included in the SCI. Altogether this amounts to a relatively thin legal and policy basis to guide developer consultation for planning applications.

The lack of legal and policy requirements for developer consultation is surprising given its potential value. This is largely because, in comparison to when an application is submitted to an LPA, there is still scope for community views to influence the design of the project, and

[100] Department of Communities and Local Government (n 74), pp. 189.

[101] Mayor of London, *London Plan* (2016), p. 96.

[102] Planning and Compulsory Purchase Act 2004, s 18(1).

[103] Tower Hamlets Borough Council, *Tower Hamlets Statement of Community Involvement Refresh 2016* , p. 45.

many of the rationales of participation are maximised in planning when participation takes place at an earlier stage.[104]

Despite the limited legal requirements of pre-application consultation, it appears to be relatively wide-spread throughout the development industry.[105] This is likely to be because there are benefits to developers in identifying the key objections to their proposals and demonstrating that they have considered them before their application comes before an LPA. Such engagement processes may also help avoid a negative perception of the planning applicant by the LPA.

What happened at Chrisp Street?

Despite the lack of legal requirement, Poplar Harca did conduct several rounds of community engagement. This started as early as 2010, with further instances of engagement in 2013, 2015, 2016 and 2018. The 2010 engagement event was titled "Chrisp Street Regeneration Public Information Event". In its Statement of Community Involvement,[106] Poplar Harca described the event as an "opportunity to meet the development team".[107] Attendees of the session were asked to complete a questionnaire that required them to fill out their aspirations and expectations for Chrisp Street. Of the responses referred to in the Statement of Community

[104] Hence the requirement in *R v Brent LBC, ex p Gunning* (n 67) that participation takes place at a 'formative' stage.

[105] The presence of specialist consultation organisation highlights this. See, 'Your Shout home page' <https://www.yourshout.com> accessed 14 February 2024.

[106] This is different to Tower Hamlets' SCI. It is confusing that they have been given the same name.

[107] Your Shout (n 93), p. 12.

Involvement, most seemed to be about improving the selection of shops around Chrisp Street.[108]

The second event was held in September 2013 at the Chrisp Street Market Festival. Another questionnaire recorded what residents liked about Chrisp Street and what they wanted to be improved. Poplar Harca's Statement of Community Involvement noted that the respondents liked the variety of shops and the community feeling, but "stressed the need for affordability".[109] In 2015, Poplar Harca held a drop-in session and asked attendees to fill in a questionnaire with the same questions. The responses stated that they liked the cleanliness of the market. Aspirations included more food places and restaurants, and again highlighted the importance of affordability.[110]

Poplar Harca held four community consultation events in May 2016. The events were publicised via leaflets to residents and retailers, and a dedicated project website was set up. The events occurred at a variety of times on weekdays and weekends, which Poplar Harca stated was to ensure that those who were working could attend. The events included a public exhibition of the plans which aimed to give "details of the scheme, including site layout, as well as the overall vision, as well as contact details and included a panel introducing the team".[111] The appendixes to Poplar Harca's Statement of Community Involvement included images of the exhibition boards on display at the consultation events. These included several

[108] ibid, p. 12.

[109] ibid, p. 12.

[110] ibid, p. 12.

[111] ibid, p. 19.

computer-generated images of the proposed design as well as short explanations on the proposals for retail, night life, new homes and the historic buildings.[112]

The exhibition and website also included a response card that asked attendees what they love about Chrisp Street, the one thing they would improve about Chrisp Street, and if they supported the proposals. An estimate of 170 people attended the exhibition; 55 provided comments on the day, 45 via free post, and 13 on the website.[113] Poplar's analysis of the responses indicates that there were four broad categories of what people loved about Chrisp Street: the range of shops, the community feeling, the library and the supermarket. There were six broad categories of what people would improve: anti-social behaviour, more homes at social rent, improved range of shops, more parking, improved amenity space and large-scale regeneration.[114] Poplar Harca's Statement of Community Involvement gives a brief response to each of these categories of improvement but without really engaging in depth with the issues raised. For instance, in relation to affordable housing, Poplar Harca stated in response that their proposals resulted in no net loss of affordable housing and that this is consistent with the desires of Tower Hamlets.[115] It is worth noting that the development proposals in 2016 only intended for 25% of the housing in the scheme to be affordable, which was below the minimum threshold in Tower Hamlet's Development Plan.

When the planning application came to be considered by the Strategic Development Committee in February 2018, they heard evidence from residents and businesses who expressed frustration at the local engagement and consultation undertaken by Poplar Harca.

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112 ibid, Appendix 3.

113 ibid, p. 21

114 ibid, p. 24-25.

115 ibid, p. 26.

These residents stated that they felt the consultation was "top-down" and there was very little publicity and consequently there was a lack of awareness within the community of what was being proposed.[116] This suggests, on the one hand, that the community felt the approach to consultation was one-sided, as opposed to being inclusive. At the same time, it is also indicative of the challenges of getting participants involved in early-stage discussions before proposals are concretised.[117]

Following a discussion, the Strategic Development Committee decided to defer the decision until a later date. The Committee cited five reasons for the deferral, including the lack of community consultation by the developer.[118] The application came before the Strategic Development Committee again in July 2018. At this meeting, the residents reiterated that there was a lack of adequate engagement with the local community by Poplar Harca.[119] Planning permission was nevertheless approved by the Committee.

The most striking aspect of the planning documents in relation to Poplar Harca's consultation is the Officer's Report. This stated in February 2018, and reiterated in the updated Report from July 2018, that Poplar Harca's consultation and engagement with the local community at both the pre-application and application stages was of a "high quality" and "thorough".[120] These comments stand in contrast to the views of the local community expressed in the February and July meetings of the Strategic Development Committee. This suggests the

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116 Tower Hamlets' Strategic Development Committee (n 27), p. 3.

117 Rydin and Pennington (n 92).

118 Tower Hamlets' Strategic Development Committee (n 27), p. 6.

119 Tower Hamlets' Strategic Development Committee, *Minutes (24 July 2018)* p. 4.

120 Officer's Report (n 14), pp. 10.11.

existence of a disconnect between the community experience of the developer's consultation and the perception of the official actors in the system.

Reflections

There are many positive aspects of Poplar Harca's engagement with the local community. For instance, the engagement started relatively early, and some of the community suggestions were included in the final proposals. However, the disconnect between the community experience of the consultation, reflected in the criticisms at the Strategic Development Committee meetings and in the Officer's Report, raise questions as to whom Poplar Harca's consultation was directed at. There are at least three aspects of Poplar Harca's consultation that suggest its aim was as much generating evidence of engagement to strengthen its planning application, as it was adopting a genuinely participatory and inclusive approach. A reason for this seems to be the lack of law and policy framing the developer's consultation.

The idea of 'evidence gathering' is similar to Armeni's concept of public participation aimed at social acceptance. Social acceptance models of public participation start from a position where "the decision has already been taken and people will need to 'accept' it, in the light of pre-framed policy objectives".[121] This impacts the contours of the public participation; it is sought for reasons of legitimacy and transparency but the scope for the public to actually influence the outcome is limited.[122] In a similar way, 'evidence-gathering' participation aims to generate material to demonstrate to another actor that the ritual of community engagement has been undertaken, without necessarily taking on board the views expressed. The focus of

[121] Armeni (n 8), 422.

[122] ibid, 423.

any consultation exercise is likely to be on the number of people who participated rather than the substantive contributions they make.

The first way Poplar Harca's consultation appears to be directed at evidence-gathering is seen in the narrowness of the questions asked at the community engagement events. For example, the 2016 response card only asked individuals three questions: what they love about Chrisp Street, what they would improve, and a tick box question asking if they supported the development proposals. This last question had three boxes that individuals could check: 'yes', 'no' and 'unsure'.[123] The Statement of Community Involvement explains that the quantitative question was chosen to give a clear picture of support or lack of. The qualitative questions were chosen to identify what the community liked, and therefore what should be retained, as well as what the community disliked and therefore should be changed. Poplar Harca characterise these questions as seeking "feedback" on the plans.[124] It is notable, however, that the qualitative questions were not asking what people would change about the development plans displayed at the exhibition. Rather, they were only asking about the *existing* Chrisp Street site. Whilst such comments would have been useful to understand what should be retained in the new development, the questions asked do not imply that Poplar Harca was really seeking "feedback" on its proposals. Indeed, the only question asking specifically about the development proposals was a checkbox question which limited peoples' ability to provide actual feedback on the plans. This suggests that rather than *involving* the community in the process of designing the project, Poplar Harca was more focused on generating evidence to show that they had engaged the community; this 'evidence' could then be submitted to the Council with the application. In this respect, it is worth highlighting that the 2016 consultation

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[123] Your Shout (n 93), Appendix 4.

[124] ibid, Appendix 4.

was undertaken in May, and the application was submitted to the LPA on 15 June 2016. At such a late stage of the design process, it is difficult to envisage what impact the community consultation could have had on the proposals.

The second factor suggesting that the consultation was designed to create evidence of engagement, as opposed to facilitating a participatory process is Poplar Harca's responses to the concerns raised in the May 2016 consultation in the Statement of Community Involvement. Despite Poplar Harca not asking for feedback on the proposals, a number of responders did use the response cards as an opportunity to give comments on the plans.[125] As indicated above, two of the notable criticisms of the design proposals related to the lack of parking and concerns that the proposals did not include enough affordable housing. In its Statement of Community Involvement, Poplar Harca acknowledges these concerns but ultimately dismiss them.

In relation to the parking concern, Poplar Harca states that the proposals are consistent with the London Plan on parking-free developments, and the "desire of LB Tower Hamlets have set out for developments in the borough".[126] Rather than trying to address the concerns raised by the community and incorporate the concerns in the proposal, Poplar Harca defer to the planning policies. They act as though the decision on parking has been taken out of their control and so treat planning policy as a reason to not engage more fully with the concerns of aspects of the community.[127] This highlights a theme discussed in full in Chapter four, namely that planning policy frames the decision and that this has the potential to close off debate on particular issues.[128] The dominance of policy means that there are real difficulties in integrating

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125 ibid, Appendix 5.

126 ibid, p. 26.

127 For a similar idea see Armeni (n 8).

128 See also, Hilson (n 37).

the wishes or concerns of a local community into design proposals when those concerns run counter to planning policy. This has been documented in the environmental context. For example, Lee and others have identified how National Policy Statements have significantly constrained the room for manoeuvre of decision-makers with the result that public consultation has limited scope to influence decision-making.[129] At Chrisp Street, simply deferring to the policy demonstrates a lack of willingness to meaningfully listen the community and their concerns. The lack of parking is raised again in the February and July meetings of the Strategic Planning Committee by residents and businesses.[130] Had Poplar Harca taken a more collaborative, or inclusive approach to consulting with the community, it may have been possible to have a dialogue about parking with the local community that created more of an understanding as to why more parking was not going to be provided.

The third factor that demonstrates how Poplar Harca's consultation focused on evidence-gathering, as opposed to meaningful participation, is the language used in the Statement of Community Involvement. The document explains the aims of pre-application consultation as being three-fold. First, "to *inform* local residents, businesses, councillors, and other key stakeholders about the redevelopment aspirations".[131] Second, to "gain a full *understanding* of local views, engage with the local and wider community…and *use* these views to identify concerns and opportunities".[132] Third, "to *demonstrate* how the applicant has responded to the issues raised by the community".[133] This implies that Poplar Harca anticipated for the consultation to be a passive exercise on behalf of the community. The language 'to

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129 See, Lee and others (n 57); Maria Lee, 'Knowledge and Landscape in Wind Energy Planning' (2017) 37 Legal studies (Society of Legal Scholars) 3; Rydin, Lee and Lock (n 34).

130 Tower Hamlets' Strategic Development Committee, *Minutes (15 February 2018)*, p. 3; Tower Hamlets' Strategic Development Committee, *Minutes (24 July 2018)*, p. 4.

131 Your Shout (n 93), p. 4.

132 ibid, p. 4.

