INTRODUCTION

Jonathan Darby

Welcome to this edition of our Planning, Environment and Property newsletter. We hope that you are all well.

This week's edition includes articles on today's Holborn Studios judgment on the publication of viability assessments; local green space designation; as well as the sixth and final in a series of articles addressing key aspects of the Environment Bill.

We hope that you enjoy the read.

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ACCESS TO VIABILITY ASSESSMENTS: HOLBORN STUDIOS 2

Richard Harwood OBE QC

In *R (Holborn Studios) v London Borough of Hackney (No 2)* [2020] EWHC 1509 (Admin) the Planning Court quashed planning permission for a residential and commercial redevelopment of the Holborn Studios site at Eagle Wharf Road, London N1 for the second time. Mr Justice Dove's judgment establishes the public's right of access to viability assessments in planning decisions and right to write to councillors on planning and other matters. In this case, like Paddington 2 or The Empire Strikes Back, the sequel is even better than the original.

The first grant of permission in 2016 was challenged by Holborn Studios who run Europe's largest photographic studio complex at the site and who would not be accommodated by the scheme. In *R (Holborn Studios) v London Borough of Hackney* the permission was quashed because it was unfair not to consult on amendments to the application, including the complete removal of affordable housing; and because there was a legitimate expectation created by the Council's statement of community involvement that representations submitted by the applicant would be published.

A new application was made offering a £757,000 contribution to off-site affordable housing, a proposal which was well below the expectations of policy. This was justified by a viability assessment which went through at least two iterations and was commented on by consultants appointed by the Council. The first version was published with all of the numbers blanked out, and a summary document was produced for the later version. In their consultation response Holborn Studios asked for the viability assessment to be published in full. Having seen the committee report they reiterated those criticisms, saying it was not possible to understand from the published material how the contribution had been calculated, and asking for the viability documents, including the Council's assessment. They also pointed out that the Council's list of background papers was unlawful as it merely contained the development plan.

Local authorities are required to make available background papers to committee reports. By the Local Government Act 1972, s 100D(5):

> "background papers for a report are those documents relating to the subject matter of the report which –
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

Background papers do not have to be provided if they contain 'exempt information' which includes information relating to financial or business affairs of a person (Local Government Act 1972, Schedule 12A, Part 1, para 3) 'so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information' (Schedule 12A, Part 2, para 10). In previous cases, culminating in *R(Perry) v Hackney London Borough Council* [2014] EWHC 1721 (Admin) the High Court had backed non-disclosure of viability assessments on confidentiality grounds. That deferential approach was not taken by the First Tier Tribunal in information rights cases.[1]

Since then the National Planning Policy Framework had said that viability assessments should be 'publicly available' (para 57). The Planning Practice Guidance explained the need to publish the entire appraisals, other than in exceptional circumstances where an executive summary could be published, but still containing the 'benchmark land value including the landowner premium'.[2]

1 *Royal Borough of Greenwich v Information Commissioner* EA/2014/0122.
See generally *Planning Permission* (Richard Harwood, Bloomsbury Professional), para 8.39-8.42.

2 Paragraphs 10-010, 10-020, 10-021.

Dove J held that the Council had failed to provide a list of background papers as required. Some at least of the unpublished viability material constituted background papers. The NPPF and PPG had an important bearing on the consideration of whether or not there is a public interest in disclosing the information contained in a viability assessment (even if it is properly to be characterised as commercially sensitive). Mr Justice Dove said (para 64):

> "save in exceptional circumstances the anticipation is that viability assessments, including their standardised inputs, will be placed in the public domain in order to ensure transparency, accountability and access to decision-taking for communities affected by development. The interests which placing viability assessments into the public domain serve are clearly public interests, which in my view support the contention that such assessments are not exempt information unless the exceptional circumstances spoken to by the PPG arise and solely an executive summary should be put in the public domain."

Perry had been decided in significantly different circumstances, before these changes in policy.

The Court went on to consider the material which had been published or included in the committee report, describing it as 'opaque and unexplained', 'incoherent', 'incapable of being reconciled' and 'None of these differences or inconsistencies are explained nor are they capable of being understood'. Dove J also said that the material should identify both the existing use value and the landowners' premium which has been used to derive the benchmark land value. These should be 'set out in a way which enables clear interpretation and interrogation of those figures'. Since Holborn Studios were the current tenants, there was much they could have said about the existing use value, if they had been given the viability material.

Dove J endorsed the views of Cranston J in *R(Joicey) v Northumberland County Council* [2014] EWHC 3657 (Admin), saying 'the purpose of having a legal obligation to confer a right to know in relation to material underpinning a democratic decision-taking process is to enable members of the public to make well-informed observations on the substance of the decision' (para 71).

Additionally the judge found a right for the public to write to councillors on planning and other matters. The Council's standard documents and practice which prohibited planning committee members from reading representations which had been sent directly to them was a breach of the right to freedom of expression under Article 10 of the European Convention on Human Rights. This aspect is considered by Richard Harwood QC in a separate article in 39 Essex Chambers' Local Government newsletter.

Richard Harwood QC appeared for Holborn Studios in both cases, instructed by Susan Ring of Harrison Grant.

THE POWER OF LOCAL GREEN SPACE DESIGNATION – IS IT TIME TO RECONSIDER ?

Celina Colquhoun

Ever since its introduction in the NPPF as a matter of policy the ability for a local planning authority (or qualifying body) to designate an area of land as Local Green Space has been a source of considerable contention in the planning world.

On the one hand it provides a clear means whereby local communities can identify green areas of particular importance to them and ensure their special protection.

