INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter, which is the last until after the Easter break. We hope that you manage to have a restful break.

This week's newsletter includes contributions from Stephen Tromans QC (on some of the implications of the Police, Crime and Sentencing Bill) and John Pugh-Smith (on two Planning Court judgments that have upheld challenges on the grounds of irrationality).

Contents

For those looking for their planning 'fix' over the next couple of weeks, Richard Harwood QC has two new podcast episodes out, which can be accessed via the following links:

Planning and the way out of Lockdown for Hospitality

Lobbying Councillors: Writing to the Committee

In related news, we are pleased to note that the Planning Magazine's annual law survey, released last week, has ranked a number of 39 Essex Chambers' barristers highly. The annual survey shines a spotlight on those most widely considered to exemplify good practice, spotlighting the top-rated planning QCs with track records of excellence, along with the well-regarded juniors and barristers aged under 35.

Richard Harwood QC, Peter Village QC, Stephen Tromans QC, Thomas Hill QC, James Strachan QC, Andrew Tabachnik QC and Richard Wald QC are ranked as top-rated planning silks.

Celina Colquhoun, Philippa Jackson, Victoria Hutton, Jonathan Darby and Katherine Barnes are ranked as top planning juniors. Katherine Barnes is also listed as one of the top-rated juniors under 35.

You can see the full listings on the Planning Resource website (behind paywall).

WHAT A NUISANCE! THE IMPLICATIONS OF THE POLICE, CRIME AND SENTENCING BILL

Stephen Tromans QC

The public order provisions of the Police Crime and Sentencing Bill, currently in its House of Commons Committee stage, has already provoked serious public disorder by protesters against its provisions in Bristol and elsewhere. What has attracted little attention so far is the word provision at clause 59(6) which reads simply, "The common law offence of public nuisance is abolished". This would bring to an end at a stroke centuries of legal learning on the offence of public nuisance.

At common law a person is guilty of a public nuisance (or in the old parlance, common nuisance) who either does an act not warranted by law, or omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects. The hallowed definition was approved by the House of Lords in *R v Rimmington; R v Goldstein* [2005] UKHL 63; [2006] 1 A.C. 459, where it was held that the definition was clear, precise, adequate and based on a rational and discernible principle, and as such had the certainty and predictability necessary to meet the requirements of the common law and of Article 7 of the European Convention on Human Rights that the citizen should be able to foresee, if need be with appropriate advice, the consequences which a given course of action might entail.

This catch all offence can, and has, encompassed a huge variety of anti-social behaviour, some of which (like accumulating refuse or generating dust, noise or smells) is of an environmental nature. In his often cited article in the Cambridge Law Journal in 1989, Professor John Spencer provided a list of other miscellaneous activities which included keeping a tiger in a pen adjoining

the highway, selling unsound meat, and depositing a mutilated corpse on a doorstep. Importantly it also includes obstructing the public highway.

In more recent times the offence has been deployed to cover matters such as making bomb hoax phone calls, repeated obscene phone calls, trying to help a homicidal patient to escape from Broadmoor, and displaying a large effigy of a bishop arm in arm with the devil. In 2012, Trenton Oldfield, who disrupted that year's University Boat Race by swimming into its path was jailed for six months for causing a public nuisance. As related by Wikipedia, in the Marx Brothers film, Duck Soup, Groucho Marx in his office hears a noisy peanut vendor (played by Chico Marx) out in the street. "Do you want to be a public nuisance?" Groucho asks. "Sure," and Chico replies, "how much does the job pay?"

The common law offence could certainly be used against individuals who disregard Covid-19 restrictions, thereby putting the health of others and the public well-being at risk. In the past, transporting a contagious child through the streets has been prosecuted. It can be used also against street protestors who obstruct the highway, potentially with much heavier penalties than the equivalent statutory offence would allow for: in 1964, CND protestors were prosecuted for incitement to commit a public nuisance, and one of them was sentenced to 18 months in prison, rather than the then maximum fine under the Highways Act 1959 of 40/- for obstructing the highway. It might also be used, to take another recent example, against protestors who shut down airports by flying drones nearby.

