Planning and Environmental Seminar - Bristol

22nd September 2022

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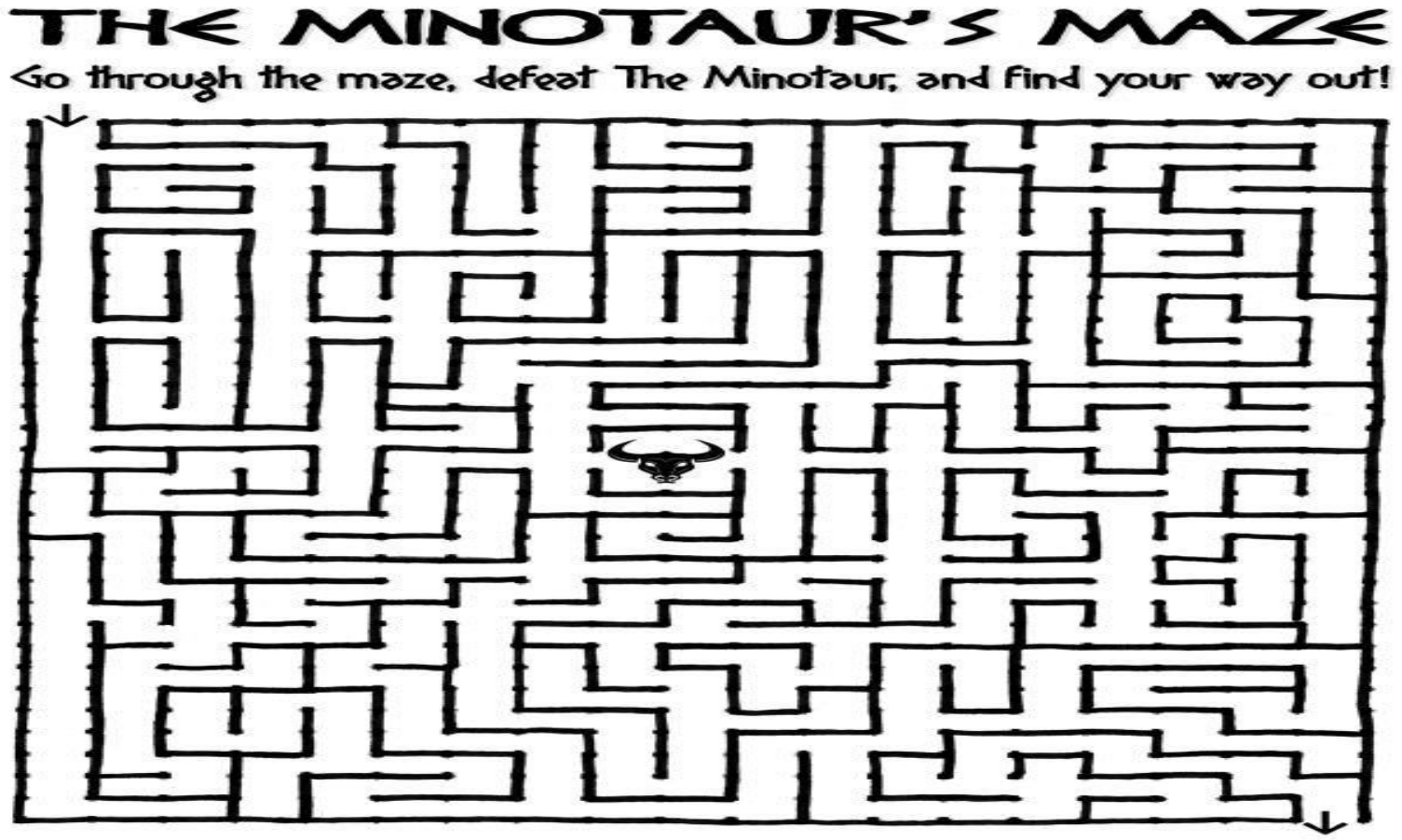
Financial Planning: CIL Update

Christiaan Zwart

Why Is CIL Complex?



