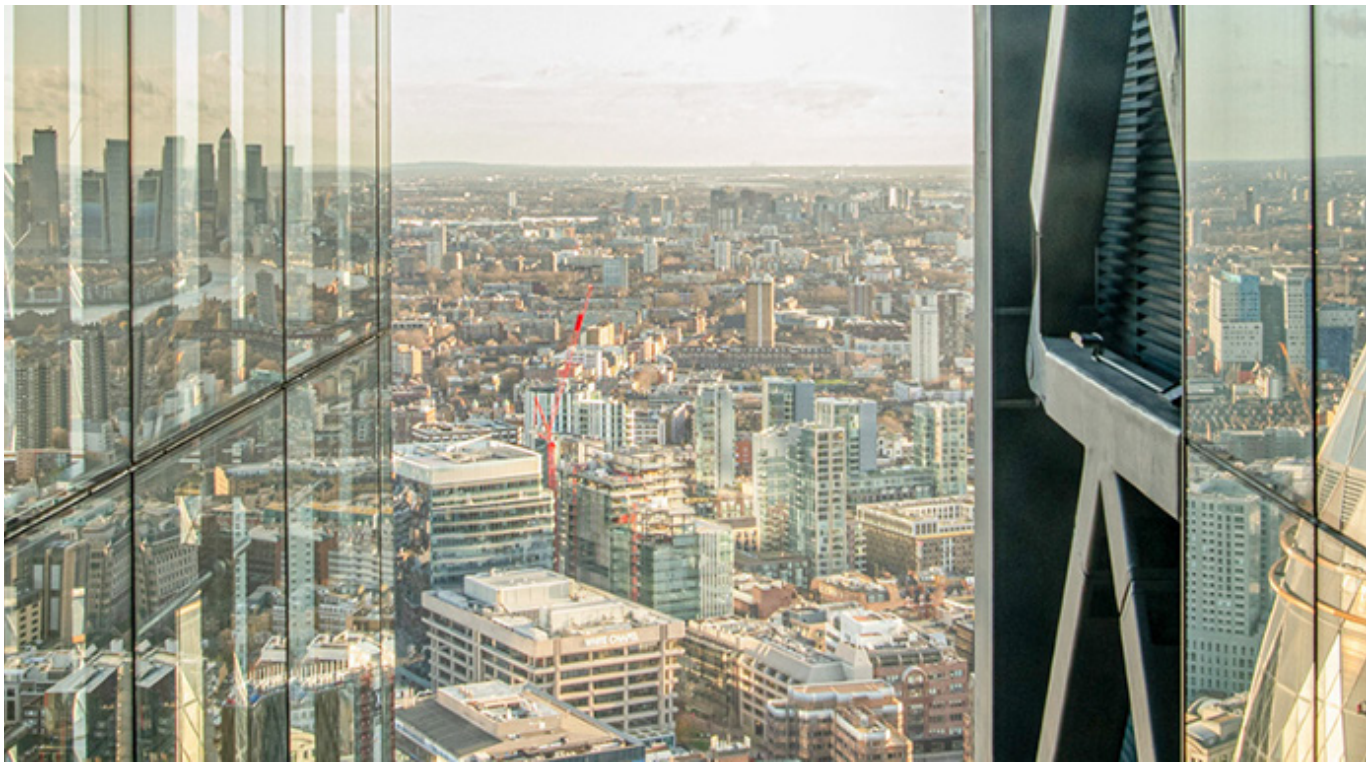

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Introduction

Celina Colquhoun
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Welcome to the Summer 2024 edition of the 39 Essex Planning Environment and Property newsletter. With the general election campaign underway and focusing more on national service than national planning policy frameworks, **Paul Stinchcombe KC** topically kicks off this edition by considering the grant of planning permission for 721 dwellings in Green Belt land and whether politics really plays that much part in the process.

We are delighted to welcome **Flora Curtis** to Chambers as part of the PEP team, she has hit the ground running and, in this edition, writes on an Advisory Opinion by the International Tribunal on the Law of the Sea on States' obligations to protect the marine environment from the effects of climate change.

This edition additionally contains an interesting and varied array of articles on the following topics:

- **Stephen Tromans KC** addresses the persistent issue of contaminated land and unfortunate ineffectiveness of Part 2A of the Environmental Protection Act 1990.
- **Celina Colquhoun** looks at recent procedural and legislative changes impacting the PEP sphere, in particular the introduction of permission stage replies in judicial review cases as well as changes to enforcement immunity periods.
- **Daniel Kozelko** considers the case of R (Low Carbon Solar Park 6 Limited) [2024] EWHC 770 (Admin) which provides a reminder of the fact sensitive nature of procedural fairness.
- **Ella Grodzinski** provides her thoughts on the curious discussion of victim status by the European Court of Human Rights in the KlimaSeniorinnen case.
- **Christopher Moss** covers the changed approach to local energy efficiency standards that exceed the levels set out in Building Regulations, as well as a challenge to the policy change brought by Rights Community Action.

Lastly, it would be remiss of us not to plug two new PEP podcasts produced by Chambers, Tora Hutton's ***"Hot Topics in Planning and Environmental Law"*** and ***"Contested Heritage"*** by Richard Harwood KC and Clarissa Levi of BHL Art Group.

We hope that the newsletter and podcast offerings provide plenty to keep you entertained as we move into Trinity Term and towards the election.

Affordable housing in the green belt – a profitable route to very special circumstances?

Paul Stinchcombe KC
Call 1985 | Silk 2011

As the coming election looms, will development in the Green Belt be a dividing issue between the parties? On one level, it would seem so. When the Labour leader, Keir Starmer, announced plans for building on brownfield sites and poor-quality areas in the Green Belt, which he has dubbed "Grey Belt", in order to boost housing supply, Rishi Sunak's response was to declare that he was standing by his leadership pledge to protect the Green Belt in England from development. And yet, are the parties actually so far apart? After all, and by a decision letter on two called-in appeals in Chiswell Green, St Albans[1], the Secretary of State has just

1 A. APP/B1930/W/22/3313110 & B. APP/B1930/W/22/3312277.

granted planning permission for a grand total of 721 dwellings in Green Belt: one a scheme for 391 homes, with 40% affordable; the other, called "Addison Park", a scheme for 330 dwellings, all of them discount market homes dedicated to essential local workers.