It has been the fate of public nuisance to be overtaken and superseded, largely but not entirely, by statutory public order and environmental offences, notable statutory nuisance, from the Town Police Clauses Act onwards, through the Public Health Acts and the Highways Acts. Clause 59(6) deals it the coup de grace. Professor Spencer in 1989 put a strong case for abolition of the common law offence, which was "vague and infinitely extensible", but also recognised that there may be a case for a general offence of doing something which creates a major hazard to the physical safety or health of the public, in order to fill any accidental gaps which will inevitably appear in the coverage of specific statutory offences. In that regard it is interesting to note that the common law offence is not only doing things, but also omitting to discharge a legal duty, if the effect of the omission is to endanger the life, health, property or comfort of the public. It is not fanciful to argue that local councils or government agencies which clearly fail to comply with duties to avoid air quality limits being exceeded, thereby undoubtedly causing danger to public health, could be committing a public nuisance – at least while the offence still exists.

Clause 59 will replace common law public nuisance with a new offence of doing an act, or omitting to do an act that they are required to do by any enactment or rule of law, where the person's act or omission causes serious harm to the public or a section of it, or obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large. The "serious harm" limb is, it will be noted, not dissimilar to the offence mooted by professor Spencer in 1989. The person must have intended that the act or omission would have that consequence, or have been reckless as to whether it would have that consequence. "Serious harm" is defined as suffering death, personal injury or disease, loss or damage to property, serious distress, annoyance, inconvenience or loss of amenity, or is put at risk of these matters. There is a defence of reasonable excuse, and the offence will be punishable by up to 12 months in prison on summary conviction, or 10 years on indictment.

The abolition of the common law offence of public nuisance does not affect civil liability, or other statutory liabilities. Therefore, the possibility will remain for civil proceedings for injunction

and damages for public nuisance – particularly obstructing the highway, and amenity nuisances that have sufficiently widespread effects on a section of the public.

So what is the impact of the Bill in the specific context of public order which has led to the riotous "Kill the Bill" protests in Bristol? First, the provisions whereby police can impose conditions on public processions and assemblies under sections 12 and 14 of the Public Order Act 1986 are broadened from where (currently) it is reasonably believed that serious public disorder, serious damage to property, or serious disruption to the life of the community could occur, to cases where noise could result in serious disruption to the activities of an organisation carried on in the vicinity, or where the noise may have a significant relevant impact on persons in the vicinity. The concept of "relevant impact" is defined as that resulting in the intimidation or harassment of "persons of reasonably firmness" or causing such persons to suffer "serious unease, alarm or distress". Thus this is a different and narrower concept than that of nuisance, i.e. interfering with reasonable comfort and convenience. The relevant offences of contravening conditions will be punishable by up to 51 weeks imprisonment in the case of summary conviction.

Finally, clause 60 of the Bill will insert a new section in the Public Order Act allowing the police to set conditions on one-person protests, where it is reasonably believed that the noise generated by that person may result in serious disruption to the activities of an organisation carried on in the vicinity, or where the noise may have a significant relevant impact on persons in the vicinity.

These provisions have clearly generated a lot of heat. Whether this is justified must be questionable. There is no necessity for assemblies or processions, or one-person protests, to involve noise which is intimidating or alarming to the public, much as protestors may wish to chant, bang drums, etc, and it is not unreasonable to give the police powers to control such noise. As always of course, it is important that such powers are exercised proportionately and responsibly by the police. This should, I would suggest, include weighing the impact of the noise likely to be generated against the right to express protest and the risk that imposing and enforcing conditions could itself lead to an escalation of disorder and a worse problem. There is a great deal of strong feeling converging from various directions, including race and sex-related issues, anti-lockdown sentiment, and environmental issues, and it is easy for events with perfectly legitimate origins to become flashpoints.