Taxing Development Hope Value

- Why CIL at all?
- Section 70(2)(c) TCPA 1990:
- "Any other material considerations"
- e.g. once only Planning Obligations
- CIL Reg. 122 regulates section 106
- Planning judgements in (2)(a)-(c)
- Now, section 70(2)(b):

  "any local finance consideration"
- Subsection (4)(b): = SoS funds & CIL
- Parliament has made finance material to planning
- Assess *weight* of m/c CIL estimate? A new skill?
- CIL Regulations regulate CIL - expressly
- CA have <u>few</u> discretions under Regs.
- CIL = a local revenue raising mechanism for "infrastructure"

CIL: Genesis & Purpose

- Back to basics: A levy or tax on 'net new' "development"
- Preferred funding mechanism: by Reg. 123 & now by Reg. 73A(1) and (12)
- PA 2008, Part 11, Section 205(2) purpose:

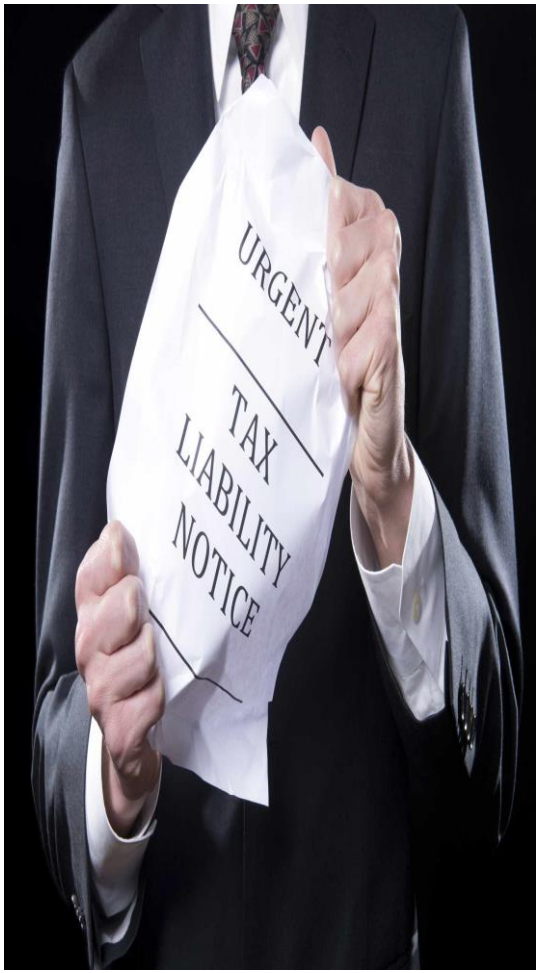
  "In making the regulations the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable."
- Statutory definitions:
  - S.216(2) "infrastructure" – inclusive & wide
  - s.208 & s.209(1) "development" (not as s.55 TCPA)
- Daughter CIL Regulations 2010 (as continuously amended)
  - Part 2 definitions & discrete purpose for certain Regs.

CIL Collection Process

1) Type of Development & Reliefs
2) Assumption of Liability form
3) Acknowledgement of receipt
4) Liability notice
5) Commencement notice
6) Demand notice
7) Payment made – on time
8) Surcharges – late payment

Liability for CIL: Who & How pinned

- Reg. 31 assumption of liability
  - Objective liability audit trail engendered by notices including for transfer of liability
  - CIL liability sticks to the land
- Reg. 32 transfer of assumed liability
- Reg. 33 default liability – land interests & persons causing commencement
- Reg. 34 apportionment to owners
- Reg. 36(2) CA can determine to transfer liability to owner of relevant land



Liability: When Engaged: Reg. 8

- Reg. 65(1): CA must issue liability notice as soon as practicable after the day on which permission first permits development
- *Trent Case* – R.65(1) requirement on CA is timely.
- Reg. 8 "first permits when .." "permission granted"
- Reg 8 "phased planning permission"
- Reg. 2(1) "phased planning permission means a planning permission that expressly provides for development to be carried out in phases"
- *Oval* Case [2020] EWHC 457 (Admin) –
  - Developer sought to defer CIL payments by reliance on reserved matters approvals
  - Court held the actual outline grant & its plans determined type of chargeable development
  - In that case, not phased but one chargeable development
- PPG 006: can have phased "full permission"
- Seek to draft phases with care to align with Regs.