In large part, however, this is not a story about the planning priority placed by politicians on the Green Belt, so much about St Albans itself, and the fact that it has been in a planning and a housing crisis dating back at least a decade and to the seminal case of *Hunston Properties Limited v (1) Secretary of State for Communities and Local Government and (2) St Albans City and District Council,*[2] the one which kicked off all the other cases about objectively assessed housing needs and the presumption in favour of sustainable development when a Council did not a 5-year housing land supply so that its Plan was out-of-date.

And make no bones about it, the Local Plan in St Albans is most certainly out-of-date. For a start, it is genuinely old – probably the oldest in the country. When Local Plans are meant to be reviewed every 5 Years, the St Albans Local Plan has not been reviewed since 1994. Moreover, and unsurprisingly, the direct consequence of the Council's failure to adopt any housing allocations for 30 years is that it has been unable to demonstrate the 5-year housing land supply required by the NPPF for more than a decade; and it can currently demonstrate just 1.7 YHLS, the worst housing land supply position in St Albans since the Local Plan was adopted all those years ago.

That failure to deliver housing in St Albans has obvious and harmful consequences. Firstly, with the housing shortfall growing bigger and bigger, the house price to earnings affordability ratio has grown higher and higher. In July 2021, it was 17.32, meaning that those on median incomes in St Albans need to find more than 17 times their annual salary to buy a property there. Second, and because the Council follow the traditional model for the delivery of affordable housing (as a minority partner of open market housing on a 60:40 split), alongside the undersupply of market housing comes a massive shortfall in affordable housing. The numbers are staggering. As of the date of the Chiswell Green decision letter, the accumulative affordable housing shortfall in St Albans was over 5,500, and to meet it the Council needed to deliver over 1,100 affordable homes every year over the next five years. However, its supply figure for the next five years was predicted to be just 39 affordable dwellings a year. To put it bluntly, the delivery of affordable housing in St Albans had collapsed.

These planning and housing crises also bring with them necessary consequences for decision-making. Until the Spring of 2026 at the earliest, when the next Local Plan might be adopted, housing needs in St Albans can only be met through allowing development in the Green Belt, and the recent call-in decisions at Chiswell Green are just the latest examples of that – there were earlier ones pointing in the same direction. In 2021, Inspector Masters allowed 100 dwellings on Green Belt land off Bullens Green Lane in Colney Heath,[3] stating that the housing position was bleak and attaching very substantial weight to the provision of both market and affordable housing. And the Council followed that lead itself, in 2022, when granting permission for 150 homes on the very same Green Belt site it had resisted 10 years earlier,[4] leading to the *Hunston* case.

That does not mean that all housing applications on Green Belt sites in areas of housing need will be permitted, of course. Whilst Inspector Masters allowed an appeal on one site in Colney Heath in 2021, earlier this year another Inspector dismissed a housing appeal elsewhere in Colney Heath;[5] and just days before the Chiswell Green decisions, the Secretary of State disagreed with an Inspector's

2 [2013] EWCA Civ 1610.
3 APP/B1930/W/20/3265925.
4 Planning Application: 5/2021/0423.
5 APP/B1930/W/23/3323099.

recommendations and refused 1,400 houses in Tring, in the neighbouring Authority of Dacorum, where the housing land supply is comparable to St Albans at just 2.06 years.[6]

If you leave aside the possibility that politics plays a part in some decisions,[7] the simple truths are that all sites and proposals are different; and different people weigh things differently as a matter of subjective planning judgement. For example, the Tring proposal was twice as large as the Chiswell Green proposals put together and, unlike the Chiswell Green sites, was in the setting of an AONB to boot; and the second Colney Heath proposal was found to cause "significant harm to the landscape character and appearance of the surrounding area", unlike the first proposal where the visual impacts were said to be "localised". And, of course, one of the proposals for Chiswell Green – "Addison Park" – was very radically different in other ways too; a proposal for 100% affordable housing, all of them dedicated to key workers.

Named after the Minister who built "homes for heroes" following the Great War, Addison Park was promoted specifically to meet the needs of those latter-day "heroes" who fought on the frontline throughout the Covid pandemic but could not afford to buy in one of the most expensive Boroughs in the country and yet earned too much to be eligible for social rented housing also. To meet their needs, the land was to be gifted for free in order to enable the market price of the housing to be discounted by at least 33%,[8] thus allowing entry onto the housing ladder for many key workers who would otherwise be unable to live where they served.

Now one might think that, in a Borough which was projected to deliver just 39 affordable homes a year against a need of 1,100, this would be seen as an entirely good thing. However. although the Council correctly conceded that the affordable housing on offer was a benefit, they nonetheless submitted that a mixture of market housing and affordable rent was preferable, and for two reasons: firstly, they argued that the provision of housing solely for key workers was not going to meet the NPPF objective of creating mixed and balanced communities; and second, they pointed out that not all key workers would be able to afford to buy, even after a 33% discount.

As for the first objection, however, Addison Park would actually begin to redress some of the imbalance inherent to the current situation – one in which large numbers of essential local workers are priced out of market home ownership in St Albans, whilst being ineligible for affordable rented accommodation also. Besides, nurses, teachers, police officers, fire fighters, local government officers, and the like, are not just part of a balanced community, they provide the local services upon which a properly balanced community actually depends.

And as for whether the proposed housing was "affordable", in policy terms the NPPF definition of affordable housing expressly states that this includes "housing that provides a subsidised route to home ownership and/or is for essential local workers", and nowhere ranks one form of affordable housing over any other. Furthermore, and as for the 'real world' housing needs of key workers in St Albans, and the extent to which the Addison Park model would help to meet them, the reality in St Albans is that if household income exceeds £70,000, that household had no access to affordable housing for rent at all (and a household income of just £50,000 excludes access to even 2-bed housing); however, such a household, one earning between £50,000 and £70,000, would be unable to buy as well; and the Appellant proved there were many thousands of key worker households serving St Albans who were in this category – the "hidden middle", whose needs were currently unmet, but who would be able to afford to buy with the discount Addison Park proposed.

