



# e-law

Better law for the environment

November/December 2016 | Issue 97



Welcome to the final edition of e-law for 2016. The theme for this issue is housing and planning.

While Brexit continues to dominate and we await the Supreme Court's judgment on whether the government can use prerogative powers to give notice under Article 50 TEU without parliamentary approval, Britain's housing crisis rumbles on.

Recent reports and announcements on housing and planning highlight some of the major issues and developments in this area, including:

- The [Royal Institution of Chartered Surveyors](#) (RICS) setting out that the UK is facing a 'critical rental shortage'. Rising house prices and pressure in social housing have resulted in a more than doubling of the number of households in the private rental sector since 2001, with upward future projections.
- The Institute for Public Policy Research (IPPR) and their report, [Closer to Home, Next Steps in Planning and Devolution](#), outlining that England needs a new devolution deal on housing to prevent a London-style housing crisis from creeping to the North. Ideas include newly-created combined authorities led by 'metro mayors' agreeing to commit to long-term housebuilding targets in return for increased powers and resources, such as the ability to build on regional green belts.
- The [Redfern Review](#), focusing on the causes for the fall in home ownership, and calling for an independent Housing Commission, alongside key policy recommendations.
- The government announcing a [new house-building package](#) of £5bn

In this edition of e-law we have a number of articles, which pick up some of these issues and consider how they impact on the environment:

- William Upton's article, [Managing housing growth and the environment—a fair balance or not?](#) examines the current balance being struck between housing development and the environment in English planning decisions.
- Horatio Waller looks at European caselaw and how development affects environmental standards in [Ensuring that development complies with the environmental standards in the Water Framework Directive: has the door been opened for judicial reviews?](#)
- Clare Symonds highlights Planning Democracy's views on the need for [Planning reform in Scotland](#)
- In news from the devolved administrations, Dr Victoria Jenkins discusses aspects of the Planning (Wales) Act 2015 in [Planning law in Wales](#)

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We also have a really interesting piece in matters in practice, [Aarhusted development: Northern Ireland's curious costs protection in environmental cases consultation](#), where Ben Christman takes a closer look at how a consultation in Northern Ireland on protective costs orders rules went from a regressive access to justice position to changes which may actually improve the position of environmental litigants in Northern Ireland.

Stephen Sykes' [Words from the Chair](#) reflecting on 'UKELA's international year' provides a great summary of the highlights of UKELA's international outreach, forging relationships with environmental law associations around the world and continuing to share knowledge and co-operation. This work could not be more important in the current global context and with Donald Trump taking the US Presidency in 2017.

And finally, I hope those of you that saw the Garner Lecture earlier this month enjoyed Pamela Castle OBE's thought provoking lecture on 'Environmental Science, Law and Policy – Challenges and Opportunities' as much as I did. If you missed the lecture, and would like to watch it, it is available in the member's area of the [UKELA website](#), with the password Garner2016. We have also provided a copy of [Pamela's lecture](#) in this edition of e-law.

Wishing you all the best for the festive period.

Kind regards

*Simone Davidson*

**Simone Davidson**  
Acting Editor  
[elaw@ukela.org](mailto:elaw@ukela.org)

## E-law editorial team

**Simone Davidson**, Acting Editor – Simone is Head of Environment at LexisPSL and was at Clyde & Co for 8 years prior to joining LexisNexis. Simone is covering Hayley Tam's maternity leave.

**Jessica Allen**, Assistant Editor – Jessica is currently studying Law with French and French Law at the University of Nottingham, expecting to graduate in 2017.

**Ben Christman**, Assistant Editor – Ben is a final year PhD candidate in the School of Law at Queen's University Belfast.

**Lewis Hadler**, Assistant Editor – Lewis currently studies the BPTC at the University of the West of England, having previously worked as a paralegal with Richard Buxton Environmental & Public law. He graduated in 2015 after completing his LLB at Anglia Ruskin University Cambridge.

# Words from the Chair



I would not wish for one moment to hurry the year along, but 2016 is drawing to a close and I thought members might be interested in a few reflections on UKELA's achievements since the start of the year.

## Our international year: highlights

Each year the Council sets a theme around which UKELA's principal activities are clustered. The theme for 2016 was environmental law's international dimension. Here are some of the highlights from our international year:

- Our annual conference was held in Brighton. The international theme took centre stage. There were speakers from Australia, Canada and the US, as well as a message of support from Kumsil Kang of the People for Earth Forum in South Korea.
- Our President, Lord Carnwath, spoke at Brighton about the 1st World Environmental Law Conference. This took place at Rio de Janeiro, Brazil, on 29 April 2016. It resulted in the World Declaration on the Environmental Rule of Law. This acknowledges that the environmental rule of law can be implemented by strengthening the roles of civil society, environmental law associations and other non-state actors that fill gaps in state-based environmental governance systems.
- We established a new category of membership for our international colleagues. Our first international members are from the People for Earth Forum from South Korea.
- By the end of 2016 we will have hosted senior judicial, legislative and non-legal delegations from Brazil, China, South Korea and Turkey. Delegates were especially interested in the UK's laws relating to climate change.
- On 11 November 2016, UKELA welcomed a delegation of senior judges from the People's Republic of China led by LI Deshen, Chinese Supreme Court Senior Judge. UKELA was

represented by Paul Davies of Latham & Watkins and Lucy Bruce Jones of Norton Rose Fulbright. The meeting was part of a week-long visit to the UK organised by ClientEarth.

- We set up UKELA's International Ambassadors scheme. We have 15 volunteers who will help us to extend our reach to both established and nascent environmental law associations in other parts of the world where help is most needed.
- We had representatives attending the annual dinner of the Environmental Law Institute at Washington last month, raising UKELA's profile amongst the 1,000+ delegates.
- One of UKELA's key strategic aims – as set out in our 2016-2020 Strategic Plan – relates to international matters. We aim to 'interact with international bodies to share knowledge, foster co-operation and enhance networking in key jurisdictions relevant to [our] members' working lives'.

So, it has been a spectacularly busy international year in which our association really has spread its wings.

## Brexit

Another dominating feature of 2016 – and no doubt for several years to come – has of course been Brexit. UKELA has been heavily engaged in the legal aspects of Brexit for the past 18 months, always taking great care to retain our independence.

We have set up a Brexit Task Force ('BTF') to guide us and ensure that we make the fullest possible contribution to ongoing discussions in each of the four countries comprising the UK. I have been invited by the 25 members of the Task Force to act as Chair of this very important body and I will do so until my term of office is complete. The BTF has made a good start with a proactive exercise to map out the EU derived environmental laws around the UK. Our Nature Conservation Working Party is mapping the environmental standards for the protection of habitats and species. This work will produce a template for our working parties to adopt for their specialist areas.



I would like to extend my gratitude to our founding Chair and Patron, Richard Macrory, for promoting UKELA's work on Brexit, as well as the establishment of the BTF, when giving evidence to the [House of Lords EU Energy and Environment Sub-Committee](#) on 26 October 2016. We will need to keep ourselves on our toes with respect to Brexit throughout 2017 to ensure that our interventions make a difference. I would also like to extend my sincere thanks to our Patron, Tom Burke, for helping me to think creatively and boldly about the work of the BTF and possible sources of funding for this as we go forward.

All organisations need to be concerned with internal and external considerations if they are to fulfil their obligations. Viewed in this light, UKELA's international activities can be seen as an essentially positive and centrifugal force – encouraging members to look outwardly and engage with other like-minded people around the world. In contrast, Brexit works more as a centripetal force, inclining us to look inwardly at our large collection of EU-derived environmental laws and to contemplate or prepare for change.

In their different ways, our international and Brexit related work shows that UKELA is working with great determination and commitment to make a difference.

Regards,

*Stephen Sykes*

**Stephen Sykes**  
UKELA Chair

# News

## Message to UKELA members from UKELA's International Ambassadors Group

One of UKELA's key initiatives of 2016 has been setting up our International Ambassadors initiative. We have a highly motivated team of 15 UKELA members who will be working together to support the development and practice of environmental law – and environmental law associations – overseas. The team is drawn from academia, private practice, the Bar and environmental consultancy.

We held our inaugural meeting in London on 16 November – the day of the Garner Lecture. It was well attended. The team is keen to play its part as UKELA's reach and ambition are extended internationally. Many of our team members have great connections with a range of countries. Our next aim is to identify the countries where we will concentrate our best efforts. We would appreciate some help with this exercise so that we choose the countries where we can have the most impact.

We are especially interested in hearing from any of our members who have a strong interest in the development of environmental law in any of the following countries:

- Belgium
- Brazil
- China
- Columbia
- France
- Myanmar
- Nigeria
- Sierra Leone
- South Korea
- United States

More generally, please do let us know if you would like to join our International Ambassadors initiative. Help can take the form of sharing contacts and information which could make all the difference, to volunteering a few days of your time to speak to or even visit people in-country. We have no doubt that this initiative will be enriching for all concerned. We will share what we can to help and we will learn in return.

We look forward to hearing from you.

## International membership reminder!

A reminder! We now offer a special rate for overseas members of £30 per member (with the exception of students, graduates and unwaged members where the rate will remain £15) available from 2017. But for new members only, this special rate is available now, so do please spread the word among your international contacts. For further details, see our [website](#).

## Membership renewals

Your membership renewal reminder will be coming your way very soon! Look out for your email pinging into your inbox during the early part of December. We look forward to you renewing your membership for 2017: we have lots of exciting activities planned, not least of which is our Annual Conference over the weekend of 7-9 July in Nottingham. Bookings will open very soon for early birds – see more in our events section. Remember that membership entitles you to attend all our events at a reduced rate and gives you exclusive access to our members' only section of the website where you can catch up on presentations from events you may have missed.

## Direct debits

Have you considered paying your membership subscription by direct debit? It is really straightforward to set up and takes all the hassle out of renewal. It also helps UKELA to save admin costs and time, meaning we can put more effort into other areas to benefit members. If you would like to sign up for a direct debit, please contact [Alison Boyd](#) for a form.

# News from the devolved administrations

## Planning law in Wales



*Dr Victoria Jenkins, Senior Lecturer in the College of Law and Criminology and Co-Director of the Hywel Dda Institute at Swansea University, and Co-Convenor of the UKELA Wales working party*

Even before devolution a distinctive Welsh approach to land-use planning began to emerge through the introduction of Planning Policy Wales. During the formative years of the Assembly, further changes to development planning were introduced by 'Wales only' provisions in the Planning and Compulsory Purchase Act 2004. However, the introduction of the Planning (Wales) Act 2015 (the Planning Act) has produced a step-change in the distinction between English and Welsh planning law.

The history of planning law in Wales and the new Planning Act have been covered in detail in the *Journal of Planning Law*.<sup>1</sup> The following is therefore, a brief outline of the more salient features of the system.

The Planning Act followed the introduction of the Well-Being of Future Generations (Wales) Act 2015; the details of which have been discussed in this journal.<sup>2</sup> As public bodies, Welsh government and local planning authorities will be subject to a duty to 'carry out sustainable development'. Section 2 of the Planning Act makes clear that in carrying out their planning functions these bodies must take development decisions in accordance with this duty.

One of the main aims of the new legislation was to create a more prominent role for Welsh government in land-use planning. This is achieved by providing for the designation of certain types of development as Development of National Significance (DNS). These projects will be identified in a National Development Framework (NDF) (discussed below) or will be listed in secondary legislation.<sup>3</sup>

Decisions on DNS will be taken in line with existing law that refers to the need to follow the Local Development Plan (LDP), unless material considerations indicate otherwise.<sup>4</sup> However, the LDP must now be in 'general conformity' with national development plan and regional plan (where relevant).<sup>5</sup>

The second key development under the Planning Act is the introduction of this new system of national and regional development planning. National development planning is not novel to Wales, as a Wales Spatial Plan has been in place since the introduction of the Planning and Compulsory Purchase Act 2004. This has now, however, been

replaced by a NDF.<sup>6</sup> The aim of the NDF is described by the Welsh government as follows:

- To set out the Welsh government's land-use priorities by identifying key locations for change and infrastructure investment over a 20 year period;
- To provide a national land-use framework for Strategic and LDPs;
- To coordinate and maximise the potential benefits from both public and private funding and investment;
- To provide the development plan context for the Welsh Ministers to make decisions on DNS.<sup>7</sup>

The Planning Act will also introduce a system of regional development planning, referred to as Strategic Development Planning.<sup>8</sup> The exact boundaries of strategic planning areas will be decided by Welsh Ministers based on proposals from LPAs who have been directed to provide these.<sup>9</sup> However, the intention is to facilitate a City Region approach to development, i.e. around Cardiff, Swansea and the A55 corridor.<sup>10</sup>

Strategic Development Plans (SDPs) will be created by a panel made up of two-thirds members of the relevant LPAs and one third independent experts. The latter do not, however, have any voting rights and cannot act as Chair or Deputy Chair of the panel.<sup>11</sup>

There are no plans to introduce a system of neighbourhood development planning in Wales but 'Place Plans' created by Town and Community Councils may continue to influence local planning process as supplementary planning guidance.

More changes will also be forthcoming in the Wales Bill and the Law Commission is currently considering a process of codification for Welsh Planning Law.<sup>12</sup> This report is a response to growing concerns about the complexity of Welsh Planning Law, given that the Planning Act takes effect by amending the already very complex Town and Country Planning Act 1990 and Planning and Compulsory Purchase Act 2004. Further changes to local land-use planning may also arise from the plans to reorganise local authorities in Wales. Previous proposals to reduce the number of councils from 22 to eight or nine have now been

dropped; but there are now plans to introduce measures to ensure greater regional co-operation in the provision of services whilst maintaining existing local authorities' structures for the purposes of engaging with local citizens.<sup>13</sup>

From an environmental perspective, perhaps the most important issue that arises is how the new system of development planning will interact with the approach to area based management of natural resources for Natural Resources Wales (NRW) under the Environment (Wales) Act 2016.<sup>14</sup> There is little attention to this very significant issue in these legislative frameworks.

