Landmark CHAMBERS

SEA and Plan Making: Legal Update

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The requirement to assess reasonable alternatives in SEA

SEA: reasonable alternatives

Article 5(1):

> "Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, **and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated**. The information to be given for this purpose is referred to in Annex I".

Annex I (h):

> "an **outline of the reasons for selecting the alternatives dealt with**, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information".

SEA: reasonable alternatives

R (Friends of the Earth England, Wales and Northern Ireland Ltd) v The Welsh Ministers [2016] Env LR 1 (26 March 2015) at [88]:

i) The authority's focus will be on the substantive plan, which will seek to attain particular policy objectives. […] The SEA Directive ensures that potentially **environmentally-preferable options** that will or may attain those policy objectives are not discarded as a result of earlier strategic decisions in respect of plans [...] It does so by imposing process obligations upon the authority prior to the adoption of a particular plan.

R (o.a.o. RLT Built Environment Limited) v The Cornwall Council [2016] EWHC 2817 (Admin) (10 November 2016): options that are environmentally inferior need not be considered

SEA: reasonable alternatives

ii) The focus of the SEA process is therefore upon a particular plan—i.e. the authority's preferred plan—although that may have various options within it. A plan will be "preferred" because, in the judgment of the authority, it best meets the objectives it seeks to attain. In the sorts of plan falling within the scope of the SEA Directive, the objectives will be policy-based and almost certainly multi-stranded, reflecting different policies that are sought to be pursued. Those policies may well not all pull in the same direction. **The choice of objectives, and the weight to be given to each, are essentially a matter for the authority subject to (a) a particular factor being afforded particular enhanced weight by statute or policy, and (b) challenge on conventional public law grounds.**

SEA: reasonable alternatives

iii) In addition to the preferred plan, "reasonable alternatives" have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan.

iv) "Reasonable alternatives" does not include all possible alternatives: the use of the word "reasonable" clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter **primarily for the decision-making authority, subject to challenge only on conventional public law grounds.**

- Subsequently confirmed by the Court of Appeal in ***Ashdown Forest Economic Development LLP v SSCLG*** [2016] PTSR 78 (9 July 2015) at [42]

SEA: reasonable alternatives

Ashdown Forest Economic Development LLP v SSCLG [2014] EWHC 406 (Admin): the LPA has a "substantial area of discretion" as regards **the extent of the inquiries required to identify the reasonable alternatives**. The necessary choices are:

"deeply enmeshed with issues of planning judgment, **use of limited resources** and the maintenance of **a balance between the objective of putting a plan in place with reasonable speed** (particularly a plan such as the Core Strategy, which has an important function to fulfil in helping to ensure that planning to meet social needs is balanced in a coherent strategic way against competing environmental interests) and the objective of **gathering relevant evidence and giving careful and informed consideration** to the issues to be determined" ([90]).

SEA: reasonable alternatives

v) Article 5(1) refers to "reasonable alternatives *taking into account the objectives… of the plan or programme… "* (emphasis added). "Reasonableness" in this context is informed by the objectives sought to be achieved. **An option which does not achieve the objectives, even if it can properly be called an "alternative" to the preferred plan, is not a "reasonable alternative". An option which will, or sensibly may, achieve the objectives is a "reasonable alternative".** The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no "reasonable alternatives" to it.

- ***HS2***, Ouseley J: alternative **objectives** do not have to be assessed – the focus of SEA is on alternative **ways of meeting** the objectives identified

SEA: reasonable alternatives

vi) The question of whether an option will achieve the objectives is **also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds**. If the authority **rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative** and it does not have to be included in the SEA Report or process.

SEA: reasonable alternatives

R (o.a.o. Stonegate Homes Ltd) v Horsham DC [2017] Env LR 8 (13 October 2016)

- Challenge to the Henfield Neighbourhood Plan
- Patterson J: the assessment of reasonable alternatives within the SEA process was flawed and the making of the HNP was incompatible with EU obligations. The LPA's decision to make the HNP was thus **irrational**.

SEA: reasonable alternatives

- Alternative "Option C" dismissed in the SA/SEA report and in the HNP because "any further significant development in that area which lies furthest from the village centre would place unsustainable pressure on the local road system"
- Patterson J: question is whether "such evidence as there was, based upon local opinion and […] "what the community felt", was sufficient to meet the standard required under the SEA Directive?"
- No: [74]: "The problem here is that the absolute nature of the rejection of Option C is **unsupported by anything other than guesswork**. At the very least, …the parish council could have contacted the highways authority to obtain their views on the capacity of the broader local highways network in the western part of Henfield. There is no evidence that that was done"

SEA: reasonable alternatives

vii) However, as a result of the consultation which forms part of that process, **new information** may be forthcoming that might transform an option that was previously judged as meeting the objectives into one that is judged not to do so, and vice versa. In respect of a complex plan, **after SEA consultation, it is likely that the authority will need to reassess**, not only whether the preferred option is still preferred as best meeting the objectives, but whether any options that were reasonable alternatives have ceased to be such and (more importantly in practice) whether any option previously regarded as not meeting the objectives might be regarded as doing so now. That may be especially important where the process is iterative, i.e. a process whereby options are reduced in number following repeated appraisals of increased rigour. As time passes, a review of the objectives might also be necessary, which also might result in a reassessment of the "reasonable alternatives". ..