6 APP/A1910/W/22/3309923.

7 Some cynics might point out that Tring is a Conservative constituency, and St Albans Liberal.

8 That is in stark contrast to the usual business model, in which, typically, a developer buys the land once planning permission is granted (often paying a very high price), and that land cost is included in the final sale price of the home. However, because he owned the land already, the Appellant did not have to sell to a developer, which allowed him to build affordable, discounted, homes directly.

It was on the back of that evidence that the Inspector held as follows, and the Secretary of State agreed with him:

> "591. … The scheme is unusual but is facilitated by the appellant's desire to meet these particular needs by offering the land for free and discounting all properties by at least 33%, in excess of that required to qualify as affordable housing. Such a scheme is unquestionably a positive aspiration that would go a long way towards boosting the Council's supply of affordable housing. In the context of such a great housing need, I attach very substantial weight to the proposed housing.
>
> 592. This weight is not diminished by the Council's assertion that some key workers would be unable to afford the properties, even after discount. The evidence presented by the appellant shows clearly that many would… The scheme might not contribute to those most in need of affordable housing, as identified by the Council, but the Framework does not rank different types of affordable housing or suggest that some types are less important than others."

The questions which arise are whether this is an entirely altruistic business model, one which is unlikely to be repeated? Two points fall to be made:

1) Firstly, whilst obviously well-motivated by the desire to help key workers, post-pandemic, the Addison Park Appellant will still make a handsome profit – if, as a rule of thumb, some developers work on a broad business model which assumes one third land cost, one third build cost, and one third profit, it is the land cost that has disappeared to make the discount possible, not the profit; and

2) Second, now that the Secretary of State has approved a proposal for 100% discount market sales housing in the Green Belt on the basis that, in locations where the need for affordable housing is great, this cleared the threshold of demonstrating "very special circumstances", there must be other Green Belt locations where the affordable housing need is great, where the affordability ratio is high, where the "hidden middle" is substantial, and where the profits of a similar scheme (especially if discounted by the NPPF threshold of 20%) would be enough for even mainstream developers.

Contaminated land rears its head again to appeal

Stephen Tromans KC
Call 1999 | Silk 2009

If ever there was a piece of legislation which failed to deliver on its promise, it is Part 2A of the Environmental Protection Act 1990, inserted by the Environment Act 1995 and coming into force on 1 April 2000. Intended to address the large legacy of industrially contaminated land in the UK, its complex provisions (overly complex) have become largely a dead letter. This is in part because of its very complexity and the formidable difficulties facing any local authority seeking to pursue it through to enforcement, but perhaps more seriously the decimation of resources for local authorities and the Environment Agency to even inspect land, let alone identify it as contaminated and proceed to enforcement of remediation. A lot of contaminated land may well be of an "orphan" nature in any event, leaving the cost of remediation in the hands of the authority. No wonder, when authorities face insolvency, let alone resource constraints, that contaminated land doesn't feature highly on their list of priorities. A UK version of the US "Superfund", it is not.

Yet of course the contamination hasn't magically gone away. Persistent chemicals and toxic metals don't do that. A salutary reminder was the report in the Financial Times on 12 March 2024: ***Abandoned Welsh Mines Discharge 500 Tonnes of Toxic Metals a Year.*** A freedom of information request

to Natural Resources Wales has revealed that 129 old mine sites were either certainly or highly likely to be releasing metals causing failures of water quality criteria. A "comprehensive assessment" is lacking, but NRW estimated that between 350-500 tonnes of toxic metals are discharged annually, including lead, zinc and cadmium. To put the matter in context Wales has around 1,300 abandoned mining sites, so what has been found so far may be the tip of the iceberg.

Whilst it has been estimated that around 700km of rivers are affected, equally serious is general dispersion into the floodplain, giving rise to potential pathways to human exposure via food grown in affected soil. A study in 2023 by NRW showed harmful levels of lead in eggs from small farms downstream from a number of abandoned mine sites and suggested that a child eating 1-2 eggs per day could become cognitively impaired. This was reported to have led to two meetings last year with other agencies including the Food Standards Agency and Food Security Agency.

Abandoned mines are not exclusive to Wales, but this does appear to be a problem which is particularly serious there. Progress on remediation has been slow, with only one large scale scheme completed, a former lead and zinc mine at Frongoch, in Ceredigion. In England, the Water and Abandoned Metal Mines Programme established in 2011 has only developed three successful mine water treatment schemes, improving a mere 20km of rivers.

Attention in recent years has tended to focus on issues such as sewage pollution, agricultural run-off of phosphates and newish phenomena such as microplastics and perfluorinated "forever chemicals". But the older sources of harm are largely still sitting there, as unremediated as they were on April Fools' Day 2000. Can the day of reckoning/remediation be postponed forever?

A Couple of Notable Legislative and Procedural Changes:
(i) "and another thing …" JR Replies to AOS CPR 54.A ;
(ii) "10 years and counting" Enforcement Immunity Periods and other changes;

Celina Colquhoun
Call 1990

Apologies for the weird puns in the title but I was aiming for a shorthand way to highlight some recent changes in the PEP legal field which caught my particular attention.

(i) "and another thing …" JR Replies to AOS

The first is the change to the Civil Procedure Rules in relation to Judicial Review which came into force on 6 April 2024 namely **CPR 54.8A *"Reply to acknowledgment of service".***

This new rule brings into effect one of the main procedural recommendations of the government's Independent Review of Administrative Law (IRAL) which reported at the beginning of 2021.

The IRAL report at paragraphs 4.150 to 4.158 made specific recommendations for there to be formal provision allowing a Claimant to file a Reply to the Defendant's Acknowledgement of Service (AOS) within seven days of receipt of the AOS.