## Endnotes

- 1 On the history of planning law in Wales see Williams and M Jarman 'Planning Policies and Development Plans in Wales – Change and Coexistence' [2007] JPL 985. For a discussion of the proposals for the new Act see: V Jenkins, 'The Proposals for the Reform of Land Use Planning in Wales' *Journal of Planning Law* (2014) Issue 10, 1055-1204. For a detailed outline of the Act see H Williams & V Jenkins, 'The Planning (Wales) Act 2015: A Case Study in Evidence-Based Planning Reform under Devolution' [2016] *Journal of Planning and Environmental Law*, 637. For more on the legislative process see: H Williams and V Jenkins 'The Planning (Wales) Act 2015: Lessons in Law Making under Devolution' [2016] *Journal of Planning Law*.
- 2 N Barry, 'The Wales Working Party and the Well-being of Future Generations Bill' *E-law* (Issue 86, February 2015) p. 31. See also H. Davies, 'The Well-being of Future Generations (Wales) Act 2015: duties or aspirations?' (2016) *Environmental Law Review*, p. 41.
- 3 Town and Country Planning Act 1990, s 62C.
- 4 Town and Country Planning Act 1990, s 70(2); Planning and Compulsory Purchase Act 2004, s 38(6).
- 5 The SDP must be in 'general conformity' with the National Development Framework for Wales (NDF) (Planning and Compulsory Purchase Act 2004, s 60I(3)) and LDPs must be in general conformity with both the relevant SDP and NDF (Planning and Compulsory Purchase Act 2004, s 62(3)(A)).
- 6 Planning and Compulsory Purchase Act 2004, s 60–60C.
- 7 The Development Plan Prospectus (Welsh Government, 2015).
- 8 Planning and Compulsory Purchase Act 2004, s 60D.
- 9 Planning and Compulsory Purchase Act 2004, s 60E(1).
- 10 For further details see Williams, H. & Jenkins, V., 'The Planning (Wales) Act 2015: A Case Study in Evidence-Based Planning Reform under Devolution', *Journal of Planning and Environmental Law*, 2016, 637.
- 11 schedule 2A, ss 13 & 10 respectively.
- 12 Planning Law in Wales: A Scoping Paper LCCP228 (Law Commission, 2016). Future developments and the implementation of the Act will be discussed in a forthcoming article by the author and Huw Williams Partner, Geldard's Solicitors, Cardiff.
- 13 Assembly News Release: Working Together to Reform Local Government: Cabinet Secretary sets out Building Blocks for more Resilient Local Authorities. The Minister also stated an intention to carry out an independent review of community councils.
- 14 This legislation has also been covered in detail in this journal see further: Victoria Jenkins, 'Welsh devolution and the protection of the environment: the story so far and the future challenges' [2016] September/October *UKELA e-law* (96) 23–25.

# Regional news

## East Midlands

Laura Hughes, Chair of the East Midlands group writes: Sue Clarson has decided to step down from her role of Secretary of the East Midlands regional group. Sue was a founder member of the East Midlands group from its establishment in the mid 1990's; she was appointed its secretary at the outset and has retained that role ever since. Professionally Sue was an Associate specialising in planning and environmental law at Browne Jacobson. She specialised in nature conservation, working extensively for both (what was then) English Nature and the Countryside Council for Wales. Throughout her tenure as secretary Sue has suffered from MS, but she has never allowed this to prevent her from efficiently organising a varied and stimulating programme of speakers and events for the East Midlands Group. Sue is a staunch supporter of UKELA and has many friends amongst the Association's membership.

Sue will continue to be a member of the management committee of the East Midlands Group. The group, and the association as a whole, owes Sue a considerable debt of gratitude for her commitment to the association over such a long period. Sue is looking forward to maintaining her involvement in the association and meeting members old and new in the future. All of us at UKELA would like to join Laura in thanking Sue for her invaluable support for UKELA over many years.



Taking over from Sue will be no mean feat, but Will Thomas has very kindly stepped forward to do so! Will is an Assistant Solicitor at Browne Jacobson LLP specialising in public law, with a focus on planning and the environment. He qualified into their public law team in 2014 and works for clients in both the private and public sectors. He has experience in a variety of areas, ranging from judicial review claims to non-contentious planning and environmental advisory work. Out of the office, Will enjoys travel, long walks in the great British countryside and the occasional triathlon. Welcome Will!



# Working party news



By Rosie Oliver, UKELA's working party adviser

UKELA's working parties are in the process of an environmental law mapping exercise to identify issues arising in relation to Brexit. The work includes mapping how EU and international environmental law is reflected in UK law, and identifying controls that are priorities to preserve as well as opportunities for reform.

UKELA submitted suggestions to the Law Commission in October for reform to primary legislation on flooding, with help from the water working party. This followed a meeting with the Law Commission about their 13th Programme of Law Reform. You can read the submission [here](#).

On 15 November, members of UKELA's working parties on environmental litigation, water and contaminated land met Turkish officials to discuss transposition of the Environmental Liability Directive. Turkey is transposing the Directive as part of its EU accession process, and the officials were keen to hear how the UK has approached the Directive, issues arising and lessons learned.

The planning and sustainable development working party helped organise the highly topical seminar on Housing Growth and the Environment on 6 October.

For more information, read William Upton's article on [Managing housing growth and the environment—a fair balance or not?](#) Two new convenors have just been appointed to lead the group: Peter Dixon of Exchange Chambers and Patrick Duffy of Waterman Group.

Working parties are in the process of planning events for 2017. Events in 2016 include the Nature Conservation Working Party meeting on Saturday 26 November.

# Student news

## Student competitions

The 2016-17 UKELA Student Competitions have kicked off with the launch of the 2017 UKELA Moot Competition at our Student Careers Evening, held on 23 November 2016. The 2017 UKELA Moot Competition and rules are available on our [website](#). The deadline for the receipt of skeletons is 4pm on 30 January 2017. The finals will be held in London on 6 March. We look forward to receiving your entries – good luck!

For more details of our other competitions and opportunities, see our Facebook page and our website.

## E-law student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal, which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to one of our Student Advisers for consideration by the Editorial Board. If selected, your article should be written with the assistance of a practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. Details for themes and deadlines will be posted on the UKELA [Facebook](#) page.

## Public Interest Environmental Law (PIEL) UK conference 2017

Public Interest Environmental Law (PIEL) UK is a not-for-profit organisation that organises an annual conference on a burning topic in Environmental Law. As it is completely run by a committee of students, we invite you to [email us](#) to express your interest in being part of the 2017 Committee.

Joining the PIEL UK Committee gives fantastic opportunities to:

- Create your own conference programme.
- Liaise with expert speakers.
- Fundraise.
- Acquire professional experience vital for your CV!

Previous speakers have included a former Vice-President of the International Court of Justice, lawyers from notable firms and barristers' chambers, leading NGOs and intergovernmental organisations, scientists, politicians, and policy-makers. Many PIEL UK Committee alumni have since gone on to work as professors, practitioners, researchers, and NGO representatives. For details of past conferences, see our [website](#).

Follow us on Twitter (@Piel\_uk) and like our [Facebook](#) page for details of our meetings.

We look forward to hearing from you!

# UKELA events

## **London meeting: the implications of UK trade negotiations for environmental law after Brexit – 5 December, London (and various UK venues)**

Join us for this early evening session on Brexit: Trade and the Environment in London and via webinar across the UK. The context for UK's environmental law could completely change following a UK withdrawal from the EU. The UK's trade arrangements with the rest of the world and any new trade agreements are likely to drive the way the UK restructures its international relationships, which could have fundamental consequences for environmental regulation and policy priorities. This seminar explores the interaction between trade law and environment issues. Find out about how environmental issues are currently dealt with under WTO law and trade agreements including the TTIP, hot issues, and how things might develop in the future. For more details, including booking details, visit our [website](#).

## **UKELA Scotland: 21st century environmental regulation in Scotland and One Planet Prosperity – challenges, opportunities and innovation – 19 January, Edinburgh**

In August 2016, the Scottish Environment Protection Agency (SEPA) published its new strategy for regulation, aimed at enabling the agency to tackle the 21st century challenges facing Scotland's environment. SEPA's ambition with the new strategy, after getting all Scottish businesses meeting the requirements of environmental laws in Scotland, is to help them go 'beyond compliance', finding profitable ways to do more than the law requires.

In 2010, the Scotch Whisky Association (SWA) published the first Environmental Strategy to cover an entire Scottish sector. Sustainability is at the heart of the strategy, which has won numerous plaudits and awards. Distillers must comply with exacting environmental standards and have a strong record of compliance. The SWA works with its members to encourage sharing best practice and continuing innovation.

In this seminar, UKELA brings together Terry A' Hearn, Chief Executive of SEPA and Morag Garden, Head of Sustainability and Innovation at SWA, to reflect on the first six months of SEPA's new regulatory regime and consider how it has worked in a heavily regulated industry where a 'beyond compliance' outlook is already firmly ingrained. Terry will discuss how SEPA's regulatory strategy focuses on the global challenge of reducing over-use of the planet's natural resources and Morag will cover the Scotch Whisky sector's environmental strategy and the partnership approach with SEPA to help deliver the One Planet Prosperity ambition for Scotland. For more details and to book, visit our [website](#).

## **Nature conservation working party meeting – 21 January, Nottingham**

Please contact the [convenor](#) for more details and to book.

## **London meeting: wildlife law – 28 February, London and various UK venues**

More details will be posted on our [website](#).

## **Annual conference – 7-9 July 2017, University of Nottingham**

Our theme in 2017 is Sustainable Cities. Booking details coming [online](#) soon! Note the date in your diary!

# The e-law 60 second interview

## Peter Dixon (Exchange Chambers) and Patrick Duffy (Waterman International), new co-convenors of the planning and sustainable development working party



### What is your current role?

Peter: I am a barrister practising from Exchange Chambers in Manchester, Liverpool and Leeds – and newly-installed co-convenor of the UKELA planning and sustainable development working group.

Patrick: I am a Technical Director at Waterman Infrastructure and Environment, which is part of the Waterman Group. I am based in London, and while most of my work is in London I also work throughout the South East and Midlands. I am also a newly-installed co-convenor of the UKELA planning and sustainable development working group.

### How did you get into environmental law?

Peter: I was a planning consultant for more than 25 years before coming to the bar and in that time became increasingly interested in the interaction between the statutory planning regime, environmental regulation and private law.

Patrick: I have been involved in environmental planning and EIA particularly for 23 years. For most of this time I have been employed within planning consultancies and now with several years working in environmental consultancy and three years with the Environment Agency. It is impossible to undertake EIA and prepare environmental statements without understanding the planning regime in which it operates and the legal issues that can arise.

### What are the main challenges in your work?

Peter: Anything labelled as deregulation or reform: it is rarely either.

Patrick: Convincing clients of the value of EIA and that it is worth the cost to do it well.

### What environmental issue keeps you awake at night?

Peter: The localism agenda in England has raised expectations that the planning system is failing to fulfil.

Patrick: The implications of the new EIA Directive within the current development market.

### What's the biggest single thing that would make a difference to environmental protection and well-being?

Peter: The recognition that environmental protection and development are mutually dependent.

Patrick: An adequately resourced planning system.

### What's your UKELA working party of choice and why?

Both: planning and sustainable development, as it is most closely aligned with our practice.

### What's the biggest benefit to you of UKELA membership?

Both: It is simply a very good way of keeping in touch with environmental law and practice – and with fellow practitioners in the same field.

# Environmental law headlines

## October – November 2016

A selection of recent environmental law news and updates prepared by the teams at [LexisPSL Environment](#) and [Practical Law Environment](#).

### Paris Agreement enters into force

#### LexisPSL Environment

The Paris Climate Change Agreement has entered into force. The agreement, which was ratified in October 2016, includes 197 countries which have promised to limit greenhouse gas emissions, and focus on investing in low carbon technologies.

The aim of the agreement is to keep global average temperatures from rising more than 2°C.

Attention now turns to implementing the terms of the agreement. The World Energy Outlook (WEO) 2016, released during the 22nd UN Climate Conference of the Parties (COP22) in Marrakech:

- Examines how far nations have to go to meet their emissions targets,
- Outlines a course that would limit the rise in global temperature to below 2°C,
- Plots possible pathways for meeting the much more ambitious 1.5°C goal.

The EU is expected to play a major role in negotiating the common international rules required to implement the Paris objectives.

For more information, see [LNB News 04/11/2016 38](#), [LNB News 07/11/2016 105](#) and [Environment Analysis – Parties prepare for Paris Agreement](#).

### Air quality developments: further consultations and ClientEarth succeeds in judicial review

#### Practical Law Environment

In October 2016, the following air quality consultations were published:

- The UK government published a consultation on a framework for clean air zones for England, including mandatory zones in Birmingham, Derby, Leeds, Nottingham and Southampton. The consultation follows the government's national air quality plan for nitrogen dioxide, published in December 2015.
- Transport for London published a second consultation on detailed proposals for the emissions surcharge in London and on extending the Ultra Low Emission Zone (ULEZ) planned for central London.

However, in November 2016, the High Court delivered its judgment in ClientEarth's long-running legal proceedings concerning the UK government's failure to comply with its obligations under the Air Quality Directive 2008 (2008/50/EC). The court quashed the government's December 2015 air quality plans because they failed to comply with the Air Quality Directive 2008 and the Air Quality Standards Regulations 2010 (SI 2010/1001).

For more information, see [Legal update, Government consults on clean air zone framework for England](#), [Legal update, Transport for London publishes second consultation on reducing air emissions from vehicles in London](#) and [Legal update, ClientEarth succeeds in judicial review application to quash government's December 2015 air quality plan \(High Court\)](#).

### Permission granted for horizontal fracking

#### LexisPSL Environment

Cuadrilla's planning appeal to test frack in Lancashire was granted on 6 October 2016, enabling shale gas to be fracked horizontally for the first time.

Last year Lancashire County Council refused permission for Cuadrilla to extract shale gas at two sites, Roseacre and Preston New Road, on grounds of noise and traffic impact. However Cuadrilla appealed the decision and Communities Secretary Sajid Javid upheld the appeal. Cuadrilla restated its case at a planning inquiry earlier this year, which lasted 6 weeks. A Planning Inspectorate report was also sent to the Department for Communities and Local Government on 4 July with a three month period being given to reach a decision.

Plans for fracking at the Preston New Road site at Little Plumpton in Lancashire have been approved but the Roseacre Wood site has not yet been approved amid concerns over the impact on the area.

In May, North Yorkshire County Council approved an application by Third Gas to vertically extract shale gas near Kirby Misperton in Ryedale. However this decision has been challenged by Friends of the Earth and Frack Free Ryedale. A rolled up permission and substantive hearing has been set down for 22 and 23 November 2016.

For more information, see [LNB News 06/10/2016 99](#), [Environment Analysis, Horizontal fracking and the shale industry](#) and [Environment Analysis, Fracking at Ryedale—environmental groups seek to challenge consent](#).

