Landmark Chambers

Andrew Byass

Air quality as a ground of challenge in planning cases – and something on climate change

Air quality (and something on climate change)

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- Some background: (1) Directive 2008/50/EC on ambient air quality and cleaner air for Europe ("the Air Quality Directive"); and (2) the ***Client Earth*** litigation
- Plan-making challenges: (1) ***Wealden DC v SSCLG*** [2017] EWHC 2306 (Admin) and (2) ***R (Spurrier) & Ors v SST*** [2019] EWHC 1070 (Admin) ("the Airports NPS challenge")
- Decision-taking challenges: (1) ***R (Shirley) v SSHCLG*** [2019] PTSR 1614 and (2) ***Gladman Developments v SSCLG*** [2017] EWHC 2768 (Admin)
- Something on climate change: (1) ***R (McLennan) v Medway Council*** [2019] EWHC 1738 and (2) the Airports NPS challenge (on sustainable development and climate change)

The Air Quality Directive

The Air Quality Directive

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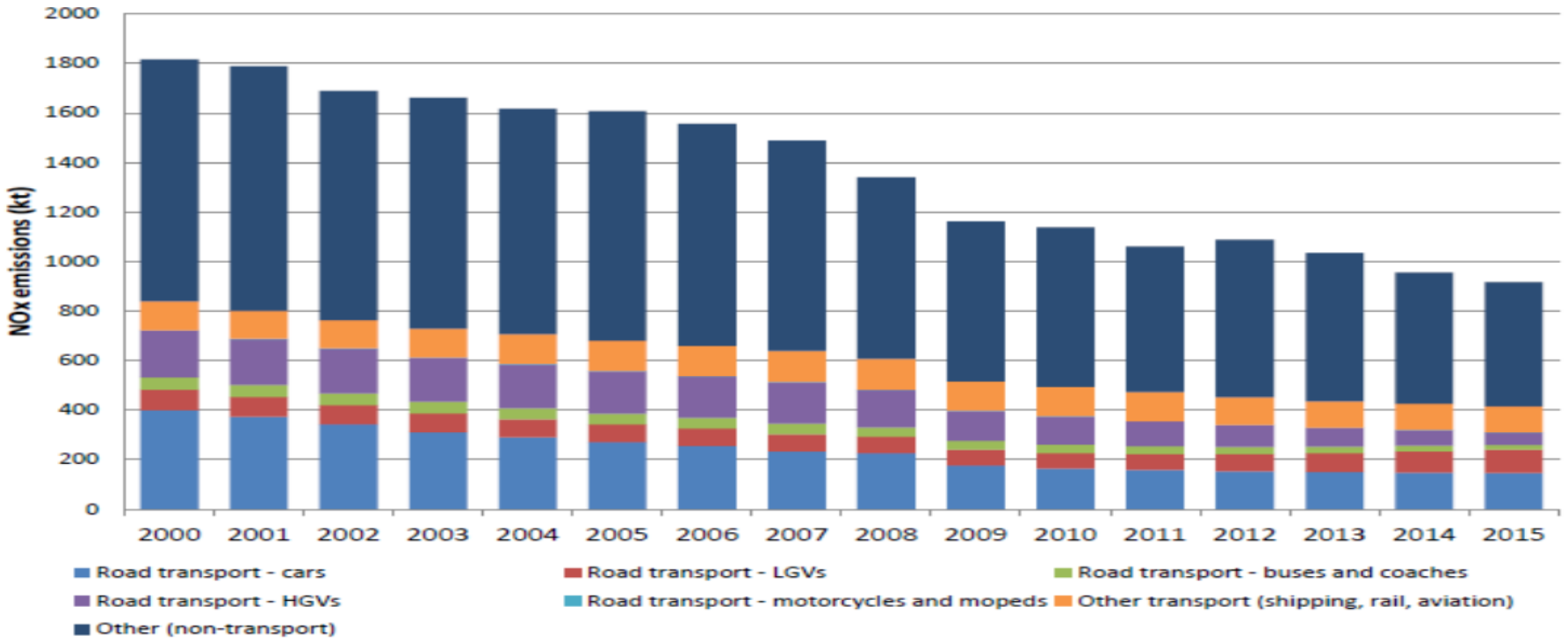
- Nitrogen dioxide (NO_2)
  - Gas formed by combustion at high temperatures
  - Main sources in UK urban areas: road traffic and domestic heating
  - NO_2 is a component of particulate matter (PM10 and PM2.5) which have an effect equivalent to 29,000 premature deaths each year in the UK