Prior to April as many will know no such right was available prior to permission being determined. Whilst the Defendant in the AOS following service of a claim need only provide summary grounds for contesting the claim (see CPR 54.8 (4)(a)) (should they wish to contest it of course) but their purpose more often than not is to persuade the judge who looks at the claim on the papers in the first instance that there is a knockout blow or indeed that s31(2A) of the Senior Courts Act 1981 applies such that it is highly likely that the outcome for the Claimant *"would not have been substantially*

different if the conduct complained of had not occurred" and permission refused.

This led to Claimants if they wanted to ensure permission was granted on the papers and save the cost of a reapplication hearing for permission, frequently having to make a separate application to the Court to submit a Reply as well as any additional evidence to address the points raised (most especially if the summary ground for contesting went beyond the pre action protocol correspondence).Such applications however would be submitted without knowing if the material had reached the deciding judge in time and, even if it had, the basis upon which a judge will exercise his discretion to accept it.

This obviously was leading to uncertainty and inconsistency and IRAL acknowledged this issue.

Whilst other recommendations made by IRAL were taken forward in the Judicial Review and Courts Act 2022 (see section 1 and 2) it was not clear if, when or how the recommendation to address the above issue might come forward.

New CPR Part 54.8A now allows a Claimant who has received an AOS to file a Reply *"not more than 7 days after service of the acknowledgment of service"* (CPR 54.8A(2)) and they must also make sure they serve the Reply on the Defendant (and any(ii) any person served with the claim form) *"as soon as practicable and in any event not later than 7 days after it is filed"*

It should be noted that the parties cannot extend the time limits by agreement so in such circumstances the Court's permission will be needed.

Importantly however Direction 54A seeks to limit the nature and purpose of such replies and states in particular that it *"should be filed* ***only if necessary for the purpose of the court's decision to grant permission*** *to apply for judicial review, for example, where a discrete issue not addressed in the Claim Form is raised in the Acknowledgement of Service. A Reply* ***is not the occasion to rehearse matters already*** *referred to in the Claim Form".* In addition, it also states that a *"shall be as concise as possible and shall not exceed 5 pages".*

If the Reply is late (i.e. after the 7 days) and/or exceeds the 5-page limit the permission of the Court will need to be sought.

In addition, there will also (not surprisingly) be costs implications where the Court finds that a *Reply is filed unnecessarily, the court may make any order it considers appropriate, whether as to costs or otherwise.* makes provision as to the content and length of any reply.

It is clear that the new rule does not present some form of 'carte blanche' for the Claimant to rewrite their grounds.

Vikram Sachdeva KC *and* ***Celina Colquhoun*** *were two of the three barrister members of the IRAL panel which carried out the review, which was published in early 2021.*

"10 years and counting" Enforcement Immunity Periods;

As many will know as of 25th of April 2024, some key changes to planning enforcement legislation and procedure (in England) have come into force as a result of some of the reforms brought about through the Levelling Up and Regeneration Act 2023 (LURA).[9]

The principal and most significant change is to the applicable immunity period from enforcement – it is now 10 years for any form of breach of planning control and the 4 year period has gone.

This means that S171B(1) and (2) of the Town and Country Planning Act 1990 ('the 1990 Act') now provide that in respect of a *"a breach of planning control consisting in the carrying out without*

9 See Regulation 3 of **Planning Act 2008 (Commencement No.8) and Levelling-up and Regeneration Act 2023 (Commencement No.4 and Transitional Provisions) Regulations 2024/452** and LURA Chapter 5 ss115 -121

planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken" in England *"after the end of the period of (a)…* ***ten years beginning with the date on which the operations were substantially completed"*** and in respect of a breach of planning control *"consisting in the change of use of any building to use as a single dwelling house"* as well as change of use generally (see 171B(3)) *"no enforcement action may be* ***taken after the end of the period of…ten years beginning with the date of the breach".*** The same period also applies to a breach of planning control comprising a breach of condition again the period is measured from the date of the breach.

In Wales the enforcement periods remain as before i.e. four years for operational development and change of use to use as a single dwelling and ten years for other any breach.

The reason given for the change to immunity for operational development and change of use to a dwelling was said to be because *"The four-year time limit can cause frustration for communities, whose initial pragmatism may result in unauthorised, harmful development becoming inadvertently immune from enforcement action."*[10]

That reference to *"initial pragmatism"* would appear to be a reference to the reasons why there were two different periods in the first place. This had been discussed in the Supreme Court in the infamous "house disguised as a barn" case *Welwyn Hatfield Borough Council v SoSCLG & Beesley* [2011] UKSC 15 (which brought about the special provisions where there had been concealment of a breach whereby immunity could be disapplied in effect).

In Welwyn the SC noted the anomaly arising out of the fact that it would be possible for an unlawful building to become immune from enforcement within 4 years of being built whereas its use could in theory still be open to enforcement. Lord Mance stated as follows:

> *"17… The building attracts a four-year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four-year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless."*

Lord Mance went on at [18] to look at the mischief to which s171B(2) was directed and noted as follows:

> *"18… the normal expectation would be that unauthorised building operations within subsection (1) would be easy to spot and quite often onerous to undo. A shorter period for enforcement steps is understandable. As to subsection (2), single dwelling houses were clearly seen as falling into a category meriting a degree of special treatment. They are after all people's homes, and a longer period than four years might well "cause serious loss and/or hardship in the event of enforcement proceedings long after the event": **Arun District Council v First Secretary of State** [2006] EWCA Civ 1172; [2007] 1 WLR 523, para 5, per Auld LJ. It is also not difficult to view change of use of an existing building to a single dwelling house as less likely to be harmful to the public interest than other development. In considering the predecessor provisions of the 1968 Act (section 15), Robert Carnwath QC suggested in his February 1989 report Enforcing Planning Control that the logic behind them was not entirely clear, but that special protection was no doubt thought desirable for peoples' homes. He went on to say that in the case of operations, now dealt with in subsection (1), "the governing considerations presumably were the relative ease of detection, the potential costs involved in reinstating the*

10 (Hansard, 6 September 2022.)