## Consolidating draft Environmental Permitting Regulations 2016

### Practical Law Environment

In October 2016, the draft Environmental Permitting (England and Wales) Regulations 2016 were published. They are accompanied by a draft explanatory memorandum.

The draft Regulations consolidate the Environmental Permitting (England and Wales) Regulations 2010 (*SI 2010/675*), which have been amended 15 times.

It is expected that the consolidating Regulations will come into force on 1 January 2017.

Annex A to the explanatory memorandum accompanying the draft Regulations sets out the correlations between the 2010 and the consolidating Regulations.

For more information, see [Legal update, Consolidating draft Environmental Permitting Regulations 2016 published](#).

## New flood risk governance model proposed to manage future flood risk

### LexisPSL Environment

A new model for managing flood risk has been proposed by the Environment, Food & Rural Affairs Select Committee (EFRA) in its report relating to future flood prevention.

The model would involve establishing a National Floods Commissioner for England, effectively overhauling the role of the Environment Agency, as well as recommending a new regional flood and coastal boards and an English Rivers and Coastal Authority.

The report calls for the tightening of building regulations to provide for flood proofing properties, if a voluntary code is not agreed and also wants developers who fail to comply with planning requirements to be liable for the costs of associated flooding.

For more information, see [LNB News 02/11/2016 59](#) and [Environment Analysis, Examining proposals to improve management of floods](#).

## ECJ decisions clarifying impact of Borealis Polyolefine decision on allocation of EU ETS allowances

### Practical Law Environment

In September and October 2016, the Court of Justice (ECJ) clarified the impact of its April 2016 decision, in *Borealis Polyolefine*, concerning the cross-sectoral correction factor (CSCF) in the allocation of free EU allowances (EUAs) to installations in Phase III of the EU Emissions Trading Scheme (EU ETS), which runs from 2013 to 2020.

In both cases, the ECJ decided that the operators of the installations concerned were not entitled to additional EUAs.

For more information on *Borealis AB and others v Naturvårdsverket* (Case C 180/15), see [Legal update, Impact of Borealis Polyolefine decision clarified on cross-sectoral correction factor in Phase III of EU ETS \(ECJ\)](#).

For more information on *Yara Suomi and others v Työ- ja elinkeinoministeriö* [2016] EUECJ C-506/14, see [Legal update, Impact of Borealis Polyolefine decision clarified on carbon leakage in Phase III of EU ETS \(ECJ\)](#).

## Court of Appeal rules on decision to withdraw the renewable source electricity exemption (Infinis Energy Holdings Ltd)

### LexisPSL Environment

On 8 July 2015 an announcement was made that the renewable source electricity (RSE) exemption was to be scrapped, with effect from 1 August 2015. The RSE exemption was one of a number of exemptions made available from the Climate Change Levy (CCL) for supplies of electricity generated from renewable sources through the use of Levy Exemption Certificates (LECs).

Infinis Energy Holdings Ltd (Infinis), the leading independent renewable energy generator in the UK and Drax Power Ltd, applied for judicial review of the removal of the RSE exemption from the CCL. Their application was dismissed by the High Court in February 2016.

Infinis appealed against the High Court's decision on the grounds that there had been a breach of EU legal principles of foreseeability, legal certainty and protection of legitimate expectations and a breach of the EU principle of proportionality, however the Court of Appeal has dismissed Infinis' appeal.

For more information, see [Environment Analysis, Court of Appeal ruling – Infinis Energy Holdings Ltd](#).

## ICAO agrees to create a global market-based mechanism to curb aviation emissions

### Practical Law Environment

In October 2016, the Assembly of the International Civil Aviation Organization (ICAO) passed a resolution to create a global market-based measure (GMBM) under which airlines will offset the growth of their carbon dioxide emissions from 2021.

The GMBM will compensate for carbon dioxide emissions generated by international aviation activities above 2020 levels. The emitting airline will be required to buy and surrender emission units generated by projects in other sectors that will reduce carbon dioxide emissions, in order to offset any increase in its emissions.

The first phase will run from 2021 to 2027 and will be voluntary. The scheme will become mandatory in 2027.

The GMBM will contribute to achieving the goals to cut emissions set in the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement.

For more information, see [Legal update, ICAO agrees to create a global market-based mechanism to curb aviation emissions](#).

## Planning ahead for Heathrow expansion

### LexisPSL Environment

The government's announcement, adopting the recommendation of the Airports' Commission, is intended to reinforce Heathrow Airport's role as the major hub airport in the UK. The government hopes that the expansion of Heathrow which the proposed new runway will enable, will bring forward wide economic benefits and benefit the regions by opening new routes and improving connectivity between London and the regional airports.

The government proposes to follow the development consent order (DCO) procedure in accordance with the Planning Act 2008. This procedure was introduced for the approval of nationally significant infrastructure projects (NSIP), including significant airport related development; avoiding the delays such as occurred in relation to Heathrow T5. The DCO, if granted is equivalent to planning permission. It may also authorise the compulsory purchase of land that is needed for the implementation of the NSIP.

In deciding whether to approve the application, the Secretary of State must have regard to any National Policy Statement (NPS) relating to the application. The next step is therefore likely to be issue of a draft NPS in the New Year followed by a consultation process leading to its adoption. If it is published and survives the legal challenges that have been threatened, it will then form the basis for the application for the DCO which is required to permit the necessary development of the construction of the new runway.

For more information, see [Planning Analysis, Planning ahead for Heathrow expansion](#).

# Annual Garner lecture

## Environmental Science, Law and Policy – Challenges and Opportunities



*Pamela Castle OBE, Former Chair of UKELA*

### Foreword

*The 2016 Garner lecture was given by Pamela Castle OBE. Pamela is a former Chair of UKELA and its only female Chair to date. She is also the first woman to give the Garner lecture, so history was made! The theme of Pamela's talk was "Environmental Science, Law and Policy – challenges and opportunities" – a wide sweep of topics covered which generated a lively debate with the audience, expertly managed by our Chair for the evening, Bishop James Jones, UKELA Patron. We were delighted to welcome audiences from 9 venues across the UK as well as in London; from Plymouth to Edinburgh via Aberystwyth, Bristol, Brighton, Birmingham, Nottingham, Manchester and Newcastle. Thank you to everyone who attended. Special thanks to Freshfields and our UK-wide venues for hosting; and last but not least a huge thank you to Pamela Castle and Bishop Jones for giving us all a splendid evening. For those of you unable to attend, we hope you enjoy reading the lecture below – and the video is available on the members' only section of the website.*

Good evening everyone and many thanks for inviting me to give this prestigious lecture. It is a great privilege to be here.

I have entitled it 'Environmental science, law and policy – challenges and opportunities' in order to cover all the aspects of environmental protection of which we need to be aware. It is also the strapline of the Castle Debates, which were founded some six years ago.

By way of introduction, my background is in science (that is, chemistry with physics and maths) in which I worked for a number of years before I moved to law and qualified as a solicitor, at just about the same time as UKELA was founded (1987) and when EEC environmental legislation was proliferating. The timing could not have been better for me, as I was already well versed in environmental issues, and this gave an opportunity to be involved in the development of environmental law and policy. I am not an expert in planning law however, which was ably handled by a separate practice in my law firm CMS Cameron McKenna, now CMS.

For the purposes of this lecture, I intend concentrating on the natural environment: air, space, water, land, plants and wildlife, as well as phenomena such as energy, radiation and magnetism. Other names of

course are the ecosystem, the biosphere, Mother Nature, Gaia, natural heritage and in more recent years, Natural Capital, the world's stock of natural resources, which provide us with a wide range of free goods and services and which underpin our economy and society.

As is well rehearsed, the natural environment, globally, is suffering abuse from human activity (for example, atmospheric pollution, overconsumption, population growth, technological development) being downgraded sometimes permanently to a point where human existence – or at least existence with a reasonable quality of life – and biodiversity etc. are under threat.

In particular, there are unequivocal signals from the natural world that greenhouse gas emissions are causing global warming giving rise to, for example, extreme weather conditions, record temperatures, severe flooding, altered habitats, water and food shortages, and ocean acidification.

In the UK we are equally vulnerable, yet the Government has axed some nine major environmental policies since May 2015, from the removal of support for carbon capture-and-storage, for zero-carbon homes, for solar power and for on-shore wind farms and has sold the Green Investment Bank. DEFRA (and the Environment Agency) have suffered a 30% reduction in their budgets and DECC has been dismantled and merged with BIS to form BEIS (Business, Energy and Industrial Strategy).

In this context, and adding to our uncertainties, are, of course, Brexit and President-Elect Trump.

In relation to Brexit, all we know so far is that the proposed Great Repeal Bill will be introduced in the next Parliamentary session beginning with the Queen's speech in May. When enacted it will annul the European Communities Act 1972 which translates EU legislation directly into UK law, and as a result, we understand that the UK Parliament will initially retain all EU legislation and then be free to retain or discard individual laws as it thinks fit. What this will mean in practice is unknown, causing much concern and discussion, but just recently Andrea Leadsom told the Environmental Audit Committee that about a third of EU legislation would not be retained because of 'technical issues'. I will come back to this later.

However, it will not be enacted until completion of the two-year process of leaving the EU under Article 50 of the Treaty of the European Union, which the Prime Minister has said will begin in early 2017, again in doubt as a result of the High Court judgment which held that the Government does not have prerogative power to decide this without approval of Parliament. The Government will appeal this at the Supreme Court on 5<sup>th</sup> December.

Encouraging news is that the Government's 25-year Plan for the Natural Environment, a framework for environmental and agricultural policy across the full range of DEFRA's remit, produced in response to reports by the Natural Capital Committee, is to go ahead. However, the prospects for a separate 25-year Food and Farming Plan are not clear. The Government has also confirmed that its National Flood Resilience Review, published in September, which assesses fluvial and coastal flood risk and the impact on people and the economy, will go ahead – but it has received criticism, for example, from both the Environmental Audit Committee and from the Environment and Rural Affairs Committee, for not going far enough. Other very welcome news is that the Government has announced details of its plans to phase out unabated coal power by 2025 and boost renewables.

In times of minimal or no financial constraint and in addition to subsidising expensive environmentally protective strategies and projects (such as carbon-capture-and-storage), a government has the possibility of three main strategies for providing environmental protection, either to prevent or remedy environmental damage and they are: so-called command-and-control regulation, market-based instruments and the raising of awareness with a view to changing behaviour. Taking these in reverse order:

### **Raising awareness**

I am sure I am not alone in feeling intense surprise, if not shock, at the number of people who express disinterest or disbelief in the current environmental problems which are causing potentially lethal damage to our environment or think that technology will step in and rectify any adverse situation we find ourselves in.

This is where the inclusion of environmental awareness in the school curriculum would be of enormous advantage, but an already overcrowded agenda, restricted resources and lack of enthusiasm makes this a tenuous proposition although some progress has been made and much depends on individual schools.

It was also the fundamental reason for setting up the Castle Debates, in an attempt to raise awareness of environmental problems, with a view to assisting in changing the attitude of sceptics and changing

general behaviour and opinions, thereby encouraging the Government to take adequate steps to ameliorate a potentially adverse situation. I think you will agree that there is some improvement in general awareness of the threats of disaster (for which we claim no credit!) but I fear that any significant improvements will be driven by actual disasters, when the imposition of strict regulation or fiscal measures can be justified – but unfortunately, after the event, in many cases. When the current situation is one of financial austerity these measures are difficult to justify – but what happened to the Precautionary Principle? Remember that?

It has been suggested that to have more engagement with the public we should refer to improved human health and well-being rather than to protection of the environment. This would have more traction with the general public than referring to protection of a range of natural phenomena of which they have no knowledge or engagement. I think there is much strength in that argument.

I remember that in 1998 the then Deputy Prime Minister, John Prescott – now Lord Prescott of course – launched a campaign entitled 'Are you doing your bit?' in order to encourage small but important behavioural changes in our everyday actions to benefit the environment. The campaign cost in the region of £25 million involving TV advertisements, national radio, consumer press, posters and bus sides. It was not deemed a success, was thought to have had little effect on the general population and, in the long run, was a complete waste of money. So it is not easy!

### **Market-based instruments**

The EU has increasingly favoured economic or market-based instruments (MBIs) such as taxation, targeted subsidies or tradeable emission rights. These are considered to have advantages over direct regulation in that they are more cost-effective; achieving given targets for reduced pollution or reduced energy at a lower cost to governments, incentivising innovation (for example, through taxes and tax breaks) and providing an efficient source of public revenue.

An example, of course, is carbon pricing, the method favoured by many economists for reducing global warming emissions, the carbon price being the price that must be paid for the right to emit one tonne of carbon dioxide into the atmosphere (or its equivalent for other greenhouse gases). It usually takes the form of either a carbon tax or the requirement to purchase permits to emit, generally known as 'cap-and-trade'. The carbon tax is becoming more popular, and particularly favoured by the UK but we are still part of the EU Emissions Trading Scheme which limits or caps emissions from more than 11,000 heavy energy-using installations (power stations and industrial plants) and from airlines operating between EU countries and Iceland, Lichtenstein and Norway. This creates a

market in which capped allowances may then be bought and sold within the system. Obviously, how Brexit will affect our participation is far from clear.

However, a recent report from the European Environment Agency highlights, among other things, the success of MBIs for environmental protection but with the potential weakness for governments with regard to revenue generation in that the more effective they prove to be, the less revenue they generate.

I am not an economist so will not go into more detail, but I include an information reference as part of this paper.<sup>1</sup>

### **Command-and-Control regulation**

By the end of the 20<sup>th</sup> century, environmental law was established as a component of the legal landscape in all developed nations of the world – and also many developing nations – as well as the larger project of international law, which I shall come back to.

However environmental law and regulation is a continuing source of controversy over its necessity, its fairness and its cost, both to the regulator and to the regulated. There are concerns on the general lack of enforcement both nationally and internationally and difficulties arise in performing cost-benefit analyses, although at least in the UK the concept of Natural Capital, which assigns economic benefits to the natural environment, is gaining ground rapidly. It is not without its critics however, on the grounds that it reduces nature to the status of a commodity to be marketed at its exchange value.<sup>2,3</sup>

In the UK, the development of environmental law can be traced back to the protection of private or common property under common law, namely under the torts of nuisance, negligence or trespass, its scope being limited to the protection of private interests and not those of the wider environment. On the basis that pollution control through torts was limited, the concept of statutory nuisance was developed some 150 years ago and then eventually consolidated under the Environmental Protection Act 1990. It is subject to control by the local authority by the issuing of an abatement notice, breach of which involves prosecution and a fine. Individuals may also apply to the Magistrates Court for an abatement notice. However, these changes are limited and they do not provide protection of the unowned environment, resource depletion, degradation, cumulative health problems or other environmental threats.