133 ibid, p. 4.

inform' suggests that an intention of the consultation was to deliver information, rather than involve the community in a collaborative exercise. This is also seen in the way the consultation is characterised as 'engagement', as opposed to participation. The latter implies active involvement in the decision-making process, whereas the former implies Poplar Harca was merely alerting the community to the development.[134] Although Poplar Harca said it wanted to gain a full understanding and use these views to identify the concerns and opportunities in relation to the project, the role for the community envisioned by Poplar Harca was still limited. It was Poplar Harca that determined how the community views were relevant. Moreover, by framing an aim of the consultation as 'demonstrating' that Poplar Harca has responded to the issues raised by the community, the Statement of Community Involvement implies that Poplar Harca saw the consultation exercise as a means to demonstrate it had engaged with the community to strengthen its application, rather than a genuine opportunity to involve them in the planning process.

The role of law and policy (or more accurately, the lack of) in contributing to the 'evidence-gathering' approach to Poplar Harca's community engagement should not overlooked. Law and policy have an agenda-setting role; by setting the aim of a particular action, or framing obligations in a particular manner they influence how those actions are carried out.[135] The absence of law and policy, and the direction it provides, leave space for other actors to determine the aims of an action.[136] In this context, the lacuna of law and policy directing developer engagement with communities, creates space for planning applicants to direct the consultation in the manner that suits their needs. Whilst many developers are well-

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[134] For discussion of different types of participation, see Arnstein (n 44).

[135] Hilda Kurtz, 'Scale frames and counter-scale frames: constructing the problem of environmental injustice' (2003) 22 Political Geography 887, 894.

[136] Armeni and Lee (n 34), 550, 570.

intentioned, their ultimate goal is securing planning permission.[137] Participation processes that reach out to members of the community who are hard to reach are likely to be costly, as is bringing the community into the design process. These factors create an environment in which developers are likely to focus on showing the official actors in the system that they have engaged with the community, even if this results in a developer consultation that is seen as 'top down' by the community.

The little policy that does exist in relation to developer consultation frames it as 'engagement' and as promoting 'efficiency' in the planning application process.[138] The language of 'engagement' connotes a limited form of participation that focuses on one-sided information giving, as opposed to a two-sided conversational approach. This is likely to have a bearing on how developers see community consultation. Similarly, the idea that community involvement should promote efficiency reflects the perspective that the public poses a barrier to development and that the focus of developer consultation should be on avoiding delay and anticipating objections. If anything, the undercurrent of the language in the NPPF is that community contributions are inevitably adverse and are obstacles to be overcome. This paints the involvement of the community in a negative manner and arguably shapes the way developer consultation is undertaken.

In this regard, it is noteworthy that the general lacuna of law and policy means that there is no external criterion by which the Planning Officer can judge Poplar Harca's community engagement. Thus, when the Planning Officer judged the engagement was of a 'high quality', it is not clear what the metric used was. This lack of criterion also contributes

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137 On the importance of understanding incentives of industry actors in drafting policy, see Elizabeth Kirk and Laurel Besco, 'Improving Energy Efficiency: The Significance of Normativity' (2021) 33 Journal of Environmental Law 669.

138 Department of Communities and Local Government (n 74), pp. 189.

to the mismatch between the community and Planning Officer's perception of the engagement process.

CHAPTER 3: THE LOCAL PLANNING AUTHORITY'S CONSULTATION

Whilst the previous chapter focused on the developer's consultation and the steps that they took to engage the local community, this Chapter studies the consultation processes undertaken by the LPA. The breadth of consultation duties on planning authorities is striking,[139] especially when compared to other areas of administrative law.[140] Many of these duties are detailed even setting out the number of days consultations must last for. However, as this chapter demonstrates, the mere existence of a consultation duty is not a guarantee of meaningful opportunities to have a voice in the planning process.

This Chapter considers both the statutory consultation of the local community and the requirement to listen to members of the local community at the Strategic Development Committee meeting which determined the planning application. Both occasions provide opportunities for the community to communicate their views on the planning application. The chapter starts by outlining the law and policy on the statutory consultation and the planning meeting, before turning to the details of what happened at Chrisp Street. The final section reflects on the consultation process, and what it tells us about the space there is to listen to community voices. Whilst there is a lot that could be said about the LPA's engagement process, the chapter focuses on two reflections which speak to the broader planning system as opposed

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[139] The obligations arise in the formation of Statements of Community Involvement (Planning and Compulsory Purchase Act 2004, s 18), formation of local development plans (Town and Country Planning (Local Planning) (England) Regulations 2012 ('2012 Regulations') reg 18), creation of supplementary planning documents (2012 Regulations, reg 12), certain developments require environmental impact assessment which have consultation duties attached (The Town and Country Planning (Environmental Impact Assessment) Regulations 2017). The Planning Inspectorate has an equally broad spectrum of duties.

[140] Janet McClean discusses the limited nature of the common law duty to consult in McLean (n 75), p. 126; Joanna Bell, 'The Resurgence of Standing in Judicial Review' Oxford Journal of Legal Studies (Advance Article), p. 13.

to the peculiarities of Chrisp Street.[141] The first relates to the accessibility of the planning system to a 'one-shotter'.[142] The second reflects on how the LPA's processes and planning actors are encouraged to channel community voices into binary categories. The consequence being that the nuances within and between different community voices were lost in the process.

Law and Policy on the LPA's Consultation and the Planning Meeting

The requirement that an LPA consults the local community before determining a planning application is found in a Statutory Instrument. Under s 15 of Town and Country Planning (Development Management Procedure) (England) Order 2015, LPAs are required to publicise applications for planning permission and invite comments on the application.[143]

Depending on a range of factors, including the scale of the application, the application's compliance with the local development plan and whether an environmental impact assessment is required, there are slightly different requirements regarding publicity of an application. In all applications, the LPA must publish on its website the address of the proposed development, a description, the date by which any representations must be made, where and when the application may be inspected and how representations may be made.[144] In addition to these statutory consultation requirements, Tower Hamlets' SCI sets out how Tower Hamlets intends to consult the community on various planning matters.[145] The SCI sets the ambition for

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141 Some of the interesting points to reflect upon include the deferral of the process, the aspirations of the statement of community involvement and the role that the local council constitution plays in letting the community speak at the planning meeting.

142 Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & society review 95.

143 Interestingly, the Development Order does not use the language of consultation, rather it uses the language of publicity.

144 The Town and Country Planning (Development Management Procedure) (England) Order 2015, s 15(7).

145 Planning and Compulsory Purchase Act 2004, s 18. SCIs have proved to be an effective mechanism for ensuring community consultation. Several judicial reviews have used the ground of legitimate

"consultations and engagement processes to be [as] transparent, accessible, and effective as possible, by ensuring that local people are effectively informed, engaged, involved and empowered by the Council on planning matters that impact their lives."[146] In relation to planning applications, the SCI explains that those who send comments for planning applications that are to be decided by committee will be notified of the date and time of the meeting. The SCI also stresses that the planning committee will consider all responses to the public consultation, and that even if a recommendation does not support the view of a person who commented, this does not mean that their view has been ignored.[147]

In relation to developments with over 10 new dwellings being constructed, such as that at Chrisp Street, the SCI sets out three additional measures Tower Hamlets endeavours to take. These include encouraging a developer to conduct pre-application engagement with the community and giving the community a right to address the Strategic Development Committee.[148] It is noteworthy that this right is relatively circumscribed insofar as only two persons objecting to any given development may address the Committee for a maximum of three minutes each.[149] The applicant and their supporters are entitled to an equal amount of time as that given to objectors.[150] Dividing community contributions in this way is indicative

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expectations to reinforce the consultation commitments made in SCIs. See, *R (Velayuthan) v Southwark LBC* [2023] EWHC 1396 (Admin) and *R (Majed) v Camden LBC* [2009] EWCA Civ 1029.

146 Tower Hamlets Borough Council, *Tower Hamlets Statement of Community Involvement Refresh 2016*, pp. 5.1.

147 ibid, pp. 9.6-9.8.

148 ibid, Appendix 3.

149 Tower Hamlets' Strategic Development Committee, *Agenda of meeting 24th July 2018* , p. 28.

150 ibid, p. 28.

of how community involvement in the process is heavily structured and seen in a binary manner: either the speaker is for or against a proposal.

Chrisp Street: what happened?

In comparison to the developer's consultation, there is far less information on the statutory consultation available on Tower Hamlets' website. For instance, there are no copies of the planning notices, or letters sent to properties in the vicinity of the project available online. This makes it more difficult to understand and evaluate the specific steps taken by the LPA. However, it is apparent from the Officer's Report that there was community engagement with the statutory consultation. The Report notes that 50 representations were received as well as 5 petitions, with over 3650 signatures in total.[151] The Report also gives a bullet-point summary of the main objections and supporting comments relating to the proposals.

In relation to the minutes of the Committee meetings, it is apparent that the structure of the meetings roughly followed the order of events detailed in the Procedure Rules. Thus, at each meeting there were at least two members of the community who spoke against the application, and one in support.[152] Both residents and traders contributed. The minutes suggest that as well as allowing the registered speakers to present their views, the Councillors asked them questions in order to clarify concerns and points that they raised.[153]

[151] Officer's Report (n 14), pp. 10.12-13.

[152] At the planning meeting on the 15 February 2018 there were two members of the public who broadly spoke against, and one in support. At the meeting on the 24th July there were three members of the public who spoke against, and one in support.

[153] The minutes give a broad overview of the meeting although it is not possible to discern the exact tenor.

Reflections

There is a lot that could be said about the LPA engagement process and the extent to which the community was listened to. There are certainly positive aspects. For instance, the SCI produced by Tower Hamlets is, perhaps in contrast to Poplar Harca's SCI, ambitious in its language: it supports 'involving' and 'empowering' the local community, both words which suggest an aspiration for meaningful participation. However, as explored elsewhere,[154] it is not uncommon for policy to aspire to ideals of participation, whilst falling short in practice. Two salient reflections on this theme have been chosen for this Chapter. First, the inaccessibility of the planning system. Although this is noted elsewhere,[155] the use of case study methodology in this project has rendered it particularly noticeable and so it is worth discussion. Second, it is argued that although planning decisions are not binary, community contributions are frequently framed as being either in support or objection by planning actors and the legal framework, with the effect that the nuances between the multitude of community voices are lost.

(a) Inaccessibility

Throughout the research for this project, it has been striking how inaccessible the planning system is to those who are not already familiar with it. This lack of accessibility affects anyone who is not a frequent user attempting to engage with the system, including the local community at Chrisp Street. Consequently, the inaccessibility of the system is worth highlighting in relation to how planning law listens to local communities. There are two interrelated points that will be made in this section. First, the personal cost of comprehending the sheer volume

[154] Armeni (n 8).

[155] Patrick McAuslan, 'Towards a just planning system: the contribution of law' (2013) Journal of Planning and Environment Law 145.

of documentation in relation to a large-scale planning decision, such as Chrisp Street. Second, the complexity of the planning system and the resulting difficulty in effectively navigating it.

First, there is an overwhelming number of documents that one must comprehend to understand the planning proposals at Chrisp Street. There are 480 documents on Tower Hamlets' planning portal for the Chrisp Street planning application.[156] Whilst many of these are plans for the proposed development, many are not. For example, at least 16 of the documents relate to the financial viability assessment.[157] In addition to the documents pertaining to the development at Chrisp Street, the Officer's Report, itself 112 pages long, cites an additional 22 relevant policies to the proposal. The main planning policy documents, the NPPF, Tower Hamlet's Core Strategy, the Managing Development Document, and the London Plan, together reach over 880 pages of policy. This does not include the relevant pages of primary and secondary legislation which are also needed to understand the decision-making framework.[158] The time and effort it takes to read and understand the documentation has a significant impact on the accessibility of the planning system.[159] This is particularly so when community members seeking to engage with planning applications are likely to be doing so in

156 'Chrisp Street Application Portal' <https://development.towerhamlets.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=DCAPR_118254> accessed 8 January 2024.

157 Explored in Chapter 4.

158 McAuslan, 'Towards a just planning system: the contribution of law' (n 155).

159 Rydin and Pennington (n 92), 159.

their free time, around work and other responsibilities. The sheer volume of documentation is off-putting and acts as a barrier for those who would like to have a voice in the planning system.

