Landmark CHAMBERS

Recent developments in air quality law

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Outline

- Directive 2008/50/EC on ambient air quality and cleaner air for Europe ('the Air Quality Directive')
- ***R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs***:
  - (1) [2015] PTSR 909 (CJEU & SCt)
  - (2) [2017] PTSR 203, Garnham J
  - (3) [2016] EWHC 3613 (Admin), Garnham J
  - (4) [2017] EWHC 1966 (Admin), Garnham J
  - (5) Potential challenge to new AQ plan?
- ***PS v Greenwich RLBC*** [2016] EWHC 1967
- ***Wealden DC v SSCLG*** [2017] EWHC 351 (Admin)
- ***Shirley v SSCLG*** [2017] EWHC 2306 (Admin)

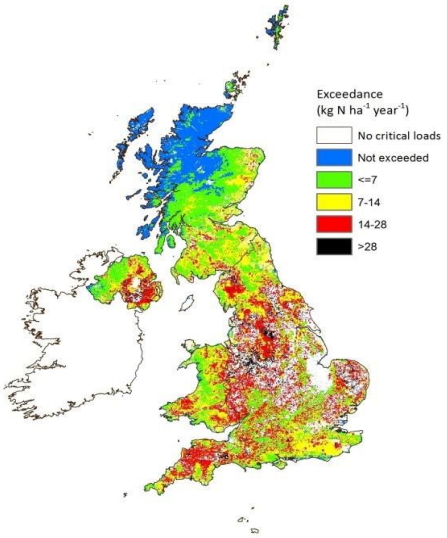
Context

- Nitrogen (N) essential for plant growth
- 78% of atmosphere = N, but inert and not available to most plans as a nutrient
- "Nutrient" N = forms of N that are available to plants:
  - nitrogen dioxide (NO_2)
  - ammonia (NH_3)
  - nitrate (NO_3)
  - ammonium (NH_4)

Context

- Fuel combustion and traffic emissions increase concentrations of "nutrient" N
- Plant communities become dominated by limited number of species that thrive on high N levels at expense of most species adapted to low nitrogen levels
- Species diversity declines
- Scientists have developed concept of "critical loads" for pollutants such as N:
  - estimate of acceptable exposure level to pollutant "below which significant harmful effects on specified sensitive elements of the environment do not occur"

Context



- Current nutrient N deposition exceeds "critical loads" through much of UK, esp. England
- Over 90% of sensitive habitat in E&W exceeding critical loads

The Air Quality Directive: background (1)

- Air Quality Framework Directive 96/62

-purpose: to establish objectives for ambient air quality in the EU designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole

-Art 4(1): EU Commission required to submit proposals on setting limit values for various atmospheric pollutants taking into account the factors in Annex II, including "economic and technical feasibility"

- Directive 1999/30

-set limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air

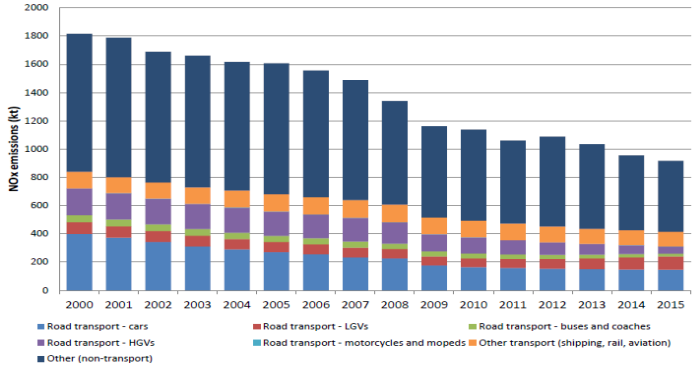
The Air Quality Directive: background (2)

- Nitrogen dioxide (NO_2)
  - Gas formed by combustion at high temperatures
  - Main sources in UK urban areas: road traffic and domestic heating
  - NO_2 is a component of particulate matter (PM10 and PM2.5) which have an effect equivalent to 29,000 premature deaths each year in the UK