- 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

- 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

- 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
- Article 12
  - In zones where the levels of NO2 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”

The Air Quality Directive

- Article 13
  - obliges Member States to ensure that throughout zones, levels of NO2 in ambient air do not exceed the Limit Values specified in Annex XI from 1 January 2010.
- 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

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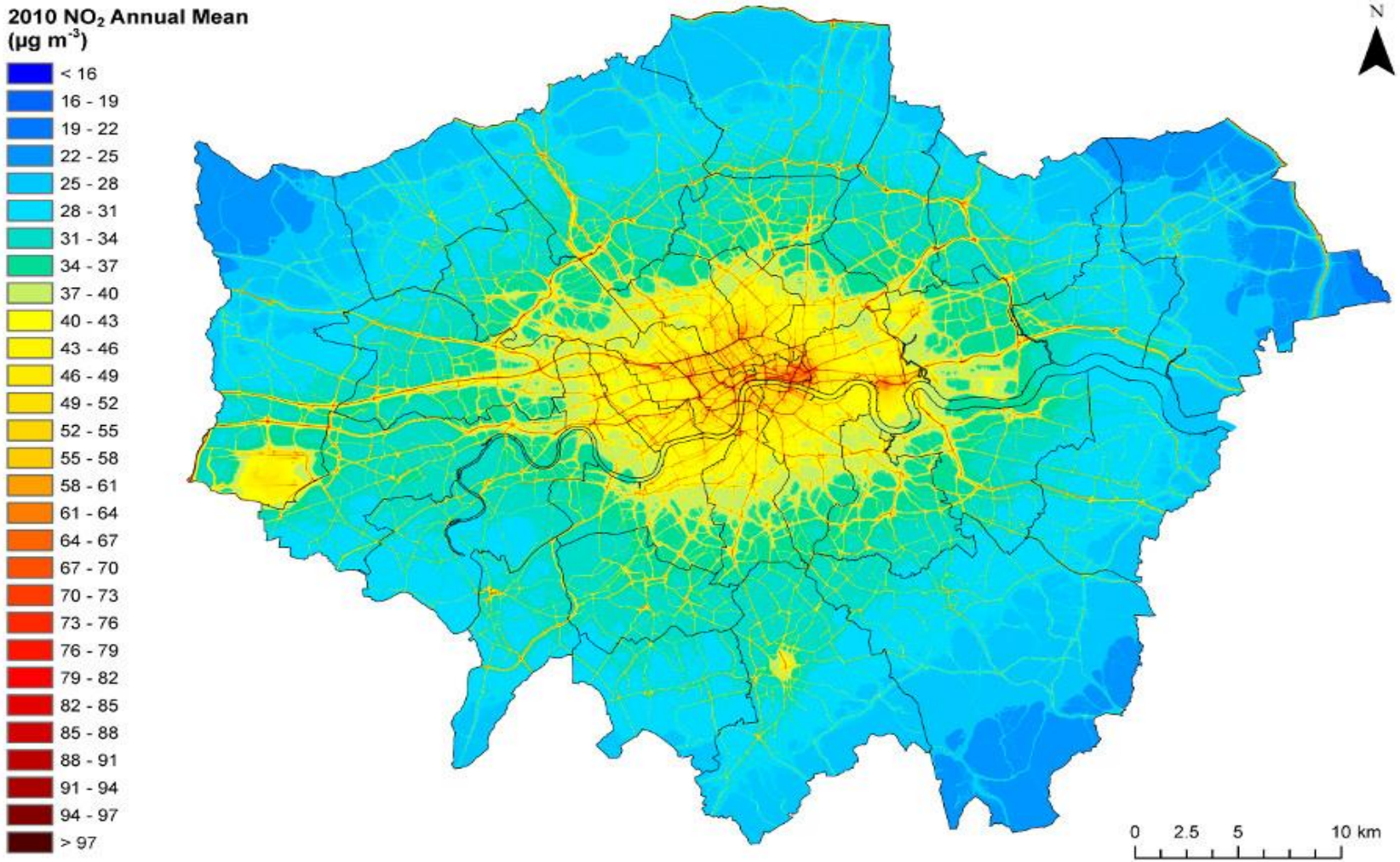

