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Introduction

Welcome to the Spring 2022 edition of 39 Essex Planning, Environment and Property newsletter.

In this newsletter we bring you some extremely thought-provoking reflections from Stephen Tromans QC on the fact that certain allegedly 'hot' and new topics in environmental and energy law are in fact very long running sagas which have yet to be effectively resolved.

We also publish Gethin Thomas' article on

progress with the UK's plan and programme adaptation to climate change following COP26 and the Glasgow Adaptation Imperative with reflections on its potential efficacy.

On the planning side Philippa Jackson and Celina Colquhoun provide some useful case summaries which look at the Court of Appeal's judgment on the challenge to the latest amendments to permitted rights in *R (on the application of Rights: Community: Action) v The Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954 as well as a recent case of *Cab Housing Limited v The Secretary of State for Levelling UP, Housing and Communities* [2022] EWHC 208 (Admin) which interprets the meaning of prior approval issues under Class AA. We also look at the judgment of Mrs Justice Lang in *Payne v Secretary of State for Housing, Communities and Local Government, Maldon District Council* [2021] EWHC 3334 (Admin) which is a relatively rare example of the Courts considering planning enforcement orders and also provides a useful reminder of the factors that give rise to new planning units.

Lastly James Burton provides an insightful heads up on the case of *Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440 which has raised questions about overlapping or 'drop in' permissions and has wide implications for the development industry and which is now heading for the Supreme Court.

2022 and déjà vu

Stephen Tromans QC

In 2021 I notched up 40 years doing environmental law, nearly 20 of them at 39 Essex Chambers. So perhaps I might be permitted a little reverie about some perennial issues in my subject. It is quite striking how many of the current "hot topics" in environmental and energy law are in fact long running sagas, where successive governments have, unfortunately, failed to get a grip and find long term, robust solutions. Here are my top four.

Waste crime

Unfortunately, certain parts of the waste business have always attracted criminals, with easy money to be made. The Deposit of Poisonous Waste Act 1972 stemmed from a public outcry over dumping toxic chemical wastes on land in the Midlands where children played. The Control of Pollution (Amendment) Act 1989 and Environmental Protection Act 1990 sought to respond to criminal handling of waste by a system based on carriers and waste management companies having to be "fit and proper" persons. Yet we find in 2022, two decades later, the government acknowledging in its recent consultation that waste largely goes untracked, that criminal intermediaries frequently conceal their identities, and that background checks on would be operators are either non-existent or inadequate. This has been hailed as a "pivotal moment". The 1989/1990 legislation was similarly hailed. Let's hope this time it works better. Despite the undoubted efforts of the Environment Agency to tackle waste crime, the criminals still seem to be on the front foot.

Sewage spills

Throughout my career, sewage overflows have continued to spill into rivers and coastal waters during stormy (and sometimes not so stormy) conditions. Back in the early 1980s, the Royal Commission on Environmental Pollution was highlighting the health and aesthetic consequences of discharges of raw swage across

beaches such as at Blackpool. Then after the UK got into trouble with the EU for breaches of the Urban Waste Water Treatment Directive, we had the unedifying, indeed comical, spectacle of the government seeking to argue in the Court of Justice that Blackpool was not a bathing beach. In the early 2000s I was involved in appeals relating to the provision of long sewage outfalls and in-system storage necessary in order to meet legal requirements. There is no doubt that this is a difficult problem, with a still essentially Victorian sewage system trying to cope with modern requirements, a hugely increased population and more extreme weather conditions. It is however disappointing that there has been a lack of the necessary investment and that governments have allowed that situation to continue. The situation if anything has deteriorated over recent years, with the Environment Agency lacking the resources to investigate and enforce effectively. As shown by the most recent Parliamentary report, that of the Environment Audit Committee in January this year, the position is now unacceptable and something has to change. It will be interesting indeed to see how the Office for Environmental Protection addresses the matter. A search for the work "sewage" on the OEP's website currently yields no results.