Areas covered by modern regulatory control regimes and enforcement agencies are very wide ranging and now of course, one of the most important is the Climate Change Act 2008 – but, although it is one of the most important, addressing global warming and

climate change and attracting much attention – we must not lose sight of the full range of other environmental problems we face, such as chemicals in the environment, the management of waste, population growth, air pollution, reduction in natural resources etc.

The Climate Change Act 2008 requires that in the UK by 2050 there will be an 80% reduction from 1990 levels in six greenhouse gases, namely, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. With a view to meeting this target the government must set 5-yearly Carbon Budgets, that is, the amount of carbon dioxide or its greenhouse gas equivalents (as rated by their Global Warming Potential (GWP)) that the UK is able to emit as its contribution to limiting a global temperature rise to 2C above pre-industrial levels, that is, basically before the widespread use of coal. The name, 'carbon budget' is misleading of course, because not all the identified greenhouse gases contain carbon.

The Fifth Carbon Budget for the period 2028–32 was set by the Government in July this year under advice from the Climate Change Committee and Adaptation Sub-Committee. Its aim is that by 2032, annual emissions in the UK will be at an average of 57% below 1990 levels.

It requires among other things a continuation of the take up of ultra-low emission vehicles (for example, electric and plug-in hybrid cars) and low-carbon heat (for example, from heat pumps which absorb heat from the atmosphere). Also, although targets in the Act itself do not include the contribution of the UK to international shipping or aviation emissions as determined by the International Maritime Organisation and the UN agency, the International Civil Aviation Organisation respectively, the Fifth Carbon Budget could possibly include emissions from international shipping. International aviation emissions are not included, however, apparently on the grounds that appropriate accounting for these emissions remains uncertain.

Another crucial area is the production, use and disposal of chemicals which have all been linked to a very wide range of environmental and health problems through exposure to contaminated sources such as water, air, food and consumer products. The cornerstone of the EU's approach to regulating the production and use of chemicals is the 2007 EU Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals, known by the acronym REACH, with the UK enforcement regime in place in 2008. From the citizen's point of view it all sounds very encouraging, but as we heard from a Castle Debate on the subject, it involves a lengthy implementation process with complex procedures for

authorisations and restrictions and in the UK, severe resource constraints. In all cases there is a need to improve knowledge on the effects of multiple exposures, cumulative risk assessments of chemical cocktails etc. and methods for risk assessment. It was concluded at the Debate that we have a long way to go before effective precautions will be taken.

When one examines the amount of environmental law throughout the world – Africa, Asia, Europe, North America, South America, Oceania (that is, islands of the tropical Pacific Ocean and Australia and New Zealand) the list is very impressive covering protection of water, air, wildlife etc., but a constant theme is the huge variation in the level of enforcement. Take for example, China, India and Brazil, all of which have ratified the UN Framework Convention on Climate Change (UNFCCC) but deemed to be some of the world's greatest polluters.

## China

Rapid economic and industrial growth has led to significant environmental degradation and China is in the process of developing more stringent controls and a solid environmental law framework. The new Environmental Protection Law came into force in January 2015. It is enforced by local environmental protection bureaux but the level of enforcement has been very varied. It is improving rapidly in the face of public reaction to severe pollution and the acknowledgement that economic sustainability is threatened.

Just on a personal note, in 1997 I was part of a European Commission Delegation to Beijing, headed by the late Lord Howe and Michael Beloff QC, in response to an invitation to discuss the then current state of EEC environmental legislation with a view to bringing in new laws in China. They seemed to be very enthusiastic and that appears to be reflected in the amount of environmental legislation which has been enacted since that time.

## India

In India, environmental law is governed by the Environment Protection Act 1986, which is enforced by the Central Pollution Control Board and numerous State Pollution Control Boards to enforce rules covering a wide range of environmental pollution and the protection of water, air, wildlife etc. but again the level of enforcement is often very weak and environmental degradation remains a problem.

## Brazil

The Brazilian government produced the Brazilian Environmental Policy in 1981 and created the Ministry of Environment in 1985 in order to develop better strategies for protecting the environment, to use natural resources more sustainably and to enforce environmental policies. However, the drive for

economic growth is severely depleting natural resources and causing a massive loss of biodiversity. The same story!

## International agreements

Global and regional environmental issues are increasingly the subject of international agreements covering terrestrial, marine and atmospheric pollution through to wildlife and biodiversity protection.

By my estimate there are some 60-70 international environmental agreements to which the EU is a contracting party. They include treaties (which can be signed by member state representatives), conventions (which have to be ratified by member states) and protocols, which are subsidiary agreements under a primary treaty and which are particularly useful in environmental law as they can incorporate recent scientific developments and allow countries to agree matters in principle, in the knowledge that, with agreement, they can be updated.

The first document in international environmental law to recognise the right to a healthy environment was the 1972 Stockholm Declaration by the UN Conference on the Human Environment at its 21<sup>st</sup> Plenary Meeting. It led to the establishment of the UN Environment Programme.

The international response to climate change began at the Rio de Janeiro Earth Summit in 1992, where the 'Rio Convention' or UN Framework Convention on Climate Change (UNFCCC) was adopted and which now has a near universal membership of 197 parties. Its purpose is to stabilise greenhouse gas concentrations in the atmosphere at a level which would 'prevent dangerous anthropogenic interference with the climate system'.

It holds an annual Conference of Parties (COP) to review the Convention's implementation. The first COP – COP1 – took place in Berlin in 1995 and, as you will be aware, COP 21 was held in Paris in November last year. This aims to achieve a legally binding and universal agreement to hold the increase in the global average temperature to well below 2C above preindustrial levels and to pursue efforts to limit this to 1.5C. It is a separate instrument under the UNFCCC rather than an amendment or successor to the Kyoto protocol, which came into force in 2005.

The Paris Agreement was opened for signature on 22nd April 2016 at a ceremony convened by the Secretary General in New York. Article 21 of the Paris Agreement provides that the Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention, accounting in total for at least 55% total global greenhouse gas emissions, have ratified the Agreement. This was achieved in October and the Agreement came into

force on 4<sup>th</sup> November. The first meeting of the parties is currently taking place (from 7<sup>th</sup>–18<sup>th</sup> November) in conjunction with COP 22 in Marrakech. As you will be aware, China, India and Brazil, and the USA, have all ratified the Agreement – but, and you will know what I am about to say – Donald Trump has declared that the USA will take no part in the Agreement which he will ‘tear up’ on the grounds that ‘climate change is a Chinese hoax invented to put American firms out of business’. Russia has yet to ratify, as has the EU, but EU national states are free to do so, which France has already done. We are told that the UK is due to ratify by the end of the year.

The Agreement has been criticised though on the grounds that the country pledges are too low to achieve the aim of 2C above pre-industrial levels, that the agreement consists of ‘promises’ or aims and not firm commitments and that there is no binding or enforcement mechanism. This is in the context of 2016 being the hottest year on record, with the average temperature being 1.2C above pre-industrial levels.

In another move to reduce the effects of emissions on global warming, on 6<sup>th</sup> October a global scheme was agreed by 191 nations, including the UK, at the International Civil Aviation Organisation. Its declared aim is to curb aviation emissions from passenger and cargo flights but, in fact, it does not involve a cap on emissions but, instead, is an off-setting scheme where forest areas and carbon-reducing activities will be funded by about 2% of the industry’s revenues. It has received strong criticism in that the level of emissions will not be reduced.

Also of note, of course, and not directly connected to climate change, is the Aarhus Convention which was adopted in the Danish city of Aarhus in 1998 and ratified by both the EU and the UK in February 2005. Just to reiterate: it provides (a) the right of everyone to receive environmental information held by public authorities, (b) enables the affected public and environmental NGOs to comment on projects, plans and proposals which should be taken into account in the decision-making process and to be informed on final decisions and (c) provides the right to challenge where the first two have not been adhered to, ‘and in doing so should not be prohibitively expensive’ – in other words, given access to justice (Article 9).

There have been many claims over the years that the UK has long been in noncompliance particularly in relation to the costs rules (although somewhat ameliorated in recent years by the limitation on adverse costs and by the introduction of Protective Cost Orders) but exacerbated by the shrinking of legal aid.

I am sure you are all very familiar with this, but I refer to it to highlight the major criticism of such agreements. On paper they seem very optimistic but

in practice can be rendered meaningless by the absence of the means of enforcement.

## Castle Debates

I now turn to the role of law and policy in specific environmental scenarios, which are taken from the Castle Debates, working closely with your Chairman and Castle Debates Partner, Stephen Sykes. Firstly:

## Biodiversity loss

Some 25% of all species are threatened with extinction: 40% of amphibians, 25% of plants and 12% of birds. The species extinction rate is 100–1000 times greater than the typical background rate throughout Earth’s history. It is a decline that impacts food supply – one billion people depend on fish as their main source of protein yet 33% of fish stocks are overexploited or dwindling. In addition to overexploitation, land use change, pollution, invasive species and climate change are drivers of biodiversity loss.

There is no shortage of legislation however with about a dozen separate legal regimes in the EU and UK (for example the Habitats Directive, the Birds Directive and Natura 2000, an EU network of protected areas, which includes the UK’s Special Protection Areas (SPAs) for birds and Special Areas of Conservation (SACs)); the same at international level (for example, the Biodiversity Convention).

However, it was made clear at the Debate that any political discussion on biodiversity has always given precedence to economic growth and the legislation tends to be reactive rather than proactive. It was agreed that it is essential to show the link between a healthy environment and a healthy population for any progress to be made. However, as said, we now have the growing popularity of the concept of Natural Capital, supported by Government, linking the protection of biodiversity with economic development and the 25-Year Environment Plan, which we have been assured will be retained.

## The Common Agricultural Policy

The European Common Agricultural Policy was created by the Treaty of Rome in 1957 and implemented in 1962 with the purpose of guaranteeing minimal levels of production so that there was enough food in Europe and that those involved in agriculture were ensured a fair standard of living. It has been subject to substantial reforms but it was concluded at the Debate that it was impossible to support farming policies for 28 countries with hugely different levels of food production, populations, climates and soils. It is complex to administer at a European level, balancing food production, managing land for other purposes and managing the environment. Farms in countries like Austria are receiving several times greater levels of subsidy than farmers in England. Moreover, levels of subsidy vary across the UK and we have recently seen

reports on the unbelievably high subsidies to very rich land owners. How it will be replaced after Brexit is far from clear.

## Air pollution

It is calculated that air pollution causes some 40,000 early deaths a year in the UK and 400,000 globally. It is clear that emission controls are not working. There are serious problems with invisible pollutants such as particulate matter and nitrogen dioxide, the major source of which is transportation, especially from the use of diesel fuel. Particulate matter is comprised of ultrafine materials being 10 microns or less in diameter, (a micron being one-millionth of a meter), which can travel through the human lung wall into the blood system, causing, primarily, cardiopulmonary problems. We also now hear that air pollution from small magnetic particles of iron ore, generated, for example, when vehicles brake or burn fuel, put people at a greater risk of Alzheimer's disease.

UK air quality standards are set out in the Environment Act 1995 and predominantly the Air Quality Framework Directive 2008/50/EC. In last year's case brought by ClientEarth, referred to in the 2015 Garner Lecture by its CEO, James Thornton, the Supreme Court declared that the UK is in breach of Article 13 of the Air Quality Framework Directive because of nitrogen dioxide failures. The European Commission is also taking action against the Government for its failure to comply with the Directive and to prepare Air Quality plans to meet requirements under Article 23. The Government produced a submission to the European Commission in December 2015 stating that it will meet the nitrogen dioxide limits in the shortest possible time. On ClientEarth's application, the High Court then decided that the UK Government should face renewed action over air quality as the Government's Plan would not bring UK air pollution within legal limits until 2025. The case was heard on the 18-19<sup>th</sup> October and it was held that the Plan was deficient both with regard to the Supreme Court Ruling and the Directive. I understand that this is not to be challenged by the Government and that agreement on the way forward is being negotiated.

## Flooding

One in six homes in the UK is at risk from flooding. In times of climate change, properties do not necessarily have to be close to a river or the sea to be vulnerable. Surface water, groundwater and overflowing sewers are increasingly common causes. Proposed remedies include improved land management, flood defences and other technical solutions, all of which of course will incur substantial cost.

Our understanding of flood risk is based on models which may be flawed. The interaction between surface flooding, groundwater flooding and flash flooding as well as the overarching impact of a warming climate,

need to be better understood. However, it may not be practical and will certainly not be affordable for us to protect all low lying areas. Some localities will inevitably be sacrificed to rising water levels.

Despite this, development in flood plains grew at a faster rate than elsewhere in England in recent years. Although the Environment Agency is a statutory consultee on flood risk in planning developments, staff reductions mean it is only focussing on large applications. Local planning authorities must take climate change into account in their decisions but these are not necessarily reported back to the Environment Agency. Equally, climate change is a key threat to businesses, particularly to those with high value long-term assets, yet there are no obligations on Chief Executives to take action on adaptation.

In the UK a jigsaw of statutes deals with flood risk, one of which is the Flood and Water Management Act 2010. This seeks to divide flood and coastal erosion management between local authorities, the Environment Agency and regional coast committees. These agencies have faced much criticism over recent years and according to the ABI the cost in one year alone reached £3.5bn.

As mentioned, the Government has now produced its National Flood Resilience Review to assess how the country can be better protected from future flooding and extreme weather events. In a six-year investment programme, flood and coastal defences will be strengthened, there will be better management of rainfall and whole river catchments will be managed in their entirety. However, as said, scepticism has been expressed on the level of funding and the effectiveness of its strategy.

## Brexit

So far, the effect of Brexit on environmental law and policy is far from clear and questions are being raised by interested – and very concerned – parties across the nation and in both Houses of Parliament.

Questions have ranged across the whole gamut of environmental issues including protection of biodiversity and habitats; the reduction of air pollution; the maintenance of clean bathing water; the security of energy supply including renewable energy and whether the UK will remain part of the EU Energy Union; Common Agricultural Policy and Common Fisheries Policy replacements; the loss of access to relevant EU funding and which organisations will replace the European Commission and the European Court of Justice to hold the Government to account. There is also the complication of different approaches in the devolved administrations. The list goes on and it will obviously be some considerable time, probably a very long time, before we have any clarity and certainty.