In any event, what these provisions really should be remembered for is not the ability to restrain an individual abusing a megaphone, but rather the replacement of an indeterminate and catch all offence of public nuisance with a much more clearly defined statutory provision.

WHEN FIXATION BECOMES LEGAL IRRATIONALITY

John Pugh-Smith

As a public lawyer, while one sometimes includes a ground of "irrationality" as part of a Judicial Review challenge one knows that, in most instances, either reliance upon it will not be required, because of some lesser error, or, the Judge will discourage you from "going there"! Therefore, it has been with pleasant surprise that so far this year, not just one but two, Planning Court judgments have upheld this ground, and, by judges not normally know for such robustness.

The UTAG Case

On 20th January 2021, in *R (United Trade Action Group Ltd & Ors) v Transport for London & Mayor of London* [2021] EWHC 72 (Admin) ("the *UTAG* case") Mrs Justice Lang upheld judicial review challenges brought by the London taxi trade against TfL's *Streetspace* Plan, its Guidance and a specific scheme on Bishopsgate (A10). Whilst TfL has now lodged an appeal, and seeks an expedited hearing, for now, the following trenchant comments of Mrs Justice Lang remain as a strong judicial rebuke

Five grounds of challenge had been brought of which the last pleaded "irrationality". Towards the end of her lengthy judgment, covering some 85 pages, Mrs Justice Lang states the following:

> ***266.*** *In my judgment, the flaws identified were symptomatic of an ill-considered response which sought to take advantage of the pandemic to push through, on an emergency basis without consultation, "radical changes", "plans to transform parts of central London into one of the largest car-free zones in any capital city in the world", and to "rapidly repurpose London's streets to serve an unprecedented demand for walking and cycling in a major new strategic shift" (Mayor's statements on 6 and 15 May 2020) …*
>
> ***267.*** *The scale and ambition of the proposals, and the manner in which they were described, strongly suggest that the Mayor and TfL intended that these schemes would become permanent, once the temporary orders expired. However, there is no evidence to suggest that there will be a permanent pandemic requiring continuation of the extreme measures introduced by the Government in 2020.*
>
> ***274.*** *In my judgment, it was both unfair and irrational to introduce such extreme measures, if it was not necessary to do so, when they impacted so adversely on certain sections of the public. The impact on the elderly and disabled who rely heavily on the door-to-door service provided by taxis is described at paragraphs 130 – 136 above. See also the adverse impacts identified in the EqIA (paragraphs 189-192 above).*[1] *Taxis are a form of public transport. Travellers may wish to travel by taxi for legitimate reasons. Taxis have been valued by the NHS and vulnerable groups during the pandemic because they are safer than trains, buses and private hire vehicles …*
>
> ***275.*** *I conclude that the decision-making processes for the Plan, Guidance and A10 Order were seriously flawed, and the decisions were not a rational response to the issues which arose as a result of the COVID-19 pandemic.*

Accordingly, the Judge concluded that quashing orders rather than declarations were appropriate because of the nature and extent of the unlawfulness which she had identified, which affects not only taxi drivers, but also their passengers. She remarked that The Plan, the Guidance and the A10 Billingsgate Order all need to be re-considered and substantially amended in the light of her judgment. To reduce disruption, she directed that TfL and the Mayor could turn their minds to this task now, on a provisional basis, as there would be a stay and a delay whilst they pursue their appeal. If the appeal were

1 The EqIA aspect of the *UTAG* case was discussed in a separate article, published on 12 February, 2021, written by John Pugh-Smith and Daniel Kozelko entitled: *Planning and Equalities Impact Assessments*
www.localgovernmentlawyer.co.uk/planning/318-planning-features/46168-planning-and-equalities-impact-assessments

unsuccessful, then they could apply for further time (if required) to finalise the proposed revised Plan, Guidance and Order before the quashing orders took effect.