> *land, and the need to provide certainty for potential purchasers" (Chap 7, para 3.2). The periods of four years retained in respect of both building operations and change of use to use as a dwelling house clearly reflect the legislator's view that this would give adequate opportunity for enforcement steps, after the expiry of which the infringer would be entitled to repose and to arrange his affairs on the basis of the status quo. The speculation that a need to provide certainty for purchasers can have motivated the legislator is less obviously sure."*

Whatever the reasons for this differentiation practitioners and property owners, prospective purchasers and developers alike need to grapple with the fact that there is less grace where it is possible there has been any breach of planning control.

Important factors will of course be the identification of the point of substantial completion of the relevant operational development and the date when the breach commenced for everything else and for the latter there is also the issue of 'continuity' over the 10 years.

For 'substantial completion' and operational development the classic guidance is provided in House of Lords judgment in *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22; [2003] 1 WLR 983 applying an holistic approach as reprised recently by the SC in *Hillside Parks Ltd (Appellant) v Snowdonia National Park Authority* [2022] UKSC 30 [59] :

> *"in applying section 171B(1), regard should be had to the totality of the operations which the developer originally contemplated and intended to carry out: the relevant question was whether these had been substantially completed".*

For 'identification of the date of breach' and in particular the need to show continuity over the ten year period when considering material change of use and breach of condition the most recent guidance is set out in Mr Justice Holgate's judgment in *R.(oao Ocado Retail Ltd) v Islington LBC* [2021] EWHC 1509 (Admin); [2022] J.P.L. 283 relating to a Certificate of Lawfulness under s191 of the 1990 Act. In particular Holgate J put to bed the notion that the use or breach of condition needed to be actively continuing at the date of enforcement action to have become immune as long as it could be shown that there had been a period of at least ten years prior to enforcement over which the breach was occurring and which could accrue therefore at an earlier stage.

I do not intend to recite all the relevant passages but would simply direct readers to the analysis and conclusions of Holgate J at [43] to [80].

Other than the need to provide evidence of when the breach began or was completed (the burden is upon the enforced owner/occupier) and be aware of how the meet s171B (1) – (3) the transitional provisions provided in the **Planning Act 2008 (Commencement No. 8) and Levelling-up and Regeneration Act 2023 (Commencement No. 4 and Transitional Provisions) Regulations** 2024/452 ('the Amendment Regs') are also key.

These provide that in respect of operational development where it can be shown that they were substantially complete before 25 April 2024 (i.e. the date that the changes came into force) then the relevant immunity period will still be four years.

With regard to change of use of any building to use as a single dwelling house again where it can be shown that the change of use occurred before 25 April 2024 then again the four year period applies.

In addition to the immunity period amendments the Amendment Regs also bring into force the new provisions relating to Enforcement Warning Notices (EWNs) **through a new section** 172ZA to the 1990 Act. EWNs in effect replace the frequent practice where enforcement officers advise owner/occupiers to *"to submit a retrospective planning application within a specified period".* An EWN however notably is only to be issued on the

basis that *"there is a reasonable prospect that, if an application for planning permission in respect of the development concerned were made, planning permission would be granted"*.

The question therefore arises if the person served with a EWN does not submit an application within the time period and the authority decides to issue an enforcement notice, then any ground (a) appeal seeking permission will be able to refer to the EWN as support for that permission. In addition, it is difficult to see how an authority can meet the expediency test under s172 of the 1990 Act relating to a decision to issue an enforcement notice in light of an EWN.

A further change to enforcement relates to the grounds of appeal against Enforcement Notices under s174(2) of the 1990 Act (see section 118 of the LURA) and which appears to be rather at odds with the EWN provisions.

Amended section 174(2A) and (2B) restrict an appellant's right to appeal against an enforcement notice under s.172(2)(a) (i.e. that permission should be granted for the development the subject of the enforcement notice) if there has been an application for planning permission which *"was related to the enforcement notice"* (s.172 (2A)).

Such an application is defined as being (see s174 (2AA)) one involving *"granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control"*.

There are however a series of exceptions to this including where (see ss 2AA and 2AB):

(i) the authority declined to accept or determine the application under ss 70A, 70B or 70C; or

(ii) if the application *"has ceased to be under consideration"* and

(iii) the enforcement notice was issued *"after the end of the period of two years beginning with the day on which the application ceased to be under consideration"*.

Cessation of consideration in turn means refusal or grant or failure to determine and not appealed under s78 (see (2AC) (a); or if a s78 appeal was dismissed or granted or if the Secretary of State declined to determine an appeal under s 79(6) relating to a development order.

The last point to note under the new enforcement provision is that by way of an amendment to s187A of the 1990 Act (by s 120 of LURA) which means that on a finding by a Court of that an offence has been committed for failure to comply with a breach of condition notice there is no limit to the fine that the Court may impose as a penalty.

R(Low Carbon Solar Park 6 Limited) v Secretary of State for Levelling Up, Housing and Communities and Another [2024] EWHC 770 (Admin)

Daniel Kozelko
Call 2018

In this case the High Court considered a challenge to the fairness of a decision of an inspector to refuse to consider representations made by an applicant after the deadline for such submissions had passed. The claimant was the applicant which had made an application for planning permission for a solar farm in Pelham, Manuden directly to the Secretary of State under s.62A TCPA 1990.

Following an earlier application refused by the local planning authority, the claimant made this application and submitted an environmental statement. The Secretary of State gave a period from 9 February 2023 to 20 March 2023 for written representations to be made in respect of that environmental statement; 150 statutory consultees and interested parties did so. A number of those representations concerned the heritage impact of the scheme, including Essex County Council's archaeological officer and Historic England. On 9 March 2023 the claimant

engaged with Historic England for the first time within the s.62A process. A site visit with Historic England did not take place under 14 April 2023.