On the other hand, whilst there are tests to be met prior to designation, they are not as stringent as those for alterations to the Green Belt or new Green Belt i.e. *"only…in exceptional circumstances"*.[3] Once in place though, the NPPF states clearly that that special protection

3 See e.g. NPPF 92

means that "[b]*y designating land as Local Green Space local communities will be able to rule out new development other than in very special circumstances".*

It is difficult to think of any other protective policy or provision that has a lower threshold for its confirmation than another protective policy but which achieves the same force as that other protective policy – it would be rather like saying a building identified as being within a Conservation Area is protected in the same way as if it were actually listed.

In addition, LGS, whilst not exclusively so, is very much more a creature of Neighbourhood Development Plans ('NDPs') than Local Plans. Whilst we do not talk in tiers of plans these days and indeed once adopted NDPs are part of the development plan, it is well established that NDPs are not tested with the same rigour as local plans i.e. meeting the basic conditions (see Para 8 Sch4 Planning and Compulsory Purchase Act 2004 ('the 2004 Act')) is a more *"limited exercise"* than meeting the test of soundness (see s20(5)(b) of the 2004 Act)(see by Supperstone J in *BDW Trading Limited v Cheshire West and Cheshire Borough Council* [2014] EWHC 1470 and Holgate J in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin), at [56] – [62]

One cannot of course though bring about changes to the Green Belt through an NDP.

To that end it is therefore possible and lawfully so for a local planning authority (LPA) to find itself with a designated piece of land as part of its development plan which is, to all intents and purposes, Green Belt within that development plan but which has not been subjected to the same scrutiny as any other piece of Green Belt land properly so called. Further this would be both as a consequence of less stringent tests and criteria to warrant such protection and in a plan which also is subject to a more limited/less rigorous process and testing.

This is highlighted in the recent case of *R(oao) Lochailort Investments v Mendip DC & Norton St Philip Parish Counci*l [2020] EWHC 1146 handed down on 11 May 2020 in which Mrs Justice Lang considered a challenge to the Norton St Philip Neighbourhood Development Plan ('the NDP'). Following the examination of the NDP and acceptance by MDC of the Inspector's report the claimant challenged the NDP in respect of its Local Green Space ("LGS") policy which identified ten sites to be designated as LGSs and in two of which the Claimant developer had an interest. In addition, however, to the NDP process, the Defendant Council was also in the midst of preparing a revised local plan ('LPP2') for the whole of Mendip District. Amongst other matters, LPP2 also proposed an LGS policy and sites based on a review of the *"open areas of local significance"* identified in the Defendant's existing plan ('LPP1'), adopted in December 2014. The LPP2 LGS sites also included the same 2 Claimant's sites as the NDP.

The Claimant raised objections to the NDP and LPP2 both in respect of the LGS policies and also in respect of housing allocations.

The examination of local plan commenced later than the NDP but the LPP2 **Inspector issued interim conclusions** during the examination criticising the methodology used to identify the LGS sites and also recommending that the LPP2 LGS policy be deleted. The Inspector's interpretation of the LGS policy within the NPPF and PPG is notable. He stated as follows:

> *"34. National policy, as expressed through the Framework and National Planning Policy Guidance (PPG),* ***sets a very high bar for LGS designation.*** *The opening sentence, which amounts to the 'headline' message, in paragraph 77 of the Framework, states that LGS* ***will not be appropriate for most green areas of open space. This is a clear message that the bar for LGS designation is set at a very high level.*** *I therefore consider that it is* ***clear from national policy that LGS designation should be the exception rather than the rule. One good***

reason *for national policy setting this high bar is explained in paragraph 78 of the Framework, which states that local policy for managing development within* ***LGS should be consistent with policy for Green Belts.***

35. In order ***to reinforce the message that LGS designation is to be used sparingly,*** *paragraph 77 of the Framework sets out three criteria, which spell out where LGS designation should only be used. It is clear from the phraseology* ***that all three of these criteria are necessary for LGS designation.*** *These criteria state that LGS designation should (i) only be used where the green space is in reasonably close proximity to the community it serves; (ii) where it is demonstrably special to the local community (holding a particular local significance); and (iii) where it is local in character and is not an extensive tract of land.*

36. Para 76 of the Framework places LGS designation in the context of provision of sufficient homes, jobs and other essential services. Therefore, ***LGS designation has to be integral to the proper planning for the future of communities,*** *and not an isolated exercise to put a stop on the organic growth of towns and villages, which would be contrary to national policy.*

37. The ***PPG sets an equally high bar in relation to LGS designation*** *and requires that landowners should be contacted at an early stage about proposals to designate any part of their land as LGS and have opportunities to make representations [ID: 37-019-20140306]. Some landowners at the Hearing sessions claimed that this had not happened, and it is not clear to me that this process has been followed in all cases.*

38. The ***clear message in national policy is that LGS designation is to be used sparingly, as part of the overall consideration of the planning and development needs of communities and is not a tool to stop development.*** *The PPG also makes clear that designation of any LGS will need to be consistent with local planning for sustainable development in the area and* ***must not be used in a way that undermines this aim of plan making*** *[ID: 37-007-20140306]."*

The Inspector then went on to set out his views as to the approach which had been adopted to the identification of sites and how it fell short of the above.

MDC accepted the Inspector's recommendations and modified LPP2. It had itself been concerned about the duplication within the NDP but rejected the criticisms of its approach.

By contrast the NDP examiner concluded that the NDP met the basic conditions including the LGS policy and its identification of the Claimant's sites.

The Council subsequently resolved that the NDP should proceed to referendum.

The Claimant based its challenge upon a misunderstanding of LGS policy and in particular drew attention to the tests for Green Belt.

