39 Essex CHAMBERS

PLANNING, ENVIRONMENT & PROPERTY NEWSLETTER
07 May 2020

INTRODUCTION

Jonathan Darby

Welcome back to our Planning, Environmental and Property newsletter. This week's edition comprises articles from John Pugh-Smith on Coronavirus and completing s.106 agreements; Stephen Tromans QC and Adam Boukraa on contamination and continuing nuisance; Katherine Barnes on the meaning of "subdivision of an existing residential dwelling" in paragraph 79(d) of the NPPF; and Richard Wald QC and Ruth Keating consider the proposed establishment of an environmental watchdog, the Office for Environmental Protection.

With the weather set fair for the next couple of days, we very much hope that you enjoy the Bank Holiday despite present circumstances.

Contents

1. INTRODUCTION
   Jonathan Darby

2. CORONAVIRUS AND COMPLETING SECTION 106 AGREEMENTS
   John Pugh-Smith

4. CONTAMINATION AND CONTINUING NUISANCE
   Stephen Tromans QC and Adam Boukraa

8. HIGH COURT ADOPTS NARROW INTERPRETATION OF "SUBDIVISION OF AN EXISTING RESIDENTIAL DWELLING" IN PARAGRAPH 79(D) NPPF
   Katherine Barnes

9. HE NEW OFFICE FOR ENVIRONMENTAL PROTECTION – GAMECHANGER OR FIG LEAF?
   Richard Wald QC and Ruth Keating

12. CONTRIBUTORS

CORONAVIRUS AND COMPLETING SECTION 106 AGREEMENTS

John Pugh-Smith

With the prospect of the first May Bank Holiday weather, and, the timelines for the easing the Lockdown making life feel brighter there remain a number of practical considerations that, short of swift amending legislation, will continue to challenge the development industry and the planning professions as we move into the remainder of 2020.

For example, EIA development and public path orders require the documents to be deposited and made available for inspection at Council Offices. While, as part of 39 Essex Chambers' Quarantine Queries service, I have suggested that, perhaps, a suitable explanation on the Council's website that these documents are available on-line (and giving the link) and that hard copies of the relevant documents can be posted to those without web access on request as mitigation these pragmatic steps cannot yet remove the risk of successful Judicial Review. Nonetheless, they carry with them the same measure of common sense to allow development management engagement with the public to remain effective.

Regarding the completion and formal execution of Section 106 agreements the challenge remains somewhat greater and its successful resolution more procedurally complicated, yet still achievable. In last month's PEP Newsletter article "Coronavirus and Executing Documents Remotely"[1] my colleagues, David Sawtell and Gethin Thomas, drew attention to the power under Section 234 of the Local Government Act 1972 which provides that documents may be signed on behalf of the Authority by the Proper Officer (usually, under Delegated Powers by the Head of Legal Services or he Director of Law and Governance). Under sub-section 234(2), any document purporting to bear the signature of the proper officer of the authority shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority of the local authority. It is specifically provided that *'the word "signature" includes a facsimile of a signature by whatever process reproduced"*. However, there are no specific provisions in the Local Government Act 1972 which govern the use of a local authority's seal. However, a local authority's standing orders frequently require the affixing of its seal to be attested by the chairman, vice chairman or other elected member, and also by the clerk or his or her deputy. As such, the procedure for the use of an electronic seal will be governed by each local authority's constitution. It may be that the individual person required to fix the seal is to be the person responsible for carrying out an electronic sealing of a document, but subject to delegated authority in accordance with a given constitution, it may also be possible to have others undertake the process of electronically sealing documents. So, sealing can be achieved.

Indeed, one local authority to whom I have given advice has pragmatically decided to appoint external solicitors to hold a power of attorney to execute deeds on its behalf.