I understand that UKELA has set up a Brexit Task Force, comprising 27 UKELA members, to take, amongst other things, proactive measures in the post-Brexit review of environmental law. The first area to be considered will cover habitats.

## Conclusions

So what are we looking for in our environmental legislation? The World Environmental Law Congress of the International Union for the Conservation of Nature which took place at Rio de Janeiro in April and described by Lord Carnwath at the UKELA Conference, the Foundations of the Environmental Rule of Law should include, amongst other things, 'The development, enactment and implementation of clear, strict, enforceable and effective laws, regulations and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality at national, sub-national, regional and international levels'.

In the UK there is certainly a need for our environmental laws and regulations to be simplified so that they are more understandable and easier to enforce. They are often characterised by over complexity and lack of coherence as a result of their being developed in an ad hoc manner and insufficient weight given to sound science.

The Government's initiative to improve and simplify regulation, known as the Red Tape Challenge<sup>4</sup> was launched in April 2011 and in March 2015 it was announced that some 650 legislative reforms, including a significant number on environmental issues, had been made. These resulted in the revocation and/or repeal of moribund legislation as well as consolidation and simplification of requirements that were spread across several statutory instruments or that had been subject to numerous amendments. Areas included revocation of water classification schemes which have been superseded by the Water Framework Directive; the re-implementation of twelve different statutory instruments under the Environmental Liability Directive as the Environmental Damage (Prevention and Remediation) (Amendment) Regulations 2015 and most important, a 2015 Order exempting different types of fireplace from the smoke control provisions of the Clean Air Act 1993. Overall, environmentalists found reassurance in that the changes focussed more on form rather than substance.

However, not all the issues that were explored in UKELA's research project on the State of UK Environmental law 2011-12<sup>5</sup> which considered the crucial issues of coherence, transparency and integration were dealt with in the Red Tape Challenge and there is still some way to go. Whether this will be achieved in the complexities of Brexit would seem unlikely in the near future.

In terms of policy, our senior public figures need to show more effective engagement to make the case for protecting the common inheritance of our environment, to give credence to sound science, to promote education and produce accurate statistics on the environment to help people understand environmental issues and make better environmental choices. They also need to work across Government departments with greater effectiveness.

They should give better access to environmental justice and reduce the need for costly environmental regulation and enforcement.

These are obviously not only national issues but are of vital importance for the whole world and ones which if current progress is not improved will end in very tragic circumstances and as far as our progeny is concerned, in the not-too-distant future.

## Endnotes

- 1 <http://www.eea.europa.eu/publications/environmental-taxation-and-eu-environmental-policies>
- 2 <http://steadystate.org/use-and-abuse-of-the-natural-capital-concept>
- 3 <https://www.theguardian.com/environment/georgemonbiot/2014/jul/24/price-nature-neoliberal-capital-road-ruin>
- 4 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-03-25/HCWS477>
- 5 <http://www.ukela.org/Aim5>

# Housing and planning

## Managing housing growth and the environment – a fair balance or not?



William Upton, Barrister, 6 Pump Court

### At a glance

- This article examines the current balance being struck between housing development and the environment in English planning decisions.
- There are inherent tensions in national policy, and the caselaw on the interpretation of the National Planning Policy Framework (NPPF) confirms that housing need has been given the priority.

It is clear that there is a pressing need for new housing in England, and that these demands are not being met. We are well short of the 222,000 new homes that have been estimated as being needed each year.<sup>1</sup> That accumulated demand presses hard on the policies that aim to protect the environment.

The main pressure is felt at the local level. Politicians, despite their words, do not build houses. That depends on the actions of developers and their promotion of individual site applications. Between January and June 2016, 31,300 of the 251,700 planning applications made to local planning authorities were for residential developments.<sup>2</sup> The majority of these housing applications were granted – in this six month period, 23,500 or some 75%. Indeed, the main work of planning system is done by elected local councillors, as members of the planning committee, and the planning officers that work for them. They do this work knowing that their decisions can be appealed to the Secretary of State, and can be challenged in court. It is the appeals that set the tone for the remaining decisions. Local authorities are still more likely than not to win an appeal, although the rate of success on appeal on larger sites is almost 50:50.<sup>3</sup> That is where the Planning Bar<sup>4</sup> gets most involved, and where we like to think we make most difference – although we do get to promote, and to advise on projects, and not just to react to refusals of permissions and appeals.

### The plan-led system

These decisions are shaped by national and local policy. The legal framework is well established, and – on its face – appears to put a clear emphasis on a plan-led system. All planning decisions are made in accordance with the development plan unless material considerations indicate otherwise (the basic test under section 38(6) of the Planning and Compulsory Purchase Act 2004). This is said to require the planning authority ‘to give priority to the provisions of a development plan ...’<sup>5</sup> If you read the

National Planning Policy Framework (NPPF)<sup>6</sup>, it too confirms that the plan-led system is a core principle.<sup>7</sup> It emphasises the importance of up-to-date plans, that Local plans are the key to delivering sustainable development and that the extent to which policies are up to date is an important factor in decision-making.<sup>8</sup> In their supervisory role, the courts will ensure that national policy is correctly interpreted and applied as a matter of law.<sup>9</sup> It is in that context that the actual effect of the NPPF has become so important.

### The tensions in the system

It has become clear that the NPPF is one of the material considerations why decisions will not be determined in accordance with the local plan. Many of these plans are dated, and are under review. But even adopted plans are vulnerable. There are inherent tensions built into the NPPF in relation to national housing policy. This often frustrates the apparent preference for a plan-led system.

Firstly, national policy changed quite dramatically in 2012. It is not just that the national policy is that local planning authorities should ‘boost significantly the supply of housing’. As Lord Justice Laws said in *Solihull MBC v Gallagher Homes* [2014]:<sup>10</sup>

The NPPF indeed effected a radical change. It consisted in the two-step approach ... The previous policy’s methodology was essentially the striking of a balance. By contrast paragraph 47 required the [Objectively Assessed Need] to be made first, and to be given effect in the Local Plan save only to the extent that that would be inconsistent with other NPPF policies.

This is a paragraph that finds its way into many submissions, and some would say that there is still a rearguard action going on against acknowledging the change. But the first tension in housing policy is here. The Objectively Assessed Need (OAN) is not some computer model, and it is a misnomer to call it an ‘objective’ assessment. There is much scope, as I know, to challenge the assumptions the individual expert makes and the choice of future projections. The Local Plan Expert Group has also criticised this trend.<sup>11</sup> But it goes further than that. It is seen as a legal error to use a figure for the housing requirements below the OAN figure until such time as the Local Plan process comes up with a constrained figure.<sup>12</sup> The identification of the Housing Need is not allowed to be based on a

balance, or on environmental constraints or deliverability. It is an absolute number which is given primacy in the system. It is sometimes referred to, rather tellingly, as a 'policy-off' figure.<sup>13</sup> It does mean that the identified shortfall is said to be much larger if there is no recent plan.

But then there is a second tension, regarding the housing land supply in the next 5 years. Paragraph 49 of the NPPF states: '... Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.' Not only is the calculation often based on the OAN, but proving deliverability is often a difficult task. A council can still have an adopted Local Plan, with a new housing target, and find that the lack of sites coming forward means that it is declared to be not 'up-to-date'. They can also be criticised for a 'persistent' under delivery of housing (often due to the recession) and find that they have to show a 20% buffer as well.

The broad effect of NPPF para 49 has also proved to be dramatic. The question as to what are the 'relevant policies for the supply of housing' for the purposes of paragraph 49 has been widely drawn. After some conflicting earlier court decisions, the Court of Appeal has taken a very wide view in *Hopkins Homes*.<sup>14</sup> Although it is under appeal to the Supreme Court, it is likely to remain the approach. It could be said that the chickens rather came home to roost. Crucially, the Court highlighted that any policy, whether directly related to housing or not, could be relevant if it has a restrictive impact upon the delivery of housing and thus that any policy would be out-of-date insofar as it impacts on the delivery of housing.

The effect of the NPPF has therefore been to shift the decision-making balance in favour of granting planning permission for housing. Firstly, the locally-adopted development plan will be treated as out of date. The restrictive plan policies remain relevant considerations, but only as one among many. There will still be some scope for argument. As Lindblom LJ said in *Hopkins Homes*:

47. ... The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements.

As to the actual decision about whether or not to grant planning permission, the NPPF does not apply a

simple planning balance as once used to be the case. Paragraph 14 of the NPPF states that, where development plan policies are out-of-date, the 'presumption in favour of sustainable development' applies which means:

... granting permission unless:

- any adverse impacts of doing so would **significantly and demonstrably outweigh the benefits**, when assessed against the policies in this Framework taken as a whole; or
- specific policies in this Framework indicate development should be restricted.

## Environmental constraints on housing development

It is not quite an open field day for new housing. The NPPF recognises that this presumption in para 14 does not require a grant of planning permission where, 'specific policies in this Framework indicate development should be restricted.' It does so with reference to the footnote to para 14. The list of policies in footnote 9 to paragraph 14 contains some important policies where housing would be restricted. These include the policies on the:

Birds and Habitats Directives... and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.

There is therefore still strong policy support for the more major interests. The Birds and the Habitats Directives require appropriate assessment of the likely effects on protected European sites and species, and even nearby housing may be deemed to be inappropriate unless considerable mitigation measures are used (hence the debate on the funding and use of alternative green spaces to provide for the recreational needs of new residents rather than the open spaces of the Thames Basin Heathlands)<sup>15</sup>. We also still see restrictions, for instance, on development affecting designated listed buildings and conservation areas.<sup>16</sup>

But there is one important omission regarding the broader environment. General areas of countryside, including 'green wedges or gaps', are not listed in the footnote. Local landscape designations have been discouraged, and the only reference to protection is for green fields which are in valued landscapes (as referred to in para 109). The carefully-drawn limits to settlements are not included. If the development plan is not up to date, then these areas are vulnerable. The loss of undesignated countryside is not often considered significant enough to outweigh the benefits of boosting the supply of new housing.

We are also seeing the gathering momentum to consider the release of green belt land for housing. Plans have just been published to provide tens of thousands of new homes on the green belt around Greater Manchester, and a new urban extension in Hertfordshire is proposed for 2,000+ houses in the green belt. This is at least being done through the plan-led process.

The more general environmental constraints regarding pollution also remain. There have been few refusals on the grounds of adverse air quality impacts, but it will be interesting to see if the judgment in *ClientEarth (No.2)*<sup>17</sup> has greater impact. Regarding the general law of nuisance, it must be remembered that planning permission does not authorise a nuisance as reiterated in the case of *Lawrence*.<sup>18</sup> It can have a direct impact, so that the Ministry of Sound could block the development of new flats next to its nightclub.<sup>19</sup> In the end, the issue was resolved by a deed of easement that ensured that the future owners of the flats would not be able to complain about any noise generated by the Club.

## Reflections

It is clear that the NPPF has brought about a radical shift in the approach to grants of planning permission for housing development. Many developers who are pressing to obtain permission for more housing on greenfield sites are doing no more than reflecting national policy back at the local decision makers. That said, there is still scope to argue about the weight to be attached to local plan policies that are said to be 'out of date' because of housing land supply policies. There may be even more scope once *Hopkins Homes* has been heard in the Supreme Court in the summer of 2017. In the meantime, securing a five-year housing land supply is imperative for Local Authorities that want to have greater control over applications for housing development in their own areas.

## Endnotes

- 1 National Housing Federation, 'Key Statistics Briefing: How many homes do we need?', January 2016; available here: [http://s3-eu-west-1.amazonaws.com/doc.housing.org.uk/KSB4\\_How\\_many\\_homes\\_do\\_we\\_need.pdf](http://s3-eu-west-1.amazonaws.com/doc.housing.org.uk/KSB4_How_many_homes_do_we_need.pdf)
- 2 <https://www.gov.uk/government/statistics/planning-inspectorate-statistics> – see particularly Table 2.5.
- 3 Larger sites are defined as those with over 10 houses or more – of which there were 454 in Jan-June 2016, and 46% succeeded on appeal. There were 2,974 minor housing projects with only a 28% success rate. As for the Planning Court, which has seen a continued stream of cases, there are about 40 new planning cases lodged each month.
- 4 The Planning Bar is shorthand for those barristers who are members of the relevant Specialist Bar Association. Membership of the Planning and Environment Bar Association ("PEBA") is for those who devote a significant proportion of their practices to the fields of planning, environment, compulsory purchase, highways, housing, rating and other aspects of local government and administrative law.
- 5 *Loup v Secretary of State for the Environment* (1996) 71 P&CR 175.
- 6 The NPPF was published by the government in 2012, and remains unamended. Note that the Secretary of State and the Planning Inspectorate prefer to refer to this as "the Framework".
- 7 See NPPF paras 17 and 196.
- 8 See in particular NPPF paras 11 to 14, 150 and 209.
- 9 *Tesco Stores Limited v Dundee City Council* [2012] J.P.L. 1078; [2012] UKSC 13.
- 10 *Solihull MBC v Gallagher Estates Ltd* [2014] EWCA Civ 1610 at [16].
- 11 See the "Local Plans Report to the Communities Secretary and to the Minister of Housing and Planning", March 2016. One of the ad hoc group's main recommendations was for a shorter, simplified, standard methodology for housing market assessments and, in particular for assessing housing need, with the aim of saving very significant time, money and, most importantly, with the intention of removing unnecessary debate from this aspect of plan making.
- 12 *City and District Council of St Albans v Hunston Properties Ltd* [2014] JPL 599.
- 13 An ugly phrase, used by some planning experts, and then adopted by the court in its discussion of housing numbers in *Gallagher Homes Ltd v Solihull MBC* [2014] EWHC 1283 (Admin). It also features in the Technical Advice Note from the Planning Advisory Service on "Objectively Assessed Need and Housing Targets" (July 2015).
- 14 *Suffolk Coastal District Council v Hopkins Homes Ltd.; Richborough Estates Partnership LLP v Cheshire East Council* [2016] 2 P&CR 1; [2016] EWCA Civ 168.
- 15 See, for instance, the situation in Surrey Heath, and the Thames Basin Heaths Special Protection Area, Avoidance Measures & Strategy (<http://www.surreyheath.gov.uk/residents/planning/planning-policy/thames-basin-heaths-special-protection-area-avoidance-measures>). This has produced its own acronym of a "Suitable Alternative Natural Greenspace" (SANG).
- 16 Special regard must be had to these considerations, in accordance with the Planning (Listed Buildings and Conservation Areas) Act 1990. Space precludes a broader discussion of the specific protection of heritage assets.
- 17 *ClientEarth (No.2) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin).
- 18 *Lawrence and another v Fen Tigers Ltd and others* [2014] UKSC 13.
- 19 See <http://news.bbc.co.uk/1/hi/magazine/8535219.stm>.