Energy crises

Energy costs are the political hot potato of the moment. The crisis with Russia and the Ukraine illustrates the potential political fragility of an energy system dependent on pipe-lined gas. The diversion of LNG tankers away from Europe to South East Asia demonstrates the economic fragility. I'm old enough to recall the OPEC petroleum crisis of the 1970s and the distress and economic disruption it caused. One consequence of that was a growth in interest in new nuclear power stations. The UK built Sizewell B, but the then nationalised Central Electricity Generating Board baulked at the cost of a second and the programme ceased. Our energy landscape would look very different today had that been followed through. We would have a sound baseload of electricity to complement the intermittent sources of wind and solar. Instead we limp along, dependent on sources outside our national control. The programme of new nuclear build started with Hinkley C is still far from assured, and we seem at the mercy of unproven technologies of carbon capture and hydrogen. There is probably nothing we can do to avert what is coming by way of energy shock in the immediate future, save to try and mitigate its worst (or least politically acceptable) consequences, but can we not try and think ahead and get a clear energy security strategy in place for the future.

Farming and the environment

I began my legal career teaching Land Economy students at Cambridge. Part of the course was the law of agricultural tenancies. A basic tenet was that, having experienced the dangers of food shortage during World War 2, food security by domestic agricultural production was of paramount importance and underlay the Agricultural Holdings Acts. The success of intensive agriculture from the 1960s onwards, with technological advances, was a triumph for production but a disaster for the environment. Legislation such as the Wildlife and Countryside Act 1981 offered only negligible protection. Now many sectors of agriculture are in economic crisis and the UK is dangerously dependent on food imports, and may become more so as a result of trade agreements. Once again 2022 has already seen a report fiercely critical of government policy, this time from the Public Accounts Committee, for lack of clear plans to replace EU support schemes, for "blind optimism" as to its impact, and for the effects of the "vague ambition" to maximise the value to society of landscape on the farming industry and hence national food security. Nor do the proposed environmental incentives get near what is necessary to deliver the environmental goals.

Final thoughts

There are some basics of good government which are at risk of being very badly compromised in the coming years, putting the welfare of the UK public at risk. Governments should surely ensure

that there is a supply of reliable and affordable energy, that there is adequate food even during geopolitical difficulties, that the nation's sewage is adequately and safely managed, and that people's health and environment, here and abroad, are not put at risk by organised waste criminals. That the public do indeed face these risks is a sad indictment on a lack of ambition, focus and forward planning by successive governments. I hope very much that those now beginning a career in environmental law will be able to look back on much better progress after 40 years than I can today.

Adapting to the unadaptable?[1]

Gethin Thomas

A. INTRODUCTION

The Second Goal of COP26

As we're all aware, the impacts of climate change are being felt globally. The scale of the issue, in 2021 alone, is pithily summarised in the COP26 Glasgow Adaptation Imperative:

> *Drought in southern Madagascar, flash flooding in Germany and China, and wildfires in Greece and the US are among events that are far more likely to have occurred due to our changing climate, with wide-ranging impacts on food harvests, livelihoods and tragically, life. While no-one is immune, it is the poorest countries who are at the frontline of climate impacts, and the most vulnerable, including young people, women and girls, people with disabilities and indigenous peoples who are hardest hit.*[2]

Against this alarming context, the second of the four COP26 goals is *'adapt to protect communities and natural habitats'*. The goal identifies two particular tasks: (i) protect and restore ecosystems, and (ii) build defences, warning systems and resilient infrastructure and agriculture to avoid loss of homes, livelihoods and lives.

What does adaptation actually mean?

The general idea of 'adaptation' to climate change is as easy to state as perhaps it is hard to achieve. The UN has expounded the following neat and comprehensive definition:

> *Adaptation refers to adjustments in ecological, social, or economic systems in response to actual or expected climatic stimuli and their effects or impacts. It refers to changes in processes, practices, and structures to moderate potential damages or to benefit from opportunities associated with climate change. In simple terms, countries and communities need to develop adaptation solution and implement action to respond to the impacts of climate change that are already happening, as well as prepare for future impacts.*[3]

In short, the aim of adaptation to climate change is to safeguard people from higher temperatures, rising seas, fiercer storms, unpredictable rainfall and more acidic oceans.