Nevertheless, in the context of planning obligations, Section 106(9) of the Town and Country Planning Act 1990 provides specifically as follows:

"A planning obligation may not be entered into except by an instrument executed as a deed which –

- *(a) states that the obligation is a planning obligation for the purposes of this section;*
- *(b identifies the land in which the person entering into the obligation is interested;*
- *(c) identifies the person entering into the obligation and states what his interest in the land is; and*
- *(d) identifies the local planning authority by whom the obligation is enforceable and, in a case where section 2E applies, identifies the Mayor of London as an authority by whom the obligation is also enforceable.*

1 April 2nd, 2020: https://www.39essex.com/planning-environment-and-property-newsletter-april-2020/

For example, where a decision notice await the completion of the "Section 106", or, with say a multi-phase scheme a necessary Section 73 modification (with linked Section 106)[2] the ability to agree the terms of the final document or its completion may still impeded by the outworkings of the CV-19 Lockdown. Is there another way of unlocking the situation?

After yielding to pressure from the development industry to allow formal endorsement of "Arsenal-type" conditions in the initial version of the national Planning Policy Guidance (published 6 March 2014) MHCLG's current advice (Paragraph: 010 Reference ID: 21a-010-20190723), effective since 23 July 2019, reads as follows:

Is it possible to use a condition to require an applicant to enter into a planning obligation or an agreement under other powers?

A positively worded condition which requires the applicant to enter into a planning obligation under section 106 of the Town and Country Planning Act 1990 or an agreement under other powers, is unlikely to pass the test of enforceability.

A negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency.

However, in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases the 6 tests should also be met.

Where consideration is given to using a negatively worded condition of this sort, it is important that the local planning authority discusses with the applicant before planning permission is granted the need for a planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principal terms need to be agreed prior to planning permission being granted."

So, if such an approach is to be utilised, first, does the current Coronavirus Crisis qualify as *"exceptional circumstances"*? Arguably, most certainly!

Secondly, is there *"clear evidence that the delivery of the development would otherwise be at serious risk"*? While the guidance is clearly contemplating "complex development schemes", arguably, the need, in the public interest, to ensure the deliverability, and, early delivery of, say, new housing sites requires a more robust approach to be taken,[3] and, thereby the maintenance of a (genuine) five year housing land supply.[4] In that regard, Mr Justice Dove notes at paragraph 108 of his judgment in the combined cases of *Canterbury City Council v SSHCLG* and *Crondall Parish Council v SSHCLG* [2019] EWHC 1211 (Admin)[5] observes as follows: "[The Inspector] *was entitled to conclude, as he did, that the policy objective of significantly boosting the supply of homes contained in paragraph 59* [of the NPPF] *did not cease to apply when housing land supply in excess of five years could be established."*

2 See, for example, my recent article *"Section 106s And The "Technical Traps" Submission"*: https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/43546-section-106s-and-the-technical-traps-submission

3 It is intended that a fuller article from me will be published, hopefully, in next week's Newsletter

4

5 These challenges are better known for how the "fall-out" from the ECJ decisions in *People over Wind* and *Sweetman* ECJ should be handled by the SSHCLG in an appeal context.

Thirdly, are there agreed Heads of Terms or a draft Section 106 already prepared, and, in the public domain prior to determination, or, as a referral back to Members as a significant material change in planning circumstances? Here, it is worth bearing in mind that Article 40(3)(b) of the Town & Country Planning (Development Management Procedure) (England) Order 2015 ("the DMPO") specifically requires a copy of *"any planning obligation or section 278 agreement entered or proposed to be entered into in connection with the application"* to be uploaded onto the on-line Planning Register i.e. drafts as well as executed deeds, a procedural requirement all too often overlooked by local planning authorities.

Fourthly, does the Applicant consent to this course of action and has been duly notified? Odd though it may seem, in this context, but Section 100ZA(5),of the 1990 Act combined with The Town and Country Planning (Pre-Commencement Conditions) Regulations 2018 require, by Regulation 2(1) the giving of prior notification and the text of the proposed pre-commencement condition. It should also be noted that Regulation 2(4) requires that the Council's notice must include:

(a) the text of the proposed pre-commencement condition;

(b) the full reasons for the proposed condition, set out clearly and precisely;

(c) the full reasons for the proposed condition being a pre-commencement condition, set out clearly and precisely; and

(d) notice that any substantive response must be received by the authority or, as the case may be, the Secretary of State no later than the last day of the period of 10 working days beginning with the day after the date on which the notice is given."