The problem of the number and length of documentation is compounded by the complexity of planning law.[160] The planning system is composed of layer upon layer of law and policy. Unpicking these layers and unravelling how they all fit together is no easy task.[161] For example, whilst the status of some documents is apparent from statute, like the development plan,[162] the relevance of others, such as the NPPF, is not.[163] Moreover, the interaction or hierarchy of policies is not always clear. For instance, it is not readily apparent to someone who is not well-versed in the internal logic, or 'grammar',[164] of planning law how the London Plan, a local development plan and supplementary planning guidance issued by the Department for Levelling up, Housing and Communities or the GLA all fit together.[165] Of

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160 Carolyn Abbot, 'Planning Inquires and Legal Expertise: A fair crack of the whip' in Maria Lee and Carolyn Abbot (eds), *Taking English planning law scholarship seriously* (1st edn, UCL Press 2022); Joanna Bell, 'Embracing the unwanted guests at the judicial review party: Why administrative law scholars should take planning law seriously' in Maria Lee and Carolyn Abbot (eds), *Taking English planning law scholarship seriously* (UCL Press 2022).

161 Abbott has explored the value of legal expertise in planning precisely as a result of this issue. See, Carolyn Abbot, 'Losing the local? Public participation and legal expertise in planning law' (2020) 40 Legal Studies: The Journal of the Society of Public Teachers of Law pp269; Abbot, 'Planning Inquires and Legal Expertise: A fair crack of the whip' (n 160).

162 Planning and Compulsory Purchase Act 2004, s 38(6).

163 For example, the NPPF has an unusual legal status. Rather that deriving from statute, power to issue the NPPF derives from the planning Acts which give the Minister for Planning overall responsibility for oversight of the planning system. See, *Hopkins Homes v Secretary of State of Communities and Local Government* [2017] UKSC 37.

164 For the language of 'grammar', see Bell, 'Embracing the unwanted guests at the judicial review party: Why administrative law scholars should take planning law seriously' (n 160).

165 This is likely to become more complex with the introduction of 'National Development Managing Policies' in the Levelling Up and Regeneration Act 2023. These are to have statutory status and be able to override local development plans. Although not yet in force, they have been noted by practitioners as confusing and unlikely to tackle the problems. See, Zack Simons, 'Autumn notes: new Act, new minister, no plan(s)' (14 November 2023) <https://www.planoraks.com/posts-1/autumn-notes-lura?rq=levelling> accessed 11 February 2024.

course, part of this is because there is no clear legal answer because the weight attributed to planning policies is a matter of planning judgment.

As well as unravelling planning policies, the field is littered with terms that lack clear meaning to 'one-shotters',[166] such as members of a local community who are engaging in the planning system for the first time out of concern or interest in a disruptive development in their area. For instance, whilst the language of "viability assessments" may be comprehensible to 'repeat players' such as LPAs and developers, it lacks an easily discernible meaning to those not lingual in the language of planning. As explored later, the legal structure's emphasis on material considerations and planning policy means framing and articulating concerns in the language of planning is important for having one's voice heard in the planning system.[167] The complexity of the planning schema precludes this.

This is not to underestimate the importance of detail in planning policy which make the planning system predictable; or the need for the setting of clear standards for environmental control or other purposes.[168] However, it is important for planning scholars and practitioners,

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[166] A one-shotter is someone who only uses the system occasionally and consequently lacks familiarity with it. For the typology of 'repeat players' and 'one shotter' see, Galanter (n 142).

[167] On the importance of framing one's concerns in the relevant language, see Abbot, 'Losing the local? Public participation and legal expertise in planning law' (n 161), 280; Christopher Rootes, 'More acted upon than acting? Campaigns against waste incinerators in England' (2009) 18 Environmental politics 869; Hilson (n 37).

[168] McAuslan, 'Towards a just planning system: the contribution of law' (n 155), 156.

as well as policy-makers, to be cognisant of how detailed and dense planning policy may undermine participation.

(b) Channelling

The second reflection on the consultation and engagement processes run by the LPA focuses on how the different community voices are channelled in particular ways by these processes. By funnelling community voices into categories of support/object, the LPA's engagement processes arguably risk failing to listen to the substance of the multitude of community contributions.

Planning officers have a central role in the planning system, and it is generally accepted that Officer's Reports have a legitimate influence on planning decisions made by committees.[169] As well as evaluating planning proposals, these reports usually contain a summary of the community views in relation to a development. In this way, they act as a bridge of communication between the local community and planning committee. This means *how* a planning officer presents the views of the community really matters to the decision. In this regard, it is notable that the Officer's Report for Chrisp Street frames the community contributions as either being in 'support' of the application, or 'objecting' to it. For instance, the Officer's Report, in summarising the responses to the statutory consultation, states that "[i]n total, 50 representations were submitted; 26 in *support* and 24 in *objection*" (emphasis added).[170] The report also notes that a petition with over 2000 signatures in *objection* to the development was received, as well as four petitions in *support*. The total number of signatures

[169] *R (Luton BC) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) [90].

[170] Officer's Report (n 14), pp. 10.13.

on these supporting petitions was 1650.[171] Whilst the Report does provide a bullet point summary of the main points objecting to the scheme and supporting it, the detail of the community views is lacking in the Report.

In a similar manner, representations at the Strategic Development Committee are channelled into 'supporters' and 'objectors' by the Development Committee Procedural Rules.[172] This is reflected in the minutes of the Strategic Development Committee meeting which labels community representations as either being in support or objecting to the proposals.

It is understandable why Officers' Reports condense the different community views aired in the statutory consultation. Part of the function of the planning officer in drafting the Officer's Report is to summarise and distil a large amount of information into an easily digestible document for the Committee.[173] The process of condensing the vast volumes of information relating to a planning application will necessarily result in some simplification of the issues in order to make the salient points easier to grasp.[174] Aggregating and channelling community voices into a binary support/object is one way of doing this.

Although it is understandable why planning officers simplify the diverse community views received, it is not without problems when analysed from a participation perspective. The directing or channelling of community voices into these binary categories creates a risk that

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171 ibid, 10.14.

172 Part. 4.8 Tower Hamlets Development Committee Procedural Rules specify that there can be a maximum of two speakers objecting, and two in support.

173 For a summary of the work that planning officer's reports do see, *R (Luton BC) v Central Bedfordshire Council* (n 169), [91]-[97]. See also, *R v Mendip DC ex parte Fabre* [2000] 1 WLUK 362; *R (Nicholson) v Allerdale BC* [2015] EWHC 2510 (admin).

174 The duty on planning officers is to not mislead the committee members. It is, however, recognised that planning officers must make judgments regarding what to include and omit in their reports and that they do generally do this without misleading the committee. See, *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314.

the planning actors fail to listen to the substance of the contributions. As demonstrated by the numerical presentation of the community responses to the statutory consultation in the Officer's Report for Chrisp Street – 26 in support, 24 in objection – the binary categorisation encourages the reduction of the community views into mere numbers. Aggregating the preference of the community in this way shows only a superficial engagement with their views as opposed to a genuine attempt to listen and engage with the substance of the varied contributions.[175]

The simplification of the diverse collection of community views in the Officer's Report also means that the nuances in community voices are overlooked as the focus is on whether any given individual 'supports' or 'objects' the development. The press surrounding Chrisp Street show that the community sentiment was much more complex than this simple binary. The campaigns relating to Chrisp Street show that the whole community was not completely opposed to the regeneration; rather, some members appeared to support redevelopment in principle but to have specific problems with aspects of Poplar's proposals.[176] For instance, a post by the campaign group "Our Chrisp Street" provides a list of demands for the development. These included that 50% of the housing be affordable, that there should be no loss of social housing, that the character of the area should be maintained and not just aimed at middle to high income families.[177] Similarly, a petition by 'Chrisp Street Market Traders' demanded the deferral of the scheme so that more consultation could take place, and

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175 For criticism of 'aggregation' see, Dryzek (n 65) and Arnstein (n 44).

176 There were several different groups campaigning, including 'Our Chrisp Street' and 'Chrisp Street Market Forum'.

177 See the post from 16 February 2016, 'https://www.facebook.com/profile.php?id=100070223927565' <https://www.facebook.com/profile.php?id=100070223927565> accessed 26/01/2024.

discussions surrounding the loss of car-parking could occur.[178] Rather than identifying this contingent support for development in principle, the binary categorisation results in the shoe-horning of complex views into simplistic for/against boxes. Consequently, there is a risk of failing to meaningfully listen to the community and bring them into the decision-making process. In this regard, it is worth noting that whilst the planning decision was initially deferred, similar criticisms were repeated at the meeting in July,[179] suggesting a continued lack of listening to the substance of the community views.

The aggregation of community views into these binary categories is also interesting because it does not mirror the options available to planning officers when they make their recommendations to planning committees, or the powers of that committee itself. There are various mechanisms available to planning committees which enable them to shape developments. Section 70(1) TCPA 1990 states that LPAs can grant planning permission, with or without any planning condition they see fit, or refuse planning permission.[180] Planning conditions give LPAs a power to shape developments, although there are limits to their use. First, conditions must be for a planning purpose and not for any ulterior one. Second, they must

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178 'https://www.change.org/p/tower-hamlets-council-save-chrisp-st-market-support-local-businesses' <https://www.change.org/p/tower-hamlets-council-save-chrisp-st-market-support-local-businesses> accessed 26/01/2024.

179 Tower Hamlets' Strategic Development Committee, *Minutes (24 July 2018)*, p. 4.

180 Town and Country Planning Act 1990, s 70(1).

fairly and reasonably relate to the development permitted. Finally, they must not be so unreasonable that no reasonable planning authority could have imposed them.[181]

In addition to planning conditions, LPAs can enter so-called 's 106 agreements' with developers in order to influence aspects of a proposed development.[182] These are currently used to secure changes to developments which cannot be achieved through planning conditions.[183] S 106(1) TCPA 1990 details that these agreements may restrict the development of land in a specific way, require specified operations or activities to be carried out in, on, under or over the land, require the land to be used in a specified way, or require a sum to be paid to the authority.[184] The Community Infrastructure Levy Regulations 2010/948 also impose limits on the role that s 106 agreements can play in the granting of planning permission.[185] Charting the exact contours of how LPAs can use planning conditions and planning obligations to influence a development is beyond the scope of this research. The significance of them for current purposes is that both planning conditions and planning obligations give LPAs some ability to control developments proposed in their area. Planning committees do not usually take the lead in suggesting or formulating planning obligations and conditions. Rather, planning officers usually devote a section of their report to this issue. The informal delegation of this function to

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181 For an early expression of these principles see, *Newbury DC v Secretary of State for the Environment* [1981] AC 578, 599. For a recent restatement see, at *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66 [28]-[32].

182 The Levelling up and Regeneration Act 2023 intends to reduce the use of s. 106 agreements through a new Infrastructure Levy. These changes, however, are not in force at the time of writing and will only partially replace s 106 agreements.

183 Department of Communities and Local Government (n 74), pp. 203.

184 Town and Country Planning Act 1990, s 106(1).

185 Community Infrastructure Levy Regulations 2010/948, reg 122(2). Section 106 agreements must be necessary, directly related to the development and fairly and reasonably related to the development's scale and kind.

planning officers is likely explained by their relative planning expertise when compared to planning committees which are usually composed of local councillors.

The fact that planning committees and planning officers have these other options available to them, but that community voices are nevertheless channelled into the binary for and against is worth reflecting upon. It suggests that rather than influencing the full range of options open to the elected decision-maker, the community voices are only seen as relevant to the narrower question of 'whether' a particular development should go ahead, as opposed to the question of 'how'.[186] The 'how' questions are largely considered and decided upon by the planning officer in their recommendations on planning conditions and obligations. Indeed, it seems community views on 'how' the development could be made more acceptable to them are lost in the process, even though they are the ones who are most significantly affected by the proposed development. This can be seen at Chrisp Street where the focus of the Officer's Report is on the *number* of supporters and objectors rather than the detail of community contributions. To the extent that the planning officer does identify specific concerns with the development at Chrisp Street, the Officer's Report states that they "will be considered within the 'Material Planning Considerations' section of the report."[187] Yet, at no point in this section of the Report does the planning officer return to the expressed community concerns and relate planning policy to the concerns raised. There is also no discussion of any planning conditions and obligations that could be used to ease the community concerns in relation to the development.