Lang J rejected the Claimant's criticisms of the NDP and the Examiner's approach. In doing so she highlighted the different approach to NDPs compared with local plans and also made the point that the LPP2 Inspector's comments had been made in the context of the previous NPPF LGS passaged [76-78]not the current NPPF [98-1010] which differ. In particular, the 'headline' message identified by the LPP2 Inspector i.e. *"LGS will not be appropriate for most green areas of open space"* is no longer there. As noted by Lang J the opening words to NPPF 100 *merely state that "The Local Green Space designation should only be used where…" and then sets out the criteria. The February 2019 policy is, in my view, more precise."*

In addition, Lang J rejected the argument that the test for designation of LGS should if not be the same should at least be allied to that of Green Belt. In her view judgment *"the policy criteria for designation are clearly set out in paragraphs 99 and 100 of the Framework. I do not consider it appropriate or helpful for me to add to the terms of the policy by labelling the criteria as setting a high*

bar or very high level, as experience shows that, over time, such labels acquire a life of their own among decision-makers, adding a judicial nuance to the original policy."

There are further aspects of the grounds and judgment which relate also to the approach to LGS in the context of addressing housing demand and allocations and the need to take that (and other development needs) into account which are clearly relevant but which again in this instance the judge concluded the NDP inspector had approached correctly as well as the Council in accepting the NDP.

Another recent example of the clear power of a LGS designation against development is contained in an Inspector's decision dated 30 April 2020 which dismissed the s.78 appeal in respect of a proposal to develop the Former Imperial College Private Ground in Teddington and in which Daniel Stedman Jones of 39 Essex Chambers appeared for the Rule 6 party Udney Park Playing Fields Trust and the Teddington Society.

The proposed scheme comprised the erection of a new extra-care community together with new public open space and improved sports facilities including in particular 107 extra-care affordable housing units; a GP surgery and pharmacy on one part of the site, with a new public park and all weather sports and games surfaces and a range of other community facilities provided on the other.

During the course of the appeal inquiry the local plan which designated the site as LGS and which had been the subject of a successful High Court challenge was adopted on 3 March 2020. It was noted in the appeal decision that the examining Inspector appointed to consider the matter had *"concluded that the vast majority of the site met the criteria to be considered as Local Green Space (LGS)."*

There were a number of issues raised by those objecting to the scheme including effect on the character and appearance of the area, impact on the site's other designation as an Other Open Land of Townscape Importance (OOLTI); impact on sports provision, and amenity impacts however the consequence of the adoption of the plan and LGS designation led the Inspector to test the scheme against the LGS policy and also to treat the development as inappropriate. This required him to test whether the harm by reason of inappropriateness, and any other harm, would be clearly outweighed by other considerations. If so, whether this would amount to the very special circumstances required to justify the proposal.

The Inspector had been asked to consider that certain elements of the scheme were not inappropriate by reference to the reasons for the designation of the site as LGS. The Inspector rejected this approach saying *"the test is not whether the benefits of the proposal would go towards the special characteristics which led to the designation of the LGS in the first place. The test, as set out in paragraph 101 of the Framework is that, once designation has happened, the policies should be consistent with those for the Green Belt, albeit that to be not inappropriate development the proposal should not conflict with the purposes of including land within the LGS."* The Inspector went on to note however that the *"purpose of LGS is somewhat different to those of the Green Belt… This is to protect green areas of particular importance to the community. In that the proposal would result in the significant loss of part of a green area of particular importance to the community the proposal would not comply with the purpose of the LGS."*

Impact on openness was an issue in any event as a consequence of the OOLTI designation but in the context of LGS, the appellant sought to argue 'openness' had a different role because it is not an essential characteristic of LGS as it is with Green Belt. The Inspector stated clearly however *"if policies for managing development in an LGS are to be consistent with those for the Green Belt, then it must be part of the consideration."*

In refusing the scheme the Inspector made a number of findings of significant or substantial harm separate from any consideration of the LGS designation however the starting point of

his planning balance assessment was that the scheme was *"inappropriate development in the LGS and contrary to the purpose of the LGS in that it would not protect a green area of particular importance to the community."*

In terms of the significant benefit from meeting recognised unmet housing need the Inspector concluded *"in the same way that unmet housing need will not normally be of sufficient weight to outweigh the presumption against inappropriate development in the Green Belt, as policies for LGS should be consistent with policies for the Green Belt, I consider that similar considerations should apply in relation to LGS."*

His final conclusion was that the scheme *"would be contrary to the terms of the development plan taken as a whole. Paragraphs 101 and 144 of the Framework make clear that substantial weight should be given to any harm to LGS and I have identified other harms that add to this. While there are benefits, I find that the other considerations in this case do not clearly outweigh the harm I have identified. Consequently, the very special circumstances necessary to justify the development do not exist. Furthermore, material considerations do not indicate that the proposal should be determined otherwise than in accordance with the development plan."*

The national circumstances both politically and economically now are clearly very different to the time when both LGS as well NDPs were introduced. They were in simple terms the product of the localism agenda and perhaps acted as a counterweight to fears being expressed about what the presumption in favour of sustainable development would mean to those who seek to protect their communities and local areas from future expansion.

We all read with interest no doubt the article in the Sunday Times last weekend about a possible meeting between amongst others Dominic Cummings, Bridget Rosewell, Christopher Katkowski QC to discuss changes to planning including the potential for a new separate independent body for certain development decision making. This week also saw the launch of a "Super Inquiry" by BEIS to investigate whether the post-pandemic world presents an opportunity for a resetting of the UK economy and to help with its recovery.[4]

The message therefore appears to be that a wide ranging re-think of many important aspects of the economy and society is underway. This includes our approach to development and the environment.

