

Habitats and Air Quality

Alistair Mills
Landmark Chambers
25 June 2018

Overview



- What was the position recently concerning habitats screening?
 - What is the effect of the CJEU's decision in *People over Wind*?
 - Two recent cases on air quality: *Wealden DC* and *Shirley*
 - The approach to SANGS in plans: *DLA Delivery Ltd*
 - Material error of fact: *Baroness Cumberlege*
 - Compensation and Mitigation: *Res UK*
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The Orthodox Position: *Wealden DC*



- First of two cases involving Wealden DC: [2017] EWCA Civ 39; [2018] Env 5
- SoS and developer appealed against quashing of Inspector's decision granting planning permission
- Residential development near the Ashdown Forest
- Argued that Inspector was too stringent in relation to the precautionary principle
- CA referred to the well-established principle that mitigation can be taken into account at screening stage



The Orthodox Position: *Wealden DC* (2)



“The inspector was entitled to conclude that, in considering whether an “appropriate assessment” was required for this particular proposal, it was necessary to take into account the mitigation to which he referred, including heathland management. And he was entitled to find that mitigation essential in reaching his conclusion that an “appropriate assessment” was not required.” (para. 20)

- The Judge however found that the Inspector had not lawfully found that the mitigation was secured, and therefore the decision was quashed.



Orthodoxy Blown Away



- C-323/17 *People over Wind* CJEU 12 April 2018
 - In a short judgment, CJEU overturns the established position:
 - “Article 6(3) of [the Habitats Directive] must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.”
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Orthodoxy Blown Away (2)



- Irish legislation provided that permission was not required unless appropriate assessment was necessary
 - Consultants found that, in the absence of protective measures, there would be negative impact upon pearl mussel population
 - Question before CJEU: is it possible at screening stage to take account of the measures intended to avoid or reduce a project's harmful effects on a protected site?
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Orthodoxy Blown Away (3)

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- The CJEU restated the two-stage approach (consider LSE, then AA) from C/387-15 *Orleans*, and referred to the precautionary principle
 - Considering mitigation presupposes LSE [35]
 - The full analysis is carried out at AA stage [36]
 - Taking into account mitigation at screening stage would risk depriving the AA stage of purpose [37], and the AA stage is to be an essential safeguard
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Air Quality: *Wealden DC*

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- Another Wealden DC case: [2017] EWHC 351 (Admin); [2017] Env 31, Jay J, a successful challenge to the adoption of the Lewes District Local Plan
 - At the heart was recommendation of Natural England that there would not be significant effects if car increases were below a certain limit, either in terms of increase per day, or percentage increase in traffic
 - Wealden also claimed that that there was no in-combination assessment with its own plan
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Air Quality: *Wealden DC (2)*

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- SoS argued that NE's guidance was so precautionary as to rule out any in-combination effects
 - This was even though NE is an expert body, whose views are entitled to considerable weight [90]
 - There is no distinction in Art 6(3) between in-combination effects relevant to scoping, and those relevant to AA [86]
 - The SoS's argument was rejected. NE's advice was illogical and ignored in-combination effects
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Air Quality: *Wealden DC (3)*

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- Regarding the 1000-car-increase threshold [93]:
“In my judgment, there may be no distinction logically to be made between 1,050 additional traffic flows from one district and 1,050...additional traffic flows from two districts. The cars are the same and the nitrogen dioxide is the same”
 - An HRA “infected by public law error would undermine the soundness of the development plan documents” [104]
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**Shirley v SSCLG [2017] EWHC 2306;
[2018] JPL 298**

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- Challenge to SSCLG's decision not to call in a planning application for his own consideration
 - Argued that the Air Quality Directive required the SoS to take the decision himself, as the SoS is the Competent Authority for the purposes of the AQD
 - Dove J held that the SoS's duties were limited to those in art 3(a)-(f) of the AQD, therefore the duties did not extend to the duty to call in the application
 - If AQ limit values, the remedy in the Directive is the preparation and implementation of an AQP
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SANGS in Plans: DLA Delivery

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- The future approach to SANGS now uncertain after *People over Wind*
 - Before that decision, CA considered challenge in *DLA Delivery* [2017] PTSR 949 that NP could not allocate land for housing without evidence that SANGS would actually be provided
 - The challenge was dismissed: Examiner should have said why he thought SANGS would be provided, however just at plan-making stage, and failure was not fatal to the NP
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Baroness Cumberlege v DLA Delivery



- Claimant's challenge to grant of planning permission was successful at first instance
 - Developer appealed [2018] EWCA Civ 1305
 - One ground concerned factual error as to whether development site within 7km of European protected site (it was)
 - Error was material; conditions did not prevent building on that land; at reserved matters stage layout may be brought forward with buildings within 7km
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Non-EU Habitats: RES UK



- Decision of Keegan J in *R (RES UK) v Planning Appeals Commission* [2018] NIQB 16
 - Decision concerned impact of renewable energy proposal upon habitats without Directive protection
 - Concerned Policy NH5 of PPS2, which has a two-stage approach ((1)is there an unacceptable adverse impact upon priority habitats? (2) balancing exercise)
 - The Commissioner erred in her consideration of compensatory measures – they could be considered within NH5 when considering the balance
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AMills@landmarkchambers.co.uk