It is not entirely clear why the decision-making process seems to limit the relevance of community contributions to the question of 'whether' a development should go ahead. One

[186] For the language of 'whether' and 'how', see Rydin, Lee and Lock (n 34).

[187] Officer's Report (n 14), pp. 10.14.

reason may be that planning conditions have been given a narrow, 'technical' framing by the courts which limits lay input.[188] This results in the exclusion of the community in the assessment of what can amount to a planning condition. Another reason is that the framing of planning obligations as a quasi-contract constructs them as private agreements negotiated by LPAs and developers without external input.[189] In a similar manner to the technical framing of planning conditions, the contractual nature of planning obligations closes off community input.

Regardless of the cause, it seems that although the decision of an LPA is not *at law* binary, because planning obligations and conditions give LPAs power to shape developments, *in practice* many of the decisions regarding obligations and conditions are taken earlier in, or outside the LPA committee process, through decisions of the planning officer and conversations with the developer. This means that the planning committee is presented with a relatively binary choice of support or object the proposals. The consequence is that community contributions are also channelled into the same binary for and against boxes that are presented to the committee.

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188 On the exclusionary nature of 'technical framing' see Antonia Layard, 'Planning by numbers: affordable housing and viability in England' in Federico Savini Mike Raco (ed), *Planning and Knowledge: How New Forms of Technocracy Are Shaping Contemporary Cities* (1 edn, Policy Press 2019); Fischer (n 86); Lee, 'Knowledge and Landscape in Wind Energy Planning' (n 129).

189 On the private nature of section 106 agreements, see Edward Mitchell, 'Contracting affordable housing delivery? Residential property development, section 106 agreements and other contractual arrangements' in Maria Lee and Carolyn Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022).

CHAPTER 4: AFFORDABLE HOUSING

Formal participation mechanisms are only part of the picture when evaluating the extent to which planning law listens to local communities affected by inner city redevelopment. It is also important to understand the extent to which planning policy creates space to include local voices in the decision-making process. This Chapter aims to do just that by drawing on insights from environmental law scholarship that show how the framing of a particular topic in law and policy implicitly renders perspectives, or issues, relevant or irrelevant.

The topic chosen for exploration is that of affordable housing. From sifting through the press related to the development at Chrisp Street, social media, and the consultation mechanisms, it is clear that the call for "more social housing" was a priority of those who lived in the area affected by the development. Leaflets distributed by those concerned with Poplar's plans stated, "We need fruit & veg & *social housing*, not corporate brands and luxury flats" (emphasis added).[190] Similarly, at a demonstration held on the 10th February 2018 and at the Strategic Development Committee meeting on the 15th February 2018 members of the public held signs calling for "More Social Housing".[191] A list of demands and assurances drafted by 'Our Chrisp Street' also called for the development to include 50% affordable housing, which reflects the upper limit of the Tower Hamlets' Core Strategy.

There are several reasons why affordable housing has been chosen over the other potential issues that could have been explored. First, it highlights that the community views of the proposals at Chrisp Street were not as simple as supporting or opposing the development.

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190 Chrisp Street Trader's Market Forum (n 15).

191 ibid (n 15).

Slogans used in leaflets relating to Chrisp Street, such as ‘more social housing’, suggest that some community members were not outright opposed to the development but wanted to see particular changes made to the proposals. It is interesting to see how this is captured (or not) in the planning process. Second, demands for more affordable housing was one of the most consistent issues identified in relation to the proposals. Third, the question of how local concerns surrounding affordable housing are captured in the planning process is an important issue for academic study. It relates to broader questions of housing supply and housing inequality in London. Whilst these issues are not the focus of this research project, they are related and give this research broader relevance.[192]

The rest of this Chapter is structured as follows. First, there is a brief explanation of the scholarship which has analysed the framing role of law and policy in planning. Second, there is an exploration of the law and policy relevant to affordable housing. Next, there is consideration of the role that these played in the decision at Chrisp Street. The final section discusses two reflections regarding the legal mechanisms that shaped the affordable housing provision. On the one hand, it is observed that planning policy’s narrow, often numerical, framing of affordable housing makes it more difficult for planning actors to listen to local voices. On the other hand, where there is an absence of policy, other actors are able to fill this gap meaning significant aspects of planning practice are being determined without public debate.

[192] Layard, ‘Property and planning law in England: facilitating and countering gentrification’ (n 11).

Policy's role in framing

This research draws on ideas from environmental law scholarship that demonstrates the role of planning law and policy both in constructing acceptable developments, and in limiting scope for participation in decision-making.[193] Two main ideas are drawn upon.

First, as Elizabeth Fisher argues, law and policy have an undeniable role constructing acceptable developments and "delineat[ing] what is an acceptable regulatory object".[194] In relation to wind turbines she demonstrates how the law, by designating certain wind turbines as permitted developments, is "normalising" certain wind energy technologies.[195] Fisher's analysis challenges the idea that planning law is purely instrumental – a means to delivering policy targets – rather, she encourages us to pay more attention to the *work* done by planning law in constructing acceptable forms of development and demarcating regulatory objects.[196]

Second, environmental law scholarship has shown how policy also foregrounds certain arguments and issues as a result of the way it frames issues.[197] This has implications for what types of arguments are relevant, and who is listened to in planning decision-making processes. For instance, in his analysis of fracking, Chris Hilson identifies how policy framed decision-making to focus only on exploration permits. The consequence of this was that the global frame of greenhouse gas emitted from the eventual burning of the extracted shale gas were omitted

193 Although this thesis is not focused on environmental law, the scholarship of this field has unpicked planning law in significant detail and consequently is relevant to this research.

194 Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (n 34), 540.

195 ibid, p. 539.

196 ibid.

197 Framing is a concept that has its roots in social science literature. The main idea is that how one frames a particular issue, is likely to accentuate different aspects of the issue. Hilson's article explore the framing concept in detail and identifies different types of frames, such as scalar frames. See, Hilson (n 37).

from view in the decision-making process.[198] Similarly, Lee et al have shown how the economic framing of the energy transition foregrounds economic incentives. Consequently, economic arguments are well-received in planning decisions relating to nuclear energy and carbon capture technology whilst visual impact arguments are not.[199] This also has an exclusionary effect. Since public comments are most likely to be directed at the visual impacts of energy developments, the public, as a group, are subtly excluded from the planning debate. Moreover, Lee has shown that the framing of issues as technical, or as requiring expert input, can result in a preference in the decision-making process for this type of knowledge. An impact of this is that lay knowledge is less well-received or absent from the decision-making process.[200] As she puts it the "legal framing of a decision around a highly technical risk assessment paradigm [makes] it difficult to embrace different perspectives that are framed in a different lens."[201]

Affordable housing: Law and policy

Planning law and policy plays a significant role in shaping the affordable housing requirements of large-scale redevelopments. It not only defines affordable housing but sets targets on how much affordable housing should be provided in schemes and how to calculate this. The implications of this on how the planning system listens to local communities are explored in the final section of this chapter. The aim of this section is to set out the key mechanisms that are relevant to the levels of affordable housing provided at Chrisp Street. Two main aspects of planning policy are considered: the development plan targets, and financial viability

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198 ibid.

199 Lee and others (n 57); see also, Rydin, Lee and Lock (n 34), 146.

200 Lee, 'Knowledge and Landscape in Wind Energy Planning' (n 129), 22.

201 Lee and others (57), 53.

assessments. Both aspects of planning policy act upon the development in different ways to shape the affordable housing provisions at Chrisp Street. Consequently, the story of affordable housing at this site cannot be understood without consideration of both policy mechanisms.

As a preliminary point, it is highlighted that unravelling the density of this planning policy has not been an easy task and the following summary remains technical and dense. This should serve as a reminder of the point raised in the previous chapter about the obstacles to participation generated by the tangled layers of planning policy.

The definition of affordable housing has been determined nationally by the NPPF (2012). The NPPF glossary defined affordable housing to include social-rented, affordable rented and intermediate housing.[202] Social rented housing is regulated by s 80 Housing and Regeneration Act 2009,[203] whilst affordable housing is defined in the NPPF as housing rented at no more than 80% market rent.[204] Intermediate housing includes housing on a shared equity basis and other low costs homes.[205] In giving this tripartite classification of affordable housing, the NPPF does not just give a definition but structures how affordable housing is understood in the whole planning system. This definition is not inevitable, neutral or even the only way of understanding affordable housing. The NPPF defines affordable housing as 80% *market* rent,[206] and in doing so ties it to the market. The NPPF could have chosen to tie affordable housing to average income, or define it in a completely different way.[207] This demonstrates

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202 Department of Communities and Local Government (n 74), p. 50.

203 Housing and Regeneration Act 2009.

204 Department of Communities and Local Government (n 74), p. 50.

205 ibid, p. 50.

206 ibid, p. 50

207 Christophers discusses how affordable housing used to be understood as a social need, but from the 1990s onwards there was a shift to seeing it as an issue of economic affordability. See, Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 International journal of urban and regional research 79, 83-84.

how the NPPF is constructing the planning system's understanding of affordable housing. The process of doing this also shuts off debate on how affordable housing should be defined in other parts of the planning system.[208]

Local development plans, issued by LPAs, set targets for levels of affordable housing in the area that they relate to.[209] The term 'development plan' includes local plans, neighbourhood plans and, if the relevant area is located within London, the London Plan. The London Plan is issued by the Mayor of London and sets a spatial development strategy for London. The London Boroughs are required to ensure that their local development documents are 'in general conformity' with the London Plan.[210]

Development plans play a critical role in planning decisions. Under s 57 TCPA 1990 any development requires planning permission.[211] Although planning decisions are ultimately discretionary,[212] in determining an application for planning permission, an LPA is required under s 70(2)(a) TCPA 1990 to have regard to the development plan.[213] The Planning and Compulsory Purchase Act 2004 ('PCPA') strengthens the position of the development plan in the decision-making process. S 38(6) PCPA 2004 states: "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination *must* be made in accordance with the plan unless material considerations indicate

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208 This is not to suggest that fixing the definition of affordable housing is necessarily a bad thing, but to highlight that this has consequences.

209 The development plan is part of an LPA's Local Development Scheme which they are required by law to produce. See, Planning and Compulsory Purchase Act 2004, s15(2).

210 Greater London Authority, 'London Plan: Overview and Introduction' (2016) <https://www.london.gov.uk/programmes-strategies/planning/london-plan/past-versions-and-alterations-london-plan/london-plan-2016/london-plan-overview-and-introduction#:~:text=Boroughs%27%20local%20development%20documents%20have,reasons%20why%20it%20should%20not.> accessed 31/01/2024.

211 Town and Country Planning Act 1990, s 57.

212 *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780.

213 Town and Country Planning Act 1990, s 70(2)(a).

otherwise" (emphasis added).[214] It has broadly been understood that this creates a 'presumption in favour of the development plan'. [215] The emphasis placed on development plans in deciding planning applications by the statute results in development plans constructing visions of acceptable development for the areas that they cover.[216] This is critical when thinking about the work done by the development plan in influencing the levels of affordable housing provision at Chrisp Street.

Tower Hamlets' development plan documents comprises of its Core Strategy (2010)[217] and Managing Development Document (2013),[218] and the London Plan,[219] all three of which include policies relating to affordable housing. A notable feature of these policies is the extent to which they use percentage and numerical targets for the construction of affordable housing requirements. A consequence of this is that the understanding of what is an acceptable large-scale development in Tower Hamlets is largely driven by numbers and percentages.

The London Plan includes a London-wide targets for affordable housing. Policy 3.11 sets a target of at least 17,000 more affordable homes per year in London, and aims for this to be split 60% affordable or social rent, and 40% for intermediate rent or sale.[220] This informs

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[214] Planning and Compulsory Purchase Act 2004, s 36(8).