After the deadline the claimant wrote to PINS to inform it of its intention to submit a rebuttal statement. PINS replied that there is no requirement to do this, and the Inspector would have a discretion whether to consider the submission. On 27 April 2023 the claimant submitted a rebuttal statement. On 11 May 2023 PINS replied and notified the claimant that the Inspector had determined to disregard the information as it was received outside of the representation period. The decision notice was also issued on 11 May 2023. In refusing to consider the rebuttal statement, Article 6(2) of the Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions Regulations 2013 was highlighted:

2) When making his determination, the inspector –
   (a) must take into account any representations made to the Secretary of State pursuant to any notice of, or information about, or consultation in relation to, the application, [under the relevant provisions] which are received within the representation period; and
   (b) may disregard any representations or information received after the end of the representation period.

The claimant challenged the decision and said that the process was procedurally unfair.

HHJ Jarman KC rejected the claim. He began by noting that other inspectors may well have had regard to the rebuttal statement, but that this was not the relevant test. He also considered 'key' in his judgment that the claimant had approached the issue of heritage harm in an improper way: having resolved that any harm could be mitigated, no assessment of the significance of relevant heritage assets had been undertaken. That approach was to put the cart before the horse; to assess whether mitigation was successful it is necessary to assess the significance of assets. The claimant had failed to do this.

The judge went on to consider that the claimant was aware of the gist of the objections of the Essex County Council archaeological officer and Historic England prior to making the s.62A application. The claimant had chosen not to delay its engagement with these consultees within the s.62A process, and had ample opportunity to respond to the points made within the response period (or shortly after). In circumstances where PINS correspondence had properly dealt with the claimant's proposed consultations, and indicated that the Inspector would exercise their discretion, there was nothing unfair about the approach taken. In any event, the judge concluded the outcome would have been the same even if the Inspector had taken into account the rebuttal statement; the claimant had adopted the wrong approach to the heritage issue.

This case emphasises the importance of front-loading applications, particularly under the s.62A route which is characterised by a (relatively) swift decision-making process. It also recognises the often-repeated point that fairness of proceedings is ultimately a fact sensitive matter. It seems likely the underlying facts weighed very heavily on the judge in this case, as the claimant had failed to engage with the relevant consultees and the proper approach to heritage assessment. However, while on less stark facts the balance of fairness may indicate more in favour of a claimant, practitioners should take care to minimise the need to rely on the indulgence of Inspectors to admit late evidence.

ITLOS Advisory Opinion on States' obligations to protect the marine environment from the effects of climate change

Flora Curtis
Call 2019

On 21 May, the International Tribunal on the Law of the Sea delivered an Advisory Opinion on States' obligations under the UN Convention on the Law of the Sea (UNCLOS) to mitigate against the deleterious effects of climate change on the marine environment. The decision is the latest example of an international court or tribunal recognising both the wide-ranging effects of climate change, and the obligations placed on States in the climate context by agreements that were not themselves designed to combat climate change.

Background to the Advisory Opinion

ITLOS's Advisory Opinion came about following a request made in December 2022 by the Commission of Small Island States on Climate Change and International Law (COSIS).

COSIS is a collective of small island states, founded on the eve of COP26 with the aim of promoting and contributing to the definition, implementation, and progressive development of rules and principles of international law concerning climate change. COSIS's core concern is that its members are likely to bear the worst effects of climate change despite having historically been least responsible for it. According to COSIS, the adverse effects that will have a particular impact on small island developing states include rising sea levels, coral bleaching, loss of fisheries, and loss of marine biodiversity.

It was in that context that COSIS requested that ITLOS clarify the climate-related obligations of the State Parties to UNCLOS. UNCLOS is a 1982 agreement establishing a comprehensive legal framework for the regulation of all ocean space. Part XII UNCLOS, upon which COSIS placed particular reliance, places obligations on States to protect and preserve the marine environment from pollution and other hazards.

COSIS asked the following two questions of ITLOS in its request:

> *"What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:*
>
> *a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?*
>
> *b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"*

The Tribunal's Response to the Request

The Tribunal delivered its unanimous response to the request on 21 May 2024.

The Tribunal began by setting out the scientific context in which its decision sits, placing particular reliance upon the scientific consensus set out in the reports of the Intergovernmental Panel on Climate Change (IPCC). The Tribunal noted that the role of the ocean in climate change is twofold. First, the ocean acts as a climate regulator. It stores both heat trapped in the atmosphere by increased concentrations of GHGs and excess carbon dioxide, providing a major control on atmospheric CO2. Second, climate change has had (and will continue to have) numerous adverse impacts on the ocean. It has caused substantial and irreversible losses to marine ecosystems; caused sea level rise; increased the ocean's heat content and marine heat waves; and led to ocean deoxygenation and acidification.

Turning to the substance of COSIS's request, the Tribunal accepted that, according to the Convention's definition of 'pollution', the release of anthropogenic GHG emissions into the environment does amount to pollution of the marine environment. The Tribunal referred to the scientific evidence that anthropogenic GHG emissions have both direct and indirect deleterious impacts on the marine environment. Part XII of the Convention was therefore engaged by COSIS's request.

The Tribunal went on to analyse the obligations placed on States by Part XII, concluding that State Parties have the following duties when it comes to protecting the marine environment from the effects of climate change:

1) To take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions.
2) To take all necessary measures to prevent, reduce and control transboundary marine pollution from anthropogenic GHG emissions.
3) To cooperate continuously, meaningfully and in good faith to prevent, reduce and control marine pollution from anthropogenic emissions.
4) To assist developing States in their efforts to address marine pollution.
5) To monitor the risks and effects of pollution, publishing reports and conducting environmental assessments as a means to address marine pollution from anthropogenic GHG emissions; and
6) To protect and preserve rare and fragile ecosystems, as well as the habitat of depleted, threatened or endanger species and other forms of marine life, from climate change impacts such as ocean acidification.

In its decision the Tribunal reached some interesting conclusions about the factors that are relevant to the determination of what measures are *"necessary"* to protect the marine environment from climate change. First, the Tribunal emphasised the relevance of international treaties on climate change, principally the UNFCCC and the Paris Agreement. However, notwithstanding the relevance of the Paris Agreement, the Tribunal rejected the argument that compliance with the Paris Agreement is in itself determinative of whether the climate-related obligations imposed by UNCLOS have been met. States' obligations under UNCLOS may go further than those imposed by the Paris Agreement – the latter is not lex specialis to the Convention and does not supersede it. Effectively, this means that a State which complies with its obligations under the Paris Agreement may nonetheless fall short when it comes to the climate obligations imposed by UNCLOS.