So, by way of conclusion, where there is a will there are ways to overcome the present challenges and successfully too.

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CONTAMINATION AND CONTINUING NUISANCE

Stephen Tromans QC and Adam Boukraa

Limitation can be a difficult issue in many cases involving contamination of the environment, both in terms of when the contamination occurred and was discovered (which may be very different) and the continuing and persistent nature of many forms of contamination. The issue has recently been addressed by the TCC in *Jalla v Royal Dutch Shell Plc* [2020] EWHC 459 (TCC); [2020] 3 WLUK 1. This involved a claim by some 27,000 Nigerian claimants and 457 communities in relation to an oil spill from the transfer of oil from an offshore platform to a ship, which affected a wide area of coastline and hinterland in the Niger Delta. The spill occurred in December 2011. Estimates of the quantity varied but was taken by the court to be over 40,000 barrels, described by the claimants as one of the largest spills in the history of Nigerian oil exploration. It was alleged that oil from the spill had devastated the shoreline and caused serious and extensive damage to the claimants' land and water supplies, and to the fishing waters in and around affected villages; and that, because it has not been cleaned up properly, it continues to cause damage.

Proceedings were originally brought against Royal Dutch Shell, but this was not the correct defendant. Proceedings against the relevant Shell companies were not commenced until

2018. In 2019 there was an application for significant amendments to the particulars of claim, constituting a major re-vamp of the claim. The defendants raised issues of jurisdiction and limitation. On limitation six years had expired from the spill before proceedings were commenced, but the claimants raised two points in response: (i) time did not start to run against any of them until 2017 because of deliberate concealment by the defendants until then of a document known as the FUGRO Report listing soil and water samples taken in early 2012; (ii) the defendants were in breach of continuing duties in tort because of their failure to clean up or remediate the consequences of the original spill. The claimants submitted that, as a result, "a fresh cause of action accrues each day so long as the pollution and/or nuisance continues". Further, at the hearing an entirely new argument was advanced for the claimants, which had neither been pleaded or included in the skeleton argument, that at least some of the claimants may have suffered no actionable damage until after 4 April 2012, so that time would not have started running either in nuisance or in negligence until then, with the result that the claim was within the limitation period as it affected those claimants.

As this was not a full trial the court had to do the best on the evidence available to ascertain when the damage had occurred. At para. [59] the court held:

> *On the basis of the information before the Court… it is safe to conclude without conducting a mini-trial that if the oil from the December 2011 Spill was responsible for the damage of which the Claimants complain, then oil reached the shoreline within a few days of 24 December 2011. Evidently, some parts of the shoreline included within the claims in this litigation were more remote than others from the [spill] and so landfall would not all have occurred at the same time. However, it is clear beyond reasonable argument to the contrary that actionable damage as alleged would have been suffered along most if not all of the affected shoreline within weeks rather than months of the December 2011 Spill … This does not mean that all Claimants living and working along the shoreline were affected as soon as oil first hit land; but the substantial quantities of polluting oil alleged by the Claimants strongly support the conclusion that, where oil hit a particular stretch of the shoreline, many if not all Claimants living and working in that area would have suffered one or more of the effects of which they now complain within a short time. Even without conducting a mini-trial, therefore, the Court can be confident that actionable damage sufficient to start time running in negligence and/or nuisance occurred for many Claimants before 4 April 2012.*

Continuing nuisance

The point of most general importance to emerge from the judgment is the "continuing nuisance" issue. The claimants' submission was that "the ongoing and unremedied pollution from the December 2011 Spill that continues to blight their land is a continuing nuisance" so that a fresh cause of action accrued each day as damage or interference with the use of land occurred. The court set out the position on such nuisances as follows:

> *64. There is no doubt that a nuisance can be a "continuing" one such that every fresh continuance may give rise to a fresh cause of action. The classic example of a continuing nuisance is provided by Battishill v Reed (1856) 18 CB 696 where the Defendant built (and subsequently kept in place) an erection higher than the Plaintiff's and, having removed tiles from the Plaintiff's eaves, had placed his own eaves so as to overhang the Plaintiff's premises. This nuisance was held to continue from day to day. "Continuing" a nuisance is also used in a different context to describe the circumstances in which responsibility for a nuisance will be imposed upon an occupier of land who, with knowledge or presumed knowledge of its existence, fails to take reasonable means to bring it to an end when he has ample time to*

> *do so. This usage is contrasted with "adopting" a nuisance by making use of an erection or artificial structure which constitutes the nuisance: see Sedleigh-Denfield v O'Callaghan [1940] AC 880. As Lord Atkin pointed out (at 896) there is a risk of imprecise language in referring to a state of affairs that has the potential to cause damage as itself being a nuisance. What is clear is that the cause of action in nuisance is dependent upon the occurrence of damage.*

The claimants had relied upon Delaware Mansions Ltd v Westminster City Council [2002] 1 AC 321 as authority for the proposition that failure to remediate a single event can be a continuing nuisance for this purpose. However, the court rejected that argument:

> *67. This reasoning does not assist the Claimants. The … passage shows the determining feature of the case, namely that the continuing presence of the tree roots gave rise to a continuing need for underpinning which would have been avoided if the highway authority had abated the (continuing) nuisance at any time by removing the tree (and, hence, the effect of its roots). The highway authority became responsible for that continuing state of affairs on being notified of the problem and when it declined to abate the nuisance. That is analogous to the person who builds and leaves a structure on or overhanging his neighbour's land – the classic "continuing" nuisance in this usage. It is quite different from the "normal" case where there is a release (be it of water, gas, smells, or other detrimental things) and that release causes damage or interferes with user of land. In the latter case, there is one occurrence of nuisance for which all damages must be claimed at once even if the consequences of the nuisance persist. So, for example, if in Sedleigh-Denfield the escape of water had formed a lake which caused damage to the plaintiff's land over a period of weeks, that would have been one occurrence of a legal nuisance despite the extent and duration of the consequential damage, for which all damages should be claimed at once. In the present case there was one escape of oil, for which the Claimants seek to impose liability upon [the defendant]. It is alleged that the escape has caused the inundation of the Claimants' land and other heads of damage. Nuisance by polluting oil is no different in principle from nuisance by escape of water, gas smells or other polluting agents. It is in that respect a "normal" case and there is no basis, either in authority or in principle based upon concepts of reasonableness or control to describe the nuisance as "continuing" in the sense contended for by the Claimants or as considered in Delaware Mansions . To treat the present escape as giving rise to a continuing nuisance in the sense asserted by the Claimants would, in my judgment, be a major and unwarranted extension of principle.*

The court concluded that, for these reasons, the limitation period should not be extended by reference to the concept of a continuing nuisance. The claimants' causes of action accrued when each claimant first suffered sufficient damage for the purposes of a claim in nuisance.

The point is one of general importance in many nuisance cases but the ostensibly clear cut reasoning of the judge may on close examination prove to be somewhat confused in its reference to smells and other "amenity" type nuisances which interfere with the enjoyment of land. It is in their nature that these will often be intermittent and continuing nuisances, though of course the limitation period in terms of damages will run from each incident or relevant period of time. So if someone has suffered odours or noise amounting to a nuisance for 8 years, they can claim for the last six. The judgment is however important on cases where there has been a release of a pollutant which has affected land, and where limitation runs from the time the initial damage occurred.

