# Planning and Environmental Seminar - Manchester

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# How the Environment Act 2021 is bedding in

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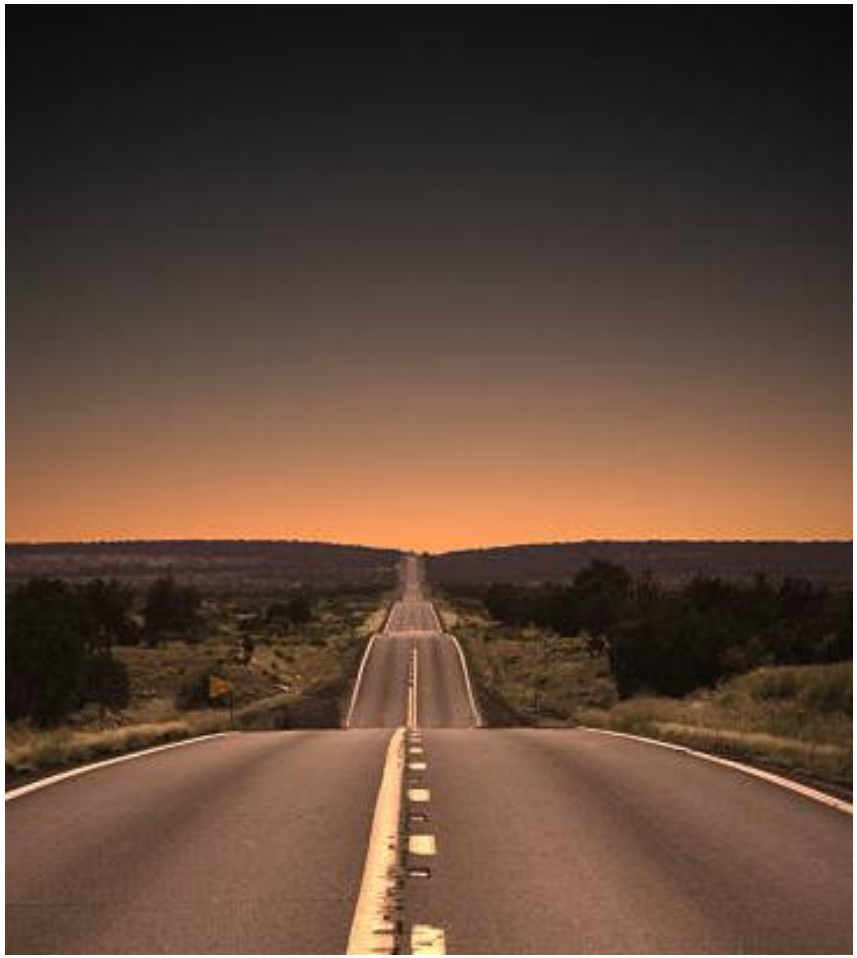
# Where we are now

- The long road – November 2021.
- *"The most ambitious environmental programme of any country on earth"* versus *"Newt-counting delays"*.
- The Act is mostly enabling legislation.
- First decisions and first consultations.



# Environmental principles: overview

- Five environmental principles: Integration, Prevention, Rectification at Source, Polluter Pays and Precautionary.
- Section 18(3) of the Environment Act 2021.
- Ministers of the crown have a duty to have “due regard” to the policy statement and embed environmental principles into policymaking.
- “Due regard” when formulating policy as compared with individual decision making.
- Draft environmental principles statement in March 2021.
- OEP advice in July 2021.
- Government submitted its draft Environmental Principles' policy statement for Parliamentary scrutiny on 12 May 2022.