- Air quality in the UK
  - UK divided into 43 zones and agglomerations
  - In 2010, 40 zones/agglomerations were in breach of one or more of the NO_2 limit values
  - In 2015, 37 zones were in breach

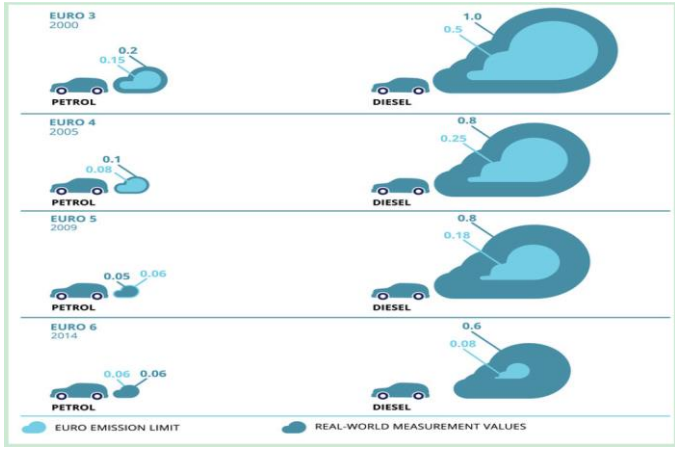
The Air Quality Directive: background (3)

Annual UK emissions of NOx since 2000: road transport being responsible for c.80% of NOx concentrations at roadside, with diesel the largest source.



The Air Quality Directive: background (4)

The emissions scandal, pictorially represented:



The Air Quality Directive: key provisions (1)

- Air Quality Directive repealed and replaced Framework Directive and Directive 1999/30 (but retained the same limit values)

- Article 2(5)
  - "Limit Values": levels fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained

The Air Quality Directive: key provisions (2)

- Article 12
  - in zones where the levels of NO_2 are below the relevant Limit Value, "Member States shall maintain the levels of these pollutants below the Limit Values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development"

- Article 13
  - obliges Member States to ensure that throughout zones, levels of NO_2 in ambient air do not exceed the Limit Values specified in Annex XI from 1 January 2010.

The Air Quality Directive: key provisions (3)

- Contrast Article 13 with Article 16
  - Art 16 only requires Members States to take "all necessary measures not entailing disproportionate costs" to achieve the "target value" for concentrations of PM2.5
- Article 22
  - allows Member States to postpone the deadlines specified in Annex XI, but only for a maximum of 5 years and on condition that an air quality plan under Article 23 is established
  - plan is to be supplemented by information listed in Section B of Annex XV demonstrating how conformity will be achieved before the new deadline

The Air Quality Directive: key provisions (4)

- Article 23(1)
  - where pollutants exceed any Limit Value, Member States must ensure that air quality plans are established for the relevant zone or zones
  - if relevant attainment deadline has already expired, the plan must set out appropriate measures so that the exceedance period can be kept "as short as possible"

The Air Quality Directive: Summary

- Member States cannot exceed the limit value for NO_2 after 1 January 2010
- Art 22 procedure allows postponement for 5 years BUT that is conditional on establishing an action plan demonstrating how compliance would be achieved before the new deadline
- Art 23 imposes a general duty to prepare action plans for areas where limit values exceeded. Where the attainment deadline has passed such plans must set out appropriate measures to keep the exceedance period "as short as possible"

ClientEarth

R (ClientEarth): THE FACTS

- In 2010, 40 out of 43 zones in the UK exceeded the limit values for NO_2
- UK applied for time extensions under Art 22 in respect of 24 zones and submitted action plans showing how the limit values would be met by 1 January 2015
- In remaining 16 zones, UK did not apply under Art 22, but instead submitted action plans under Art 23 projecting compliance between 2015 and 2025

R (ClientEarth): THE CHALLENGE

ClientEarth sought judicial review claiming:

- Declaration that the draft NO_2 action plans did not comply with the requirements of EU law;
- Mandatory order requiring SofS:
  - to revise the action plans to ensure that they demonstrate how conformity with the NO_2 limit values will be achieved as quickly as possible and by 1 January 2015 at the latest;
  - to publish the revised action plans for consultation;
- Declaration that the UK is in breach of its obligation to comply with the NO_2 limit values provided for in Art 13

R (ClientEarth): MITTING J'S JUDGMENT

- [2012] 1 C.M.L.R. 47
  - dismissed the claim
  - Art 22 was discretionary, i.e. UK did not need to apply for an extension where there were exceedances
  - refused a mandatory order:

"15… because such a mandatory order, like the imposition of an obligation on the Government to submit a plan under Article 22 to bring the United Kingdom within limit values by 1 January 2015, would raise serious political and economic questions which are not for this court. It is clear from all I have seen that any practical requirement on the United Kingdom to achieve limit values in its major agglomerations, in particular in London, would impose upon taxpayers and individuals a heavy burden of expenditure which would require difficult political choices to be made. It would be likely to have a significant economic impact. The courts have traditionally been wary of entering this area of political debate for good reason."

R (ClientEarth): QUESTIONS REFERRED TO CJEU

- Supreme Court referred 4 questions ([2013] 3 C.M.L.R. 29):

i) Where in a given zone or agglomeration conformity with the limit values for nitrogen dioxide cannot be achieved by the deadline of 1 January 2010 specified in annex XI of Directive 2008/50/EC ("the Directive"), is a Member State obliged pursuant to the Directive and/or article 4 TEU to seek postponement of the deadline in accordance with article 22 of the Directive?

ii) If so, in what circumstances (if any) may a Member State be relieved of that obligation?

iii) If the answer to (i) is no, to what extent (if at all) are the obligations of a Member State which has failed to comply with article 13 , and has not made an application under article 22, affected by article 23 (in particular its second paragraph)?

iv) In the event of non-compliance with article 13 , and in the absence of an application under article 22 , what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or art19 TEU ?

R(ClientEarth): CJEU'S PRELIMINARY RULING (1)

- [2015] P.T.S.R. 909

- CJEU reformulated questions (i) and (ii) and answered that:

"35. …article 22(1) of Directive 2008/50 must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a member state is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that member state of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline. Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1)." (emphasis added)

R(ClientEarth): CJEU'S PRELIMINARY RULING (2)

- CJEU answered the third question as follows:

"49. …where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a member state by 1 January 2010, the date specified in that annex, and that member state has not applied for postponement of that deadline under article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second sub-paragraph of article 23(1) of the Directive has been drawn up does not, in itself, permit the view to be taken that that member state has nevertheless met its obligations under article 13 of the Directive."

R(ClientEarth): CJEU'S PRELIMINARY RULING (3)

- CJEU answered the fourth question as follows:

"58. …where a member state has failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter."

R(ClientEarth): SUPREME COURT'S DECISION (1)

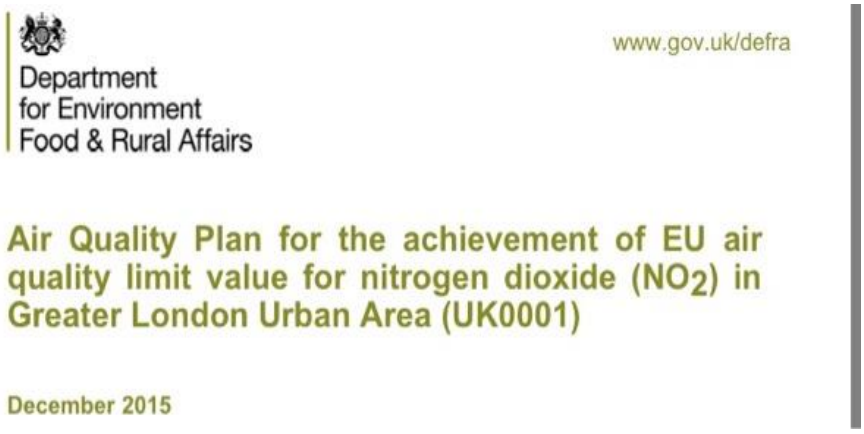
- Lord Carnwath JSC gave the judgment of the Court:
  - CJEU's reformulation of questions (i) and (ii) "introduced a degree of ambiguity which it had been hoped to avoid in the original formulation"
  - But unnecessary to decide if the Article 22 postponement procedure was mandatory or not. Proceedings took so long that the longstop postponement date of 1 January 2015 had passed.
  - *Obiter* [27]: Article 22 was not mandatory but failure to apply for postponement reinforces the obligation to act urgently under Article 23 "to remedy a real and continuing danger to public health as soon as possible".