B. ADAPTATION IN THE PARIS AGREEMENT

Paris Agreement

Article 7 of the Paris Agreement[4] set a 'Global Goal on Adaptation', one of the three core goals established at Paris. Article 7(1) stated:

> *Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing*

1 This article was first delivered as a webinar on 27 October 2021. The webinar, 'Glasgow and Beyond', was chaired by Stephen Tromans QC with presentations from Richard Wald QC, Catherine Dobson, Stephanie David, Ruth Keating. The recording of the webinar is available online here: https://www.39essex.com/cop26-glasgow-and-beyond/

2 The UK COP26 Presidency Glasgow Imperative: Closing the Adaptation Gap and Responding to Climate Impacts, available online here: https://ukcop26.org/the-uk-cop26-presidency-glasgow-imperative-closing-the-adaptation-gap-and-responding-to-climate-impacts/

3 United Nations Framework on Climate Change, available online here: https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean

4 Available online here: https://unfccc.int/sites/default/files/english_paris_agreement.pdf

vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal.

Article 7 further states:

(5) Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.

(6) Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.

Article 7(10) provides the most concrete limb of the Global Goal on Adaptation. It obliges each party to submit and then update periodically *'an adaptation communication, which may include its priorities, implementation and support needs, plans and actions, without creating any additional burden for developing country Parties.'*

C. ADAPTATION IN DOMESTIC LAW AND POLICY

The UK's Adaptation Communication 2020

In December 2020, DEFRA published the UK's adaptation communication. It summarises how climate adaptation will be "integrated across government departments". It notes, among other things:

a. **UK impacts, risks and vulnerabilities:** The second UK Climate Change Risk Assessment (CCRA), which was laid before Parliament in January 2017, included 56 priority risks to the UK to be addressed in adaptation planning.

b. **Implementation of adaptation actions, and results achieved:** It lists a number of recent adaptation initiatives such as the National Framework for Water Resources published by the EA.

c. **Monitoring and evaluation of adaptation, barriers and challenges:** It notes that the monitoring of adaptation progress remains a significant challenge, with an absence of a full set of robust metrics and indicators, and that adaptation and resilience planning is inherently complex, with uncertainty related to climate models, projections, and what those means in terms of climate impacts.

The UK's Adaptation Communication also summarises the statutory framework that the UK already has in place to plan for planning adaptation to climate change. The UK does have a legislative system in place for programming adaptation efforts, and was among the first countries to legislate for climate change adaptation.

Part 4 of the Climate Change Act 2008

Part 4 of the Climate Change Act 2008 addresses the impact of, and adaptation to, climate change. In particular, the key provisions are:

a. **Report on impact of climate change:** Section 56 places a duty on the Secretary of State to carry out an assessment of the risks to the UK from the impact of climate change; the first report was required to be made within three years, with subsequent reports at least every five years thereafter. Each risk assessment must then be followed by the publication of a Government programme of adaptation measures. The most recent report was laid in 2017.

b. **Programme for adaptation to climate change:** Under section 58, the Secretary of State is under a duty to lay programmes before Parliament setting out: (a) the objectives of the Government in relation

to adaptation to climate change, (b) the Government's proposals and policies for meeting those objectives, and (c) the time-scales for introducing those proposals and policies, addressing the risks identified in the most recent report under section 56. The objectives, proposals and policies must contribute to sustainable development.

c. **Reporting on progress in connection with adaptation:** Under section 59, when the Climate Change Committee produces its report on progress towards meeting carbon budgets (for the purposes section 36), it must also assess the progress made towards implementing the objectives, proposals and policies set out in programmes laid before Parliament under section 58. The Secretary of State published the most recent National Adaptation Plan in July 2018.

d. **Directions by Secretary of State to prepare reports:** The Secretary of State can require public bodies and infrastructure operators that provide key services, referred to as 'reporting authorities' to report on what actions they are taking to address climate impacts:

   i. The Secretary of State has a power, under section 62, to direct a 'reporting authority' to prepare a report containing: (a) an assessment of the current and predicted impact of climate change in relation to the authority's functions; (b) a statement of the authority's proposals and policies for adapting to climate change in the exercise of its functions and the time-scales for introducing those proposals and policies; (c) an assessment of the progress made by the authority towards implementing the proposals and policies set out in its previous reports.

   ii. The Secretary of State is empowered to issue guidance (under section 61) on those issues.

   iii. Under section 63, a reporting authority is obliged to comply with directions issued by the Secretary of State. A failure to comply with the statutory duty would therefore be an illegality challengeable by way of a judicial review.

   iv. However, in the 2018 NAP, it is explained that the Secretary of State does not intend to direct organisations to report. The Government considered that a voluntary reporting process was the most constructive and collaborative approach for engaging reporting organisations and it considered would allow the greatest flexibility and innovation to address climate risk. Accordingly, the obligatory process prescribed by sections 62 to 63 is currently, has been in the recent past, dormant.