In the *Jalla* case, there was actually no evidence on when damage occurred for individual claimants, of whom there were thousands. For those living

some considerable distance inland, it might have been the case that there was a delay before the oil reached them. The court said that "The only assumption that can safely be made is that the further from the shoreline and the more remote in time it may ultimately be alleged that damage was first suffered, the greater will be the need for the case to be properly pleaded and for evidence, both general and specific, to sustain a claim that the individual Claimants suffered actionable damage...". Beyond that it was not possible to determine which Claimants suffered actionable damage when.

In a later procedural judgment [2020] EWHC 738 (TCC) the judge refused permission to appeal on the continuing nuisance point, and ordered the claimants to serve a "Date of Damage Pleading", setting out the Claimants' case on when all relevant accruals of damage occurred with sufficient particularity to enable the Defendants to know the case that they have to meet.

Deliberate concealment

A more fact specific issue was whether the limitation period should be extended on the basis of deliberate concealment by the defendants. This however also has some potential general relevance, as it is quite often the case that a defendant may have reports identifying contamination, of which a claimant is unaware.

On the basis of expert evidence, the judge found that the touchstones for the application of the doctrine of deliberate concealment under Nigerian Law included that (a) the injured party must be ignorant of the existence of a tortious act having been committed against him and (b) there must be deliberate concealment of the facts that would alert the injured party to the existence of a tortious act having been committed against him. That was in his judgment "entirely consistent with English Law". Two principles were important in addressing this issue. First, what must be concealed must be a fact relevant to the existence of the injured party's cause of action, not simply evidence that will strengthen the injured party's claim and second, where deliberate concealment is demonstrated, it will only prevent time running against the defendant who carried it out. There could be no justification for depriving a defendant of a limitation defence that would otherwise have accrued because someone else (not acting on his behalf or as his agent) has deliberately concealed relevant facts from the claimant.

On these points, the argument of deliberate concealment failed. Furthermore, the claimants had not shown any basis for the existence of a duty on the defendant to disclose a copy of the FUGRO Report (assuming for these purposes that it had a copy) either to the claimants or to the Nigerian Authorities. Following the litigation, the obligations of the parties had been governed by the Court's procedural rules and, because of the pace at which things have progressed, no obligation to give either specific or general disclosure had arisen. Given that what the claimants complained of was the omission to disclose the document, the absence of any duty to do so was fatal to the claimants' submissions. Also, the FUGRO Report was not "a fact relevant to the Claimants' right of action" and withholding of the report (if it were to be proved) would not amount to concealment of "the right of action" within the meaning of the relevant statutes: "At its highest it is evidence that may enhance the Claimants' claim."

HIGH COURT ADOPTS NARROW INTERPRETATION OF "SUBDIVISION OF AN EXISTING RESIDENTIAL DWELLING" IN PARAGRAPH 79(D) NPPF

Katherine Barnes

In the recent decision of *R (Wiltshire Council) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 954 (Admin) Lieven J allowed the appeal of the local planning authority ("LPA") under s.288 of the Town and Country Planning Act 1990 and, in so doing, clarified the meaning of "subdivision of an existing residential dwelling" in paragraph 79(d) of the NPPF.

Paragraph 79(d) contains one of the exceptions to general prohibition on the development of isolated homes in the countryside:

"Planning policies and decisions should avoid the development of isolated homes in the countryside unless one or more of the following circumstances apply:

> (a) *there is an essential need for a rural worker, including those taking majority control of a farm business, to live permanently at or near their place of work in the countryside;*
>
> (b) *the development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets;*
>
> (c) *the development would re-use redundant or disused buildings and enhance its immediate setting;*
>
> (d) *the development would involve the* ***subdivision of an existing residential dwelling;*** *or*
>
> (e) *the design is of exceptional quality, in that it: – is truly outstanding or innovative, reflecting the highest standards in architecture, and would help to raise standards of design more generally in rural areas; and – would significantly enhance its immediate setting, and be sensitive to the defining characteristics of the local area."* (Emphasis added).