Interpretative Approach to CILR

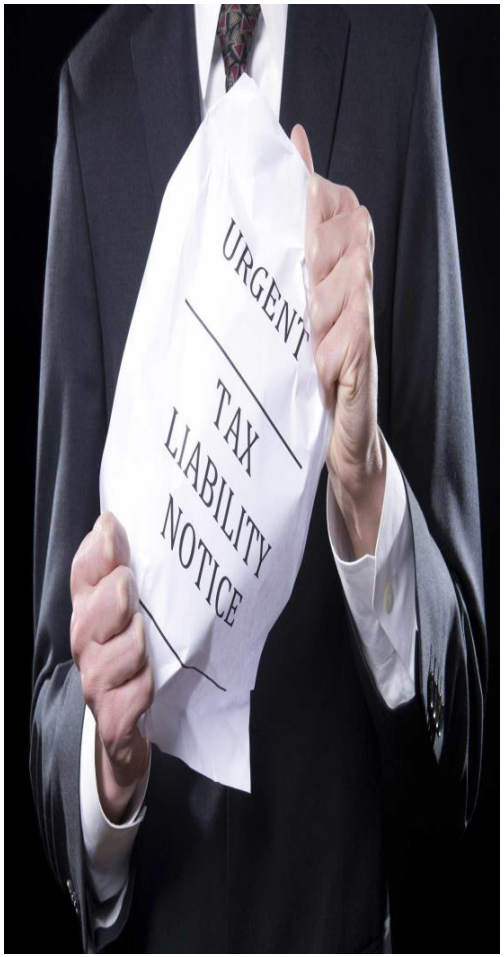
- Few CIL High Court cases still as system continues to bed in (before change to "Infrastructure Levy" "IL"?).
- Early cases include *R v Orbital Shopping Park v Swindon BC* [2016] EWHC 448(Admin): split out planning permissions (internal mezzanine & external works)
  - Permissible to avoid the CIL tax
  - Correct approach to interpretation of CIL: what do the terms actually state, on a purposive construction
- "Purposive" gives Court wriggle room on its interpretation as it figures it out.
- Post-*Orbital*, newer cases favouring CA side of £ fence – but increasing confusion in already complex/Delphic Regs.
- CA in *Gardiner* [2022] (22 August 2022) applied:
  - *Orbital*
  - *Cape Brandy Syndicate* [1921] 1 KB 64
- VOA appeals: small scale, fact sensitive, written reps. Web published & redacted. Some guidance but little.

Retrospective permission & CIL

- NB: TCPA 1990 allows for retrospective permission but CILR results to exclude reliance on such permission for Reliefs.
- Regs define "planning permission" to include s.73A but other Regs now construed to exclude s.73A because not stated.
- *Gardiner v Hertsmere* [2022] EWCA Civ 1162(August 2022)
- Case about a self-builder who built outside of the permitted plans & then corrected the situation under s.73A TCPA
- CA Held: CIL Reliefs unavailable for retrospective planning permission (granted under s.73A TCPA 1990):
  - To align CIL with TCPA approach of ensuring permission before (not after) event;
  - To avoid risk of CA having to make repayments.
- That mis step cost the self-builder his full Relief of £118,000.
- Case applies in principle to ALL other Reliefs (including Social Housing Reliefs). Could be very expensive to change plans.
- In detail: Straightforward statutory interpretation : no express exception for s.73A planning permissions whereas language of R.54B(2)(a)(i) "forward looking".
- Courts taking strict approach to express CIL letter (*Cape*).

Payment Step 1: Liability Notice

- Reg.65(1) requires CA to issue LN
- Reg.65(2) prescribes LN content incl. “chargeable amount” & Reliefs
- Reg.65(4) requires revised LN issue where chargeable amount of same chargeable development changes – e.g. S96A
- Reg. 65(5) allows re-issue of LN
- Reg. 65(8) deems cessation of effect of any prior LN
- *Braithwaite* Case [2022] EWHC 691
  - Lang J. held “ceases to have effect” not mean “ceases to exist”
  - Now going to Court of Appeal
  - Removal of prior notices avoids confusion for all
- Reg. 65(10) payment of all “due” CIL results in LN cessation of effect
- Historic unpaid CIL?