# Housing and planning

## Ensuring that development complies with the environmental standards in the Water Framework Directive: has the door been opened for judicial reviews?



Horatio Waller is currently completing pupillage at Francis Taylor Building. Before starting pupillage, Horatio worked for the Law Commission as a research assistant on the reform of the Deprivation of Liberty Safeguards. He has also worked in Luxembourg as a stagiere of the President of the EFTA Court, Professor Carl Baudenbacher, and as a para-legal for Richard Buxton Solicitors.

### At a glance

- Discusses Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland v Germany* where the ECJ was asked to clarify the nature and scope of the environmental objectives in Article 4 of the Water Framework Directive.
- The ECJ held that Article 4 requires Member States to refuse planning permission for individual developments unless they meet strict standards regarding water quality. The Court rejected the interpretation that the Directive is only about long-term environmental planning, leaving discretion to the Member States as to how objectives are achieved.
- As planning authorities are the “competent national authority” to implement this duty in Article 4, can they be challenged in judicial review proceedings for failure to comply with it? In order for planning authorities to be challengeable, the doctrines of directive effect, indirect effect or state liability must apply.
- The way those doctrines were originally formulated by the ECJ makes it questionable whether they apply here. However, it is suggested that recent caselaw of the ECJ has relaxed the original formulations of these doctrines in the context of EU environmental law and this article concludes that it is arguable that judicial review is available.

### Introduction

This article discusses whether the environmental standards in the Water Framework Directive<sup>1</sup> (WFD) apply directly to particular developments or whether they only apply at the general level of long-term state environmental planning. If they do apply directly to development, are the environmental standards strictly applicable or can they be outweighed by other factors? In terms of how they fit into the planning law system, are planning authorities legally required to ensure that development is consistent with these environmental standards? Are they liable to face a judicial review for granting planning permission for a development that does not comply with those standards?

The Court of Justice (ECJ) ruling in Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland v Germany* sheds light on some of these questions. The ECJ decided that developments that may cause deterioration of the status of a body of surface water, as well as projects having certain other adverse effects, must not be granted planning permission unless one of the grounds of derogation under Article 4 apply.

However, the ECJ did not clarify how in practice Member States must ensure that developments are compatible with the WFD. Crucially, in a situation where a planning authority grants approval for a development that is inconsistent with the WFD, must a national court in a judicial review of that planning permission declare it to be unlawful? This question is important because the ECJ's ruling will only have a relatively minor impact if the duty to ensure developments comply with the WFD is not enforceable in national courts.

This is particularly topical at the moment as following the withdrawal of the UK from the EU, environmental lawyers will no longer be able to rely on EU law doctrines such as direct effect and indirect effect to argue that international environmental law creates direct obligations in national law. An article re-examining these questions in a post-Brexit United Kingdom will be published by the author for UKELA in due course. Readers may also like to read the longer version of this article published in the *European Law Reporter*.<sup>2</sup>

### Facts of the case

In a nutshell, the WFD sets an EU wide objective of achieving, by coordinated action, ‘good status’ of all EU surface waters by 2015. It works by imposing on Member States procedural duties to assess and register bodies of water, as well as a substantive duty to achieve certain ‘environmental objectives’ with respect to those bodies of water. *Case C-461/13* dealt with references from a German court considering a judicial review of a planning permission. The relevant

development involved dredging parts of the River Weser in northern Germany so that larger vessels could navigate the river and call at the ports of Bremerhaven, Brake and Bremen. An environmental NGO in Germany was arguing before the court that the planning authority acted unlawfully in granting permission as the proposed development would cause adverse effects to bodies of surface water, contrary to the environmental objectives in the WFD.

It was common ground that dredging the river Weser would indirectly cause adverse effects to bodies of surface water in the river. The case primarily turned on whether the WFD had the effect of prohibiting particular developments that could degrade water quality, or whether it simply set out a general environmental plan. On the one hand, it was argued that the WFD required Member States to adopt a long-term environmental plan to ensure waters meet certain standards. According to this contention, the relevant parts of the WFD simply create objectives for environmental planning, leaving discretion to the Member States as to how they are achieved, and with no direct effect on planning frameworks. On the other, it was contended that the WFD does apply to individual developments, and Member States must refuse planning permission for certain developments that may harm the status of a body of surface water, absent an applicable ground of derogation.

The ECJ agreed with the second argument, namely that the WFD creates obligations applying to individual developments as well as general environmental planning. At one level, the judgment is very clear in its effects. Member States are required by EU law to ensure that individual developments comply with the WFD. Further, since national planning authorities are the bodies responsible for approving land development, EU law would consider them as the competent national authorities responsible for ensuring that individual developments comply with environmental quality standards set at the EU level.<sup>3</sup>

However, the practical impact of the ruling is not clear as the judgment does not clarify whether these obligations can be enforced against planning authorities in national courts in the absence of national law directly transposing them. This is a particularly important question as academic research shows that there is wide variance in compliance with the WFD across the EU.<sup>4</sup> Thus, there is a risk that developments that do not comply with the WFD's standards are being allowed to go ahead. That raises the question of how the WFD's standards can be upheld in practice.

## How can the WFD's standards be upheld in practice?

First, there is the possibility of the EU Commission bringing infringement proceedings against the State

under Art 260 of the TFEU. However, in practice, the Commission is unlikely to have the resources or inclination to monitor all developments across the EU in order to take legal action against Member States, especially after the Brexit vote.

Second, there is the possibility of the WFD giving rise to enforceable rights in domestic courts such that an individual could challenge a grant of planning permission for a development as being inconsistent with the environmental standards in the WFD. EU environmental law has in other areas been held to create enforceable rights in domestic courts, such as the requirement to carry out an environmental impact assessment (EIA).<sup>5</sup> However, in order for the WFD to be relied upon by individuals in a judicial review, it must be shown that the EU law doctrines of direct effect, indirect effect or damages for breach of EU law apply. I will take these in turn.

Does the WFD meet the requirements of direct effect? The no deterioration obligation appears to impose an unconditional obligation as it is not qualified by a condition or subject to the taking of a further measure. It would be more difficult, however, to establish that the provision is sufficiently precise, and that it confers rights on individuals.

In relation to the first point, the Advocate General opined that the WFD is 'unusually difficult to understand' and 'particularly elaborate'.<sup>6</sup> On the other hand, scholars have argued,<sup>7</sup> and the case-law would seem to support, that the requirements of direct effect are significantly relaxed for EU environmental law in light of its special character and the importance of effectiveness in this area.

The most important case in this regard is Case C-72/95 *Kraaijeveld*,<sup>8</sup> which involved provisions that do not appear to be precise, nor do they appear to confer rights on individuals. Nevertheless, the ECJ concluded that individuals could enforce those provisions directly before national courts. The case concerned a development in the Netherlands to reinforce dykes which were not subjected to an EIA. Under Dutch law, no EIA was carried out because the size of the works fell below the minimum set by national legislation for an EIA to be mandatory. The case turned mostly on Articles 4(1) and 2(1) of the EIA directive. Article 4(1), in conjunction with Annex I, specifies projects in respect of which an impact assessment is mandatory. However, the particular project in question fell within the scope of Annex II, and, pursuant to Article 4(2), the Netherlands was competent to determine whether such projects should be subject to an EIA.

The ECJ held that Member States had discretion to create criteria excluding certain projects from the requirement to carry out an EIA but, pursuant to Article 2(1), this cannot have the effect of excluding

projects that are likely to have significant effects on the environment. Further, the ECJ held that these provisions are directly effective so that Kraaijeveld could argue before a national court that, in breach of the EIA Directive, the dyke reinforcement works were not subjected to an EIA.

However, the ECJ held that the provision had direct effect without considering whether the relevant provisions of the EIA Directive met the requirements of direct effect. Instead, the ECJ held that where a Directive imposes an environmental obligation on a Member State, national courts must be able to use that provision to review the legality of the Member State's exercise of discretion.<sup>9</sup> The ECJ's decision was in contrast to the approach of the referring court and the Advocate General, both of whom considered the requirements of direct effect in detail. Further, the margin of discretion conferred on Member States by Article 4(2) appears to be too wide to fulfil the criteria of precision and unconditionality. Although the Court concluded that this discretion is limited by the terms of Article 2(1), the term 'significant effects on the environment' is not legally defined in the directive and determining what projects are likely to have such effects inherently involves elements of political judgment in each case.

This suggests that, although worded in a vague way, provisions that can be formulated by the ECJ into a legal obligation through legal reasoning and be applied to concrete situations are capable of having direct effect.<sup>10</sup> That is consistent with AG Elmer in his opinion in *Kraaijeveld* invoking a previous ruling of the ECJ that concerned the interpretation of article 2(1) when concluding that the provision is sufficiently precise.<sup>11</sup> *Kraaijeveld* has been relied upon by scholars to suggest there is a new type of duty on Member States, one of 'public law effect', which does not require proof of the traditional requirements of direct effect.<sup>12</sup>

In relation to the second criterion for direct effect (conferring rights on individuals), there are judgments where the ECJ has held that EU environmental directives are directly effective without considering the conditions of direct effect, and where it is doubtful whether those directives confer rights on individuals (*Kraaijeveld* being one).<sup>13</sup> Thus, it is arguable that, under the relaxed conditions for direct effect applying to EU environmental law, the environmental standards in the WFD can be directly invoked by individuals before national courts, as it imposes a legal obligation on Member States that has been precisely formulated by the ECJ in Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland*.

Third, there is the possibility of bringing an action against the state under the non-contractual damages principle in the *Francovich* case. Individuals seeking to

bring a *Francovich* claim should be encouraged that the ECJ in *Wells* recognised a right to compensation despite the fact that the EIA Directive did not bestow individual rights.<sup>14</sup> However, the requirement of proving damage will be difficult. Not only do environmental law cases involve complex questions of causation, it would be difficult for an individual to show enough harm for the potential compensation awarded to offset the costs of litigation.

Fourth, there is a requirement in EU law that national courts are to interpret domestic norms as far as possible consistently with EU provisions. The doctrine is limited by the *contra legem* principle which provides that the meaning of national law provisions can be distorted or new words read into them.<sup>15</sup> One thing an individual seeking to rely on the principle of indirect effect would have to bear in mind is that they would be asking a court to read English law in a manner inconsistent with established planning policy, which is that environmental impact is a material planning consideration to be taken into account by planning authorities, but not a decisive consideration.<sup>16</sup>

## Conclusion and other matters to consider

It has been shown that there are avenues available for individuals to pursue judicial review proceedings against planning authorities in order to uphold the environmental standards in the WFD. However, there are various matters which remain to be considered in order to fully understand the significance of this ruling.

Firstly, what types of development trigger a duty for planning authorities to consider compliance with environmental standards? The judgment may apply more broadly than the facts of the German development under consideration immediately suggest. For example, in the longer version of this article I suggest it could apply to fracking proposals on the basis that they have the potential to contaminate sources of groundwater with pollutants from fracturing fluid and methane gasses through the fractures created. Secondly, how do planning authorities assess whether the development complies with the standards in the WFD? The ECJ clarified in its judgment that developments must be refused permission where they cause "deterioration" of the status of a body of surface water. Deterioration is interpreted strictly as occurring when the status of one quality element of a water body declines, regardless of whether the overall classification changes. However, there are grounds of derogation which allow developments causing deterioration of water bodies to be allowed in some circumstances.

Readers can find a full discussion of these questions in the longer version of this article.

## Endnotes

- 1 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327, p1.
- 2 Horatio Waller, *Case C-461/13 Bund Bund für Umwelt und Naturschutz Deutschland eV: could this case change the current of EU environmental law or will it just wash over?* European Law Reporter 2016, 53 (available at [http://www.elr.lu/archiv\\_pdf/Ausgabe\\_2016\\_nr02.pdf](http://www.elr.lu/archiv_pdf/Ausgabe_2016_nr02.pdf)).
- 3 Judgment in *Fratelli Costanzo v Comune di Milano*, C-103/88, EU:C:1989:256, para 31; on planning, see Judgment in *R. (Wells) v Secretary of State for Transport, Local Government and the Regions*, C-201/02, EU:C:2004:12; and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26. This is also accepted by the UK Supreme Court – see *R (Champion) v North Norfolk District Council* [2015] UKSC 52, para 6.
- 4 *Keesen et al*, European River Basin Districts: Are They Swimming in the Same Implementation Pool? *J of Environmental Law* 2010, 220-221.
- 5 Opinion in *R. (Wells) v Secretary of State for Transport, Local Government and the Regions*, C-201/02, EU:C:2003:502, para 62.
- 6 Opinion in *Bund für Umwelt und Naturschutz Deutschland v Germany*, Case C-461/13, paras 4 and 5.
- 7 *Sacha Prechal*, *Directives in EC Law* (2nd edition 2005), p99; *Sacha Prechal and Leigh Hancher*, *Individual Environmental Rights: Conceptual Pollution in EU Environmental Law? Yearbook of European Environmental Law* 2002, 89 (98); and *Martin Hedemann-Robinson*, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edition 2015), ch 6.
- 8 Judgment in *Kraaijeveld and others*, C-72/95, [1996] ECR I-5403;
- 9 Judgment in *Kraaijeveld and others*, C-72/95, [1996] ECR I-5403; compare with judgment in *Comitato*, C-236/92, EU:C:1994:60.
- 10 See, in this regard, Opinion in Case C-128/92 *Banks v British Coal Corporation* [1994] ECR I-1209, para 27.
- 11 Opinion in *Kraaijeveld and others*, C-72/95, EU:C:1996:135, para 72.
- 12 See, generally, *Martin Hedemann-Robinson*, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edition 2015), p 290.
- 13 See, in particular, judgments in *Dieter Janecek v Freistaat Bayern*, C-237/07, EU:C:2008:447, paras 36-39; *Commission v Germany*, C-361/88, EU:C:1991:224; *Commission v Germany*, C-59/89, EU:C:1991:225; and *Commission v Germany*, C-58/89, EU:C:1991:391; *Associazione Italia per il WWF*, C-118/94; and *Waddenzee*, C-127/02 EU:C:2004:482.
- 14 Judgment in *Wells* (no 22), paras 64 and 66.
- 15 Judgment in *Wagner Miret v Fondo de Garantía Salarial*, C-334/92, [199e] ECR I-6911.
- 16 i.e. Town and Country Planning Act 1990, s 70(2); and The Water Environment (Water Framework Directive) (England) and Wales) Regulations 2003 SI 2003/3242, reg 17.