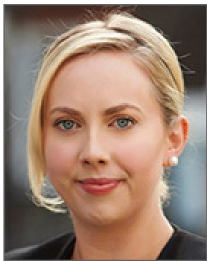
The Inspector, whose decision was the subject of the LPA's appeal, had found that "subdivision of an existing residential dwelling" referred to subdivision of a residential planning unit. As such, the Inspector considered that paragraph 79(d) applied to Interested Party's planning application, which sought permission for the change of use from a residential annexe (some 19 metres from the main residential dwelling) to an independent residential dwelling. In contrast, the LPA, supported by the Secretary of State, contended that "subdivision of an existing residential dwelling" referred to the subdivision of a single physical dwelling.

Lieven J preferred the interpretation of the LPA and the Secretary of State, finding that the words of paragraph 79(d) and the context indicated that the exception should be narrowly construed so that "subdivision of a single physical dwelling" should be understood as referring to subdivision of a single dwelling. She explained that, in her view, paragraph 79(d) would have used words such as "the residential unit" or "the property" if it had intended the exception to apply to the whole planning unit. She went on:

> *"Most importantly, in my view the context strongly militates towards a narrow interpretation. The sub-paragraphs in para 79 are exceptions to the general policy against creating new residential development in isolated rural locations. It is important to have in mind that the policy reason for not supporting new housing in such locations is that it would be fundamentally unsustainable, being poorly located for local services, and that sustainability lies at the heart of the NPPF. As such, it does in my view follow that the exceptions should be narrowly construed as being in general not supportive of sustainable development. The exceptions are all forms of development which could be said to enhance the countryside, whether by adding housing for rural workers, or reusing redundant buildings. […] [P]ara 79(d) makes sense in this context as allowing the sub-division of large properties into flats where that is a good use of the existing dwelling. To allow the sub-division of residential units by allowing separate buildings to become separate dwellings goes well beyond that limited exception."* (At [29]).

THE NEW OFFICE FOR ENVIRONMENTAL PROTECTION – GAMECHANGER OR FIG LEAF?

Richard Wald QC and Ruth Keating



Overview

An Environment Bill (the "Bill") was introduced in October 2019, before the December election, to replace EU-based environment law. The Bill's progress has been halted, first by the general election and then by COVID-19, but on 26th February parliament finally held its second reading of this proposed legislation and the agenda for post-Brexit environmental reform and government it contains. The Committee is now scheduled to report by Thursday 25 June 2020.

A core part of the Bill is the establishment of an environmental watchdog, the Office for Environmental Protection ("OEP"). The Government's stated ambition is to create *"a new, world-leading, independent environmental watchdog"* to hold Government to account on its environmental ambitions and obligations.[6]

The OEP's enforcement powers dealing with breaches of environmental law duties by public bodies are designed largely to fill the hole left by the supervisory powers of the European Commission following Brexit. The OEP's constitution is not set out in the Bill, but its statement of impacts explains that it will be an arm's length body and its explanatory notes provide that the OEP is to be a non-Departmental public body.[7] Environmental groups and Parliament itself have both, however, and with some justification, expressed concerns that the gaps which will be left by the loss of the Commission's monitoring and enforcement role have not been filled by the current provisions of the Bill.

In this short article we will look first at the relevant provisions of the Bill as currently drafted and then consider some issues with the currently proposed framework. In the next 39 Essex Chambers PEP Bulletin we will consider another key aspect of the Bill, its environmental target provisions.

Draft OEP provisions

A tracked changed version of the Bill dated 6 March 2020 can be accessed at: https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf This indicates amendments to the Bill as introduced (in the House of Commons on 15 October 2019 – Bill 3) made during its passage through Parliament (now Bill 9).