# Environmental principles: update

- Draft statement and explanatory memorandum.
- What is "policy"?
- The duty is not designed to capture individual regulatory, planning or licensing decisions made by ministers or authorities acting on their behalf.
- The policy statement provides *"before a policy has been developed, a policymaker should consider how the environmental principles listed in the policy statement could help shape the policy in general. This might involve considering whether the policy can prevent environmental harm, promote environmental enhancement, or do both".*
- Primarily applies to UK, but: *"…[t]he environmental effects of a policy should be considered regardless of where the potential effect occurs whether that be in England, or other nations in the UK. If it is feasible and appropriate to consider the overseas effects of a policy, this must be done proportionately and within reason".*
- Proportionality: *"Policymakers are not expected to carry out a "deep-dive" assessment into all environmental effects, as these may not be known. Nor are policymakers required to replicate the environmental impact assessment process. Instead, the level of research into the environmental effect should be relative to the likely effect of the policy on the environment."*

# Environmental principles: next steps

- The draft statement remains with Parliament for scrutiny until 28 June 2022.
- Final policy statement expected in Autumn 2022.
- Not *"rules"* and not a *"set formula"*.
- Views on strengthening the principles.

## Environmental targets

Must set at least one environmental target in each of four priority areas (water, air quality, biodiversity and waste/resource efficiency), as well as on species abundance and fine particulate matter (PM2.5).

These targets must be laid before Parliament by 31 October 2022.

Defra's Consultation on environmental targets: opened on 16 March 2022 and closes 27 June 2022 (this was extended on 6 May 2022).

# Environmental targets: what does the consultation say?

- *"The Environment Act requires the government to always have an Environmental Improvement Plan (EIP) in place. This sets out the steps the government intends to take to improve the natural environment, including measures needed to meet its targets. The first review of the EIP will be completed by January 2023. As part of that review, it will be updated to include at least one interim target for each long-term target that has been set."*
- Biodiversity on land:
  - Increase species abundance by at least 10% by 2042, compared to 2030 levels.
  - Improve the England-level GB Red List Index for species extinction risk by 2042 compared to 2022 levels (plan to publish a new index by September 2022).
  - Create or restore in excess of 500,000 hectares of a range of wildlife-rich habitats outside protected sites by 2042, compared to 2022 levels.
- Water quality (2037 targets – so a shorter timeframe):
  - Abandoned metal mines target: Reduce the length of rivers and estuaries polluted by target substances from abandoned mines by 50% by 2037 against a baseline of around 1,500km.
  - Nutrient targets: to address the two principal sources of nutrient pollution by 2037 (nitrogen, phosphorus and sediment pollution from agriculture and phosphorus loadings from treated wastewater).
  - Water demand: Reduce the use of public water supply in England per head of population by 20% by 2037 against a 2019/20 baseline.

# Environmental targets: what does the consultation say?

- Woodland cover: increase tree canopy and woodland cover from 14.5% to 17.5% of total land area in England by 2050 (biomass strategy to be published in 2022).
- Resource efficiency and waste reduction: Reduce residual waste (excluding major mineral wastes) kg per capita by 50% by 2042 from 2019 levels. LAs to provide data on waste.
- Air: PM2.5 to 10 micrograms per cubic metre (µg/m3) by 2040 and Population Exposure Reduction Target 35% reduction in population exposure by 2040 (compared to a base year of 2018). ("*Two areas where further action may be needed are domestic burning and road transport.*")
- Air Quality Strategy review (consulting on this in late 2022) and revised National Air Quality Strategy to be published in 2023.
- At least every five years, 'Significant Improvement Test' to be carried out. The first test and lay a report on the outcome before Parliament by 31 January 2023.