Currently, TfL anticipate their appeal being listed for an expedited hearing in early June 2021. Its outcome has serious potential implications upon a series of High Court challenges of borough-specific schemes which are currently listed for hearing before Mr Justice Kerr from 6th June 2021.

The Norfolk Vanguard Case[2]

Within a month, on 18th February 2021, Mr Justice Holgate handed down judgment in *R (Pearce) v Secretary of State for Business Energy And Industrial Strategy* [2021] EWHC 326 (Admin), quashing the decision of the Secretary of State for Business, Energy and Industrial Strategy ("the SoS") on 1st July 2020 to make the North Vanguard Offshore Wind Farm Order ("the Order"). The North Vanguard project is closely related to the neighbouring Norfolk Boreas project, lying immediately to the north-east. Both are to be developed by Vattenfall Wind Power Limited ("Vattenfall"). Both are, individually and jointly, said to be one of the largest in the world. The promoter of the project, Norfolk Vanguard Limited ("NVL") (a subsidiary of Vattenfall), proposed that the onshore infrastructure for the two projects (North Vanguard and Boreas) be co-located and share several common elements to help reduce construction costs and increase efficiencies. These currently involve a cable route carrying direct current for 60km from the proposed landfall at Happisburgh, North-East Norfolk, to a substation site near the village of Necton, Mid-Norfolk. There, the power would be converted and fed into the National Grid, with both sharing the grid connection. The Environmental Statement ("ES") prepared by NVL for the North Vanguard project assessed cumulative impacts arising from both projects, including landscape and visual impacts from the infrastructure proposed at Necton. The ES asserted that sufficient information was available in order to undertake a meaningful assessment. Objections were received from many, including Mr Pearce, the Claimant, in relation both to the impacts of the Necton infrastructure for the Vanguard project, in isolation, and also the cumulative impacts which would occur if infrastructure for the Boreas project was added.

The approach of the Examining Authority ("ExA") and the Secretary of State ("SoS") only became apparent with the publication of the ExA's report, the matter not having been the subject of discussion at the examination. The relevant paragraph stated: *"Finally, whilst the Norfolk Boreas Offshore wind farm has been included in the Applicant's LVIA cumulative impact assessment, the ExA have not considered it in this part of the assessment due to the limited amount of details available. The ExA considers it would most appropriate for cumulative impacts to be considered in any future examination into Norfolk Boreas."* The SoS followed this approach in his decision: *"The ExA notes that, while the Applicant's Landscape and Visual Impact Assessment cumulative assessment included the proposed Norfolk Boreas offshore wind farm, it was not considered by the ExA because of the limited information available on that project. The ExA concluded, therefore, that this matter should be considered in the future as part of the examination of the development consent application for the Norfolk Boreas offshore wind farm."*

However, the Judge found this approach had been unlawful: *"The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available,*

2 More detailed articles about this case and its contextual context, respectively, by my 39 Essex Chambers' colleagues, Stephen Tromans QC and Gethin Thomas, can be found through this link: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/PEPNewsletter_25February2021.pdf

or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard."

Indeed, unlike so many, it could not be defended on the basis of questions of planning or expert judgement.

Moreover, Mr Justice Holgate then found that the decision was irrational, concluding that irrationality arose from the SoS's deferral of the evaluation of cumulative effects of both projects. Indeed, he notes that it had been common ground between the parties that the nature and level of information on the two projects, for the purposes of assessing landscape and visual impacts of the Necton substation development, was essentially the same. He also observes that the SoS must have proceeded on the basis that the information on the impacts of the Vanguard project was sufficient for him to be able to evaluate and weigh that matter. The decision was therefore *'flawed by an obvious internal inconsistency.'* [3, 4]

It was an unfortunate result for the promoter of the scheme, who as the judge had pointed out, had expressly catered for any lack of detailed information on Boreas by proposing a "Rochdale envelope" parameters approach. There was no basis to do anything but quash the decision.