Whilst the Government's stated position as ever is to continue to protect Green Belt it would be interesting as part of the re-think to know what thought may given to powerful bar to development that is LGS and in particular where that can come about through the less stringent process of NDPs.

THE ENVIRONMENT BILL'S AIR QUALITY AND ENVIRONMENTAL RECALL PROVISIONS: SMOKESCREEN OR BREATH OF FRESH AIR?

Richard Wald QC and Gethin Thomas

Overview

In this, the sixth and final in a series of articles addressing key aspects of the Environment Bill ("the Bill") we consider its Part 4 which relates to air quality regulation and makes provision first for the so-called 'local air quality framework', the control of smoke and for the recall of motor vehicles that do not meet relevant environmental standards.

We assess whether the provisions in the Bill which address air quality are sufficient to tackle the scale of the problem currently posed by air pollution in the UK. We conclude that the Bill fails to meet the challenge, and instead provides a collection

4 https://committees.parliament.uk/call-for-evidence/160/postpandemic-economic-growth/

of disparate and piecemeal reforms, primarily focused on facilitating the making of air quality plans rather than concrete action. In its current form we consider that the Bill creates a real risk that air quality limit values and targets could slip behind those required within the EU after Brexit.

The policy background

The principal contaminants currently affecting UK air quality are carbon monoxide (CO), oxides of nitrogen (NOx), volatile organic compounds (VOCs) and particulate matter. Of particular concern in terms of environmental health are: (i) fine particulate matter (PM2.5), i.e. particles of less than 2.5 microns diameter, emitted during fuel combustion and (ii) nitrogen dioxide (NO2), a fossil fuel combustion pollutant.

The problem of poor air quality afflicts much of the UK[5] with many areas currently in breach of EU legal limits for NO2 limits that should have been met in 2010 pursuant to Directive 2008/50/EC. Forty towns and cities exceed World Health Organisation ("WHO") guideline limits for fine particle pollution.[6] The policy case for intervention is threefold.

First, the government has recognised that air quality is currently the most significant environmental health risk in the UK. Health can be affected both by short-term, high-pollution episodes and by long-term exposure to lower levels of pollution. In January this year, the British Heart Foundation issued a stark warning that heart attack and stroke deaths related to air pollution could exceed 160,000 by 2030.[7] The Covid-19 pandemic has also thrown the implications of poor air quality into sharp focus. Although research on the links between air quality and Covid-19 is still emerging, Dr Maria Neira, director of public health at the WHO, has explained that *'we know if you are exposed to air pollution you are increasing your chances of being more severely affected.'*[8]

Secondly, air pollution has a significant impact on the natural environment, and contributes to climate change. Air quality impacts local ecosystems, and affects their ability to grow and function. This has knock-on implications for biological diversity.[9] Photochemical reactions resulting from the action of sunlight on nitrogen dioxide (NO2) and VOCs, typically emitted from road vehicles, lead to the formation of ozone.[10] Ozone is a so-called 'short-lived' climate pollutant, which can make a significant contribution to the greenhouse effect. 'Short-lived' climate pollutants, such as black carbon (another vehicle exhaust pollutant), as well as methane, and hydrofluorocarbons, collectively account for up to 45% of current global warming.[11]

Thirdly, there is a significant economic cost to poor air quality. A joint report of the Royal College of Physicians ("RCP") and the Royal College of Paediatrics and Child Health ("RCPCH") have estimated that the health problems resulting from exposure to air pollution cost the health services,

5 The Guardian, Pollution map reveals unsafe air quality at almost 2,000 UK sites (27 February 2019), available online here: https://www.theguardian.com/environment/2019/feb/27/pollution-map-reveals-unsafe-air-quality-at-almost-2000-uk-sites

6 Friends of the Earth, Clean Air Campaign, available online here: https://friendsoftheearth.uk/clean-air

7 British Heart Foundation, Heart attack and stroke deaths related to air pollution could exceed 160,000 by 2030 (13 January 2020), available online here: https://www.bhf.org.uk/what-we-do/news-from-the-bhf/news-archive/2020/january/heart-and-circulatory-deaths-related-to-air-pollution-could-exceed-160000-over-next-decade

8 The Guardian, Is Air pollution making the coronavirus pandemic even more deadly? (Monday 4 May 2020); https://www.theguardian.com/world/2020/may/04/is-air-pollution-making-the-coronavirus-pandemic-even-more-deadly

9 UNECE, Air pollution, ecosystems and biodiversity, available online here: http://www.unece.org/environmental-policy/conventions/envlrtapwelcome/cross-sectoral-linkages/air-pollution-ecosystems-and-biodiversity.html#:~:text=Ecosystems%20are%20impacted%20by%20air,ability%20to%20function%20and%20grow.&text=As%20ecosystems%20are%20impacted%2C%20so,human%20populations%20are%20also%20affected

10 DEFRA, UK Air Information Resource, available online here: https://uk-air.defra.gov.uk/air-pollution/causes.
See also, the DEFRA and developed administration commissioned Air Quality Expert Group Report, *Air Quality and Climate Change: A UK Perspective* (2007), available online here: https://uk-air.defra.gov.uk/assets/documents/reports/aqeg/fullreport.pdf

11 UN Environment Programme: Climate & Clean Air Coalition, *Short-lived climate pollutants*, available online here: https://www.ccacoalition.org/en/science-resources.

business, and the people who suffer from illness and premature death, up to more than £20 billion every year.[12]

On 14 January 2019, DEFRA published its *'Clean Air Strategy'*, with the stated aim of *'tackling all sources of air pollution, making our air healthier to breathe, protecting nature and boosting the economy.'*[13] This follows the government's commitment to reduce pollution enshrined in its 25 year environment plan. The latent ambition is apparent from the priority given to air quality in the plan. The first of the government's ten 25-year goals is to achieve 'clean air'. The government does not have a stellar recent track record in tackling air pollution. In particular, all three of its attempts to produce a lawful UK Air Quality Plan, aimed at tackling nitrogen dioxide concentrations, were quashed following legal challenges brought by ClientEarth.[14] Regrettably, the Environment Bill does not mark a significant turning point in the regulation of air pollution, but instead: (i) defers implementing concrete targets, and (ii) offers merely piecemeal reform.