# Housing and planning

## Planning reform in Scotland



Clare Symonds, convenor and founder of Planning Democracy,<sup>1</sup> a national charity established in 2009 with the aim of promoting a stronger public voice in the Scottish planning system.

### At a glance

- The Scottish planning system is undergoing a comprehensive, 'game-changing' review.
- 48 recommendations have recently been made by an independent panel and a white paper is expected to be forthcoming.
- Despite acknowledging the limitations of the planning system in engaging and empowering communities; there are concerns that the review retains a problematic focus on the early 'frontloading' of engagement with communities which fails to address the planning system's democratic deficit.
- The review ruled out the creation of 'equal rights of appeal' for communities in planning decisions, yet it paid little consideration to the surrounding evidence and arguments for such reform.
- There are a number of risks associated with this approach of 'storing up dissent' – recent events such as Brexit and the election of Trump demonstrate that popular dissatisfaction is capable of creating considerable political uncertainty and exacerbating social divisions.

Planning Democracy was formed in response to growing concerns from individuals and groups who found that planning reforms enacted by the Planning etc (Scotland) Act 2006, and implemented in the following three years, made little difference to their ability to understand and influence decisions about the use and development of land. Now in the face of a new set of reforms communities across Scotland seem set to face further disappointment and frustration at a time when public confidence in planning is already low.

In October 2015, an independent panel was appointed by the Scottish Government to deliver a 'game-changing' review of land-use planning in Scotland.<sup>2</sup> The aims of the review were multifold and potentially conflicting. Reflecting the contradictory demands society places on land-use regulation, the panel were charged with making recommendations that would deliver a system of planning in Scotland that ensured efficiency, consistency *and* certainty, addressing concerns that the system was still not sufficiently 'open for business' whilst also ensuring a fairer distribution of opportunities and support for local democratic decision making.

The panel's subsequent report has 48 wide-ranging recommendations that, if fully implemented, would

lead to a substantial reorientation of the system.<sup>3</sup> The Government's initial response to the review, published on 11<sup>th</sup> of July, identified ten immediate actions.<sup>4</sup> Meanwhile, since the summer there has been more detailed work on other recommendations, including a series of stakeholder working groups and the commissioning of research into a variety of topics from planning permission in principle for sites, to improvement of enforcement powers, as well as barriers to engagement and the role of community councils in planning. A white paper is expected to emerge in the near future.

When the review was commissioned it took many people by surprise and was widely interpreted as a response to pressure from the development industry, particularly the housing sector. Thus it is perhaps unsurprising that we at Planning Democracy believe many of the key challenges of balancing fundamentally competing interests through the planning system have been underestimated and are likely to remain unaddressed, particularly those that relate to a long-standing democratic deficit in decision-making.

### What does the planning review promise for communities and will it work?

The review makes the welcome acknowledgement that the planning system is 'not yet effective in engaging, let alone empowering communities'. And, to the uninitiated, the response to this 'problem' of community engagement looks sensible enough, with recommendations to show a commitment to early engagement in planning, empowering communities to bring forward their own local place plans and giving community councils statutory rights to be consulted on development plans.

However, those who remember the previous reforms in 2006 may see a familiar strategy that relies on what is termed 'front loading', involving citizens early on in planning processes. The arguments put forward for this approach are that it can lead to more community ownership of the vision and way forward for an area, giving communities the opportunity to proactively shape their place. This, according to the Royal Town Planning Institute (RTPI),<sup>5</sup> will lead to better outcomes and a less adversarial system than one that focuses on the development management end of planning, where specific planning proposals are determined.

These are laudable aims, but sadly unlikely outcomes. And this 'upstreaming' approach is once again being proposed as the 'answer' for community engagement, despite a complete lack of hard evidence that it is working (and with substantial anecdotal evidence from communities, local authorities and developers that it is not). Better, early engagement has been consistently promised since the Skeffington Report on Public Participation in the Planning System was published in 1969, but has never actually been realised. Meanwhile the highly discretionary decision-making that characterises UK based planning systems means that even when people do actively engage in the production of plans they can still find themselves fighting applications for unwanted development further down the line.

Those promoting this frontloading agenda also seem worryingly keen to point out that communities should keep their expectations low as to how much they will actually be able to influence subsequent decision-making processes. For example Planning Aid Scotland's SP=EED document appears to focus more on efficiency than empowerment.<sup>6</sup> It states that 'an essential aspect of effective engagement is managing public expectation'. The document goes on to say 'timescales in delivering development can be lengthy, so meaningful engagement needs to be planned to manage and retain stakeholder involvement throughout the process, as well as setting out a realistic understanding of what can be achieved'.

Unfortunately, frontloading does not provide any guarantee to communities that they can influence the development plan for their area. A community might attend charrettes (an interactive design process), workshops and drop-ins, write responses and encourage others to do likewise, with little or no guarantee that their efforts will be effective. Then, even if they are successful in getting their wishes incorporated into the plan, there is no guarantee that their aspirations will be reflected in subsequent decision-making.

This lack of predictability does not provide much incentive for individuals to get involved in development plan preparation, even if they are motivated enough to navigate the legal, technical and procedural complexities involved. And in this regard, there remains a clear expectation that people need to learn the language of planning, rather than developing a more genuinely enabling system where planners translate community wishes into planning terms.

A proposal to introduce new statutory, community-led plans as a means to bring forward a community vision of place and renew local democracy *may* provide an opportunity to shift planners into this more enabling role, but much will depend on how it is implemented.

There are many differing conceptualisations of community-led plans, from those that are locally initiated and developed, sometimes as a means of challenging development pressures that threaten local priorities, to those initiated by local authorities or external agencies that often involve fairly standard consultation, perhaps with some additional design process such as a charrette. The review report states communities should be empowered to bring forward their own local place plans to be incorporated into the development plan. However, it caveats this with an important specification, 'where it can be demonstrated they deliver development requirements'.<sup>7</sup>

This statement reveals where a real community empowerment model may differ from the more typical local authority driven model of the planning world. How these differing models of plans can be incorporated into local development plans, whose direction and policy is determined increasingly by the Scottish Government, is yet to be established but will be a true test of the Government's commitment to real community empowerment in planning. The lessons emerging from Neighbourhood Planning in England suggest that such plans can work, but that without proper resourcing, support and political will, the power to plan is hard for all communities to make use of and can also deepen inequalities between better and less-well resourced places.

## Balancing community rights

In arguing for frontloading, the review also rejects the case for equalising appeal rights at the end of the planning process. The current lack of appeal rights for communities perpetuates a fundamental inequality at the heart of the planning system. Developers can appeal when an application is rejected, but there is no mechanism for communities to challenge the 94% of planning applications that are approved.<sup>8</sup>

The logic of frontloading suggests that by engaging people in development plan processes, communities have no need of rights to challenge decisions made later, optimistically assuming that all the issues will have already been ironed out. However, this unacceptably simple view does not reflect the reality of the process. It assumes firstly that communities are aware enough and motivated to engage in development planning, the reality being that most people have no knowledge of what a development plan is or how to get involved in the process (sadly, the courts have also typically left it to communities to be proactive in looking out for information and notices regarding planning consultation).<sup>9</sup> Secondly it assumes that community aspirations will be reflected in development plans when, as explained above, there is no guarantee that this will be the case. Thirdly, it assumes that development plans are prescriptive and detailed enough to determine exactly what gets built,

something that has never been the case in Scotland where 'discretionary decision-making' on a site-by-site basis remains highly valued. Finally, this means that it disregards the role speculative development plays in shaping places, whereby developers do not necessarily take any notice of what is in the plan. It is surely unacceptable that communities are unable to challenge decisions even when they are contrary to an agreed development plan.

The issue of frontloading therefore raises a number of questions about the relationship between enhancing early engagement and ensuring meaningful powers at the business end of the planning process where decisions actually get made. As in 2005-6, there were a large number of calls for an equal right of appeal (ERA) from community respondents to the Review (nearly half by our count), even despite the panel not raising the issue in their consultation questions (as they did, for example, on charrettes, where only around 20% of community respondents responded favourably). However, without citing any evidence the panel immediately rejected the idea, repeating development industry concerns that it would lead to delay and uncertainty, and also raising fears that ERA would be centralising, since appeals are mainly determined by the Department for Environmental Appeals. However, they did not see this feature as cause to consider removing developers' existing appeal rights.

Even more oddly the Government then followed up by making a promise *not* to equalise appeal rights as one of its ten immediate 'actions' in response to the review, circumventing any debate on the issue whilst simultaneously acknowledging a need for further research and discussion on 'barriers to engagement'. The speed at which the Government response to the review dismissed the case for ERA is somewhat shocking (listed as one of the Government's 10 Immediate Actions 'to be taken forward as priority' published in July – less than two months after the review's report was published on May 31<sup>st</sup>).<sup>10</sup> It perhaps reveals how little power the Government really wishes to hand to communities.

The positive gains that might be made by providing communities with even a limited right to appeal decisions do not seem to have been considered at all. In addition to addressing a glaring inequality, by providing a right to challenge decisions that are contrary to the development plan ERA could, for example, incentivise developers to ensure that proposals are in accordance with the development plan, promoting frontloaded engagement in plan production and the much vaunted goal of a plan-led system. The capacity for ERA to improve decision-making by correcting weak approvals is also overlooked (at the moment only weak refusals are subject to any scrutiny). And of course, alongside other changes to make the system more accessible, a

right to appeal controversial decisions also has the capacity to substantially improve public trust in planning, enabling heightened scrutiny of controversial proposals for example where the decision-maker has an interest in the land, or when a decision is made against an officer's recommendation. Finally the righting of an injustice would go a long way to increasing confidence in our political leadership, giving communities the faith that politicians are not favouring any corporate elites. As recent events have demonstrated a disenfranchised electorate can result in some pretty unsettling events.

Having closed down debate about ERA, in what looks worryingly like a tokenistic gesture, the Scottish Government have now commissioned research to examine 'barriers to engagement'.<sup>11</sup> The tone of the questions being asked by the researchers, however, seem to reflect the long-standing concerns of planning professionals, rather than the lived experience and concerns of members of the public, focusing on 'what are the risks involved in community engagement?' and 'how much engagement is appropriate?'

### Storing up dissent?

Perhaps a better question to ask would be 'what are the risks associated with not engaging the public?' We do not have to look far to see the consequences of neglecting our democracy and the voices of citizens. The 'shock' results of Brexit and a Donald Trump presidency, show how popular dissatisfaction can be mobilised as a protest, generating considerable political uncertainty and threatening to exacerbate divisions between different elements of society.

The widespread representation of those who voted for change under Brexit and Trump as uneducated, ignorant, even malicious, is an inadequate response that threatens to further entrench dissatisfaction. Rather it is vital that all voices and perspectives are understood, and that means listening to the people who made it happen. As things settle, politicians would do well to get out there and talk, finding out what is driving people's motivations rather than just assuming that they are ill-informed. Those are the patronising attitudes and assumptions that drove them to want to make something happen in the first place.

There are parallels here with planning and its similar elitist attitudes and dismissive approach to people who say something that differs from the professional establishment's viewpoint. We routinely see people who object to developments portrayed as interfering NIMBYs, motivated only by their own selfish interests, unrepresentative and unable to understand the larger consequences of decisions. This is a powerful way to justify not listening to their concerns or valuing their input. Professionals looking for a compliant public, who do not raise awkward issues and inconvenient arguments will be disappointed, for none such exists.

In planning, as in the rest of our public life, there is an urgent need to develop better ways of deliberating about contentious issues, and including dissenting, thus making our institutions responsive to the people they are meant to serve. Otherwise we should continue to expect more unpredictable public reactions in future.

## Endnotes

- 1 See [www.planningdemocracy.org.uk](http://www.planningdemocracy.org.uk).
- 2 See <http://www.gov.scot/Topics/Built-Environment/planning/Review-of-Planning>. The review, Crawford Beveridge, Petra Biberbach and John Hamilton, 'Empowering Planning to Deliver Great Places' (May 2016), is available at <http://www.gov.scot/Resource/0050/00500946.pdf> (accessed 28/11/16).
- 3 Ibid.
- 4 Review of Planning – Scottish Government Response (July 2016), available at <http://www.gov.scot/Resource/0050/00502867.pdf> (accessed 28/11/16).
- 5 Public Petitions Committee Petition 1534, Equal Rights of Appeal in the Planning System, RTPI Scotland Response, available at [http://www.parliament.scot/S4\\_PublicPetitionsCommittee/General%20Documents/PE1534\\_G\\_RTPI\\_Scotland\\_19.12.14.pdf](http://www.parliament.scot/S4_PublicPetitionsCommittee/General%20Documents/PE1534_G_RTPI_Scotland_19.12.14.pdf) (accessed 28/11/16).
- 6 Planning Aid Scotland, 'SP=EED' (2013), available at <http://pas.org.uk/wp-content/uploads/2013/07/SPEED.pdf> (accessed 28/11/16).
- 7 Recommendation 44. Page 38 of Empowering Planning to Deliver Great Places <http://www.gov.scot/Resource/0050/00500946.pdf> (accessed 28/11/16).
- 8 Annual and Quarterly Planning Performance Statistics 2015-16, section 9 Approval Rates <http://www.gov.scot/Publications/2016/07/6839/10> (accessed 28/11/16).
- 9 The *McGinty* case (*McGinty v Scottish Ministers* [2013] CSIH 78) suggests that advertising in the somewhat obscure Edinburgh Gazette was sufficient to comply with advertising requirements firmly placing the onus on the public to be aware of major developments, with minimal requirements on the local authority. The Scottish Ministers win at Appeal of the John Muir Trust's Stronelairg Judicial Review (*John Muir Trust Vs Scottish Ministers and SSE Generation Ltd* [2016] CSIH 33) demonstrated in essence, that Further Environmental Information (FEI) only requires advertising once, regardless of what subsequent information is sent through, which places the emphasis on pro-active monitoring of websites by the public on section 36 consents.
- 10 Review of Planning – Scottish Government Response July 11, 2016 <http://www.gov.scot/Resource/0050/00502867.pdf> (accessed 28/11/2016).
- 11 The Barriers to Engagement research was commissioned by Building Standards Division (BSD) of the Scottish Government Directorate for Local Government and Communities on behalf of Planning and Architecture Division. The aim of the research is 'to identify the barriers that exist which prevent the full involvement of communities, young people and other seldom heard groups in the Scottish planning system and provide findings which, either through changes in policy, practice or legislation, support a more collaborative and inclusive planning system'. Yellow book consultants were appointed to carry out the research.