Second, the Tribunal considered that the principle of common but differentiated responsibilities – in other words, the principle that States with greater means and capabilities must do more to combat climate change than those with less – is relevant to the interpretation of the climate obligations imposed by Part XII of the Convention. While the Convention itself does not make express reference to Parties' *"common but differentiated responsibilities",* it is a key principle in the implementation of international climate agreements. In particular, the Tribunal emphasised that developed nations have specific obligations to provide scientific, educational and technical assistance to developing States in their efforts to address marine pollution from anthropogenic GHG emissions.

Conclusion

ITLOS's Advisory Opinion will be a welcome decision for the small island states represented by COSIS, many of which are facing existential challenges as a result of climate change.

The Advisory Opinion is the latest in a series of decisions made by international courts and tribunals that have recognised the need for States to take rapid action to mitigate and adapt to the effects of climate change. It comes shortly after the similar decision of

the European Court of Human Rights (ECtHR) in the Verein KlimaSeniorinnen Schweiz case, which emphasised States' obligations to tackle climate change in order to protect human rights. Both decisions are reflective of the growing urgency with which States need to act to reduce greenhouse gas emissions, as well as highlighting the wide-ranging nature of the effects of climate change.

The ITLOS Advisory Opinion on climate change will not be the last in the international arena. The COSIS request was made simultaneously with a separate request, made by one of its members states (Vanuatu), to the International Court of Justice (ICJ). The Vanuatu request seeks to clarify, at the highest level, States' obligations under international law to combat climate change. Hearings are likely to take place later this year or in early 2025. It will be interesting to see whether the ICJ takes a similar approach to ITLOS and the ECtHR as it grapples with climate change for the first time.

'Some are more equal than others': Victim status in the case of *Verein KlimaSeniorinnen Schweiz and others v Switzerland*

Ella Grodzinski
Call 2022

Estates The Grand Chamber of the European Court of Human Rights handed down the judgment in the case of *Verein KlimaSeniorinnen* (app no. 53600/20) on 9 April 2024, along with the judgments in the cases of *Carême v France* (app no 7189/21) and *Duarte Agostinho and Others v Portugal and 32 Others* (app no 39371/20). These cases were the first time that the Court directly addressed the relationship between climate change and the European Convention on Human Rights, and for that reason are seminal cases the judgments in which were hotly anticipated.

The judgment in *Verein KlimaSeniorinnen* in particular is a tour de force of international climate law (presumably doing the legal legwork required in advance of future climate change cases). All three judgments have already been the subject of much discussion; rather than re-hashing the many excellent summaries and analyses which already exist online, this article zooms in on the curious discussion of victim status in the *KlimaSeniorinnen* case.

Cases are only admissible before the ECtHR if the applicant is a 'victim' under Article 34 of the ECHR. The ECHR does not allow *action popularis* – action brought purely in the public interest. However, *"in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change"* [483]. The question facing the court was thus how to address allegations of harm arising from state actions/omissions on climate change which potentially affect everybody without allowing *actio popularis* by the back door [481]. The balance here is between throwing the net wide enough that the court can offer judicial recourse for *"obvious deficiencies or dysfunctions in government action or democratic processes [which] could lead to the Convention rights of individuals and groups of individuals being affected",* but not so widely that the number of cases thereby allowed *"would risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change".* (Interestingly, the concern articulated here seems not to be a floodgates argument but a risk of inviting judicial interventionism).

Certain mechanisms which the Court itself has previously used to define victim status do not work in the context of climate change. For example, the Court noted that *"the case-law concerning "potential" victims under which victim status could be claimed by a "class of people" who have "a legitimate personal interest" in seeing the impugned situation being brought to an end"* cannot be applied in a climate change case,

because the risks of climate change concern everyone, and everyone has a *"legitimate personal interest in seeing those risks disappear"* [485]. The Court therefore concluded that in the climate context, applicants will need to show that they are personally and directly affected by the impugned failures (not indirectly or potentially affected, as allowed in other contexts), with reference to two distinguishing factors: firstly, *"the applicant must be subject to a high intensity of exposure to the adverse effects of climate change";* secondly, *"there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm."* The Court noted that each case will, of course, be determined on close examination of the concrete facts, but the Court noted that the threshold for meeting these criteria will be *"especially high"* [487]-[488] – in other words, applicants must be particularly affected, more particularly than the general effects of climate change on the national population.

However, the Court's discussion of the ability of associations to represent victims before the court moves in the opposite direction – while the definition of victimhood is restricted, the allowances made for representation by associations was widened in this case. While conscious again of the need to avoid *action popularis,* the court noted that *"the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context … speak in favour of recognising the standing of associations before the Court in climate-change cases"* [499]. Further, climate litigation is complex and difficult both legally and financially, and well-resourced associations are likely to be better able to conduct such litigation than individuals [497]. The court also noted the distinction between who has victim status and who has standing to represent victims [496], as well as the fact that in most member States to the ECHR *"there may at least be a theoretical possibility for environmental associations to bring a climate-change case"* (note, not exactly the most certain wording…) [494]. For these reasons the Court decided that it would be *"appropriate"* to allow associations locus standi before the court to lodge an application under Article 34 on behalf of individuals, but only if the association is a) lawfully established in its jurisdiction, b) *"pursues a dedicated purpose"* in defence of human rights, and c) can be regarded as *"genuinely qualified and representative to act on behalf [of those] … who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention"* [502]. Thus, in this case the Court permitted KlimaSeniorinnen Schweiz ('Senior Women for Climate Protection Switzerland') to bring the case on behalf of the women in that association.

While it is curious that the Court simultaneously restricted and expanded the pool of potential applicants who can bring a complaint to the ECHR, a degree of change was unsurprising: the paradigm shifts required to allow the ECHR to address human rights mean that the old rulebook clearly cannot apply in quite the same way.