What to Pay: Reg. 40 & Sch. 1

- Reg.65(2)(d) requires “chargeable amount” stated
- How to establish the scope of net new?
- (Former Reg.40) Reg. 40 – Schedule 1, 5 Parts
- CA must calculate CIL amount on chargeable development as set out in *relevant part*
- Part 1 – Standard cases
- Part 2 – ‘Amended’ planning permissions
  - Section 73 situation – net new – CIL same/up/down
- Part 3 – Calculation of Social Housing Relief
- Part 4 – Pre-CIL permissions ‘amended’ when CIL in effect
- Part 5 – Pre-CIL permissions ‘amended’ when CIL in effect

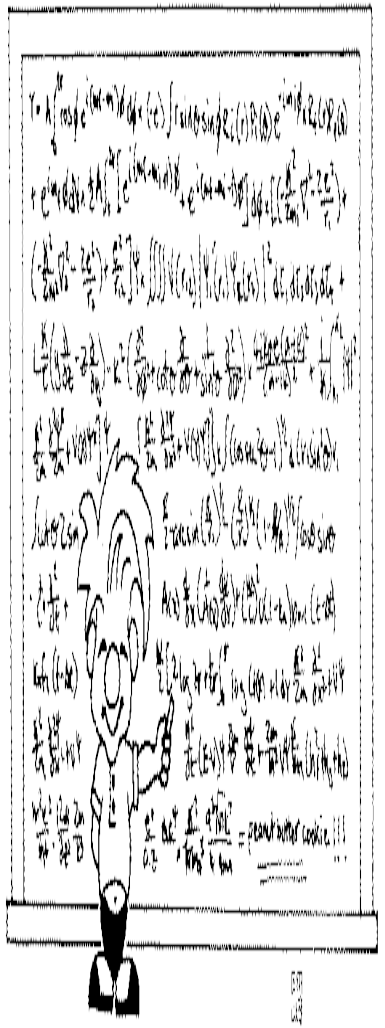
Developer Change of Mind

- Case about Reg 40 & timing of completion of prior works to relevant part – "potential" use relying on permitted development rights not enough for CIL Regs. Must be actual use.
- *R oao Giordano Ltd v LB Camden* [2018] EWHC 3417 (Admin): Reg. 40(7) case:
  - permission 1 permitted use, alterations, & extension of existing building for 6 flats (no CIL Sch.)
  - Structural works & strip out done but partitions incomplete on 3 floors – "a mere shell" still
  - Change of plan (CIL Sch. in force)
  - Permitted Development (2) for 3 larger flats: CIL Form stated property "vacant" but "current use" as residential;
  - CIL of £547,419.09
  - Reg. 40(7): "able to be carried on lawfully"? No, as then incomplete partitions & so use not yet capable to occur & not yet started

What to pay: formulae & actual use

- CA mandated to collect: Reg. 40 applies Schedule 1 Pt 1
- Part 1, "Standard Cases", paragraph 1(5) applies formula:
  - R[ate] x A[rea] X Ip / Ic
- Paragraph 1(7) defines A by further applied formula:

  Gr – Kr – (Gr x E)/G
- Paragraph 1(7):
  - G: gross internal area ("GIA") – in square metres
  - Kr: Aggregate retained parts of "in-use buildings" … able to be carried on lawfully & permanently
  - E: aggregate of in use buildings to be demolished
- Paragraph 1(11): "In-use building":
  - "Building" ?
  - "Relevant building"
  - "contains a part … in lawful use"
- *Hourhope* [2015] EWHC 518 – pub "in lawful [actual] use"
- Focus on actual occurrence of permitted use (not ancillary)



Payment Step 2: When to Pay

- Tax must be paid when "due"
- Reg. 70: general instalment policies position
- Reg. 70(8): if an amount of CIL not received on when it "is due", then unpaid balance becomes payable in full immediately
- Reg. 69(1) Demand Notice must be served on each liable person
- Reg. 69(2) prescribed content
  - Identify related LN
  - State amount payable
  - State "day on which payment of the amount is due"
- DN must include all particulars including appeal rights (*Hillingdon* Case)
- Reg. 69(3): CA can re-issue DN
- Regs. 69(4) & (5) – cessation of effect of any prior notice (see *Braithwate* Case for similar wording)