# Biodiversity net gain

- At least a 10% gain in biodiversity value.
- January 2022 consultation: *"intention that mandatory biodiversity net gain for development requiring planning permission under the Town and Country Planning 1990 will commence for new applications 2 years after royal assent of the Environment Act, which was achieved in November 2021".*
- Transition period: *"The UK Government is not currently looking to amend the 2-year transition period. We would, however, welcome feedback on whether a longer transition period (up to 12 months longer) for minor development would be of practical benefit to planning authorities and developers and specific reasons as to why it might be necessary."*
- NSIPs: *"By November 2025, it is our intention that the requirement should apply across all terrestrial projects, or terrestrial components of projects, which are accepted for examination through the NSIPs regime".*

# BNG - guidance

- *Redwood (South West) Ltd v Waverley BC* [2022] P.A.D. 18:

*"124. The Framework in paragraph 170 states that planning decisions should contribute to and enhance the natural and local environment by minimising impacts on and providing net gains in biodiversity. The Environment Act 2021 requires a biodiversity net gain of 10%. The ecological report prepared by the Appellant, which includes a metricated assessment, suggests the site would achieve a net gain of over 20%. This figure is disputed by representors who suggest the development would result in a negative net gain in the region of -44%.*

*125. It appears that one of the main differences relates to the assessment of woodland condition. The baseline affects the level of enhancement that can be achieved and therefore the overall net gain. I take account of the fact that third parties have not had the opportunity to go onto the site and undertake detailed site surveys. Furthermore, the Appellant's assessment has been scrutinised independently and found to be sound. I also note that there is the opportunity for further enhancement on the adjacent land in the Appellant's ownership, which is to be used for the permissive path and circular walk. Whilst there may be differences in judgments, I have no reason to conclude that the metricated assessment undertaken by the Appellant is unreliable.*

*126. Should the appeal be allowed, a planning condition could be imposed to require biodiversity net gain, which would be subject to annual monitoring and audit. I am therefore satisfied that the scheme would be acceptable in this regard."* (Emphasis added.)

# BNG - guidance

- *Bloor Homes South West Ltd v Wiltshire Council* [2022] P.A.D. 12:

*"41. Full on-site mitigation is not achievable. Compensation for residual harm is therefore required. In this regard, although The Environment Act 2021 has now passed, secondary legislation is required for it to be implemented. Therefore, the 10% biodiversity net gain requirement set out in the Act is not yet law and is not applicable to these appeals. Policy CP50 of the CS, and Paragraph 174 of the Framework, both seek a net gain in biodiversity without identifying a specific percentage. A net gain of just 1% would be policy compliant in these circumstances. This could be secured by a planning obligation."*

# The OEP

- The ‘watchdog’.
- January 2022 launched consultation on its role.
- 12 May 2022 published its first monitoring report.
- *“Environmental laws and government strategy and policy have not yet proved successful in significantly slowing down, halting or reversing biodiversity decline or the unsustainable use of resources or the pollution of the environment.”*
- The Environment Act is *“fresh opportunity to make a difference”*.

## Concluding thoughts

Areas to watch.

Detail to be developed.

# The End

# Climate Change: Planning and the Environment, after *Heathrow* (UKSC)

14 June 2022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# R (oao FoE) v Heathrow Airport Ltd [2020] UKSC [1]

- Airports National Policy Statement promulgation
- Climate change in policy-making – *and* wider considerations (up to CA only)
- Argument before SC:

- (i) Interpreting s.5(8) Planning Act 2008 [National Policy Statements]: reasons explaining how a policy instrument takes account of Gov. policy for mitigating/adapting to climate change (so, what constitutes Gov. policy for these purposes?)
- (ii) Interpreting s.10(3) PA 2008: S/S must have regard to desirability of mitigating/adapting to climate change, in exercising ss.5/6 functions
- (iii) Breach of SEA Directive?

