Landmark CHAMBERS

SEA and Habitats: Case law update

Richard Turney

- When is SEA required?
- What in substance is required in the SEA process?

When is SEA required?

- A plan or programme
- Likely to have significant effects on the environment
- Required by legislative, regulatory or administrative provision
- Which sets the framework for development consent
- Note purpose of SEA Directive and the reasons for its introduction after the EIA Directive had been in force for several years

HS2 (R (Bucks CC) v SST [2014] UKSC 3)

- Issue was whether the Command Paper stating the Government's intention to seek consent through the Hybrid Bill procedure should have been subject to SEA

- Turned primarily on whether the Command Paper "set the framework" for the future development consent decision

- Majority of Court of Appeal (Sullivan LJ dissenting) had accepted SST's case that it did not, as it lacked sufficient influence over the Parliamentary development consent decision

HS2 (2)

- 7 judge Supreme Court unanimously dismissed appeals and refused to refer to CJEU

- Lord Carnwath gave leading judgment

- Proceeded on assumption that whether DNS was “required by administrative provisions” was at least a referable issue and therefore the issue was whether it “set the framework for development consent”

HS2 (3)

- More restrictive approach to “sets the framework” than Court of Appeal:
  - “One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it” [36]
  - The test is more than just *influence*; that influence must “constrain subsequent consideration, and to prevent appropriate account from being taken of all the environmental effects which might otherwise be relevant”

HS2 (4)

- Nothing in the Aarhus Convention changes the scope of the SEA Directive, as they are not intended to cover same ground

- No need to refer because little disagreement on the formulation of the test; the issue was its application to the facts

HS2 (6)

- Lord Sumption agreed with Lord Carnwath, see [123]:

"None of this means that the only policy framework which counts is one which is determinative of the application for development consent, or of some question relevant to the application for development consent. What it means is that the policy framework must operate as a constraint on the discretion of the authority charged with making the subsequent decision about development consent. It must at least limit the range of discretionary factors which can be taken into account in making that decision, or affect the weight to be attached to them. Thus a development plan may set the framework for future development consent although the only obligation of the planning authority in dealing with development consent is to take account of it. In that sense the development plan may be described as influential rather than determinative. But it cannot be enough that a statement or rule is influential in some broader sense, for example because it presents a highly persuasive view of the merits of the project which the decision maker is perfectly free to ignore but likely in practice to accept. Nor can it be enough that it comes from a source such as a governmental proposal or a ministerial press statement, or a resolution at a party conference, or an editorial in a mass circulation newspaper which the decision-maker is at liberty to ignore but may in practice be reluctant to offend."

HS2 (7)

- Lady Hale troubled, but ultimately not persuaded that there should be a reference:
  - Grand Chamber had adopted, in short terms, a meaning for the phrase “set the framework”
  - Aim of Directive not to subject all plans to SEA, but to ensure development consent decisions not constrained by earlier decisions
  - Quashing the DNS would not necessarily derail process
  - In any event SEA would not require comparison of the effects of HS2 against increased capacity of existing lines

HS2 (8)

- Note the hugely significant judgment of Lords Neuberger and Mance, with support of the other 5 JSCs
- The question of the meaning of “required” would have been answered without a reference, but for the CJEU having given the word “a meaning which the European legislature clearly did not intend”
- If necessary therefore the matter would have been referred “for it to reconsider, hopefully in a fully reasoned judgment of the Grand Chamber, the correctness of its previous decision”

HS2: possible consequences

- More restrictive application of the Directive from the UKSC's interpretation of "sets the framework"?

- Potential future reference on "required"?

Earl's Court (*West Kensington TRA* [2013] EWHC 2834 (Admin))

- Issue of whether Earl's Court SPD required SEA
- No domestic requirement for sustainability appraisal of SPD
- Lindblom J held that SEA was required
- Applied *Inter-Environnement Bruxelles* [2012] Env LR 30: voluntary plans and programmes are within the scope of the SEA Directive

Earl's Court (2)

- The SPD was "required… by administrative provision" because it was referred to in the two Borough Core Strategies

- The SPD was likely to influence decisions on proposals in the Opportunity Area and therefore performed a framework setting function: see *HS2*

- Question: when, if ever, will an SPD be outside the scope of the SEA Directive as now understood?

What is required in SEA?

- Substantial compliance with the requirements of the Directive
- Court unlikely to quash for procedural errors: see *Walton* and see also *West Kensington TRA*
- Need to consider alternatives in a reasoned way
- Tiered approach where plans form part of a hierarchy, to avoid duplication of assessment
- Adequacy of SEA is for decision-maker, subject to *Wednesbury*: see *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin)

DB Schenker v Leeds CC [2013] EWHC 2865 (Admin)

- Challenge to Natural Resources and Waste Local Plan
- Claimants owned sites which are allocated in NRWLP for aggregate transportation uses
- Claimants argued for mixed use/housing allocations through the local plan process

DB Schenker (2)

- Judge held that "thematic" plan relating to waste and minerals did not have to consider alternatives such as housing:

> *"provided that the thematic plan forms part of a series of relevant documents, one or more of which consider the alternatives such as housing, and provided that the series of documents are considered together, or to use the SA terminology, "acting cumulatively""*

R (Chalfont St Peter PC) v Chiltern DC [2013] EWHC 1877 (Admin)

- Attempt to quash part of Core Strategy
- Applied *Heard v Broadland* in respect of the adequacy of consideration of alternatives
- Found that alternatives which were obvious non-starters did not need to be considered
- Note generally the impacts of SEA on plan preparation and examination

Habitats: plan-making

- *Forest of Dean FoE v Forest of Dean DC* [2014] Env LR 3 – assessment under s 102 Conservation of Habitats and Species Regulations 2010 for CS and AAP

- Held that the appropriate assessment process was adequate

- Notes the practical issues which may arise from AA during the plan process, and from having two relevant tiers of policy

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