Exemptions & Reliefs

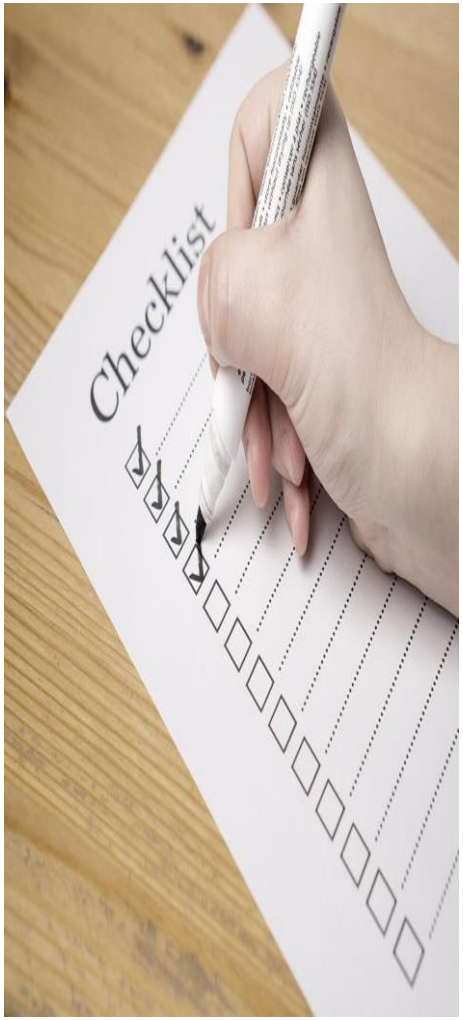
- Part 6: Range of Exemptions & Reliefs reduce CIL
- Small scale development:
  - Minor (<100m2), Annexes, extensions
- Charities
  - development "wholly or mainly" for charitable purpose
- Social Housing Relief – mandatory & discretionary
  - Reg. 49 criteria & qualifying amount
  - Reg. 51 procedure – commencement
- Tax and 7 year "clawback period" (State Aid)
- BUT Exemptions & reliefs can be lost:
  - premature commencement (*Gardiner; Heronslea*) or prescribed situations ("disqualifying events")
  - *Heronslea (Bushey4) Ltd* [2022] EWHC 96 Admin – c £350,000 SHR lost from premature commencement & absence of service of commencement notice.

Late Payment Surcharges

- *Lambeth LBC v Secretary of State* [2021] EWHC 1459 Admin
- Regs. Part 9: surcharges: range of sums & mandatory interest
- Criteria & discretionary ("may"):
  - Reg. 80 - not assume liability? £50
  - Reg. 81 – apportionment process? £500
  - Reg. 82 – no notice of PD chargeable development? Lower of £20% or £2,500
  - Reg. 83 – no commencement notice? 20% or £2,500
  - Reg. 84 – disqualifying event? Lower of 20% or £2,500
  - Reg. 85 – late payment? For each of 30 days, 6 months & 12 months, the greater of £200 or 5% of the amount due
  - Reg. 86 – non-compliance with information notice? £1,000 or 20%
  - Reg. 87 – daily mandatory interest – 2.5% over Base
- *Lambeth* case: Same development changed under s.96A TCPA 1990 reduced CIL & financier pulled out. CA imposed surcharges of £1m. Negotiation reduced to £500,000. faced Court upheld CA imposition of £500,000 on reduced CIL.

Financial Planning: Conclusions

- Viability:
  - "Buy in at the right price. Sell at the right price"
  - Approximate CIL liability before a planning application
  - CIL informs viability process & PPG Viability
  - If buying in, check pre-purchase historic CIL situation
  - NPPF (2019): (now normally) excludes viability assessment
- Practical Conclusions:
  - Premature Commencement is CIL Risky
  - Do not execute CIL Forms – client should do
  - Duty to warn?
  - Check your engagement terms, scope & exclusions, & Professional Indemnity
  - Get Tax Advice from CIL Experienced Counsel
  - Don't panic – Infrastructure Levy is just around the corner … (PM Truss Infrastructure Levy? "TIL"?)



Planning (Case Law) Update

Eleanor Leydon

Agenda

- *London Historic Parks and Gardens Trust v Minister of State for Housing* [2022] EWHC 829 (Admin) (Holocaust Memorial JR) – heritage and alternatives

- *R (Save Stonehenge) v SST* [2021] EWHC 2161 (Admin) (Stonehenge JR) - common law obligation to consider alternatives

- *R (oao Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983 – nutrient neutrality

London Historic Parks and Gardens Trust v Minister of State for Housing [2022] EWHC 829 (Admin) (Holocaust Memorial JR)

- S288 challenge to grant of PP for Holocaust Memorial at Victoria Tower Gardens in Westminster by Minister of State for Housing
- Decision of Thornton J
- 3 Grounds:
  - Inspector had erred in applying wrong test to "substantial harm"
  - Failure to take into account the London County Council (Improvements) Act 1900
  - Error of law in consideration of alternatives

What is substantial harm?