# R (oao FoE) v Heathrow Airport Ltd [2020] UKSC [2]

- No breach of legislative climate change obligations (= narrow)
- Context: albeit no breach, important requirements elsewhere for giving effect to 'legal significance' of climate change
- E.g. 'Indirect' climate legislation: e.g. PA 2008: DCO (NSIPs) integral requirements, including:

- (i) **EIA (& SEA)**
- (ii) compatibility with Net Zero by 2050 & other climate targets (s.1 obligation, Climate Change Act 2008, etc.)
- (iii) short- and long- term carbon targeting; carbon budgets (independent Committee on Climate Change: Pt. 2 CCA)

- E.g. Ministerial statements – but, split-strategising and policy uncertainties: BEIS; DEFRA; DfT & DfLUHC

# EIA and GHGs: Finch (CA) [2022] (1)

- Appeal from dismissal of JR of PP for expansion of oil well, allowing 25 yrs' extraction
- Potential EIA impacts: offsite & 'downstream' GHGs, exceeding natural gas release, from oil hydrocarbons & future refined oil combustion
- EIA confined to onsite GHGs assessment (e.g. excluding GHGs from 'end product' use/refined oil combustion)
- Scope of assessment & whether development would give rise to indirect, likely significant effects on environment, for assessment (reg. 4(2) EIA Regs. 2017)
- Nexus between development and putative effects, critical = essential planning judgment (not legalese of 'causation')

# EIA and GHGs: Finch (CA) [2022] (2)

- In EIA terms, GHGs from future combustion *capable* of constituting a (likely, significant) environmental effect, requiring EIA, of the subject project
- So, not legally incapable, but not a mandated inclusion either!
- Wide construction of "project" and "proposed development" for reg. 4(2) purposes, including the construction and extraction processes
- "Purpose" of "project" neither defining of project components, nor or of its potential (likely, significant) environmental effects
- Emphasis: (i) EIA = *process*; (ii) is one component of larger, planning decision-making (e.g. DCO); (iii) direct and indirect (likely, significant) effects *potentially* relevant (scoping in)

# EIA and GHGs: Finch (CA) [2022] (3)

- Held: ultimate use of 'end product' not an identifiable part of this "project". Any significant environmental effect of end-product combustion outwith assessment
- Where, 'end-product' (ECJ jurisprudence: Ecologistas en Accion-CODA [2009]) is not drawn as wide as to include consequences that are beyond the project outcome
- So, considering R (oao Squire) v Shropshire Council [2019] EWCA Civ 888, no *requirement* to assess environmental effects of end consumption/use of 'end product' – on basis that environmental effects were not of the project itself
- LPA judgment permissible in excluding 'downstream' GHGs as insufficiently connected to the development, having regard to multiple oil treatment phases, post extraction

# R (oao Goesa Ltd) v Eastleigh BC [2022] (1)

- JR of Southampton International Airport pp. for (164m) runway extension and associated development
- EA addenda projecting future operations, including sensitivity test with reduced projections of future passenger numbers, with and without runway extension
- Applicant: EIA Guide to Assessing GHGs…, followed (GHGs 'might' be considered significant) and had compared significance of likely proposal emissions with UK carbon budgets, UK aviation forecasting and local borough emissions
- Quality of baseline environmental information and policy assessment, beyond legal criticism: CCC's recommended (fifth) carbon budget (excluding international flight emissions); NZ (including these emissions); planning assumptions for sector; UK Gov. policy 'gaps'

# R (oao Goesa Ltd) v Eastleigh BC [2022] (2)

- Ground 3: By making no assessment of the cumulative effects of GHG emissions in combination with other airport expansion projects (Bristol, Stanstead, Leeds: all unconsented, at decision date), an argued breach of EIA Regs (including reg.18(3))
- Emphasis: EIA reg.18(3)(b) = description of likely significant effects; reg. 18(3)(f): Sch. 4 additional information relevant to: (i) specific characteristics of development (or development type); (ii) environmental features likely to be significantly affected
- Reg. 18(4): ES must include information "*reasonably required* for reaching reasoned conclusion" on significant effects of development on environment, taking account of current knowledge and methods of assessment
- Sch.4: categories of additional information, including "climate" and GHGs (para 5(f))