Air quality reform in the Bill: the story so far

Part 4 is not the entirety of the Bill's air quality provisions. Some also feature in part 1 of the Bill.[15] In particular, clause 1 of the Bill would confer a secondary legislation making power on the Secretary of State may to set environmental long-term targets, and air quality is identified as a priority area. Furthermore, clause 2 would introduce a duty on the government to set a legally-binding target for fine particulate matter (PM2.5).

These clauses share the same fundamental flaw seen elsewhere in the Bill: the critical work is left to the future, rendering it subject to the vicissitudes of future political preferences. A proposed amendment to the Bill setting the target for PM2.5 at 10µg/m3 as an annual average, the level advised by the WHO, offered a potential solution to this problem and would have provided a stricter target than the 25 µg/m3 currently prescribed by the EU's Air Quality Directive. But that amendment was rejected and with it this potential solution was lost.[16] This missed opportunity in the Bill's provision on air quality has been the subject of particular lament.[17]

As considered further below, regrettably, the sum of parts 1 and 4 do not add up to the change necessary to tackle the scale of the problem posed by poor air quality in the UK.

The air quality framework: amendments to the Environment Act 1995

Clause 69, and schedule 11, to the Bill contain amendments to part 4 of the Environment Act 1995 ("the 1995 Act") whose key provisions include the following s:

a. **National air quality strategy:** section 80 of the 1995 Act obliges the Secretary of State to publish a policy statement on air quality assessment and management. Para 2 of schedule 11 to the Bill would amend section 80 to remove subsection (3), which requires that the statement (or statements) should relate to the whole of Great Britain. It would also introduce a new subsection (4A), which would require the strategy to be reviewed, and, following that review, amended if that is considered necessary. A new subsection (4B) sets out the minimum review periods, requiring a review initially within 12 months of the schedule coming into force, and then subsequent reviews to happen at least once every five years after that. This remedies the

12 RCP and RCPCH Working Party Report, *Every breath we take: the lifelong impact of air pollution* (23 February 2016), available online here: https://www.rcplondon.ac.uk/projects/outputs/every-breath-we-take-lifelong-impact-air-pollution

13 Available online here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf

14 *R. (on the application of ClientEarth) v Secretary of State for Food, Environment and Rural Affairs (No.3)* [2018] EWHC 315 (Admin).

15 Part 1 of the Bill was considered by Richard Wald QC and Ruth Keating in an article published in this newsletter on 14 May 2020, available online here: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/PEPNewsletter_14May2020.pdf

16 https://airqualitynews.com/2020/03/19/mps-vote-against-introducing-who-pm2-5-guideline-to-environment-bill/

17 See, for example, ClientEarth, The Environment Bill: another missed opportunity for clean air (31 January 2020), available online here: https://www.clientearth.org/were-demanding-urgent-action-on-uk-air-pollution/.

surprising omission that section 80, as made, did not itself contain a review mechanism. However, following a 12 month initial review, a review may only occur as infrequently as every 5 years. This may not be enough to ensure that the strategy is kept properly up to date or that interventions are sufficiently targeted and swift.

b. **Duty to report on air equality in England:** Para 3 would introduce a new section 80A, requiring that the Secretary of State lays an annual statement before Parliament which sets out an assessment of progress made towards meeting air quality objectives and standards in England, as well as the steps the Secretary of State has taken in support of meeting those standards and objectives. Progress made in meeting the extant objectives and standards will be subject to frequent assessment, although the adequacy of the objectives and standards themselves may go unreviewed within a five year period.

c. **Functions of relevant public authorities:** para 4 would add a new section 81A, which imposes a requirement on certain relevant public authorities to co-operate with local authority air quality action planning, once the relevant public authority has been designated by the Secretary of State. It would also apply a duty to have regard to the National Air Quality Strategy when carrying out functions and services which might affect air quality to additional bodies who may be relevant to meeting air quality standards and objectives. Moreover, para 5 would amend section 82 (concerning local authority reviews). Of note, the new subsection (5) provides that local authorities in England must also identify which sources of emissions they believe are responsible for failure to achieve air quality standards or objectives; identify neighbouring authorities who may be responsible for emissions; and identify other relevant public authorities or the Environment Agency who may be responsible for emissions. This would establish a more directed and comprehensive review process.

d. **Duties of English local authorities in relation to designated areas:** a new section 83A would require local authorities to prepare an action plan to ensure air quality standards and objectives are achieved in the Air Quality Management Area it has designated under section 83. This is intended to 'tighten' the requirement to ensure action plans should secure the required standards and objectives.[18] Action plans must set out air quality measures to be taken by the local authority within the Air Quality Management Area together with associated deadlines. Action plans may be revised, and indeed *must* be revised, by relevant local authorities, if new or different measures are required. There is also a mechanism for resolving any disputes as to the content of an action plan between a county and district council by making a referral to the Secretary of State.