- Had the Inspector erred in his approach to assessing whether the proposal would result in "substantial harm" in NPPF terms to the setting of heritage assets (Grade II* Buxton Memorial and Grade II listed Victoria Tower Gardens)?
- C argued that the Inspector had wrongly relied on *Bedford BC v SSCLG* [2013] EWHC 2847 (Admin) and applied an overly stringent test that harm could not be "substantial" unless the significance of the asset was "drained away".

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 whether there was a "serious degree of harm to the asset's significance". This was unimpeachable.

- 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:

- The Inspector had not placed a burden of proof on objectors to demonstrate the existence of a feasible alternative scheme (see *Trusthouse Forte Hotels Ltd v SSE* (1987) 53 P.&C.R. 293).

- 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

- Failure to take into account the above impediment also rendered the assessment of alternative sites flawed

R (Save Stonehenge) v SST [2021] EWHC 2161 (Admin) (Stonehenge JR)

- Successful challenge to DCO authorising a dual-carriageway road tunnel under Stonehenge (WHS) to replace the existing A303 road.

- Examining Authority had considered the scheme would cause substantial harm to the WHS and recommended refusal. SoS disagreed.

- Allowed on two grounds:
  - Failure to consider alterative proposals
  - Failure to take into account impacts on heritage assets (inadequate information before the Minister)

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

R (oao Wyatt) v Fareham Borough Council [2022] EWCA Civ 983
Nutrient Neutrality

- Challenge to permission for residential development of 8 x houses in the Solent region, 5.5km from a protected wetland site (the Solent and Southampton Special Protection Area)

- Scientific uncertainty about the impact of the development, particularly around the impact arising from nitrates discharged into the water from domestic users

- Natural England advice that only developments that were, at worst, "nitrate neutral" should be granted permission. Council calculated nitrate impact and C sought to challenge those calculations and the conclusions reached

- C argued that Natural England's guidance was legally flawed

Wyatt: nutrient neutrality

- Jay J had criticized the guidance approach to occupancy rates, but considered it sufficiently precautionary to be *Wednesbury* reasonable
- Similar conclusions reached on average land use figures and the application of the 20% buffer
- Appellant argued:
  - The court should have assessed the underlying evidence and made its own determination of whether the figures were sound (relying on 'Dutch Nitrogen': *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17)).
  - Accepted *Wednesbury* applied, but submitted a stringent approach should be taken given the high level of certainty required under the Habitats Regulations.
  - The court had erred in its approach to the precautionary principle - should have assessed the "reasonable worst-case scenario"
  - The NE guidance was wrong in several respects

Wyatt: Nutrient Neutrality

- Held on appeal:
- Jay J had correctly applied the *Wednesbury* standard with "suitable rigour" [50]
- No support in the legislation or case law to support the proposition that the unfavourable status of a protected site raises the level of certainty to be achieved or for the application of a more demanding standard of review [51]
- Reasonable worst case scenario did not have to be assessed if the precautionary principle was to be satisfied.
- Technical guidance not unlawful. In particular the use of average occupancy rates were not "authorised" in every case. The precautionary buffer was not unlawful.

Richard Harwood OBE KC

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: *Consultation on possible longer transition period (up to 12 months longer) for minor development."*
- 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. …. 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. …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."

Climate Change: Planning and the Environment

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

- 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

- 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

Greenpeace (Vorlich)

- Challenge to Oil and Gas Authority consent and SoS approval of EIA for oil and gas extraction in the Vorlich field
- Previous English decision that procedures for bringing claims in breach of EIA Directive – *R(Greenpeace) v SoSi*
- Scottish substantive claim *Greenpeace v Lord Advocate*
- Held greenhouse effects of use of oil and gas not relevant to the EIA of the decision
- Also held Greenpeace did not have standing
- Supreme Court refused permission to appeal on standing, so said greenhouse gas issue did not arise

EIA and GHGs: *Finch v Surrey*(CA) [2022]

- 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)

EIA and GHGs: *Finch* (CA) [2022]

- In EIA terms, GHGs from future combustion *capable* of constituting a (likely, significant) environmental effect, requiring EIA, of the subject project. CA disagreed with High Court who had said it was incapable of being relevant
- By majority, council judgement permissible in excluding 'downstream' GHGs as insufficiently connected to the development, having regard to multiple oil treatment phases, post extraction
- Supreme Court have granted permission to appeal