# R (oao Goesa Ltd) v Eastleigh BC [2022] (3)

- Reg. 4(2): requires overall EIA process (including ES + consultation responses + in/direct significant effects)
- Sch. 4(5)(e): cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems
- Sch. 4(5)(f): climate impacts including e.g. “the nature and magnitude of GHG emissions, and the vulnerability of the project to climate change”
- Unresolved: whether “existing and/or approved” (Sch. 4(5)(e)) excludes unconsented, pipeline proposals
- Instead, determined G3 on conventional JR (EIA) principles

# R (oao Goesa Ltd) v Eastleigh BC [2022] (4)

- Reg. 18(4): information "*reasonably required…*" – no more, no less (Preston New Road Action Group v SSCLG [2018])
- Significance and adequacy = evaluative planning judgments, subject to irrationality (R (Blewett) v Derbyshire CC [2004] Env LR 29; Finch [2022] at [15])
- A substantial margin of appreciation applies to judgments founded upon scientific, technical and/or predictive assessments, typically by experts (Plan B Earth v SST [2020] PTSR 1446)
- Endorsing summary appraisal of climate change statutory framework in R (Packham) v SST [2021] Env LR 215 at [83-85] (JR: environmental impact of HS2, Phase 1; argued failure to take into account GHGs viz. CCA 2008 & Paris)
- R (oao Spurrier) v SST [2019] – issues essentially depending upon political judgment, will likely call for lower intensity review

# Margin of Appreciation: some EIA practicalities

- R (oao FoE) v SSIT (UK Export Finance) [2022] EWHC 568: breadth of MoA (decision of Export Credits Guarantee Dept.) underscored by public interest considerations
- In application:

- Whether to adopt a 'nil' baseline (= no associated emissions) for development site/location?
- Benchmarking and significance of GHGs?
- Extent of assessment of GHGs, and comparative data: local, regional and national datasets?
- Quantifying GHGs (e.g. construction materials and transportation)?
- GHGs at the decommissioning phase (scope in/out)?
- Monitoring and other onward duties

# Climate Change: Planning and the Environment, after *Heathrow* (UKSC)

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# Planning (case law) update

Katherine Barnes

# Agenda

- New test for determining planning apps – Levelling-up and Regeneration Bill
- NPPF test for "substantial harm" to designated heritage assets – London Historic Parks and Gardens Trust v Minister of State for Housing [2022] EWHC 829 (Admin) (Holocaust Memorial JR)
- Local Act of Parliament as a material consideration – Holocaust Memorial JR
- Common law obligation to consider alternatives – R (Save Stonehenge) v SST [2021] EWHC 2161 (Admin) (Stonehenge JR)
- An "indirect effect" for EIA purposes – R (Finch) v Surrey CC [2022] EWCA Civ 187

# Levelling-up and Regeneration Bill

Current test

- Section 70(2) TCPA: in determining planning apps must: *"have regard to the provisions of the development plan, so far as material"* and any other material considerations
- Section 38(6) PCPA: *"determination must be made in accordance with the plan unless material considerations indicate otherwise"*
- So development plan tops the hierarchy
- National policy is a material consideration

# Levelling-up and Regeneration Bill

New test

- *"[T]he determination must be made in accordance with the development plan and any national development management policies, unless material considerations strongly indicate otherwise"*
- *"If to any extent the development plan conflicts with a national development management policy, the conflict must be resolved in favour of the the national development management policy"*

# Levelling-up and Regeneration Bill

- So, hierarchy is: national policy, development plan and other material considerations
  - Improves clarity re role of national policy
  - Major shift from localism to more centralised approach
  - What does “strongly” mean? Expect litigation!