[215] Lord Hope in *Edinburgh City Council v Secretary of State for Scotland* [1997] 1 WLR 1447 explained that this does not mean the decision-maker is obliged to "slavishly to adhere" to the development plan, but that "in most cases decisions about the control of development will be taken in accordance with what it has laid down". p. 1449-1450. Lord Hope was describing s 18A Town and County Act (Scotland) 1972 introduced by s 58 Planning and Compensation Act 1991. The language of this section is almost identical to s 38(6) PCPA 2004 and Lord Hope's dicta has been cited in describing the effect of s 38(6) PCPA 2004 (*R (Corbett) v Cornwall Council* [2020] EWCA Civ 508 [42]).

[216] The role of the local development plan will change once National Developing Management Policies are introduced under the Levelling Up and Regeneration Act 2023.

[217] London Borough of Tower Hamlets, *Core Strategy Development Plan Document*.

[218] London Borough of Tower Hamlets, *Managing Development Document*.

[219] Greater London Authority Act 1999, s 41 and s 334.

[220] Mayor of London (n 101), p. 119. Policy 3.11 also requires boroughs to set their own targets for the number of affordable homes to be constructed each year, having regard to the current and future housing

the policy targets set for Tower Hamlets: the London Plan set a target of 3,931 new homes to be built annually in Tower Hamlets from 2015-2025.[221]

In addition to the London Plan, Tower Hamlets' policies contain several targets relating to affordable housing.[222] A number of these resemble the policies expressed in the London Plan, indicating the influence it has on local development plans.[223] The Core Strategy sets a target of 50 per cent of new homes to be affordable until 2025.[224] This target is to be achieved by requiring all developments of over 10 new residential units to provide between 35 and 50 per cent affordable homes (subject to viability).[225] The Core Strategy also sets a target of affordable homes to have a tenure split of 70% social rent and 30% intermediate rent.[226] The Managing Development Document repeats these targets, and also explains that affordable housing is calculated on the basis of habitable rooms and based on the total housing existing or permitted as part of a development.[227]

As well as the development plan documents, the levels of affordable housing at Chrisp Street were influenced by a number of financial viability assessments.[228] These assessments

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targets, the strategic priority for family affordable housing, the Mayor's Housing Strategy, the need to promote mixed and balanced communities, and the future viability of development.

221 ibid, p. 96.

222 Other relevant supplementary planning policies include the London Mayor's 'Housing Supplementary Guidance' published in 2016, and the London Mayor's 'Homes for Londoner's' guidance.

223 For instance, the Strategic Policy 02 in the Council's Core Strategy sets out Tower Hamlets' aim to deliver new housing in line with the London Plan targets.

224 London Borough of Tower Hamlets, *Core Strategy Development Plan Document*, p. 46.

225 ibid.

226 ibid.

227 London Borough of Tower Hamlets, *Managing Development Document*, p.26.

228 Chrisp Street required a viability assessment as a result of its reliance on public subsidy. The Mayor's supplementary planning guidance creates two categories of developments of 10 units or more. Those developments which deliver 35% or more affordable housing without any public subsidy are 'fast-tracked' and do not need to submit viability assessments. Those developments which fail to deliver 35% affordable housing or only do so with public subsidy must submit full viability assessments. Chrisp Street fell into the latter category, failing at first to meet the 35% threshold, and then only doing so with public subsidy.

use financial modelling to assess the levels of affordable housing that it is 'financially viable' for a development to provide.

Whilst financial modelling had been used in planning before 2012,[229] paragraph 173 of the 2012 NPPF framed financial viability as a necessary element of sustainable development.[230] This has led to financial viability assessments playing a key role in how LPAs assess the amount of affordable housing provided in development proposals.[231] Affordable housing is relevant to the question of financial viability as it has a lower market value than private housing. This means that the greater the amount of affordable housing proposed the lower the final value of a proposed development. This in turn influences the viability calculations. The impact of viability assessments has been noted most significantly where they are used as a justification by a developer to provide less affordable housing than stipulated in the development plan.[232] They do this by showing that more affordable housing is 'unviable' in the scheme.

Viability assessments are usually commissioned by the developer and submitted to the LPA with the other planning documents. The LPA will often instruct a third party to scrutinise

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229 See, Department of Communities and Local Government, *Circular 05/2005 - Planning Obligations* For analysis see, Christophers (n 207), p. 90-91.

230 The NPPF stated that sustainable development could only be achieved if it was viable and that there was a risk of policy requirements placing excessive burdens on new development. Consequently, the NPPF expressed that, "[t]o ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable." See, Department of Communities and Local Government, *NPPF* (n 74), pp. 173.

231 London Borough of Tower Hamlets, *Core Strategy Development Plan Document*, p. 46.

232 See, *Kensington and Chelsea RLBC v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1466; *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 991 (Admin). The relevant policy for Chrisp Street is Tower Hamlets Borough Council, *Development Viability Supplementary Planning Document* (October 2017), Mayor of London, *Homes for Londoners: Affordable Housing and Viability Supplementary Planning Guidance* (August 2017). For analysis, see Edward Mitchell, 'Planning, property and profit: the use of financial viability modelling in urban property development' (2020) 71 Northern Ireland Legal Quarterly 35; Layard (n 188); Town and Country Planning Association, *Planning 2020 – Final Report of the Raynsford Review of Planning in England* (Nov 2018).

the assessment. The basic idea of a viability assessment is to compare the current value of the land ('residual land value'[233]) with the estimated value of the final development minus the costs. The costs generally include the build costs, marketing, professional fees, but also the developer's profit, usually set at 20%. A scheme is viable if the final value of the development minus the costs is higher than the residual land value (estimated final development value – costs > residual land value). A simple example may help in understanding what this means. Suppose the current value of a plot of land is £100; this is the 'residual land value'. A developer has a plan to build 20 new houses on the plot. The cost of this is £60. The estimated value of completed development is £180. Such a development would be viable because the current value of the land (£100) is less than the final value of the scheme (£180) minus the costs (£60). Had the final value of the land been £150, the development would not be viable as the current value of the land (£100) would exceed the final value of the scheme minus the costs (£150-£60 = £90).

Although there is no settled methodology for viability assessments,[234] policy has over time developed to encourage a more consistent approach. For instance, in the early 2010s there was significant divergence in the approach to calculating the 'residual land value' or current value of the land. Different approaches included using the market value of the land, the 'existing use value plus premium '(EUV+) and the alternative use value. The market value is how much the land is actually purchased for, whereas 'existing use value plus premium' is the current value of the use of the land with a premium added to reflect the uplift in value that planning permission for land provides. At the time the planning application for Chrisp Street was submitted, the Mayor of London's Supplementary Housing Guidance supported the EUV+

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[233] In essence, this is how much the developer can expect to pay for the land.

[234] Layard (n 188).

approach.[235] Although the EUV+ approach is not without its own problems,[236] it has generally been preferred by LPAs on the basis that the 'market value' approach encourages developers to overpay for land on the assumption they can recover the costs by not providing affordable housing. The guidance also recommends that the premium applied to land should be between 10 and 30 %, but that it would nevertheless have to be justified on each site.[237] Tower Hamlets' viability guidance indicates that the premium should not normally exceed 20%.[238] Although the language of the assessments, and policy relating to them is couched in neutral and objective terms, it should not be overlooked that issues such as whether to use the market value or EUV+ represents a contentious, normative question about land value.

As well as attempting to settle some aspects of methodology, the Mayor of London's supplementary planning guidance ('SPG') also sets out an expectation of transparency of viability assessments. The SPG states that "the Mayor will treat information submitted as part of, and in support of, a viability assessment transparently" and that it should generally be published with the rest of the planning documentation relevant to the decision.[239]

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235 Mayor of London, *Housing Supplementary Plannning Guidance* (March 2016). This was echoed in Mayor of London, *Homes for Londoners: Affordable Housing and Viability Supplementary Planning Guidance*; Tower Hamlets Borough Council, *Development Viability Supplementary Planning Document*.

236 There has also been scepticism of the use of EUV+. This is summarised by Holgate J in the postscript to *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* (n 232).

237 Mayor of London, *Homes for Londoners: Affordable Housing and Viability Supplementary Planning Guidance*, pp. 3.46

238 Tower Hamlets Borough Council, *Development Viability Supplementary Planning Document*, p. 8.

239 Mayor of London, *Homes for Londoners: Affordable Housing and Viability Supplementary Planning Guidance*, pp. 1.20-1.21. The Mayor's position reflects a growing judicial acceptance of transparency in viability assessments. See Mitchell (n 232), 46-47. Compare, *Royal Borough of Greenwich v ICO & Shane Brownie* EA/2014/0122; *Turner v Secretary of State for Communities and Local Government* [2015] EWHC 375 (Admin) and *R (Perry) v Hackney LBC* [2014] EWHC 3499 (Admin); *R (Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin).

Chrisp Street: what happened?

The story of affordable housing at Chrisp Street is as much about what happened between the planning proposals being submitted in June 2016 and the decision taken in July 2018, as it is about the decision itself. When the planning proposals were originally submitted, only 131 of the 649 properties were to be affordable. This amounted to 25% affordable housing (calculated on the basis of habitable rooms). By the time the decision came to be considered in February 2018, this had increased to 206 affordable rented units. This equated to 35.6% affordable housing.[240] This increase was significant as it transformed the development from being non-compliant with Tower Hamlets' Core Strategy to one that reached the minimum threshold in the local development plan of 35%.

Whilst the exact reasons for the increase are not recorded in publicly available documents,[241] the policy targets are likely to have played a role in the increase. At some point in 2017 additional funding from the GLA and Tower Hamlets was made available to Poplar Harca, and this enabled the increase in affordable housing.[242] From the documents that are available, it seems that the fact the development did not comply with the targets in the local plan was a motivating factor for why additional funding was made available,[243] indicating the impact that they can have on shaping development proposals.

The financial viability assessment of proposals at Chrisp Street appear to have worked against increasing the levels of affordable housing above 35%. On Tower Hamlets website,

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240 Savills, *Planning Statement Addendum: Chrisp Street Market* (Nov 2017), pp. 2.6

241 It is not uncommon for affordable housing requirements to be negotiated behind closed doors. See Mitchell (n 189).

242 Tower Hamlets Borough Council, *Updated Officer's Report Chrisp Street* (2018), pp. 4.2.

243 The Planning Addendum, dated November 2017, refers to Poplar Harca's "extensive discussions" with officers at LBTH and the GLA and that it was following these discussions that additional funding was

there are four different viability reports. These relate to viability assessments undertaken both before and after the securing of additional funding to increase the affordable housing provision from 25% to 35.6%. The number of reports also reflects the number of actors involved in assessing viability. Poplar Harca and Telford Homes commissioned Savills to undertake a viability assessment on their behalf. The LPA requested that BNP Paribas review these viability assessments and the GLA also undertook a review of the mechanisms.[244]

Whilst these assessments showed considerable disagreement between the relevant actors as to how to calculate the viability of the development at Chrisp Street, the conclusion of each was that the scheme could not support additional affordable housing beyond 35.6% as it was already operating at a 'deficit'.[245] In this way, the viability assessments appear to have acted as a limiting factor on the levels of affordable housing at Chrisp Street as they justified capping the levels of affordable housing at approximately 35%.

At the decision-making stage of the planning application, both the numerical targets and the viability assessments appear to have played a determinative role. Despite dissatisfaction from some of the community at the levels of affordable housing,[246] the Officer's Report recommended planning permission was granted at both the February and July meetings of the

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made available. Savills, *Planning Statement Addendum: Chrisp Street Market*, pp. 2.3. The GLA Stage I referral report also expressed "concern" at the minimal uplift of affordable housing in December 2016. See, Greater London Authority, *Chrisp Street Market: Strategic Planning Application Stage I Report*, pp. 27.

244 The email chain discussing the viability reports, and BNP's appraisal is available as a result of a Freedom of Information Request made in 2018. The email chain has provided significant insight into the complexity of the viability assessments at Chrisp Street. See, 'EIR - Chrisp Street Market review' <https://www.london.gov.uk/who-we-are/governance-and-spending/sharing-our-information/freedom-information/foi-disclosure-log/eir-chrisp-street-market-review> accessed 20/12/2023.

245 Savills, *Chrisp Street Market Viability Assessment Report* (10 August 2017); Savills, *Chrisp Street Market Viability Assessment Addendum Report* (9 October 2017); BNP Paribas Real Estate, *Chrisp Street Market, E14, Review of the 'Financial Viability Assessment'* (2017).