R(ClientEarth): SUPREME COURT'S DECISION (2)

- Mitting J's approach to remedy "is clearly untenable in the light of the CJEU's answer to the fourth question. That makes clear that, regardless of any action taken by the Commission, enforcement is the responsibility of the national courts" [28]
- CJEU's judgment "leaves no doubt as to the seriousness of the breach" … "nor as to the responsibility of the national court for securing compliance" [29]
- Granted a mandatory order requiring SofS to prepare new air quality plans under Article 23 to be delivered to the Commission by 31 December 2015

R(ClientEarth): SUPREME COURT'S DECISION (3)

- SofS's evidence shows a significant deterioration in predicted compliance timescales (5 zones compliant by 2015, 15 by 2020, 38 by 2025 and 40 by 2030, with Greater London Urban Area, West Midlands Urban Area and West Yorkshire Urban Area still not compliant by 2030) [20]
- *Obiter* [33] a question which "may well arise in connection with the new plans" concerns the interpretation of the words "as short as possible" in Article 23(1)
- Cases cited by the Commission "indicate that the scope for arguing "impossibility" on practical or economic grounds is very limited".
- "If this remains an issue in relation to the new air quality plans, when they are published for consultation, it may call for resolution by the court at an early stage to avoid further delay in the completion of compliant plans"



ClientEarth (No.2): Introduction

- UK's Air Quality Plan published on 17 December 2015
- Plan's projections of emissions were modelled at 5-yearly intervals with a compliance date of 2020 for regional zones and 2025 for London
- ClientEarth challenged the Plan arguing that DEFRA had erred in its approach to the requirement of Art 23(1) that periods of exceedance should be "as short as possible"

ClientEarth (No.2): breach of Article 23

- Garnham J held that Article 23 gave Member States some discretion to select the necessary measures for compliance BUT that discretion was narrow and greatly constrained (see e.g. ***Case C-237/07 Janecek v Freistaat Bayern*** [2008] ECR I-6221)
- Measures selected had to be effective in achieving the objective of meeting the limits in the shortest possible time
- Costs could be considered when choosing between **equally effective measures**, but not when fixing target date for compliance or in determining the route by which compliance could be achieved, where one route produced results quicker than another

ClientEarth (No.2): breach of Article 23 cont'd

- Measures adopted should be proportionate i.e. no more than was required to meet the target
- DEFRA therefore had to achieve compliance by the soonest date possible and choose a route to that objective which reduced exposure to air pollutants as quickly as possible

ClientEarth (No.2): other error of law

Garnham J: DEFRA had erred in law in that:

(1) No evidence to suggest that 5-yearly emission forecasts cycles were sufficient when a Member State was faced with the urgent task of bringing its pollutant levels within the limits of the Directive. Projected compliance date was fixed for administrative convenience and DEFRA had deprived itself of opportunity to discover what was necessary to ensure compliance sooner.

(2) Plan did not identify measures which would ensure exceedance would be **as short as possible**. Instead, identified measures which, if very optimistic forecasts happed to be proved right and emerging data happened to be wrong, might achieve compliance.