# Holocaust Memorial: what is substantial harm?

- Issue was whether Inspector had erred in his approach to assessing whether the proposal would result in "substantial harm" in NPPF terms to the setting of various heritage assets (Grade II* Buxton Memorial and Grade II listed Victoria Tower Gardens)

# Holocaust Memorial: what is substantial harm?

- C argued that Inspector had wrongly relied on the test for substantial harm taken from Bedford BC v SSCLG [2013] EWHC 2847 (Admin) and had therefore applied too high a threshold.
- According to C, the Inspector took from Bedford that harm could not be substantial unless “the significance [of the heritage asset] was drained away”

# Holocaust Memorial: what is substantial harm?

- The High Court (Thornton J) clarified that there is no "draining away" test (Bedford read in context did not indicate this) and dismissed this part of the challenge.
- The test the Inspector actually applied was unimpeachable. It was whether there was a "serious degree of harm to the asset's significance"
- The court cautioned against putting a gloss on the words of the NPPF test. The question, as a matter of planning judgment, is whether the proposal would result in "substantial harm"
- Undoubtedly still a high threshold (but now likely to be met more often…)

# Holocaust Memorial: material considerations

- Section 8(1) London County Council (Improvements) Act 1990 – relevant land to be laid out and *"maintained… for use as a garden open to the public and as an integral part of the existing [VTG]"*
- Issue raised by third party objector at inquiry but not addressed by DM

# Holocaust Memorial: material considerations

Court found:

- Properly construed, s.8(1) LCC(I) Act imposes an enduring obligation to retain VTG for use as a public garden
- Material consideration due to the impediment imposed to delivery, especially given the importance attached to the construction of the Memorial in the lifetime of Holocaust survivors
- Assessment of alternative sites also flawed in so far as it failed to take into account the above impediment
- Permission to appeal sought

# Stonehenge: alternatives

- Successful challenge to DCO authorising a dual-carriageway road tunnel under Stonehenge (WHS) to replace the existing A303 road.
- Issue was whether the Defendant had done enough in applying the relevance guidance, which said that where the applicant had done an options appraisal, option testing need not be considered by the examining authority or the decision maker. Or, was consideration of the relative merits of the alternatives "so obviously material" that the common law required this to be taken into account?

# Stonehenge: alternatives

Summary of key principles on when alternatives are "so obviously material" that the decision-maker must consider them (see [268]-[276]):

(a) The relevant advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. The general position is that land may be developed in any way which is acceptable for planning purposes.

(b) However, in exceptional circumstances is it necessary to consider alternatives. Typically, this is where a development proposal has significant adverse effects and/or there is a conflict with planning policy.

(c) In exceptional circumstances where alternatives may be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

# Stonehenge: alternatives

- Court (Holgate J) concluded that the common law required the decision-maker to exercise their discretion to depart from the advice in policy and consider the alternatives:

> *"The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account. I reach this conclusion for a number of reasons the cumulative effect of which I judge to be overwhelming."*

# Stonehenge: alternatives

Key reasoning underpinning the judge's conclusion:

- WHS designation (designation based on "outstanding universal value")
- DM accepted overall heritage impact would be "significantly adverse" and permanent
- Previous consideration of alternatives by the applicant could not be relied on because the applicant had proceeded on the basis (not adopted by the DM) that the scheme would not result in any substantial harm to heritage assets

# Finch: indirect effects and EIA

- JR of planning permission to retain and expand an existing oil well site for the production of crude oil over a 25 year period
- Argued the EIA was unlawful because it considered only the direct releases of greenhouse gases from within the well site. It did not consider the subsequent use of the crude oil even though it was accepted the eventual combustion of the refined products of the oil extracted was “inevitable”

# Finch: indirect effects and EIA

- Court (Lewison LJ and Sir Keith Lindblom; Moylan LJ dissenting) dismissed the appeal
- What needed to be considered was the degree of connection required between the development and its putative effects. It was not possible to say greenhouse gas emissions from the future combustion of oil products from the site was legally incapable of being a environmental effect requiring assessment, but it was ultimately a question of planning judgment for the LPA on the facts of a particular case
- Difficult to square with fact "inevitable" oil products would be burned. One to watch in the SC.

# The End