246 See, Officer's Report (n 14), pp. 10.6, 10.13

Strategic Development Committee.[247] Both the original and updated Officer's Reports deemed the levels of affordable housing as "acceptable" following consideration of Tower Hamlets' strategic target of 35-50% affordable housing in large developments. [248] The minutes of the planning officer's presentation at the meeting on 24 July 2018 also shows emphasis was placed on how the levels of affordable housing was consistent with policy.[249] This suggests that the officer was using the percentage targets as an means to evaluate the proposals. In turn, this indicates that the numerical targets for affordable housing framed the debate surrounding what is to be expected of large-scale redevelopment projects.

Likewise, the viability assessment appears to have played a significant role in the planning officer's evaluation of the development. In explaining why the development could not support an increase in the levels of affordable housing, the Officer's Report relied on the conclusions of the viability assessment.[250] Identifying the 'deficit' in the scheme, the Report stated that the site already provided the "the maximum reasonable amount [of affordable housing] that could viably be supported by the development".[251] The emphasis placed on the viability assessments in coming to this conclusion is significant. It shows how the weight placed on viability in planning policy translates in practice to questions of financial viability becoming the lens through which planning actors scrutinise affordable housing provision.

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247 The levels of affordable housing were 35.6% in February 2018, but had increased to 35.8% due to a reconfiguration of the rooms on the site.

248 Officer's Report (n 14), pp. 11.74.

249 Tower Hamlets' Strategic Development Committee, *Minutes (24 July 2018)*, p. 6.

250 Tower Hamlets Borough Council, *Updated Officer's Report Chrisp Street* (n 242), pp. 11.69. There is some discussion in the updated officer's report of potential options to increase the levels of affordable housing further, but each is ultimately rejected. See, pp. 4.4.

251 ibid, pp. 4.2

Reflections on affordable housing

There are two main reflections to make about how planning policy creates space to listen to those communities affected by inner city development. First, the way in which planning policy frames the issue of affordable housing in numerical terms makes it more difficult for decision-makers to listen to the local community views. Second, gaps in planning policy have allowed other characters to influence mechanisms, such as viability assessments, that determine affordable housing provision.

(a) Framing

The first reflection that emerges from studying Chrisp Street is that the framing in planning policy of how affordable housing provision is to be determined makes it more difficult to listen to the local community. There are two examples of this to explore: the framing of affordable housing in percentage targets, and the foregrounding of financial viability in policy.

The way in which the development plan, whether it be the London Plan or Tower Hamlet's Core strategy, phrases and frames issues is important in planning. This is because the 'presumption in favour of the development plan'[252] in s 38(6) PCPA 2004 creates an expectation that developments which accord with the plan will be granted planning permission: they are acceptable developments.[253] As a result, development plans should be understood as

252 *Edinburgh City Council v Secretary of State for Scotland* (n 215), p.1449-1450.

253 See, Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (n 34).

constructing a vision of acceptable development for an area. At Chrisp Street, a significant degree of this construction is facilitated using percentage targets.

The first argument in this section is that the development plan's framing of the desirable levels of affordable housing using percentage and numerical targets results in these targets becoming a critical lens through which the proposals at Chrisp Street are understood. A consequence of this is that the planning officer at Chrisp Street is less able to listen to and accommodate the voices of the community that do not speak in this language of percentages and numbers.[254]

This can be demonstrated by consideration of affordable family housing at Chrisp Street. One of the bulleted concerns of the statutory consultation at Chrisp Street was that there was "Not enough affordable family sized units".[255] The planning mechanism through which 'family units' is understood is 'unit size' (i.e. the number of bedrooms per housing unit). Tower Hamlets sets percentage targets for different unit sizes against which the planning officer evaluated the Chrisp Street proposals. In relation to affordable housing, the Core Strategy set a target of 30% of affordable housing units to provide 3 bedrooms, whilst 15 % of units ought to provide 4 bedrooms.[256] There were no targets for 5 or 6 bed units.

When evaluating the family housing provision at Chrisp Street, it is notable that the planning officer focused almost exclusively on whether the proposals were consistent with the percentage targets in the plan. Thus, the Officer's Report remarked that there was a slight under-provision of 3 and 4 bed affordable units at Chrisp Street when compared to Tower

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[254] See, Lee and others (n 57), 43.

[255] Tower Hamlets Borough Council, *Updated Officer's Report Chrisp Street* (n 242), pp. 10.14.

[256] London Borough of Tower Hamlets, *Core Strategy Development Plan Document*, p. 46.

Hamlets' target: 26.5% of units were to provide 3 bedrooms, and 13.5% of units were 4 bedrooms.[257] What is equally striking is that this section of the Officer's Report addressing family housing does not discuss the community concerns regarding the provision of affordable family housing. Such omission implies that the percentage targets overshadowed the community voices in the evaluation of the proposals and highlights how the numerical targets come to mediate the planning officer's understanding of the development proposals.

Whilst it is recognised that numerical targets may provide clear indicators for LPAs and developers, it should be appreciated that framing an issue like affordable housing in this way has consequences on the space left to listen to community voices. A risk of this numerical, percentage framing of affordable housing is that it becomes a *critical* lens through which aspects of development proposals are understood such that there is limited scope to listen to community voices beyond the percentage targets.[258] The question for the decision-makers becomes whether the level or type of affordable housing hits the target, irrespective of any community input in the decision. Participation thus becomes illusory insofar as there is no real space in the planning process for community voices to play a role since the acceptability of a development is determined by whether it complies with a numerical target.[259] Resolving this tension between certainty for LPAs and developers and ensuring there is space to listen to local communities is not necessarily solved by abandoning targets altogether. Rather, it may indicate

[257] Tower Hamlets Borough Council, *Updated Officer's Report Chrisp Street* (n 242), pp. 11.76.

[258] For a similar points about economic framing see, Lee and others (n 57), 43.

[259] For a similar idea in relation to fracking planning policy, see Hilson (n 37), 190.

that there is a need for more creative and imaginative policy drafting that finds a way to balance certainty with flexibility.

Another dominant frame of analysis of the affordable housing provisions found in the Officer's Report is that of financial viability. This was especially important in relation to the net provision of affordable housing at Chrisp Street. Indeed, the conclusion of the financial viability assessment that the scheme was operating at a 'deficit' appears to have played an important role in closing down debate on increasing the net amount of affordable housing. For instance, the Officer's Report noted that the applicant tested whether it would be financially viable to provide 40% affordable housing,[260] but found this would not be viable, thus precluding further debate on the issue.

The argument in this latter section is that framing financial viability as a consideration of how much affordable housing should be provided, relegates community voices to playing a secondary role in discussions on affordable housing. This occurs first because community concerns and contributions are always conditional on the viability assessment's conclusions. Second, viability assessments hide from public view key normative questions such as how land value should be calculated and how to balance profit with public benefit.

Whilst the financing of large-scale developments has always been a consideration of planning applicants,[261] a shift occurred when questions of financial viability was foregrounded in planning policy. By framing financial viability as part of sustainability – the 'golden thread'[262] of the NPPF – national planning policy renders financial viability a criterion of an

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[260] The conclusion was that "a 40% affordable housing scheme would result in a greater deficit than the currently proposed 35.8% scheme and would thus not be viable for the applicant to pursue." Tower Hamlets Borough Council, *Updated Officer's Report Chrisp Street* (n 242), pp. 4.3

[261] Christophers (n 207), 85.

[262] Department of Communities and Local Government, *NPPF*, pp. 14.

acceptable development.[263] In other words, viability becomes a frame through which the decision-maker understands and evaluates a development like Chrisp Street. One implication of this is that discussion on increasing affordable housing is limited by the conclusions of a viability assessment. Consequently, where, like at Chrisp Street, the conclusions of such assessment showed increasing levels of affordable housing was not viable, it was unlikely community concerns would be listened to in decision-making.[264] In this way, community voices are relegated to playing a secondary role in discussions on how much affordable housing should be provided in local developments.

From a participation perspective, this would not pose so many issues if it were easier to scrutinise and debate financial viability assessments and so contest the role that they play in decision-making. However, as Layard explains the expert, calculative presentation of viability assessments hides from view several normative assumptions buried in their calculations.[265] The effect of this is that local communities are unable to discuss and challenge these key assumptions that influence affordable housing provision in large scale developments.

At Chrisp Street, the way viability assessments hide normative questions behind a veil of expertise is clearly seen in relation to the calculation of the 'Existing Use Value Premium' (EUV+).[266] Savills, who produced a viability assessment on behalf of Poplar Harca, included in their calculations a land value premium of 15%, identifying that the Compensation and Buyouts costs should form part of the premium.[267] BNP Paribas, however, in their review for

[263] Christophers (n 207), 81.

[264] This is effectively what occurred at Chrisp Street where the conclusions that it was not financially viable to increase the levels of affordable housing closed down debate on the question.

[265] Layard (n 188) 220. See also, Corburn (n 86); Lash, Szerszynski and Wynne (n 86).

[266] On methodological problems with land value calculation see, Neil Crosby, Pat McAllister and Peter Wyatt, 'Fit for Planning? An Evaluation of the Application of Development Viability Appraisal Models in the UK Planning System' (2013) 40 Environment and Planning.

[267] Savills, *Chrisp Street Market Viability Assessment Report*, pp. 6.2.14.

the LPA argued that there should be no premium applied to the site in view of the fact that "the site was transferred to the landowner by the council for redevelopment at nil value" [268] and that the area not in the developer's ownership had a premium inherent in its value and to apply the premium in this case would amount to double counting. This demonstrates a fundamental dispute over the normative question of how to calculate the value of land at Chrisp Street. Documents obtained from a Freedom of Information request show that the GLA expert on viability assessments considered a 15% premium was appropriate, although no reasoning was given.[269]

What is interesting about this debate is that BNP Paribas' view mirrors points raised by part of the community. Some members of the community had argued that more affordable housing should be provided as the Council had transferred the land to Poplar Harca for free in the early 2000s.[270] The committee minutes, however, show no consideration of this issue. Rather, the email chain obtained from the FOI request seems to show that it was settled in 'expert' discussions between the GLA, Savills and BNP.[271] This highlights how the local community, despite being interested in the issue, were excluded from discussions on the deeply normative question of land value. The perception that viability assessments are objective models and any disagreement relates to neutral calculations,[272] as opposed to normative

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[268] BNP Paribas Real Estate, *Chrisp Street Market: Development Appraisal* (11 April 2017), p. 23.

[269] See email dated 27 September 2017 included in the documents from the FOI request:, 'EIR - Chrisp Street Market review'

[270] BNP Paribas Real Estate, *Chrisp Street Market, E14, Review of the 'Financial Viability Assessment'*, p. 23.

[271] See email dated 27 September 2017 in the FOI request, 'EIR - Chrisp Street Market review'

[272] See, Patrick McAllister, Emma Street and Peter Wyatt, 'Governing calculative practices: An investigation of development viability modelling in the English planning system' (2016) 53 Urban studies 2363, 2376.

debates,[273] arguably influences the exclusion of the public in these discussions. Models are a 'simplification of reality',[274] constructed for a purpose and "contingent on numerous policy-relevant assumptions and framing decisions".[275] These assumptions, many of which are social assumptions which should be open to public debate, are often hidden behind the presentation of models as expert knowledge.[276] This suggests that viability assessments are not only constructing our understanding of acceptable developments but doing so in very specific ways which are hidden from the public by their expert presentation.

The issue of land value is not the only aspect of viability assessments where digging deeper reveals the presence of important normative assumptions. At first glance, the viability assessment leads to the conclusion that the scheme is operating at a circa £30 million deficit. Naturally, this suggests that the scheme cannot support more affordable housing. However, a £30 million deficit also raises the question of whether the scheme is even deliverable. £30 million is not insignificant and it seems odd that a developer would be prepared to undertake a scheme on such an apparent loss. In understanding this, the point to recognise here is that financial viability assessments internalise profit. By this, it is meant that profit is considered a 'cost' in the viability calculations. This is clearly demonstrated by the detailed calculations included in BNP's appraisal in October 2017. This shows that the total gross development value (GDV) is £321 million. This includes £267m build costs, marketing etc. and £56.4m profit, representing 17.59% GDV profit.[277] Thus, although the headline of the financial

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[273] For discussion on the use of models, see Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Understanding Environmental Models in Their Legal and Regulatory Context' (2010) 22 Journal of Environmental Law 251.