The key provisions, as currently drafted, include the following:

- The OEP is established, by clause 21.
- ***OEP's objective:*** The principal objective of the OEP is said to be to *"contribute to – (a) environmental protection, and (b) the improvement of the natural environment"* (clause 22(1)). The OEP must act objectively and impartially (clause 22(2)).
- ***Strategy:*** The OEP must also prepare a strategy which sets out, amongst other things, how it intends to exercise its functions (clause 22(3)) and that strategy must contain its enforcement policy (clause 22(6)). This strategy must be laid before Parliament and published. It may be revised at any time.
- ***Scrutiny and advice:*** The Bill also lays out the OEP's scrutiny and advice functions, which include monitoring and reporting on environmental improvement plans and targets. The OEP must – (a) arrange for its reports

6 Scrutiny of the Draft Environment (Principles and Governance) Bill, The Office for Environmental Protection https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/195107.htm

7 Draft Environment (Principles and Governance) Bill, clause 11 draft explanatory note and Statement of Impacts, 8; Institute for Government (DEB0030).

under this section to be laid before Parliament, and (b) publish them. The Secretary of State must – (a) respond to a report under this section, and (b) lay before Parliament, and publish, a copy of the response (clause 25).

- ***Monitoring and reporting:*** Clause 26 deals with monitoring and reporting on environmental law.
- ***Advising:*** Clause 27 covers the OEP advising on changes to environmental law.
- ***Enforcement:*** Clause 28 relates to the OEP's enforcement functions where there is a failure of public authorities to comply with environmental law.
- ***Complaints:*** A person may make a complaint to the OEP under this section if the person believes that a public authority has failed to comply with environmental law (clause 29).
- ***Investigations:*** The OEP may carry out an investigation under this section if it receives a complaint made under section 29 (clause 30).
- ***Information notices:*** The OEP may give an information notice to a public authority if – (a) the OEP has reasonable grounds for suspecting that the authority has failed to comply with environmental law, and (b) it considers that the failure, if it occurred, would be serious (clause 32).
- ***Decision notices:*** The OEP may give a decision notice to a public authority if the OEP is satisfied, on the balance of probabilities, of (a) and (b) above. The recipient of a decision notice must respond in writing to that notice (clause 33).
- ***Environmental review:*** Where the OEP has given a decision notice to a public authority it may apply to the Upper Tribunal for an environmental review. Where the Upper Tribunal makes a statement of non-compliance it may grant any remedy that could be granted by the court on a judicial review other than damages, but only if satisfied that granting the remedy would not – (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or (b) be detrimental to good administration (clause 35).
- ***Judicial review:*** The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) if the OEP considers that the conduct constitutes a serious failure to comply with environmental law (clause 36).

Commentary on the draft provisions

The House of Lords EU Environment and Energy Subcommittee recently stated that *"an effective and independent domestic enforcement mechanism will be necessary, in order to fill the vacuum left by the European Commission in ensuring the compliance of the Government and public authorities with environmental obligations"*. (House of Lords European Union Committee Brexit: environment and climate change 12th Report of Session 2016–2017 (14 February 2017) HL Paper 109, at [84].) Whether the OEP in its current form can fill that vacuum is questionable.

There are some important, and promising, functions of the OEP such as clauses 26 and 27 which provide, respectively for the OEP to monitor and advise upon environmental, a role which has not hitherto existed in this form. It is however not clear how the OEP will perform this function and in particular whether it will set up a programme for reviewing certain areas of the law or whether it will instead be responsive to issues as they are raised or become relevant.

As for enforcement the OEP's proposed structure is similar to that of the European Commission (see the analogous provisions contained in Article 258 of the Treaty on the Functioning of the European Union) in that it provides for (i) an information notice (clause 32); (ii) a decision notice (clause 33); and (iii) review by the Upper Tribunal or judicial review (clauses 35-36). In previous iterations of the Bill the OEP relied solely on judicial review as

a means of challenging the acts or omissions of a local authority. The newer three-tiered system will add welcome flexibility where it was needed.

Such flexibility is all the more important when one considers that the success of the OEP will rely to great extent on its ability to act as an effective enforcement authority. Over-reliance on softer measures rather than a direct challenge to offending local authorities would inevitably be perceived as weakness and, more critically, would expose the environment to risk of harm at a time when its need for protection has become urgent. Moreover, as no specific environmental tribunal has been designated yet, it is not yet clear whether it would possess the necessary level of expertise and therefore the confidence to determine the matters which would come before it.