National Adaptation Plan

The National Adaptation Plan published in July 2018 is the second NAP since the 2008 Act was brought into force. The NAP identifies six priority areas of climate change risks for the UK.

Annex 2 to the NAP is a 'Detailed Actions Log', which sets out proposed planning, or monitoring. The Detailed Actions log is relatively light, in the main, on concrete actions, or is vague in describing exactly what action is required. For example, one of the key actions it prescribes is to *'Take action to eradicate high priority invasive non-native species.'*

However, there are, albeit perhaps in the minority, some clear tasks, such as planting 5,000-10,000 hectares of new woodland habitat (including new native woodland priority habitat) per year in England, up to 38,000 hectares by 2023.

When the NAP was published, it was criticised as being only a 'partial plan', and that it was hard to say if the NAP was sustainable and effective. On a more positive note, the author of a CCC insight article did observe that the forewords to the first

NAP (by Owen Paterson MP) and the second (by Lord Gardiner) had a striking difference in tone, and not just because *'the word 'climate' is actually mentioned more than once in the latest version', which was said to be 'certainly cause for optimism'*.[5]

The CCC also has a duty to assess the progress in implementing the NAP, reporting to Parliament every two years. The most recent report was published on 24 June 2021.[6] In short, whilst the CCC recognised some areas of good progress, it noted that progress had been made only in a minority of sectors. The overarching theme of its report was that more effort is required. It made a series of recommendations, among which was to resume the use of the mandatory reporting power under section 62 of the Climate Change Act 2008.

The Government thereafter published its response to the CCC's report. It explained that it is now preparing for the next National Adaptation Programme, and will consult on the future use of the reporting power.[7]

Other statutory measures

There have been, in the past couple of years, a number of more targeted adaptation planning measures. To take some very brief indicative examples:

a. **Agriculture Act 2020:** The Government now has a duty to publish a regular report on the subject of UK food security, under section 19.

b. **Fisheries Act 2020:** The Fisheries Act 2020 set a new regime for fisheries management. The fisheries objectives listed at section 1, include a sustainability objective requiring that fish and aquaculture activities are environmentally sustainable in the long term, and specifically the precautionary objective

c. **Environmental Act 2021:** The Environment Act 2021 includes a number of measures which are aimed at adaptation planning, including, for example, drought plans.

Conclusion on the statutory framework

In summary, it is a great credit that the Climate Change Act 2008 established a statutory framework for the purposes of planning and programming adaptation to climate change. It ensures, at the very least, that adaptation is kept on the government of the day's agenda, and the value of that is easy to underestimate. The complexity of the task of identifying and implementing clear and effective adaptation measures is also easy to underestimate. That said, the primary function of the current framework is, arguably, to plan to plan, which takes us to Glasgow.

D. ADAPTATION AT COP26

The Glasgow Adaptation Imperative

At COP26, securing action on adaptation was a key goal. The Glasgow Adaptation Imperative, produced to set out action to date and prescribe the progress required to COP27 set key objectives which were relatively broad.

So, what was achieved?

With the intention of strengthening action on adaptation, a 2 year Glasgow-Sharm el Sheikh Work Programme on the Global Goal of Adaptation ("the GlaSS") was agreed as a product of the COP26 negotiations. The GlaSS objectives are:

> *Enable the full and sustained implementation of the Paris Agreement with a view to enhancing adaptation action and support.*
>
> *Enhance the understanding of the global goal on adaptation.*
>
> *Contribute to reviewing the overall progress*

5 Kathryn Brown, The New National Adaptation Programme: Hit or Miss? (19 July 2018), available online here: https://www.theccc.org.uk/2018/07/19/the-new-national-adaptation-programme-hit-or-miss/

6 Available online here: https://www.theccc.org.uk/wp-content/uploads/2021/06/Progress-in-adapting-to-climate-change-2021-Report-to-Parliament.pdf

7 Available online here: https://www.gov.uk/government/publications/government-response-to-the-climate-change-committee-report-on-progress-in-adapting-to-climate-change

made in achieving the global goal on adaptation.

Enhance national planning and implementation of adaptation actions.

Enable parties to better communicate their adaptation priorities, needs, plans and actions.