ClientEarth (No.2): the 2017 judgment

- 2017: SoS applied for an extension of time to publish the modified Plan given the impending local and general elections
- Cabinet Office election guidance included a "Purdah" period for 3 weeks preceding elections during which sensitive decisions were to be avoided
- SoS: holding a consultation on air quality in the run-up to an election would distract from election and make consultation less effective
- Garnham J in [2017] EWHC 1618 (Admin):
  - court would take Purdah into account, but not a principle of law that amended legal duties, or gave a defence to failure to comply with court order
  - change of timetable to after *local* elections would not threaten date of publication of final plan, but this later date unchanged

ClientEarth (No.3): [2017] EWHC 1966 (Admin)

- The draft AQ plan was published on 5 May 2017. ClientEarth challenged, seeking a supplement to the plan that: (1) adequetely identified measures to be applied in the devolved administrations and local authorities and (2) reflects the findings of the technical report
- Latter challenge complained that delays would be caused if the option of non-charging clean air zones (CAZs) remained. Difficulty with the challenge, at consultation stage, was that these were matters that could be refined / otherwise justified in a final plan
- Former challenge complained that leaving decisions about specific measures to the local level would delay compliance. Garnham J held that this was not inevitable, and nor was delegation in this way per se unlawful
- Garnham J however left open the possibility that such challenges might be more fruitful when made in respect of a final plan

Department for Environment Food & Rural Affairs

Department for Transport

UK plan for tackling roadside nitrogen dioxide concentrations

Detailed plan

July 2017

The Air Quality Plan (1)

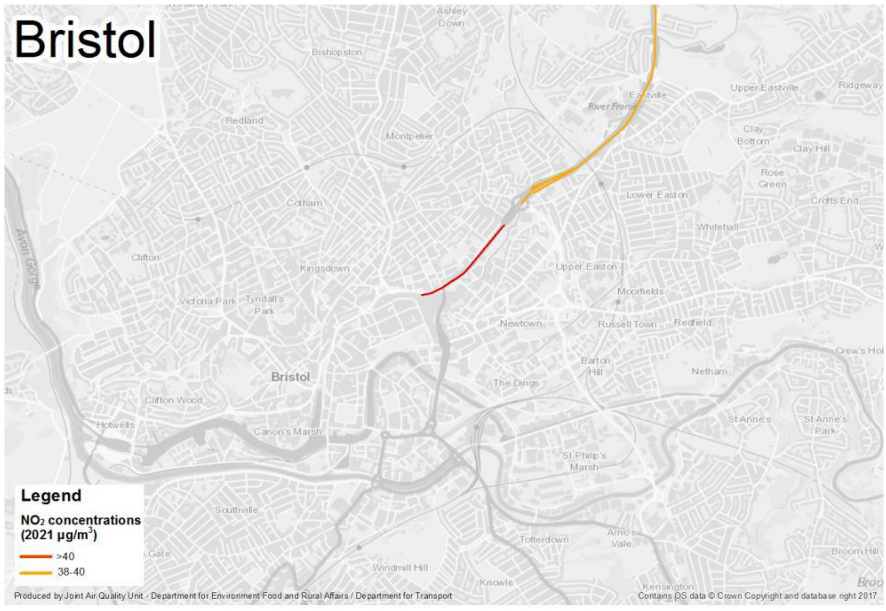
- There is "An Overview", a "Detailed Plan" and a "Technical Report"
- The Government's solution:
  - Investing in ultra low emission vehicles or ULEVs (including infrastructure), low carbon and clean buses, cycling and walking and roads (to reduce congestion)
  - In England, retains the delegation to local authorities: "Local knowledge is vital to finding solutions for air quality problems"
  - The options to be considered in the first instance are: changing road layouts at congestion and air pollution pinch points; encouraging public and private uptake of ULEVs; using innovative retrofitting technologies and new fuels; encouraging use of public transport
  - Thereafter: charging zones or measures to prevent certain vehicles using particular roads at particular times

The Air Quality Plan (2)