e. **Air quality partners:** paras 8 and 9 would introduce new sections 85A and 85B, that are aimed at increasing cooperation at the local level, and sharing responsibility for tackling local air pollution between relevant public bodies (designated as 'air quality partners'). An 'air quality partner' is a body responsible for emissions contributing to exceedance of local air quality objectives,[19] and they are under a duty to assist a local authority, upon request, in meeting air quality standards and objectives, where there is an exceedance ("duty to co-operate"). However, the potential effectiveness of this requirement is blunted because the air quality partner can simply refuse such a request if it considers it unreasonable. A local authority in England that intends to prepare an action plan must notify each of its air quality partners that it intends to do so. Air quality partners are under a duty to propose measures for inclusion in the plan they will take

18 Explanatory Notes to the Environment Bill, para 1390, available online here: https://publications.parliament.uk/pa/bills/cbill/58-01/0009/en/20009en.pdf

19 As identified by that authority in accordance with the proposed amended section 82(5)(b) or (c), namely that: (b) in the case of a relevant source within the area of a neighbouring authority, identify that authority, and (c) in the case of a relevant source within an area in relation to which a relevant public authority or the Agency has functions of a public nature, identify that person in relation to that source.

to contribute to achievement or maintenance of air quality standards, and to specify a date for each particular measure by which it will be carried out. It is then obliged to carry out those measures by those dates, as far as is reasonably practicable. The Secretary of State may direct an air quality partner to make further proposals, where it has made insufficient or otherwise inappropriate proposals itself.

f. **Role of the Mayor of London in relation to action plans:** Para 10 would replace the current section 86A. It would oblige a local authority in London that intends to prepare an action plan to notify the Mayor of London. In response, the Mayor must, before the end of the relevant period, provide the authority with proposals for particular measures the Mayor will take to contribute to the achievement, and maintenance, of air quality standards and objectives in the area to which the plan relates. Local authorities are required to incorporate the Mayor of London's proposals and dates in their action plans.

g. **Role of combined authorities in relation to action plans:** in a similar fashion, a local authority in a combined authority area must notify the combined authority of its intention to produce a plan. The combined authority must respond in the same manner as the mayor of London (above), and local authorities must then incorporate combined authority proposals and dates in their action plans.

Finally, paragraphs 11 and 12 amend sections 87 and 88 of the 1995 Act respectively, to broaden the range of bodies subject to these regulating powers, so as to include county councils, relevant public authorities and the Environment Agency.

Whilst these provisions would introduce a more tightly prescribed framework for the making of local air quality action plans, and facilitate increased co-operation between local authorities and other public bodies, the content of the action plans will be critical to determine how effective this framework will be in reality. Ultimately, the focus of these provisions is primarily on making plans, rather than on achieving them.

Control of smoke: amendments to the Clean Air Act 1993

Historically, the main air pollution problem in the UK has been high levels of smoke and sulphur dioxide emitted pursuant to the combustion of sulphur-containing fossil fuels such as coal, used for both domestic and industrial purposes.[20] The first Clean Air Act was enacted in 1956, following the 1952 London smog disaster, which is thought to have claimed as many 12,000 lives. The Clean Air Act 1956 was the first legislative intervention made to regulate both domestic and industrial smoke emissions.[21] The Clean Air Act 1968 supplemented it in the following decade.

Although since 1956, the main sources of air pollution have shifted from the traditional smoke emissions, to vehicle fumes,[22] the domestic burning of wood and coal in open fires and stoves nonetheless still makes up 38% of the UK's primary emissions of fine particulate matter (PM2.5). Harmful sulphur dioxide (SO") is also emitted by coal burned in open fires.[23]

The 1957 and 1968 Acts were repealed and replaced by the Clean Air Act 1993 ("the 1993 Act"), which consolidated and extended their provisions. The main pillars of the 1993 Act are as follows:

a. Prohibitions on emitting dark smoke from the chimneys of any building or industrial or trade premises (part 1).

b. Powers for local authorities to designate smoke control areas. Most of the UK's major towns and cities are subject to smoke control orders.

20 DEFRA, UK Air Information Resource, available online here: https://uk-air.defra.gov.uk/air-pollution/causes.

21 https://friendsoftheearth.uk/clean-air/london-smog-and-1956-clean-air-act#:~:text=Historians%20widely%20considered%20the%20Clean,fuel%2C%20gas%20and%20electricity)

22 Prof Peter Brimblecombe, "The Clean Air Act after 50 years", Weather (November 2006), Vol. 61, No. 11.

23 DEFRA, Clean Air Strategy, (14 January 2020), p 10, available online here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf

In a smoke control area, only authorised fuels or a specified smokeless fuel may be burned, unless an exempt appliance in used (part 3).[24]

c. Requirements that new non-domestic furnaces (such as boilers) be provided with local authority-approved plant for arresting grit and dust (part 2).

d. Requirements for the height of chimneys serving certain furnaces to be approved by local authorities (sections 14 to 16)

e. Powers for local authorities to obtain information about air pollution, including by serving notices on the occupiers of premises (but not private dwellings) (part 5).

Notably, whilst there have been amendments to regulations made pursuant to the Clean Air Act 1993 ("the 1993 Act") in 2014,[25] there have been no discrete changes to the 1993 Act itself, let alone the wholesale overhaul of its provisions that some were seeking.[26] In its current form the Bill does not however offer a fundamental rethink, but rather, tinkers at the edges of its provisions.