Facilitate the establishment of robust, nationally appropriate systems for monitoring and evaluating adaption actions.

Strengthen implementation of adaptation actions in vulnerable developing countries.

Whether this will be as significant a step forward as it claims to be, will have to be seen in Egypt. But there can be no question that the time for planning is running out, and implementation now, is imperative.

Case Summaries

Celina Colquhoun
Philippa Jackson

***The Queen (on the application of Rights: Community: Action) v The Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954**

The Facts

An environmental campaigning group named 'Rights: Community: Action' applied for judicial review of the introduction of three statutory instruments by the Secretary of State for Housing, Communities and Local Government. The statutory instruments are the **Town and Country Planning (General Permitted Development) (England) (Amendment) (No.2) Order 2020 (" S.I. 2020/755 "), the Town and Country Planning (General Permitted Development) (England) (Amendment) (No.3) Order 2020 (" S.I. 2020/756 ")** and the **Town and Country Planning (Use Classes) (Amendment) (England)a Regulations 2020 (" S.I. 2020/757 ").**

S.I. 2020/755 and S.I. 2020/756 came into force on 31 August 2020. They amended the **Town and Country Planning (General Permitted Development) (England) Order 2015 ("**the **GPDO")** by permitting development involving one or two additional stories above a dwelling-house/ a detached or terraced building used for commercial purposes, and permitting the demolition of blocks of flats and certain commercial buildings to rebuild for residential use respectively.

S.I. 2020/757 came into force on 1 September 2020, amending the **Town and Country Planning (Use Classes) Order 1987** by introducing a new commercial, business and service use class.

The Appellants challenged the lawfulness of these amendments without first undertaking a strategic environmental assessment under **Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001** on the assessment of the effects of certain plans and programmes on the environment ("the **SEA Directive**") and the **Environmental Assessment of Plans and Programmes Regulations 2004** ("the **SEA Regulations**"). The SEA Directive remains retained EU law, being transposed into domestic law by the SEA Regulations.

Art.3(2) of the SEA Directive requires an environmental assessment to be carried out for all plans and programmes which were prepared for town and country planning or land use and which set the framework for future development consent of certain projects listed in the SEA Directive. Art.3(4), requires Member States to determine whether plans and programmes, other than those in Art.3(2), which set the framework for future development consent of projects, are likely to have significant environmental effects.

The case was an appeal from the High Court of Justice Queen's Bench Division (Divisional Court) ([2020] EWHC 3073 (Admin)), before Lord Justice Lewis and Mr Justice Holgate. Only one ground of challenge remained on appeal, namely whether:

"[the] Divisional Court erred in concluding that the three statutory instruments were not required to be subject to Strategic Environmental

Assessment because they did not set the framework for future development consent of projects, or modify an existing framework for future development consent of projects", and therefore did not fall within article 3(4) of the SEA Directive."

Judgment

The Court of Appeal dismissed the appeal holding that the Secretary of State had acted lawfully in making the three statutory instruments as they did not set the *'framework for future development consent'* and therefore fell outside the requirements of Art.3(4) of the SEA Directive. Consequently, no SEA was required.

When considering whether a plan or programme would come within the SEA Directive, it was common ground that there are four requirements which must be satisfied:

1. It must be subject to preparation or adoption by a public authority through a legislative process.
2. It must be required by legislative, regulatory, or administrative provisions.
3. It must set the "framework for future development consent of projects".
4. It must be likely to have significant environmental effects.

It was accepted that requirements 1, 2, and 4 were met, and so the case turned on the third requirement.

The Claimants argued for a broader construction of the concept of a "framework" for future development consents, submitting that it must embrace both the rules governing whether development consent ought to be granted, and the rules defining or affecting the matters for which such consent is required. Otherwise, the SEA regime could be frustrated by taking certain types of proposals outside the range of development for which a formal grant of planning permission by a local planning authority is required, which was precisely the effect of the statutory instruments under challenge. Further, that the Divisional Court had misunderstood the concept of *"development consent"* by holding it to be synonymous with a grant of planning permission, and that it should not be limited in this way.