R (Goesa Ltd) v Eastleigh BC [2022]

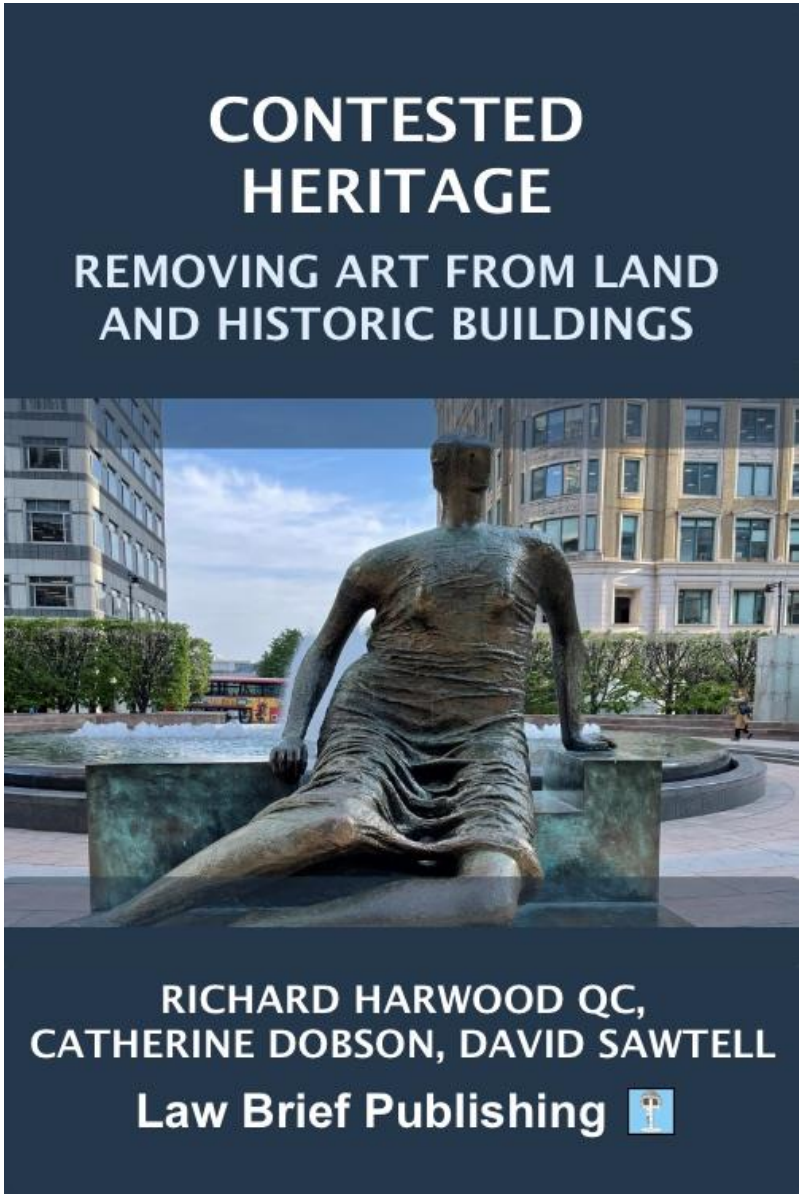
- JR of Southampton International Airport pp. for (164m) runway extension and associated development
- EA addenda projecting future operations, including sensitivity test with reduced projections of future passenger numbers, with and without runway extension
- Ground 3: By making no assessment of the 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))

R (Goesa Ltd) v Eastleigh BC [2022]

- Unresolved: whether "existing and/or approved" (Sch. 4(5)(e)) excludes unconsented, pipeline proposals
- Instead, determined Ground 3 on conventional JR (EIA) principles
- 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)

R(Friends of the Earth Ltd) v Secretary of State [2022] EWHC 1841 (Admin)

- Section 13 Climate Change Act 2008 places a duty on the SoS to 'prepare such proposals and policies' as he considers will enable the carbon budgets set under the CCA 2008 to be met. S 14 put before Parliament.
- Net Zero Strategy laid before Parliament in October 2021.
- Holgate J held, Did not need to quantify how would reach 100% of target, but insufficient evidence before the Minister to conclude that the unquantified effects would make it up to 100%
- Parliament should have had a quantitative explanation
- Fresh report required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Planning and Environmental Seminar - Bristol

22nd September 2022

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