Clause 70, and schedule 12, make provision for:

a. **Financial penalties for the emission of smoke in smoke control areas in England:** clause 3 would insert a new schedule 1A into the 1993 Act, that would provide for financial penalties to be imposed by local authorities for the emission of smoke in a smoke control area in England, by either a domestic or industry chimney. The new schedule prescribes the process of issuing a penalty. The local authority must be satisfied, on the balance of probabilities (rather than on the criminal standard, beyond a reasonable doubt) that on a particular occasion smoke has been emitted from a relevant chimney within a smoke control area declared by that authority. The minimum amount of a financial penalty is £175, and the maximum is £300. This is a blanket figure which applies to both domestic and industrial emitters. For the latter, this is likely to be far too small a sum to have the necessary deterrent effect. A more targeted and staggered approach would have been more effective.

b. **Offences relating to the sale and acquisition of solid fuel in England:** para 4 would introduce a new section 19B, which introduces three criminal offences:

   i. First, it would be a criminal offence for any person in England to acquire any controlled solid fuel for use in: (a) a building to which a smoke control order in England applies, (b) a fireplace to which such an order applies, or (c) a fixed boiler or industrial plant to which such an order applies. A person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently being £1,000).

   ii. Secondly, any person who offers a controlled fuel for sale by retain in England, and fails to take reasonable steps to notify potential purchasers that it is an offence to acquire that fuel for any of those prohibited uses, is also guilty of an offence.

   iii. Thirdly, a person who sells any controlled solid fuel in England for delivery by that person, on their behalf, to: (a) a building to which a smoke control order in England applies, or (b) premises in which there is any fixed boiler or industrial plant to which such an order applies, is guilty of an offence. However, there is a relatively broad defence to this offence where a defendant reasonably believed that: (a) the building was not one to which the smoke control order in question applied, or (b) the fuel was acquired

24 In England, the lists of authorised fuels and exempt appliances are published by the Secretary of State. In Wales, authorised fuels are set out in the Smoke Control Areas (Authorised Fuels) (Wales) Regulations 2019 (SI 2019/50) and exempt appliances are set out in the Smoke Control Areas (Exempted Classes of Fireplace) (Wales) Order 2019 (SI 2019/51).

25 Clean Air (Miscellaneous Provisions) (England) Regulations 2014 SI No 3318.

26 The Government carried out a policy review and consultation in 2013, which resulted in the regulations made in 2014. For more information, see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326129/clean-air-act-sum-resp.pdf There have been recent calls for such a rethink, and a vigorous campaign spearheaded by ClientEarth has pushed for a new Clean Air Act to address the air quality threats posed in the 21st Century, see for example: https://www.healthyair.org.uk/clean-air-act-21st-century/

for use in, (i) a fireplace that was, at the time of the delivery, an approved fireplace, or (ii) a boiler or plant to which the smoke control order did not apply.

c. **Applying smoke control orders to vessels in England:** A vessel moored in a smoke control area in England is also brought expressly within the scope of the new schedule 1A, and subject to financial penalties. If the local authority is unable to give a notice of intent to the occupier of the vessel who is not the registered owner of the vessel, the local authority may give the notice to the registered owner of the vessel instead. Moreover, a person may object to a financial penalty issued by the local authority on the ground that the emission of smoke was solely due to the use of the vessel's engine to propel the vessel or to provide it with electric power. Many moored house canal boats have a solid fuel fire for heating, and cooking. The Canal and River Trust have observed that *'smoky boater's stoves are the source of many a complaint to the Trust during the winter months, particularly in urban areas which are already likely to be suffering from poor air quality…[it] affects boaters' health more than anyone else, so it's in our own interests to make things as good as they can be.'* [27] As such, and although inland boating contributes only *'a tiny fraction of harmful emissions compared to other forms of transport such as road, air and shipping,'* [28] the explicit inclusion of moored vessels is to be welcomed.

d. **Authorised fuels and exempted fireplaces to be listed in Wales:** paragraphs 9 to 11 make amendments to the 1993 Act in respect of the powers conferred on the Welsh Ministers. The amendments would enable Welsh Ministers to authorise fuels and exempt fireplaces as and when they are manufactured and tested, rather than waiting for common commencement dates as is currently the case for Wales.

Somewhat inexplicably, the Secretary of State, if it appears 'necessary or expedient to do so' may by order suspend or relax the operation of the penalties for emission of smoke, or the offences relating to acquisition and sale of fuel, in relation to the whole or part of a smoke control area in England. The Secretary of State is obliged to consult the relevant local authority, unless 'on account of urgency', such consultation is impracticable. This equips the Secretary of State with the power to significantly undercut the potential effectiveness of these provisions. It is not clear what legitimate purpose the relaxation or suspension would serve.

Power to recall motor vehicles

It is widely recognised that the main threat to clean air is posed by traffic emissions. DEFRA has explained that:

> *Petrol and diesel-engined motor vehicles emit a wide variety of pollutants, principally carbon monoxide (CO), oxides of nitrogen (NOx), volatile organic compounds (VOCs) and particulate matter (PM10), which have an increasing impact on urban air quality. In addition, pollutants from these sources may not only prove a problem in the immediate vicinity of these sources, but can be transported long distances.* [29]

As part of its strategy to deal with emissions from motor vehicles, the Bill confers a new power on the Secretary of State, under clauses 71 to 73, to compel vehicle manufacturers to recall vehicles and non-road mobile machinery ("a relevant product")[30] if they are found not to comply with the environmental standards that they are legally required to meet. The government will also be able to set manufacturers a minimum recall level.