High Court Grants Permission to challenge local energy efficiency standards guidance

Christopher Moss
Call: 2021

On 13 December 2023 the Parliamentary Undersecretary of State for Levelling Up, Housing and Communities Baroness Penn issued a written ministerial statement ("WMS") regarding the approach to be taken by local planning authorities and inspectors in respect of local plans setting energy efficiency requirements that exceed the levels set out in Building Regulations. The statement provides that:

> "[A]ny planning policies that propose local energy efficiency standards for buildings that go beyond current or planned buildings regulation should be rejected at examination if

> they do not have a well-reasoned and robustly costed rationale that ensures:
>
> > That development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.
> >
> > The additional requirement is expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).
>
> …The Secretary of State will closely monitor the implementation of the policy set out in this WMS and has intervention powers provided by Parliament that may be used in respect to policies in plans or development management decisions"

Prior to the latest statement, the relevant national policies were unhelpfully somewhat unclear due to conflicts with a 2015 WMS, changes to the Building Regulations in 2021 increasing energy standards, and subsequent Government statements in 2021 and 2022. The pre-December 2023 position was however recently addressed by Lieven J in *R (Rights Community Action Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 359 (Admin) and essentially was that LPAs could exceed energy efficiency requirements beyond the minimum standards set out in the Building Regulations until such a time as section 43 of the Deregulation Act 2013 comes into force. This accorded also with paragraph 158 of the NPPF requiring plans to "take a proactive approach to mitigating and adapting to climate change". Energy efficiency standards going beyond the Building Regulations are already required by a number of local authorities, whether through model planning conditions as in Swale Borough Council, or local plan polices as in Bath and North East Somerset.

The latest WMS is therefore a significant change.

It is stated that the proliferation of multiple varied local standards undermines clarity for businesses to invest and prepare to build net-zero ready homes and that nationally applied standards would provide much-needed clarity and consistency. It is also noted that "A further change to energy efficiency building regulations is planned for 2025 meaning that homes built to that standard will be net zero ready and should need no significant work to ensure that they have zero carbon emissions as the grid continue [sic] to decarbonize."

Shortly after publication of the December WMS, Rights Community Action, supported by the Good Law Project, issued a claim for judicial review challenging the latest guidance. Permission was granted to apply for judicial review on two grounds by Sir Peter Lane on 10 April 2024 who stated that it would be desirable for the case to be heard before the end of Trintiy Term, 31 July 2024. The grounds of claim have not been published.

Comment

There are some merits with the approach set out in the December WMS, no doubt variable local standards can cause headaches for businesses proposing house building development across the country. Equally however, variable local policies and standards are (fortunately or unfortunately) a hallmark of the planning system and a feature developers are no doubt familiar with. Further, given the importance placed in the NPPF on local plans taking proactive measures to mitigate and adapt to climate change, it would seem desirable for local authorities to be able to do just that in the sphere of energy efficiency; particularly given the Government plan to require homes to be net zero ready in the proposed change to the Building Regulations in 2025. In any event, the outcome of Rights Community Action's latest claim will certainly be one to watch.

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Call 1999 | Silk 2009

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.

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Paul was called to the Bar in 1985, building up a substantial practice in public, environmental and planning law before becoming an MP (1997-2005), during which time he served on the Home Affairs Select Committee, the Joint Committee on Human Rights and the Joint Committee on House of Lords Reform. Since returning to the Bar in May 2005, Paul rapidly rebuilt his practice and was elevated to silk within six years. Paul acts for developers, local authorities and private clients, including local campaign groups. Paul is regularly recommended in the legal directories and was named as The Times Lawyer of the week following his successful challenge against a decision to redevelop the house in which Sir Arthur Conan Doyle wrote The Hound of the Baskervilles. Paul was shortlisted for *"Real Estate, Environmental and Planning Silk of the Year"* at The Legal 500 UK Bar Awards 2018 and, in 2005, was elected as a Visiting Fellow to Cambridge University's Centre of Public Law.

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Celina regularly acts for and advises local authority and private sector clients in all aspects of Planning and Environmental law including the Community Infrastructure Levy (CIL) regime, Highways Law, Sewers and Drains and National Infrastructure. She appears in Planning Inquiries representing appellants; planning authorities and third parties as well as in; the High Court and the Court of Appeal in respect of statutory review challenges and judicial review cases. She also undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown Courts as well as Enforcement Notice appeals. She specialises in all aspects of Compulsory Purchase and compensation, acting for and advising acquiring authorities seeking to promote such Orders or objectors and affected landowners. Her career had a significant grounding in national infrastructure, airports and highways projects and she continues those specialisms today – *"dedicated, very analytical and keen for precision… She is very much considered to be a leading figure in the legal planning world."* Chambers Directory 2023.

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Call 2018

Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. In 2019-2020 Daniel was a judicial assistant to Lord Carnwath and Lady Ardenat the Supreme Court of the United Kingdom. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20.

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Flora Curtis
Call 2019

Flora's practice is focused on environmental, planning and public law. Flora has been ranked as one of the top planning barristers under the age of 35. She acts for a wide range of clients including NGOs, central and local government, developers and landowners, and local residents. She regularly appears in court, inquiries and hearings, both in her own right and as junior counsel. Flora has particular experience in cases involving complex environmental matters, and has acted in high profile climate change litigation. Between August 2023 and March 2024, she was seconded to the Office for Environmental Protection.

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Christopher Moss
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Christopher is keen to grow his practice in planning and environmental matters. He has advised claimants and local authorities on matters including rights of way and related issues, breach of condition enforcement proceedings, and local authorities' powers in relation to restricting advertising of 'high carbon' products. He is currently being led by Daniel Stedman Jones in a judicial review of a decision by a local authority to de-pedestrianise a road as part of a multi-million-pound scheme of highway improvements.

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Ella Grodzinski
Call 2022

Ella joined 39 Essex Chambers as a tenant in September 2023, following successful completion of her pupillage. She accepts instructions across all the Chambers' practice areas, with a particular interest in environmental, planning and public law cases. She has already been involved in matters ranging from judicial review of planning decisions to the registration of town and village greens.

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