[274] National Research Council (NRC), 'Models in Environmental Regulatory Decision Making' (National Academies Press, Washington DC 2007) 3.

[275] Fisher, Pascual and Wagner (n 273), 251.

[276] Lash, Szerszynski and Wynne (n 86), 57.

[277] Savills, *Chrisp Street Market Viability Assessment Addendum Report*, Appendix 13.

viability assessment is ‘deficit’, the reality is that the calculations include £56 million internalised profit and so if the scheme goes ahead with an approximate ‘deficit’ of £30 million, then the net profit is closer to £26 million.

The viability assessment produced by Savills show that it is an industry standard for profit to be considered a ‘cost’ in the calculations, and that it is standard for the profit to be set at 20% GDV.[278] This assumption is buried within the calculations of the viability assessment. By including such assumption in a technical assessment, which is frequently not even made publicly available,[279] viability assessments close off public debate on how much profit is socially acceptable, and the extent to which developer profit should prioritised over affordable housing. This is not to say that developers should not be entitled to a profit, but to highlight how planning policy frames financial viability as an objective and neutral question, when the reality is that the *way* these calculations are carried out really matters. Discussion on this question, however, is hidden from view meaning that there is little scope to challenge the embedded assumptions, locally or nationally.[280]

(b) Policy gaps and who gets to fill them

The second major reflection mirrors an observation made in chapter 1 regarding the implications of gaps in policy. Scholarship on framing has shown that planning policy can have

[278] See, Christophers (n 207), 87; Layard (n 188) 214.

[279] The majority of the documentation pertaining to the viability assessments were not published on Tower Hamlet’s website until the 11 June 2018, and the most up to date viability assessments were not published until the 23 July 2018. This is significant given the first meeting of the strategic development committee was held in February 2018, and the second was held on 24th July 2018. This means members of the public were not able to scrutinise the viability assessments before the initial meeting, and had approximately 6 weeks to consider the viability documentation before the second meeting. The reluctance to publish viability assessments has been identified as a pattern across the industry; see, Mitchell (n 232), 45-50 , Layard (n 188) 220-223.

[280] Layard (n 188), 215.

a really important role in framing issues, and that this influences what arguments, and who, is likely to be listened to.[281] An exploration of the financial viability assessments at Chrisp Street show that what is underexplored in this framing scholarship is the way that gaps or omissions in planning policy create space for other actors to fill. These actors tend to be the frequent users of the system who have incentives and resources to direct it in a way that suits them: in other words, the repeat players. They are rarely local community members who are only exercised by the developments in their local area: the one-shotters. A consequence of this is that key mechanisms in the planning system are disproportionately influenced by repeat players. This creates a structural deficit of participation and influence on behalf of the local community when compared to developers.

Despite the question of financial viability playing such a significant role in planning decisions, between 2012 and 2019 there existed relatively little planning policy directing how calculations and assumptions in viability assessments should be conducted.[282] Indeed, in *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 991 (Admin), Holgate J identified the lack of controlling policy as an issue leading to a proliferation of litigation regarding viability assessments.[283]

A consequence of the lack of policy is that the development industry has been left to develop viability models and determine how the relevant assumptions are made.[284] The role of industry in setting the standards used in viability assessments is evident in the way Savills present the 20% GDV profit assumption in the viability assessment. They state that a "return

281 See, Hilson (n 37); Lee and others (n 57); Rydin, Lee and Lock (n 34).

282 Crosby, McAllister and Wyatt (n 266), 20.

283 *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* (n 232), [147].

284 For a charting of the private sector development of viability assessments see, Christophers (n 207), 87.

on GDV of 20% in the current *market* is a minimum allowance" (emphasis added).[285] This shows how the blank space left by the absence of policy has enabled assumptions, such as a 20% of GDV profit, and a 15% EUV land premium,[286] to be embedded into viability calculations and accepted as the norm in planning. From the perspective of public involvement in planning decisions this is arguably problematic. It means that there has been no public conversation or consultation about the methodology and normative assumptions that they embed into critical questions of financial viability. Whilst consultation mechanisms on planning policy are far from perfect, from a participation perspective it is better than industry setting the standards themselves without any public consultation.

It is not surprising that industry filled the gap left by planning policy's absence. The development industry has the advantage of being a repeat player in the system. This not only gives them the opportunity to influence the system through their informal relationships with official actors and access to expertise, but also means that they have an incentive to promote the use of a method that suits their interests.[287] Inevitably, these interests will not always be aligned with that of the local community or the general public.

Since the decision was taken at Chrisp Street, there has been the publication of new national policy on viability. In 2018, a new viability Planning Practice Guidance ('PPG') was published, and this was updated in 2019. A notable change to the guidance is that it encourages viability assessments at the plan-making stage.[288] An advantage of this is that it seeks to incorporate into land values affordable housing requirements. This should help ensure that

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[285] Savills, *Chrisp Street Market Viability Assessment Addendum Report*, p. 18

[286] See Holgate J's postscript in *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* (n 232) which discusses the arbitrary nature of EUV+ premiums.

[287] On the benefits of being a repeat player, see Galanter (n 142).

[288] Department of Communities and Local Government, *Planning Practice Guidance: Viability* (2019), Paragraph: 002 Reference ID: 10-002-20190509.

developers do not overpay for land and use this to justify why they cannot comply with affordable housing requirements in development plans.[289]

The guidance also legitimises many of the assumptions seen in the private sectors' viability assessments. For instance, the PPG states that a profit "assumption of 15-20% of gross development value (GDV) may be considered a suitable return to developers in order to establish the viability".[290] In thinking about the way planning law and policy makes room to listen to communities, there are two points to make about this change. First, whilst the gap in policy initially enabled developer control over viability assessments, policy has now legitimised the assumptions contained therein. As Brett Christophers argues, we can see this as a process of 'actualisation', where "world pictured in this [viability] model — a world of land values, affordable housing quotas, developer profits, and living densities—has, …gradually come to be 'actualized'"[291] and subsequently legitimised through the use of planning policy. The cementing in policy of assumptions, such as developer profit, limits the already narrow scope for debate on these important questions of planning. Second, the PPG, although having a similar status to the NPPF, is often changed without consultation.[292] This means that the solidification of key assumptions, such as the 20% profit margin, has occurred without public consultation and participation. Thus, at a national level, and local level, we can see limited room for public voices to influence the debate on these normative questions.

[289] This was a significant concern in the Raynsford Review and was the subject of the dispute in *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* (n 232).

[290] Department of Communities and Local Government, *Planning Practice Guidance: Viability*, 018 Reference ID: 10-018-20190509

[291] Christophers (n 207), 80.

[292] Town and Country Planning Association (n 232), p. 26.

CHAPTER 5: THREADS

This chapter aims to weave together some of the themes that have emerged in the preceding chapters. There are many threads that could have been highlighted in relation to the rich tapestry of the Chrisp Street case study, but the focus of this chapter will be on two 'C's: complexity and characters. Both threads speak to broader themes in planning law and its scholarship. This chapter will also be forward looking in the sense that it will look at the state of the law going into the future and the implications of the analysis in this thesis for legal scholars.

Complexity

It is well-known that the planning system is complex. The immense detail combined with the intricate web of planning law and policy is not only off-putting but makes it difficult for non-experts to engage and express themselves in a way that can be received by the planning system.[293] In this short section, three of the different complexities of the planning system will be highlighted before noting the combined impact that this has on how accessible the planning process is to local communities.

The first aspect of the planning system that renders it difficult to navigate is the way it is composed of a complex web of law and policy that does not clearly fit together. This complexity arises from the almost constant 'tinkering'[294] with the planning system, which

[293] This research not the first, and unlikely to be the last, to identify the complexity of the planning system as a problem.

[294] Town and Country Planning Association (n 232), p. 3.

means the sources of planning law and policy are found in disparate places and are frequently changing.

A recent example of such tinkering which will influence the planning landscape for developments like Chrisp Street in the future is the Levelling Up and Regeneration Act 2023 ('LURA'). One way that LURA 2023 has added to the entanglement of the planning system is by amending existing legislation. Such repetitive adjustment to older statutes renders them harder to navigate and understand. The knock-on effects of such amendments can also be unclear. As described by Rhiannon Ogden-Jones, LURA 2023 amends Paragraph 8(2)(e) of Schedule 4B of the Town and Country Planning Act 1990 by inserting the 'levelling up agenda'. This changes the meaning of the section and creates uncertainty as to how changes in the levelling up agenda may influence the section going forward. [295] Another way LURA 2023 adds to the complexity of the planning system is by adding a new layer of policy: National Development Management Policies ('NDMP'). This new type of policy, like local development plans, will have a statutory basis. However, the Government has expressed an intention for NDMPs to override local development plans where they conflict.[296] The introduction of NDMPs represents the sixth change to the status and operation of development plans since 2004.[297] The addition of another layer of policy is similarly indicative of the disparate nature of the planning system and how hard it can be to navigate. This difficulty is compounded by the litigation that often follows such changes to policy.[298] As noted by Bell

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[295] Rhiannon Ogden-Jones, *'Legal Uncertainty and the Levelling-Up and Regeneration Bill 2023'* (U.K. Const. L. Blog 28th June 2023).

[296] Levelling Up and Regeneration Act 2023, s 93. For an explanation see, House of Commons Library, *Planning reforms in England: Levelling Up and Regeneration Act 2023 and further changes* (5 December 2023).

[297] The other changes came from the PCPA 2004, Localism Act 2011, Neighbourhood Planning Act 2017, revision of the NPPF in 2018, and the revision of the NPPF in 2023.

[298] Recent examples include, *DB Symmetry Ltd and another v Swindon Borough Council* [2022] UKSC 33, *Secretary of State for Transport v Curzon Park Ltd and others* [2023] UKSC 30.

and Fisher, the largest number of appeals in the administrative courts are planning cases, [299] and these cases are largely driven by legislative and policy changes.[300] Whilst this case law is rich, it brings with it its own legalese and logic which is laborious to understand.

These different aspects of LURA are representative of how almost constant planning reform renders the planning system complex to a lay person. The resulting complexity increases the 'cost' of engaging with the system.[301] More time and effort is needed to understand even the basics. In turn, this makes it more difficult to meaningfully contribute whether in local planning decisions or in national conversations about planning reform.

The second point on complexity is the language of planning. As highlighted by the Raynsford Review,[302] the lexicon of planning makes the system harder to understand by those not already lingual. This, combined with the unequal access to planning experts,[303] makes it harder for 'one-shotters' to communicate in a way that will be listened to by planning actors. This was observed in relation to the issue of affordable housing at Chrisp Street. For instance, the Officer's Report notes that some members of the community expressed concern that the new properties would be sold on a buy-to-let basis, or be too expensive for local community members. In response the Officer's Report commented that "these do not cover issues strictly within planning remit. Specific terms offered to residential / commercial tenants, commercial rental values, end users and the prices of products/ services are largely matters assessed outside

[299] Joanna Bell and Elizabeth Fisher, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] Public Law 505, 517.

[300] ibid, 515.

[301] Rydin and Pennington (n 92).

[302] Town and Country Planning Association (n 232), p. 56.

[303] Abbot, 'Losing the local? Public participation and legal expertise in planning law' (n 161); Abbot, 'Planning Inquires and Legal Expertise: A fair crack of the whip' (n 160).

of the planning process."[304] Whilst this is technically accurate, it overlooks that the concern is essentially about the levels of affordable housing. This demonstrates a disconnect between the lay engagement with the system and the language of planning. It also highlights how planning language can pose barriers for local community members to be heard effectively within the system.