Furthermore, no provision is currently made within the Bill for the Upper Tribunal to make an award of damages or to impose a fine. If the experience of the European Commission is anything to go by then such a power would equip the new watch dog with real teeth and enable the proper regulation of public bodies whose acts or omissions harm the environment. Yet the Bill makes no equivalent provision for the crucial Commission power to fine Member States for non-compliance with environmental legislation. On any view this must be seen as a down-grading of regulatory power.

Finally, and perhaps most fundamentally, there are real questions about the extent to which the OEP will be capable of acting as a truly independent body, willing and able to take local and central government to task where necessary. As it stands, both the appointment of non-executive board members and allocation of budget would be the duty of the Secretary of State. Experience suggests that non-departmental public bodies structured in this way are often subject to significant governmental oversight as a result of the appointment process and financial allocation. All of which could very well get in the way of the goal of "robustly hold[ing] the Government to account".

Conclusion

While the current provisions establishing the OEP contain welcome features for those interested in the protection of the environment, the doubtless laudable ambition that the OEP will be "a new, world-leading, independent environmental watchdog" risks being undermined by the short-comings in the current draft of the Bill identified here. If the government is serious about its stated ambition it will need to equip its watch dog with the teeth and freedom to make that possible.

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Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

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Richard regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. High Court, Court of Appeal and Supreme Court work includes statutory challenges and judicial review. He undertakes both prosecution and defence work in respect of planning, environmental and health & safety enforcement in Magistrates' and Crown courts. He also acts for landowners and acquiring authorities on all aspects of compulsory purchase and compensation at inquiry and in the Lands Chamber of the Upper Tribunal. He is ranked by Chambers & Partners and the Legal 500 for both Environmental Law and Planning Law. Prior to taking silk he was rated by Planning Magazine Legal Survey as amongst the UK's top planning juniors for over a decade. To view full CV click here.

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John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues. To view full CV click here.

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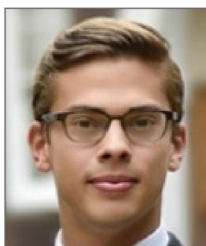
Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.



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Adam has a broad public law practice and a particular interest in environmental work. He acted for Southern Water in a dispute with the Environment Agency on changes to water abstraction licences, culminating in an inquiry in March 2018 (led by Justine Thornton QC). More recently, he has advised another water company on the preparation of its water resources management plan (with Stephen Tromans QC). Adam writes regularly on environmental issues: he is a contributor to the Journal of Environmental Law and assisted with updating the leading text on contaminated land. He also has experience of planning matters, including successfully representing the appellant in a challenge to an enforcement notice. To view full CV click here.

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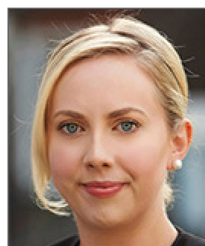
Katherine practises in all areas of planning and environmental law, including the specialist areas of town and village greens, assets of community value and highways. Her clients include developers, local authorities, NGOs, community groups and individuals. She is listed as one of the 'Highest Rated Planning Juniors Under 35' by Planning Magazine. To view full CV click here.



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Ruth is developing a broad environmental, public and planning law practice. She has gained experience, during pupillage and thereafter, on a variety of planning and environmental matters including a judicial review challenge to the third runway at Heathrow, protected species, development and land use classes, enforcement notices and environmental offences. Last year Ruth was a Judicial Assistant at the Supreme Court and worked on several environmental, planning and property cases including R (on the application of Lancashire County Council); R (on the application of NHS Property Services Ltd) (UKSC 2018/0094/UKSC 2018/0109), the Manchester Ship Canal Company Ltd (UKSC 2018/0116) and London Borough of Lambeth [2019] UKSC 33. She is an editor of the Sweet & Maxwell Environmental Law Bulletins. To view full CV click here.

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