27 Canal and River Trust, The future's bright, the future's green – cleaning up boating (27 June 2018), available online here: https://canalrivertrust.org.uk/enjoy-the-waterways/boating/boating-blogs-and-features/boating-team/the-futures-bright-the-futures-green-cleaning-up-boating

28 Ibid.

29 DEFRA, UK Air Information Resource, available online here: https://uk-air.defra.gov.uk/air-pollution/causes

30 Defined under the proposed clause 71 as: (a) a mechanically propelled vehicle; (b) a part of a mechanically propelled vehicle; (c) an engine that is, or forms part of, machinery that is transportable (including by way of self-propulsion); (d) a part of such an engine, or any other part of such machinery that is connected with the operation of the engine

A relevant environmental standard is defined as meaning a standard that:

a. by virtue of any enactment, a relevant product must meet,
b. is relevant to the environmental impact of that product, and;
c. is specified in the regulations

"Environmental impact" is defined relatively broadly, as being any impact on the environment caused by noise, heat or vibrations or any other kind of release of energy or emissions resulting from the use of the relevant product. This means that the recall power could, potentially, apply more broadly to regulate the environmental impact of motor vehicles than solely in respect to improving air quality. For example, DEFRA has recently published the results of a government-funded research study which suggests that particles released from vehicle tyres could be a significant source of microplastics in the marine environment.[31]

The Secretary of State may issue a compulsory recall notice to a manufacturer or distributor, which requires them to organise the return of the relevant product to the recipient, or indeed, to any others on specified in the notice. Such a notice may only be issued if the Secretary of State has reasonable grounds for believing the product does not meet a relevant environmental standard.

The regulations also may confer a power on the Secretary of State to give a recipient of a compulsory recall notice a further notice (a "supplementary notice") that imposes supplementary requirements on its recipients such as, for example, to:

a. to publicise a compulsory recall notice;
b. to provide information to the Secretary of State;
c. a prohibition on supplying, or offering or agreeing to supply, a product subject to a compulsory recall notice, or;
d. to pay such compensation to a person who returns a product subject to a compulsory recall notice as may be specified.

In addition, regulations made by the Secretary may impose a duty on a manufacturer or distributor of a relevant product to notify the Secretary of State if the person has reason to consider that the product does not meet a relevant environmental standard.

The Environment Bill Delegated Powers Memorandum refers to the Volkswagen Group's emission test fixing scandal as illustrating the current limits of the government's powers to compel a recall of motor vehicles for reason of environmental non-conformity or failure under the General Product Safety Regulations 2005 SI No 1803. It summarises that the new power under the Bill:

> *would allow the Secretary of State to make provision to reflect any future emissions standards or changes in technology which may necessitate a compulsory recall of products which are subject to these, either in line with EU standards or under a separate UK regime when the UK leaves the EU. The power to compel the recall of vehicles where there are reasonable grounds for believing they do not meet a relevant environmental standard will be underpinned by technical evidence leading to the issue of a compulsory recall notice.*[32]

However, whilst the provision of a power to recall motor vehicles for environmental failures is, in principle, to be welcomed, again, as with so much of the Bill, the devil is in the detail. Far too much is left to the discretion of the Secretary of State. The effectiveness of the power to recall will turn on the stringency of the environmental standards, and the political will required to issue recalls when those standards are breached.

31 Available online here: https://www.gov.uk/government/news/tyre-particles-are-contaminating-our-rivers-and-ocean-study-says

32 See paras 312 to 317, available online here: https://publications.parliament.uk/pa/bills/cbill/58-01/0009/2020.01.29%20Environment%20Bill%20Delegated%20Powers%20Memorandum.pdf

The Bill has failed to take the opportunity to enshrine such environmental standards in primary legislation, with the requisite scrutiny and significance that would entail, both practically and symbolically. In addition, the Bill does not address the potential gap in environmental standards that may well arise after the UK leaves the EU. Putting standards into primary legislation would prevent them potentially being watered down in the course of trade negotiations with third countries, such as the USA (whose officials have apparently banned any talk of a climate crisis in negotiations).[33]

Moreover, it might perhaps have been prudent to have shared this power with the environmental regulators (such as the Environment Agency in England, or Natural Resources Wales), which would be able to exercise it entirely independently from the government of the day.

Conclusion

The sum of parts 1 and 4 of the Bill do not add up to the change necessary to tackle the scale of the problem posed by poor air quality in the UK. The Covid-19 pandemic has resulted in a glimpse of a less polluted atmosphere, with stark 'before and after' photographs and data imaging illustrating the unsettling differences in visible pollution. Whilst recent environmental improvements offer some sort of a silver lining as to what might be achievable, as the lockdown eases, and economies reopen, previous levels of pollution are almost certain to return just as quickly as they fell.[34]

Ultimately, much will need to be achieved at a local, as well as a national level. The Mayor of London has recently announced a significant car-free initiative by closing a number of major road arteries in central London to cars and vans.[35] It is to be hoped that provides an inspirational model for other towns and cities across the UK.

Moreover, Brexit will pose particular challenges for resolving air pollution that remain largely unaddressed in the Bill. As with much of the UK's environmental standards and targets, EU law sets the parameters that must not be exceeded for different pollutants. Brexit means that there is a real risk that limit values and targets for air quality could slip behind the EU. The Environment Bill does little to assuage this concern.

33 The Guardian, US rules out any talk of acclimate crisis in trade negotiations (21 December 2019) available online: https://www.theguardian.com/politics/2019/dec/21/us-bans-mention-of-climate-in-uk-trade-talks

34 https://airqualitynews.com/2020/05/11/covid-19-shutdowns-are-clearing-the-air-but-pollution-will-return-as-economies-reopen/.

35 https://www.theguardian.com/uk-news/2020/may/15/large-areas-of-london-to-be-made-car-free-as-lockdown-eased

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