# Matters in practice

## Aarhusted development: Northern Ireland's curious costs protection in environmental cases consultation



Ben Christman – PhD Candidate at Queen's University Belfast and Diploma in Professional Legal Practice Student at the University of Edinburgh ([bchristman01@qub.ac.uk](mailto:bchristman01@qub.ac.uk)).

### At a glance

- The Northern Ireland Department of Justice proposed a number of changes to the Northern Ireland (NI) protective costs orders rules in a February 2016 consultation.
- The proposals mirrored a similar consultation in England and Wales – they were regressive from an access to justice perspective and would have worsened a pre-existing position of non-compliance with Article 9 of the Aarhus Convention.
- Following a number of consultation responses opposing the proposals, the Department has reversed its position and now intends to proceed with changes which may *improve* the position of environmental litigants in NI.
- Contrast the position in England and Wales, where the Ministry of Justice's equivalent consultation response indicates a similar opposition from consultees, yet a determination to proceed with the general direction of change regardless.
- This raises a number of issues concerning devolution and further divergence of the position of environmental litigants in NI (and Scotland) versus those in England and Wales.
- Ultimately the Northern Irish proposals are insufficient to meet the requirements of the Aarhus Convention.

### Introduction

The law of holes dictates that should you find yourself in one, stop digging. Despite being non-compliant with the Aarhus Convention for some years; in early 2016 the Northern Ireland Department of Justice (DOJ) appeared to be revving up an industrial excavator rather than downing tools.

The DOJ's 'Costs Protection in Environmental Cases' consultation<sup>1</sup> proposed a number of changes to the rules in NI covering costs capping in environmental cases. It is the offspring of a sinister parent consultation in England and Wales.<sup>2</sup> The proposals were regressive from an access to justice perspective, and appeared carefully cultivated to make environmental litigation inaccessible.

We live in unpredictable times. Following robust civil society engagement, the offending proposals have been

exorcised. The DOJ is now bringing changes which may facilitate access to environmental justice in NI.

This article introduces and critiques the consultation's initial proposals, sets out the consultation's outcome and concludes with some reflections on the significance of the DOJ's change in approach.

### Background: why cap costs?

The Aarhus Convention aims to secure '...the right of every person of present and future generations to live in an environment adequate to his or her health and well-being...'<sup>3</sup>

It does this by promoting participatory, deliberative environmental citizenship. The Convention provides rights of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.

All parts of the UK have had difficulty implementing the Convention's Article 9(4) requirement that access to environmental justice is 'not prohibitively expensive'. The Aarhus Convention's 2014 Meeting of the Parties found that the UK was not meeting its Article 9(4) obligations in this regard, followed by the Compliance Committee's first progress review reaching a similar conclusion in October 2015.<sup>4</sup> The ideal of an engaged public able to access the courts to challenge breaches of environmental law and enforce their environmental rights remains largely illusory.

NI has a 'Protective Costs Orders' (PCO) system in place in an attempt to reduce costs.<sup>5</sup> Successful PCO applicants have liability for their opponent's costs capped at a maximum of £5,000 for individuals or £10,000 for other applicants (e.g. NGOs). A 'cross-cap' is also created whereby the opponent (e.g. the State) faces only £35,000 of liability for the applicant's costs if the applicant wins.

The PCO system is problematic. It offers costs predictability which insulates from the 'chilling effect' of open liability. PCOs allow litigants to plan, but do not necessarily make litigation affordable.

One manifestation of the affordability problem in NI in this area is a number of citizens who have recently

taken to raising environmental judicial reviews without legal representation.<sup>6</sup> Environmental law tends to be complex, and judicial review likewise. These are challenging waters for navigation by lawyers. The inequality of arms in such situations requires little explanation; with even the most impressive 'litigant in person' facing a good chance of legal shipwreck.

The importance of affordable access to environmental justice is acute in NI, where the right to a clean and healthy environment is threatened by a 'systemic failure' in environmental governance.<sup>7</sup> The recently discovered Mabuoy road 'superdump' – one of the largest illegal landfill sites ever discovered in Europe – is symptomatic of NI's status as 'the dirty corner of the UK'.<sup>8</sup> Friends of the Earth NI have recently warned that the costs of cleaning up illegal waste dumping could leave NI bankrupt;<sup>9</sup> and this is not the only structural environmental governance challenge facing the country.

Environmental laws are routinely left unenforced, and breaches left unchallenged in NI. There is a clear, untapped remedial potential for citizen-led, public interest environmental litigation.

## The proposals

The DOJ proposed a number of changes to NI's PCO system. These included the introduction of:

- **'Hybrid' costs caps.** These would set 'default' costs caps (with some suggestion that the default levels would rise), and would additionally provide that either party could apply (at any stage) to increase or decrease the caps levels, or remove them. This would reduce the certainty for claimants' costs liability and create the opportunity for 'satellite litigation' over costs levels.
- **Mandatory disclosure of claimants' financial details.** Disclosing sensitive personal financial information would undoubtedly deter applications for PCOs. There were unaddressed data protection and privacy issues, and no other UK civil proceedings have the same requirement.
- **Changing the costs of challenging PCOs from an 'indemnity' to a 'standard' basis.** Essentially this would create more favourable conditions for respondents to challenge PCO awards. It would encourage more challenges against the award of PCOs, adding extra costs and uncertainty for claimants.

Individually, these proposals were poorly considered and badly evidenced. Cumulatively, this was an attack on access to justice. Most of the consultees argued that these would have deepened NI's non-compliance with the Aarhus Convention, breached EU law and reduced access to justice.<sup>10</sup>

## Consultation outcome

The consultation provoked several strong civil society responses. The DOJ acknowledged a:

'...widespread opposition amongst respondents to the proposals made and a general consensus that they were a retrograde step in terms of the protection offered to environmental litigants...'<sup>11</sup>

As a result, the DOJ has 'revisited its initial proposals and made some significant changes to them'.<sup>12</sup> They are significant indeed. The outcome appears to be an almost complete about-face. The dubious proposals have been withdrawn, and some have been suggested which may improve access to environmental justice, including:

- PCO applicants will be able to apply to the courts for their caps to be reduced if the default limits would make the proceedings prohibitively expensive, and to apply for the respondent's cap to be increased. Respondents will not be able to apply to vary the cap. This will allow applicants to apply to have their liability reduced below the default limits, and increase applicant's ability to recover their own costs from respondents.
- The proposal for the mandatory disclosure of applicants' financial details has been dropped.
- Unsuccessful challenges to the status of Aarhus cases will continue on the indemnity basis (the proposal to change this to a standard basis has been dropped).

## Reflections

The DOJ – and new Justice Minister Claire Sugden – deserve praise for listening to the consultees. However, regulations will be needed to implement the changes, the details of which will require vigilance. The debate on access to environmental justice will continue beyond the conclusion of this process.

Finally, some reflections on this odd episode and a number of questions without many answers:

- **Why were these dismal changes proposed?** The *Edwards* and *European Commission v UK* litigation were outwardly stated as the primary drivers;<sup>13</sup> but as Jill Crawford has explained, the proposals had more nefarious aims.<sup>14</sup> Was this an unthinking cut/paste job from England & Wales – and the DOJ is now enlightened as to the value of the PCO system following consultation? Was this genuine 'listening' by NI's new Justice Minister (an independent MLA) with positive indications for her term in office; or fear of the proposals being struck down by the courts as non-EU law compliant?<sup>15</sup>
- **What are the implications for the rest of the UK?** NI's consultation response preceded that of its parent consultation in England and Wales (the NI

response was released in September, with England & Wales' being released in November). NI's pro-Aarhus response appears to have had little bearing on the Ministry of Justice's determination to tighten the noose. Rather than evidencing a strong ideological difference between the respective decision-makers, this may be explained by the constitutional restrictions which apply to the legislative output of the NI Assembly. Regardless, as England and Wales slip backwards and NI claws its way slowly towards compliance, the UK regimes will diverge. The outlook is bleak for England and Wales. A deluded optimist might suggest that NI's proposals could create an access to environmental justice 'race to the top' between NI and Scotland as distinctive devolved approaches to the Aarhus Convention emerge.<sup>16</sup>

- **Critically – why is this area so neglected? And what is actually needed to facilitate affordable access to environmental justice?** A cynic might be tempted to label this strange episode as a red herring-type exercise; a distraction from the ultimately conservative nature of the proposals emerging from the consultation which are insufficient to comply with the Convention. The proposals in this consultation are not enough. PCOs are fundamentally inadequate as a solution to the problem of unaffordable environmental litigation. There are lessons to be gained from other jurisdictions – starting points would be legal aid; specialist environmental courts/tribunals and 'One Way Costs Shifting'.<sup>17</sup> Amongst the tedious technicalities in this debate it is important to occasionally remind oneself that what is at stake is not some legal obscurity; but a fundamental human right – and a key component of the rule of law. Change – and political will – are sorely needed.

## Endnotes

- 1 NI DOJ, 'Costs Protection in Environmental Cases: Proposals to revise the costs capping scheme for eligible environmental challenges' (2015). Available at <https://www.justice-ni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges> (accessed 19/11/2016).
- 2 Ministry of Justice, 'Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenges' (2015). Available at <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims> (accessed 19/11/2016). For a critique, see Jill Crawford, 'Further changes to judicial review' UKELA e-law January/February 2016 35-37.
- 3 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 ('the Aarhus Convention'), Article 1.
- 4 Decision v9/n (5th session of the Meeting of the Parties) on compliance by the United Kingdom of Great Britain and Northern Ireland (June/July 2014), paragraph 2(a). Aarhus Convention Compliance Committee, 'First progress review of the implementation of decision V/9n on compliance by the United Kingdom with its obligations under the Convention' (2015). Both available at <https://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfvg/envppcc/envppccimplemation/fifth-meeting-of-the-parties-2014/united-kingdom-decision-v9n.html> (accessed 19/11/2016).
- 5 The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, SR 2010/414.
- 6 Including challenges to the grants of planning permission for a ferry terminal project (see <http://www.newsletter.co.uk/news/crime/appeal-against-carlingford-lough-ferry-terminal-rejected-1-7681449>) and a gold mine (<http://www.belfasttelegraph.co.uk/business/news/omagh-gold-mine-firm-galantas-braced-for-legal-fight-over-plans-34120205.html>).
- 7 Elli Kontoravdis, 'Systemic Failure' (03/02/2014). Available at <https://www.foe.co.uk/northern-ireland/news/systemic-failure-41740> (accessed 19/11/2016).
- 8 Dean Blackwood, 'Environmental Crime: a symptom of institutional neglect in Northern Ireland's Planning System?' UKELA e-law February 2014 12-15. Available at <http://blogs.qub.ac.uk/qub-elrg/files/2014/03/Dean-Blackwood-Environmental-Crime-a-symptom-of-institutional-neglect-in-NIs-Planning-System-e-law-april-2014.pdf> (accessed 19/11/2016).
- 9 Cormac Campbell, 'Waking up to waste: How Northern Ireland's waste problem could leave a toxic legacy' (07/11/2016). Available at <http://www.thedetail.tv/articles/waking-up-to-waste-how-northern-ireland-s-waste-problem-could-leave-a-toxic-legacy> (accessed 19/11/2016).
- 10 This is a tentative conclusion reached from the DOJ's response to the consultation (DOJ, 'Costs Protection in Environmental Cases – Proposals to revise the costs capping scheme for eligible environmental challenges: Summary of Responses and Way Forward' (2016). Available at <https://www.justice-ni.gov.uk/publications/costs-protection-environmental-cases-summary-responses>) and discussions with a number of the other respondents at an event on the consultation held at Queen's University Belfast on the 11th of January 2016. The DOJ has not yet published the responses to the consultation. See NI Environment Link's incisive response to the consultation at:

- <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf> and my own (less incisive but equally critical) at: [https://www.academia.edu/29401749/Response\\_to\\_Northern\\_Ireland\\_Department\\_of\\_Justice\\_Costs\\_Protection\\_in\\_Environmental\\_Cases\\_Consultation\\_17-02-16](https://www.academia.edu/29401749/Response_to_Northern_Ireland_Department_of_Justice_Costs_Protection_in_Environmental_Cases_Consultation_17-02-16)
- 11 DOJ, 'Costs Protection in Environmental Cases – Proposals to revise the costs capping scheme for eligible environmental challenges: Summary of Responses and Way Forward' (2016), p5. Available at <https://www.justice-ni.gov.uk/publications/costs-protection-environmental-cases-summary-responses>.
- 12 *ibid*, p6.
- 13 NI DOJ, 'Costs Protection in Environmental Cases: Proposals to revise the costs capping scheme for eligible environmental challenges' (2015), p7-10.
- 14 *op cit*, fn 2.
- 15 The NI Assembly has limited legislative competence. See Northern Ireland Act 1998, S6 – particularly S6(2)(d).
- 16 See for example, the NI Committee for Justice's recent scrutiny of the DOJ in this area: Committee for Justice, 'Cost Protection Regime for Environmental Challenges: Department of Justice' (22/09/2016), available at <http://data.niassembly.gov.uk/HansardXml/committee-19122.pdf> (accessed 19/11/2016).
- 17 See George and Catherine Pring, 'Greening Justice' (2010), available at <http://www.accessinitiative.org/resources/greening-justice> (accessed 19/11/2016); and ClientEarth 'Making Court Costs Reasonable in the UK in Environmental Cases' (2011), available at <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/correspondence/7%20Jan%202011%20follow%20up/frClientEarth15.03.2011/ClientEarthJacksonConsultationResponseFinal.pdf> (accessed 19/11/2016).

# UK Environmental Law Association

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Letters to the editor will be published, space permitting.

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[Linda@ukela.org](mailto:Linda@ukela.org)  
07970 956 171