They also argued, in the alternative, that even if the statutory instruments were not themselves plans or programmes within the scope of the SEA Directive, they still affected the operation of policies for existing plans, which are within that scope. The effect of the instruments is to lift a large portion of development control from local planning authorities, meaning that the *"framework"* that existed before has gone. Finally, the Claimants argued that the SEA Directive and Regulations had to be interpreted broadly because of their overarching purpose (to provide a high level of protection for the environment). These reforms would have significant environmental impacts which had not been the subject of environmental assessment. This was incompatible with the overarching purpose of the legislation.

Dismissing these arguments, the Court returned to the language of the legislation itself, emphasising that even a broad and purposive approach to interpreting EU legislation for the assessment of environmental affects must *'respect the words that are used'* and should assume Art.3(4) was drafted with care. From that starting point, the Court held that there was no indication in relevant case law that statutory instruments of this kind could be regarded as setting a *'framework for future development consent of projects,'* and that this was more typically understood as referring to a new development plan or the amendment of an extant plan, which has itself been the subject of environmental assessment.

The Court held that a narrower construction than that advanced by the Claimants would not undermine the SEA regime merely by recognising that the regime was not unbounded. The limits of the regime were drawn by the provisions of the SEA Directive and SEA Regime themselves, and the statutory instruments sat beyond them. The fact that measures of a different kind will

fall within them, perhaps with less significant implications for the environment, does not mean that the legislation must be read more liberally than its drafting allows, even if the consequences for the planning system are extensive.

Comment

This is a useful reminder of the Court's approach to statutory interpretation, where it is argued that legislation must be interpreted so as to give effect to broad, overarching objectives such as the protection of the environment. As the Court makes clear, its task is only *'to consider the legal questions before us'*. It focussed squarely on the language of the SEA Directive itself and the drafting of Art.3(4) as the starting point. Crucially, any purposive interpretation must still respect the language used, even if a narrower interpretation may have consequences for the environment. As the Court emphasised, it was no part of its role *'to visit any of the political or economic judgments'* that may have *'motivated'* the introduction of the statutory instruments.

In addition, it may be noted that this case was referred to in a recent judgment of Mr Justice Holgate in ***Cab Housing Limited v The Secretary of State for Levelling UP, Housing and Communities*** [2022] EWHC 208 which considered the proper interpretation of Sch.2 Pt 1 Class AA of the GPDO which deals with the new permitted rights to add up to two storeys or one storey above a single-storey building subject to prior approval. The case looked at the extent of matters covered by the need to have regard external appearance of the proposed developments and the impact upon other premises.

The conclusions in short were that the provisions should not be interpreted on a narrow basis; that 'adjoining' properties meant more than those that are contiguous; that the relevant impacts upon amenity to which decision makers may have regard under the prior approval process were not confined to 'overlooking, privacy or loss of light' and that the external appearance of the subject property was not limited to the public facing aspects.

This latter decision to some extent may provide comfort to local authorities which have expressed themselves uncomfortable about the loss of control over decision making in respect of quite a significant range of development as consequence of the amended GPDO.

Malcolm Payne v Secretary of State for Housing, Communities and Local Government, Maldon District Council **[2021] EWHC 3334 (Admin)**

Facts

The Appellant owned a farm of approximately 12 acres in size, and he and his family lived in a house on the farm. The farm included the appeal site as well as other land. In 2009 the house burned down and the appellant moved into a caravan and other buildings on the appeal site. Later that same year he converted a building into a day room and converted a garage into a bungalow. He also rebuilt the main house.

In 2010 the Appellant put the entire property up for sale but the eventual purchasers only wished to buy parts of the farm, excluding the appeal site. This sale, excluding the appeal site, was made in 2011.

In 2019 the local authority obtained a planning enforcement order ("**PEO**") pursuant to s171BA and s171BC **Town and Country Planning Act 1990**. The breach of planning control was described as the material change of use of part of the land to residential with associated operational development, which was a reference to the conversion of the garage into a bungalow.

In 2020 the local authority then issued an enforcement notice ("**EN**") which identified the breach of planning control as being an unauthorised change of use to a mixed-use, comprising external and internal storage use, workshop, a caravan site for the station of a caravan used for residential purposes, and a change of use of the garage to residential with associated operational development.

The inspector dismissed the appellant's appeal against the EN, finding that the effect of the PEO was to suspend the enforcement time limit in s171B(3) as it applied to the residential use of the converted garage, and that, as the residential use was part of the mixed-use of the site, the fact that enforcement action could be taken against that element of the breach meant that the mix of uses as a whole fell under the same suspension of the enforcement time limit.