The third aspect of the planning system that adds to its complexity is the 'technocratic turn'.[305] This is the belief that "all problems are technical problems"[306] and consequently that the solutions are also technical. In planning, this has manifested in the increasing use of technical assessments to make judgments within the planning system. Viability assessments discussed in the Chapter on affordable housing are one example. This technocratic turn has several implications for complexity. Technical assessments, such as viability assessments, are themselves complex and so add another layer of required specialist knowledge. Moreover, the more planning policy frames issues in a technical, expert manner, the less likely that there will be space in the system to listen to non-expert voices.[307] As highlighted in the chapter on affordable housing, how issues are framed matters because it impacts which voices are received and listened to in decision-making. Consequently, a turn in planning policy to technical assessments, whether they be financial viability or car-parking,[308] renders it harder for community voices to be heard in decision-making. It is worth noting what is not being argued here. It is not suggested that the existence of policy itself necessarily limits how planning law listens to communities. Rather, it is argued that *how* planning law and policy frames particular

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304 Officer's Report (n 14), pp. 10.14.

305 Layard (n 188).

306 Armeni and Lee (n 34), 550.

307 See, ibid; Layard (n 188); Lee, 'Knowledge and Landscape in Wind Energy Planning' (n 129).

308 At Chrisp Street community concerns about the lack of car-parking were side-lined by an expert car parking survey.

issues influences who is listened to. The benefits of expertise and the certainty that planning policy can bring are not necessarily opposed to the flexibility that the value of participation seems to demand. However, accommodating all these values is likely to require more creativity and craft in the drafting of policy.[309]

These three aspects of the planning system's complexity are not comprehensive.[310] They do, however, give a flavour of a system that is inaccessible to those without the expertise, time, or energy to learn the language of planning, and unravel the dense and evolving layers of law and policy. The start of this thesis explored the value of participation in planning and identified three overlapping rationales. What the analysis on the complexity of planning shows is that regardless of the formal procedures and mechanisms that exist to consult and engage with the community, if the planning system remains as dense and complicated as it is currently, the ideals of participation are unlikely to be realised.

Legal scholars studying planning ought to consider seriously the problems for participation posed by complexity. Scholars are in a privilege position since they have the time and resources to unravel this complexity, and crucially to envisage a different future for planning. Researching how the planning system can be simplified or streamlined would be a fruitful avenue for future scholarship.

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309 On the use of 'craft', see Fisher and Shapiro (n 80), p. 52.

310 On the volume of planning material, see McAuslan, 'Towards a just planning system: the contribution of law' (n 155). Bell has also highlighted the way planning case law is both an important part of administrative law, even if it has its own characteristics; see, Bell, 'Embracing the unwanted guests at the judicial review party: Why administrative law scholars should take planning law seriously' (n 160) and Bell and Fisher (n 299).

Characters

The planning system is dependent upon, and influenced by, a number of different characters. Planning officers play an important role in drafting development plans and writing officer's reports; the planning inspectorate deals with planning appeals and examination of local plans; lawyers provide legal analysis in planning inquiries and appeals; and the Secretary of State plays a critical role in issuing regulation and decision-making. Some of these characters are frequently considered by planning scholars. For instance, the role of courts, LPAs and the Secretary of State are regularly discussed.[311] However, the role of other characters is often overlooked, despite their importance.[312] Throughout this research two characters have stood out for the role that they play in shaping how developments are understood and in influencing planning policy. The first is the planning officer, and the second is the development industry.

(a) The planning officer

Planning officers are a central character in the planning system. In many instances, planning committees delegate their role to planning officers.[313] Where this does not happen, Officer's Reports mediate the development for planning committees and in many cases the report will

311 Discussion of the courts and their impact fits within a more doctrinal approach to studying planning law. Many of the most controversial planning decisions are taken by the Secretary of State which may explain why they are frequently discussed. The LPA is the recognised statutory decision maker and as a result seems to invite the most interest from legal scholars.

312 Carolyn Abbot's work on legal expertise is an exception to this. See, Abbot, 'Losing the local? Public participation and legal expertise in planning law' (n 161); Abbot, 'Planning Inquires and Legal Expertise: A fair crack of the whip' (n 160); Carolyn Abbot and Maria Lee, 'NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation' Journal of Environmental Law (Advance Article).

313 The power stems from Local Government Act 1972, s 101. See, *R (Flynn) v Southwark LBC* [2021] EWCA Civ 827, [40].

be the most important document in reaching a planning decision.[314] As explored in the chapter on the LPA's consultation with the community, they also act as a bridge of communication between communities and the planning committee. This means how they frame contributions from community members is likely to have a significant impact on how planning committees perceive the community's view.

Despite this, there is relatively little legal research into their role or acknowledgment that they are *the* voice of planning. Through their role in writing Officer's Reports, they translate planning applications, and the many documents contained therein,[315] into a readable document for the planning committee that both explains the development and evaluates it.

In some ways, the lack of scholarship exploring the role of planning officers is surprising. There is a relatively large, well-developed body of case law setting out their duties and relationship with an LPA.[316] Much of this case law touches on themes, such as delegation and reason-giving, that are discussed in general administrative law scholarship.[317] Moreover,

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314 The UKSC has even held that in the majority of planning decisions reasons need not be given by planning committees as the Officer's Report will explain the reasons for the decision: *Dover DC v CPRE Kent* [2017] UKSC 79, [42].

315 Over 400 in the case of Chrisp Street.

316 For a flavour see, *R (Nicholson) v Allerdale BC*; *Samuel Smith Old Brewery (Tadcaster) v Selby DC* (18 April 1997) *R v Mendip DC ex parte Fabre*; *Morge v Hampshire CC* [2011] UKSC 2 (see Baroness Hale); *R (Luton BC) v Central Bedfordshire Council* (n 169).

317 For example, on reason-giving Joanna Bell, 'Reason-Giving in Administrative Law: Where are We and Why have the Courts not Embraced the 'General Common Law Duty to Give Reasons'?' (2019) 82 MLR; Elliott, 'Has the common law duty to give reasons come of age yet?' (n 68), Fordham (n 53). For example, on delegation, *Carltona Ltd v Commissioner of Works* [1943] 2 All E.R. 560; Mark Freedland, 'Privatising Carltona: Part II of the Deregulation and Contracting Out Act 1994' (1995) Spring Public Law 21; Rory Gregson, 'When should there be an implied power to delegate?' (2017) 3 Public Law 408. Joanna Bell has highlighted the way how planning is often overlooked by administrative law scholars: Bell, 'Embracing the unwanted guests at the judicial review party: Why administrative law scholars should take planning law seriously' (n 160).

in a field where 'planning judgment' plays such a critical role,[318] it is perhaps surprising that the character whose judgment matters is missed.

On the other hand, the planning officer is somewhat legally invisible. Whilst the power of delegation is found in s 101 Local Government Act 1972, the role of planning officers lacks a clear legal basis. It is also arguable that legal scholars often struggle to include the role of different characters and institutions in their analysis.[319] The bread and butter of legal scholarship has been rules and norms, not institutions and the people that accompany them.[320] However, as Sidney Shapiro and Fisher argue, it is equally important that legal scholars take seriously the whole of *public administration*, and consequently the institutional actors that sit at its heart, if legal scholarship is to truly understand with the legal realities.[321]

In the planning context, this might involve a more granular analysis of how decision-making is divided between different characters, the expertise this fosters amongst these actors, and the relationship of these characters to the various legal mechanisms. As the discussion on affordable housing demonstrates, the legal framework in planning makes clear local planning authorities, as a body, are not limited to making a purely binary decision. Rather, they are enabled to use planning conditions and obligations to set requirements on developments. Yet, as Chrisp Street demonstrates, planning officers, as opposed to planning committees, appear to

318 *Tesco Stores Ltd v Secretary of State for the Environment* (n 212).

319 On the lack of imagination of administrative lawyers in this regard, see Elizabeth Fisher, *The Open Road?: Navigating Public Administration and the Failed Promise of Administrative Law* (Oxford University Press 2020).

320 In the UK context see, Robert Thomas, *Administrative law in action : immigration administration* (Hart Publishing 2022), p. 2. In the US context see, Sidney Shapiro, 'The failure to understand expertise in administrative law: the problem and the consequences' (2015) 50 Wake Forest law review 1097; Fisher and Shapiro (n 80).

321 See, Fisher, *The Open Road?: Navigating Public Administration and the Failed Promise of Administrative Law* (n 319); Fisher and Shapiro (n 80).

have the expertise, and take the lead in crafting the appropriate obligations and conditions.[322] The planning committee, as an elected body, seems to provide the democratic legitimacy to the decision, and acts as a safety valve or a check on the expertise of planning officers. A full exploration of why the legal framework in planning, and the realities of public administration, has resulted in this division of labour and expertise is not possible in this thesis.[323] It suffices to say though that there may be a relationship between delegation and the fostering of the specialist expertise of planning officers.[324]

(b) The development industry

The second character to discuss is developers, or more accurately, the development industry. It is important to recognise that the development industry is not homogenous, and the needs and interests of small-scale developers are very different to those which build tens of thousands of homes each year. However, it is also worth reflecting on the role that this industry as a whole plays in setting standards in the planning system, and how this is enabled by planning law and policy or its absence.

Environmental law scholarship has shown how planning law and policy tends to frame what arguments and issues are important and unimportant.[325] What is less well explored is how the absence of law and policy can create a space that other actors will use to perform a framing

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322 For an analysis of the use of 'craft' to describe administrative expertise, see Fisher and Shapiro (n 80), p. 52.

323 A full exploration would also require a deeper delve into what administrative expertise is. See ibid, p. 49 onwards.

324 Fisher and Shapiro's discussion of tacit knowledge is insightful here. The process of delegating responsibility to the planning officers, such that they routinely consider proposed developments and produce recommendations for s 106 agreements etc. enables them to develop the 'tacit' knowledge that results in them being considered 'experts'. See, ibid, p. 50.

325 See, Hilson (n 37); Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (n 34) 536; Lee and others (n 57).

function. For instance, in the chapter on developer consultation, it was identified how a lacuna of policy enabled the developer to shape their community engagement in a manner that suited their needs. This resulted in a community consultation that seemed to be aimed at demonstrating to the LPA they had undertaken consultation, rather than facilitating meaningful participation of the community. This suggests that as well as creating frames, law and policy can create space for other actors to create them too. This is a different dimension of framing that although important is currently underexplored in scholarship. No law or policy is fully comprehensive, and so understanding who fills in the gaps, and how they fill it in can elucidate who has a voice in the planning system.

Thin law and policy can also create a space that is filled by other characters. This can have important implications for mechanisms in the planning system as demonstrated in the chapter on affordable housing. This chapter showed how the minimalistic policy on viability assessments from 2012 to 2019 meant that the development industry was able to set the standards on how viability assessments are undertaken. Too often these other actors which fill the gaps are likely to be 'repeat players' since they have the incentives and resources necessary to pursue a consistent agenda that is likely to have a norm-setting effect. This has important implications for public participation in planning as it highlights how crucial aspects of the planning system are being shaped without public input and scrutiny. In turn, this suggests that it is just as important for legal scholarship to focus on formal participation mechanisms as it is to pay attention to the informal ways different groups influence law and policy when seeking to understand who has a voice in planning.

CONCLUSION

Six years on from when planning permission was granted at Chrisp Street, the site is still largely rubble, and it is not clear when construction will start let alone finish. According to the timetable of construction published on Poplar's website, the development is behind schedule.[326] Whilst this thesis has critiqued the participatory mechanisms in relation to the development at Chrisp Street, it is by no means a guarantee that better participation would speed up construction. However, as identified in chapter 2 that is beside the point: participation has a value for its own sake that should not be overlooked. This thesis explored the operation of this principle in practice in the planning system. In particular, it has attempted to tease out how the planning system and planning law listen to communities affected by large scale inner city redevelopment. However, that does not mean more work cannot be done in this area. The research in this thesis has shown that to understand better how public participation in the planning system can be improved, legal scholars ought to engage with all aspects of the planning system. This includes the institutions and characters that are legally invisible, and the policies which play a significant role in the legal regime at issue. Moreover, it has identified that legal scholars ought not just to look at the concrete law and policy that exists but look at the gaps and the spaces they leave. This can illuminate the way different actors influence the planning system in discrete ways.

[326] Poplar Harca, 'Chrisp Street Construction Update' <https://www.chrispstreet.org.uk/regeneration-plan#:~:text=Construction%20works%20have%20temporarily%20paused,to%20deliver%20a%20successful%20development.> accessed 14.04.2024.

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