- Local authorities must set out initial plans by March 2018 with final plans in place by December 2018
- Subject to approval by Government, assessed on the basis of whether compliance with NO2 levels achieved in the shortest time possible, effects have been properly assessed, and proposals requiring Government funding demonstrate value for money
- BUT the Technical Report identifies charging CAZs as the measure able to achieve limit values in the shortest possible time [detailed report; 95]. Any alternative to a charging CAZ must be "at least as effective"

The Air Quality Plan (3)

- In sum, the roll-out of charging CAZs is likely but where alternative measures are at least as effective, these "should be preferred"
- Bristol is one of the authorities showing exceedances persisting to 2021 and so requiring the production of a local plan. It is to receive funding to accelerate the update of ULEVs e.g. by measures such as rapid chargepoint hubs and a range of local incentives, e.g. free or reduced parking for ULEVs
- Future challenge: ClientEarth have sent a pre-action letter citing lack of specific requirement for local authorities to take action: https://www.clientearth.org/missed-air-quality-targets-hits-new-high-clientearth-mulls-fresh-legal-action/



The Air Quality Plan (4)

- Planning implications: highways; local plan development; (yet further) emphasis on walking, cycling and the use of public transport; presence of a CAZ a relevant consideration in planning decisions; developments being required to meet heightened air quality standards; greater scrutiny of major infrastructure projects like Heathrow
- Brexit implications: a potential for watering down the standards, time for compliance; though December 2018 plan deadline will mean measures are in place before Brexit; more pressing issues may arise if the Directive bites on individual project decision-making (cf ***Shirley v SSCLG***)

PS v Greenwich RLBC [2016] EWHC 1967

- Challenge to planning permission to enlarge a cruise ship terminal building
- Report concluded that the impact of extra NO_2 emissions from diesel engines when ships docked would be negligble
- C: LPA has failed to require an assessment of the total cumulative and combined effects on air quality as required by Core Strategy and NPPF
- Collins J:
  - policies did not require consideration of total emissions
  - focus on ***effect*** of development
  - report had indicated no unacceptable increase in pollution
  - LPA had taken account of "the effects (including cumulative effects) of pollution on health... and the potential sensitivity of the area... to adverse effects from pollution"
  - assessment of "cumulative effects" = assessment of effects against existing background pollution

Wealden DC v SSCLG [2017] EWHC 351 (Admin)

- Challenge to decision of two LPAs to adopt a joint core strategy (JCS)
- JCS covered Ashdown Forest SAC, designated under Habitats Directive because it had large areas of lowland heath vulnerable to NO_2 pollution from motor vehicles
- 2 major A-roads intersected SAC
- Natural England (NE) had advised two LPAs that additional traffic from development planned in JCS not likely to have a significant impact on SAC
- Two LPAs accepted that advice and examining SSCLG inspector did not challenge it

Wealden DC v SSCLG: judgment

- Jay J:
  - NE's advice could not be supported logically or empirically
  - Why had NE not advised that extra traffic from JCS should be assessed cumulatively with traffic arising from development planned in C's own core strategy?
  - Inspector should have found JCS unsound
  - Two LPAs should have made further inquiries of NE (ordinary public law)
  - In any event, NE's advice breached requirement for cumulative assessment under art. 6(3)