The inspector also held that when the house was sold in 2011, the single planned unit had been divided and the mixed use described in the EN began. Consequently, the material change of use to a mixed use occurred less than ten years ago and the enforcement action was not time-barred in accordance with s171B.

The appellant in his subsequent appeal to the High Court under s289 argued that the inspector had misunderstood the effect of the PEO, which was confined only to the "apparent breach" detailed on the PEO, and did not extend to other uses on the site.

The appellant further argued in a second ground that there was no material change of use following the sale in 2011, and that the only rational conclusion was that the original planning unit, which encompassed the house and the 12 acres, was divided earlier in 2009 when the appellant ceased to live in the house and moved into the caravan and other buildings and not when the landholding had been sold and divided. To that end he argued the ten years immunity period could be met.

Judgment

The appellant was successful in respect of his ground 1 arguments. The Court held that the relevant provisions in s.171BA and s.171BC were confined to the "apparent breach" specified in the PEO and the power to take enforcement action went no further. The PEO provisions were intended to operate only where a use had been concealed. They were not intended to operate in respect of other uses which were not concealed, merely because those uses were on the same site as part of a mixed use. The court also clarified that the PEO does not suspend or disapply the time limits in s.171B, as s.171BA(5)(a) states that subsection (2) applies (a) whether or not the time limits under s.171B had expired, and (b) did not prevent the taking of enforcement action after the end of the enforcement year but within those time limits. Instead, it permitted a further period of enforcement action in respect of the apparent breach specified in the PEO.

The Court noted that the LPA has a discretion as to which breaches of planning control it enforces against. An enforcement notice could have been issued which was limited to the breach identified in the PEO namely the residential change in use. It was not necessary to enforce against the entirety of the mixed-use in order to enforce against the breach in the PEO.

However, in order to succeed in his s289 appeal, it was common ground that the Appellant also had to succeed under his ground 2 i.e. that the Inspector erred in concluding that the material change of use occurred in 2011 rather than 2009. However, the Court found that there was a sufficient evidential basis on which the inspector could rationally conclude that the planning unit had split and the change of use occurred after the sale of the wider landholding in 2011. Although the house had burned down in 2009, the farm and wider site remained in single occupation with the Appellant and his family simply moving to other temporary accommodation on the site. The inspector in the Mrs Justice Lang's view, was therefore plainly entitled to consider the planning unit prior to the 2011 on the basis of the prima facie case of the area of occupation and the single ownership of the land. The court found that this did not come close to the high threshold required for a finding of *Wednesbury* unreasonableness.

Comment

There have been only a handful of cases concerning the statutory regime for PEOs under s171BA and s171BC. This judgment highlights the importance of the need for careful drafting of PEOs, as enforcement action taken under s171BA and 171BC is confined to the *'apparent breach'* specified in the PEO and cannot go further. It also clarifies the effect PEOs have on enforcement time limits, providing helpful guidance on the limitations of PEOs and the circumstances in which they should be sought.

The case also provides a timely reminder of the different factors that can influence the creation of a new separate planning unit.

Drop-in permissions: Hillside Parks heads for the Supreme Court

James Burton

Readers may recall the decision of the Court of Appeal in *Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440, discussed by Stephen Tromans QC in the December 2020 edition of this newsletter (available on our website: https://www.39essex.com/planning-environment-and-property-newsletter-3rd-december-2020/).

In very short form (please see Stephen's article for the full synopsis), the convoluted facts begin with a 1967 grant of planning permission for a large application based on a "masterplan", followed by subsequent grants of planning permission within the original permission boundary that were inconsistent with the masterplan. There was then litigation in the 1980s that saw Drake J declare, *inter alia*, that development under the original permission had been lawfully begun and that it could be completed. Then a 2017 announcement by the planning authority that the original permission could no longer be implemented as it could not be completed (due to development under the subsequent permissions). The developer, Hillside Parks Ltd, sought declarations that the authority was bound by the judgment of Drake J (by reason of res judicata/estoppel) and that it could, in fact, continue to build out under the original permission.

The claim was rejected at first instance and again in the Court of Appeal.