SEA: reasonable alternatives

The format of the assessment of alternatives

- Commission guidance: where certain aspects of a plan or programme have been assessed at an earlier stage of the planning process and the plan / programme maker wishes to use the findings of that earlier assessment at a later stage of the process, that approach will be legitimate if the earlier findings remain up-to-date and accurate and those findings are placed in the context of the new assessment.
- However: "[i]n order to form an identifiable report, the relevant information must be brought together: it should not be necessary to embark on a paper-chase in order to understand the environmental effects of a proposal".
  - See ***Heard v Broadland DC*** [2012] Env LR 23 (Ouseley J) at [12]

SEA: reasonable alternatives

viii) Although the SEA Directive is focused on the preferred plan, **it makes no distinction between the assessment requirements for that plan (including all options within it) and any reasonable alternatives to that plan. The potential significant effects of that plan, and any reasonable alternatives, have to be identified, described and evaluated in a comparable way.**

ix) Particularly where the relevant plan sets a framework for future projects (e.g. a core planning strategy), it may be appropriate and indeed helpful to have an SEA process that is **iterative**. If so, the appraisal has to evaluate the extant options at each stage in a comparable way. As part of an iterative SEA process, options which may be capable of achieving the objectives may be discarded on the way; but such options cannot be discarded without being subjected to an SEA Directive-compliant assessment.

SEA: reasonable alternatives

x) Although an SEA process that is iterative may be particularly appropriate for some framework-setting plans and programmes, it is by no means mandatory. The authority may adopt a non-SEA process to identify those options which meet the objectives. That non-SEA process may itself be iterative.

- N.b. though: ***Ashdown Forest Economic Development LLP v SSCLG*** [2016] PTSR 78 (9 July 2015): Court of Appeal holds that LPA was <u>not</u> entitled to rely on Habitats Regulations Assessment to satisfy the SEA requirement that reasonable alternatives be identified and assessed

SEA: reasonable alternatives

xi) The objectives an authority sets for plans caught by the SEA Directive are likely to be particularly broad and high level, as well as multiple and varied. An assessment as to whether the objectives would be "met" by a particular option is therefore peculiarly evaluative; **but an option will meet the objectives if, although it may not be (in the authority's judgment) the option that best meets the objectives overall** (i.e. the preferred option), **it is an option which is capable of sufficiently meeting the objectives such that that option could viably be adopted and implemented**. That, again, is an **evaluative judgment by the authority**, which will only be challengeable on conventional public law grounds. However, whilst allowing the authority a due margin of discretion, the court will scrutinise the authority's choice of alternatives considered in the SEA process to ensure that it is not seeking to avoid its obligation to evaluate reasonable alternatives by improperly restricting the range options it has identified as such.

SEA: reasonable alternatives

xii) The authority has an obligation to **give outline reasons for selecting (i) its preferred option over the reasonable alternatives, and (ii) the alternatives "dealt with" in the SEA process**. Alternatives "dealt with" include both (i) reasonable alternatives (which must be dealt with in the SEA process) and (ii) other alternatives (which need not, but may, be dealt with in that process). The reasons that are required are merely "outline". The authority need only give the main reasons, so that consultees and other interested parties are aware of why reasonable alternatives were chosen as such (including, in appropriate cases, why other options were *not* chosen as reasonable alternatives)—and, similarly, why the preferred option was chosen as such.

- ***Heard v Broadland DC*** [2012] Env LR 23 (Ouseley J) no obligation to give even an outline reason for disregarding "obvious non-starters"
- N.b. the fact that only outline reasons are required doesn't lessen the extent of the duty to **assess** the chosen alternatives

Curing deficiencies in the SEA process

SEA: curing deficiencies

No Adastral New Town Ltd v Suffolk Coastal DC [2015] Env LR 28 (CA) (17 February 2015)

- Patterson J concludes that there were two deficiencies in the course of the SEA process:
  - Failure to carry out SEA at the early stages of preparation of the Core Strategy (prior to Preferred Options consultation)
  - Failure to consult on alternative options when an increase in housing allocation was subsequently proposed
- However, both deficiencies were subsequently cured by the time the draft CS was submitted for examination by the inspector

SEA: curing deficiencies

Court of Appeal

- As a matter of law, earlier deficiencies in the SEA process are capable of being cured later in the process
- Approves judgment of Singh J in ***Cogent Land LLP v Rochford DC*** [2013] 1 P&CR 2. Failure adequately to set out reasons for preferring selected locations in Core Strategy over rejected alternatives cured by submission of a later addendum
- Also Sales J (*obiter*) in ***Ashdown Forest Economic Development LLP v SSCLG*** [2014] EWHC 406 (Admin) at [89]. The correct focus for analysis under the SEA Directive are the Core Strategy documents submitted for independent examination by the inspector: "[the] procedures involved in independent examination of a plan by an inspector, including by examination in public, appear to me to be a consultation process which is capable of fulfilling the consultation requirement under Article 6 of the Directive"

SEA: curing deficiencies

Richards LJ in ***NANT***:

- Appellant argues that ***Cogent*** should be distinguished because the defect there was simply a failure to give reasons, explain why the LPA had made its choices
- Distinction rejected by Richards LJ at [54]: "[t]he failure in ***Cogent*** to give adequate reasons for preferring the selected locations over alternatives was just as much a defect of process as were the deficiencies in the present case. In any event, the reasoning of Singh J in ***Cogent*** is just as applicable to the deficiencies in the present case as it was to the defect in ***Cogent*** itself.

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