On the issue of relief, both the SoS and NVL contended that the Secretary of State would have made the same conclusion, even if he had taken into account the cumulative impacts (relying on section 31(2A) of the Senior Courts Act 1981). However, the Judge rejected the argument.[5] His view was that consequence of the legal errors made by the SoS was that the Court did not have any notion as to what the evaluation of cumulative impacts by the Defendant would have been if he had considered the matter. The Court did not even have an idea as to how the ExA had evaluated the cumulative impacts, because they too had decided not to do so. As it would be impermissible for the Court to make findings on that issue for itself, instead, it was being asked to deduce from the SoS's conclusions on the solus impacts of the Vanguard development at Necton and the way in which the overall balance was struck that it would be highly likely that the outcome would have been the same if the cumulative impacts had been evaluated as well.

"In my judgment, there is a fundamental flaw in the argument relying upon s.31(2A) which cannot be overcome. It flies in the face of the conclusion which the Defendant actually reached, namely that he would not assess cumulative impacts at Necton because the information on Boreas was "limited". This criticism by the Defendant makes it impossible to deduce what his conclusion would have been if he had evaluated those impacts. But even if that point is put to one side, there are other flaws…" [6]

However, the Judge declined the Claimant's invitation to issue particular directions as to how either of the two project's DCOs should be determined when they are re-visited; though he did observe that: *"…it is very doubtful whether the Defendant could properly proceed to re-determine the Vanguard application, or to determine the Boreas application, without at least giving a reasonable opportunity for representations to be made by interested parties on the implications of this judgment for the procedures now to be followed in each application, considering those representations, and then deciding and explaining what course will be followed."* [7]

3 Judgment, para. 131
4 Para. 156-158
5 Para. 156-158
6 Para. 158
7 Para. 179

Conclusions

Here, the judicial brakes have been so firmly applied to two significant proposals that there will have to be commensurate appeal grounds for either judgment to be overturned. Perhaps, that may also be due to the common thread, namely, the manifest inadequacy in the decision making process and the seeming "fixation" with trying to push through the underlying objective with insufficient regard to the procedural consequences. Whatever the outcome of the re-taken decisions, it is to hoped, indeed, my expectation, as a public lawyer, that greater endeavours will be applied by the promoters and decision-makers to ensure that the desired outcome is, again, not at the expense of the necessary "due process".

With the recent publication of the Government's Response to, as well as, the Faulks' Independent Review of Administrative Law[8] reassurance is provided of the continuing necessity for public accountability through the Judicial Review process. Whether there will be a subtle curbing of the noted increase in judicial willingness to review the merits of the decisions themselves, and, thereby on irrationality findings, must remain a matter of speculation at this stage. Nonetheless, however laudable may be the objective, and, its swift delivery, its procedural achievement still needs to ensure that due process is maintained. Whether that decision-making process is susceptible to an irrationality finding, at the end of the day, comes down to ensuring that sound reasoning is not sacrificed in the interests of expediency.

John Pugh-Smith and Daniel Kozelko of 39 Essex Chambers are currently jointly engaged in a High Court challenge to the outworkings of the Streetspace programme within the London Borough of Hounslow and its effects on Chiswick High Road. John is also an advisory member to Norfolk Coastal Futures. An earlier podcast version of this article can be heard through this link: https://podcasts.captivate.fm/media/9d23b5fd-74bc-4583-95f6-910822793867/14-c-pepp-mixdown.mp3

3 https://www.gov.uk/government/consultations/judicial-review-reform (18.03.21)

CONTRIBUTORS

Stephen Tromans QC
stephen.tromans@39essex.com

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.

John Pugh-Smith
john.pugh-smith@39essex.com

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

Jonathan Darby
jon.darby@39essex.com

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

KEY CONTACTS

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com
Call: +44 (0)20 7832 1190
Mobile: +44 (0)7921 880 669

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com
Call: +44 (0)20 7634 9023
Mobile: +44 (0)7809 086 843

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.