As regards the point of particular interest to planners, essentially concerned with what have tended to be termed "drop-in" permissions, the Court of Appeal relied upon *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 and *Sage v Secretary of State* [2003] UKHL 22; [2003] 1 WLR 983, in particular the oft-cited words of Lord Hobhouse at [23], which flow from the "holistic" structure of planning law:

> *23. … if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the whole operation is unlawful…*

On that basis, and in accordance with the approach taken by Hickinbottom J (as he then was) in *Singh v Secretary of State* [2010] EWHC 1621 (Admin), at [19-20], the Court of Appeal held that as the original permission could not be completed in accordance with the masterplan, no further development could be carried out under it. The Court of Appeal distinguished *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1966) 17 P & CR 111.

Hillside Parks Ltd has now been granted (limited) permission to appeal to the Supreme Court. Although limited, the grant of permission is understood to cover the point of keen planning interest: whether the original permission can be continued notwithstanding the conflict between the masterplan and the subsequent permissions and so the inability to build out in full in accordance with the original permission.

How far discussion will range in the Supreme Court cannot be known, let alone the Court's ultimate judgment. However, the Supreme Court

will no doubt consider *Pilkington* and the rule developed there, along with the words of Lord Hobhouse in *Sage*. As such, the result promises to be of considerable importance for "drop ins" as a matter of principle.

Query, though, whether it will be of similar practice importance. On any view *Hillside* involves issues that seem rather dated in terms of modern planning practice, and which modern planning practice would tend to avoid. Many of the key events took place in a very different planning world. That world can be compared and contrasted with (1) the present legislative provision for both non-material amendments and "minor" material "variation" permissions; (2) habitual insistence upon site-wide infrastructure as a condition of planning permission for larger schemes; and (3) the practice of phasing for larger schemes. In reality, would the modern planning system give rise to a situation such as that in *Hillside*?

CONTRIBUTORS

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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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Celina regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. She also regularly appears in the High Court and Court of Appeal in respect of statutory challenges and judicial review. She undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown courts. She specialises in all aspects of compulsory purchase and compensation, acting for and advising acquiring authorities seeking to promote such Order or objectors and affected landowners. Her career had a significant grounding in national infrastructure planning and highways projects and she has continued that specialism throughout. *"She has a track record of infrastructure matters"* Legal 500 2019-20. To view full CV click here.

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James specialises in environmental, planning, and related areas, including compulsory purchase and claims under Part 1 of the Land Compensation Act 1973. He acts for both developers and local authorities, as well as national agencies such as Natural England and the Marine Management Organisation. Recent notable cases/inquiries include *Grafton Group UK plc v Secretary of State for Transport* [2016] EWCA 561; [2016] CP Rep 37 (the successful quashing of a CPO promoted by the Port of London Authority after a five week inquiry), *Mann & ors v Transport for London* [2016] UKUT 0126 (LC)R (a successful group action under Part 1 of the Land Compensation Act 1973 and the 1-3 Corbridge Crescent/1-4). James successfully appeared on behalf of the London Borough of Tower Hamlets in the two week tall Building Proposal at the Oval inquiry. James has also appeared frequently in Committee (both Commons and Lords) in relation to HS2. To view full CV click here.

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Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents, and challenges in the High Court. She is recommended as a leading junior in planning, environmental and aviation law by the directories and she has been consistently rated as one of the top planning juniors by Planning Magazine. Recent cases and appeals of note in 2020/2021 include successfully acting (as junior to Thomas Hill QC) for Stansted Airport in its appeal against the refusal of permission for its expansion proposals and (as sole counsel) in *Gluck v Secretary of State for Housing Communities and LocalGovernment* [2020] EWCA 161 Admin. 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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Gethin has a broad planning and environmental law practice. Gethin is ranked as one of the *'Highest Rated Planning Juniors Under 35'* by Planning Magazine (2020). His recent instructions include acting as junior counsel to Richard Wald QC, on behalf of Natural Resources Wales, in a successful 4 week inquiry concerning proposed byelaws to protect salmon and sea trout stocks in Wales. He was also instructed by the Government Legal Department in the judicial review challenge to the Heathrow third runway. He regularly advises on a diverse range of planning and environmental issues. For example, he has advised in relation to the Environmental Information Regulations, on the prospects of appealing a refusal of planning permission to develop a site within the Green Belt, and in relation to issues arising from the removal of permitted development rights by planning conditions. Gethin has been instructed in relation to judicial review claims as sole and junior counsel. Gethin also has experience of enforcement matters. To view full CV click here.

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