Wealden DC v SSCLG: broader context

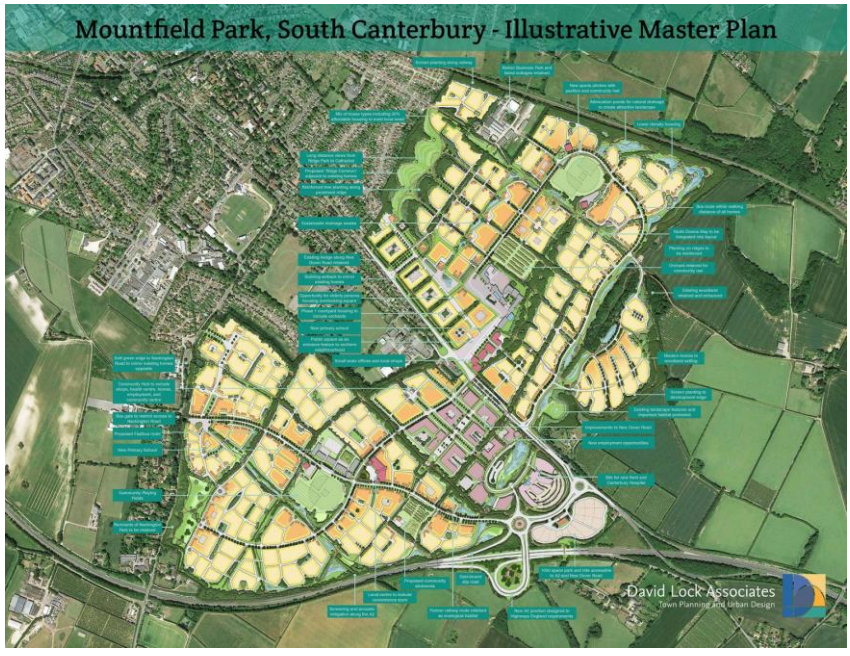
- Judgment follows earlier judgment of Court of Appeal in another case involving Wealden DC and the Ashdown Forest SAC: ***Wealden DC v SSCLG*** [2017] EWCA Civ 39
- Planning application for 103 houses, granted on appeal
- Court of Appeal upheld Lang J's order quashing the permission
- Key issue: whether assessment of LSE should include "in-combination effects" and so trigger need for AA
- NE: in-combination assessment not required unless *inter alia* project contributed more than 1% of critical loads

Wealden DC v SSCLG: broader context

- INS took more precautionary approach: risk of "significant in-combination effects" so LSE conclusion unsafe unless those effects taken into account
- Court held: matter for INS how much weight to give to NE's advice, but he had erred in concluding that no AA required because there was an effective SAMMS (Strategic Access Managmenet and Monitoring Strategy)
- No evidence that SAMMS would provide requirement mitigation for nitrogen deposition – SAMMS would only deal with recreational impacts

Conclusion

- In-combination effects with other plans and projects should be considered at the stage of screening for LSE
- Insofar as NE, the EA or NRW have been advising otherwise based on their own internal guidance documents – documents need to be reviewed and advice received in the meantime scrutinized
- Mitigation of AQ impacts a matter in its own right, not simply an aspect or "by-product" of mitigating recreational impacts
- Challenge to ecological sector to provide robust evidence of how increased N loads can be mitigated or compensated. How to enable development in areas where cumulative N loads are leading to LSE?



R(Shirley) v SSCLG [2017] EWHC 2306 (Admin)

- Challenge to refusal to call-in following LPA's resolution to grant permission for 4,000 homes on outskirts of Canterbury
- An AQMA had been designated for centre of city and on one version of the scheme it was accepted that development would have moderate adverse impact on AQ in one location although LPA concluded that the threshold value for NO_2 would not be exceeded
- Claimant and others argued that on the facts Canterbury was already in exceedance and development would lead to a breach of the 40µg/m3.

Shirley v SSCLG: Claimants' argument

- SoS was the "competent authority" under AQD and obligated to take all measures to ensure compliance with AQD
- This includes all measures required to meet the obligation to comply with AQ limit values under Article 13 – which, it was argued, is not to be remedied solely by the production of an AQP.
- Duty to meet limit values an overriding consideration in circumstances where either the thresholds were exceeded or the development would have the potential to impact upon the requirement to reduce exceedances in a period which has to be kept as short as possible.

Shirley v SSCLG: judgment

- Dove J
  - Dismissed argument that designation of competent authority gave Defendant responsibilities beyond those set out in Article 3(a)-(f); obligation to comply with limit values in Article 13 was on MSs
  - AQD contains its own remedy for breaches of Article 13: the requirement under Article 23 to establish and implement an AQP which is effective and reduces any periods of exceedance. See ***Clientearth*** in CJEU [40]-[42].
  - Therefore no basis for reading in a duty to take particular actions in relation to permits or development consents.