The Air Quality Directive

- 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”

Air Quality Directive - Summary

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- 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”

Air Quality Directive

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Air Quality Directive

- ***Client Earth (No.1)*** [2015] PTSR 909; 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

Air Quality Directive

- Challenge resulted in referral to CJEU, including on the following question: "*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?*"
- Answer: "*where a member state has failed to comply with the requirements of the second sub-paragraph of article 13(1) of Directive 2008/50 …, it is for the national court having jurisdiction… 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.*"

Air Quality Directive

- Lord Carnwath JSC gave the judgment of the Court.
- 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

Air Quality Directive

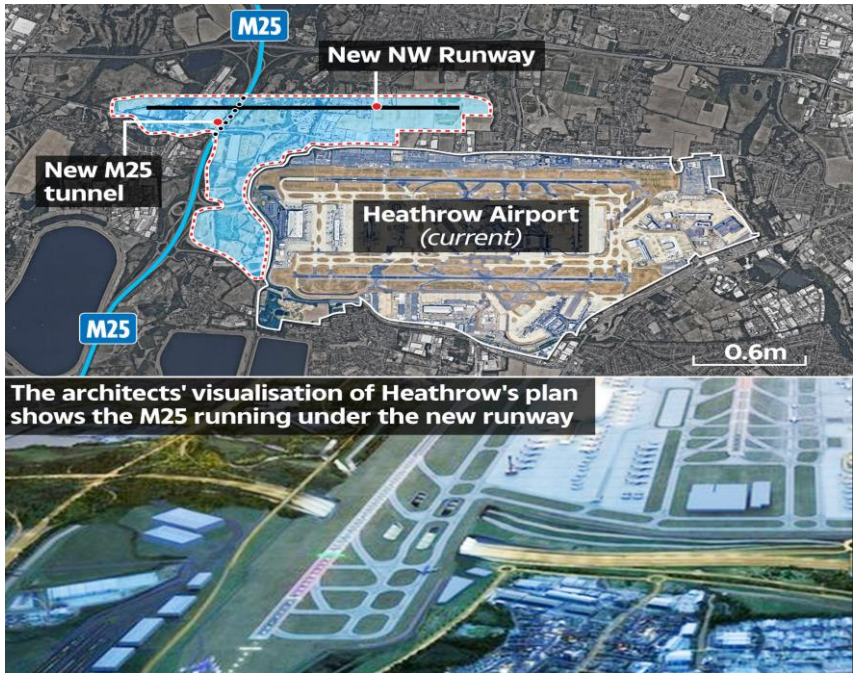
- ***Client Earth (No. 2)*** [2017] PTSR 203, Garnham J
- Plan's projections of emissions were modelled at 5-yearly intervals with a compliance date of 2020 for regional zones and 2025 for London
- ClientEarth challenged the plan arguing that DEFRA had erred in its approach to the requirement of Art 23(1) that periods of exceedance should be "as short as possible"
- DEFRA had erred since there was 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.

Air Quality Directive

- ***ClientEarth****:* [2017] EWHC 1966 (Admin)
- Challenge to the draft plan produced following CE (No.2). Dismissed, but Garnham J left open the possibility that some of the grounds of challenge might be more fruitful when made in respect of a final plan
- ***ClientEarth (No.3)*** [2018] EWHC 398 (Admin)
- The 2017 plan was also deficient in so far as it imposed less onerous obligations on 45 local authorities that were expected to achieve compliance with the limits by 2021
- The Art. 23 obligation involves (i) aiming to achieve compliance by the soonest date possible; (ii) choosing a route to that objective which reduced exposure as quickly as possible; and (iii) taking steps which meant meeting the value limits was not just possible, but likely. This the plan did not do.

Plan making challenges

- Two cases to consider: ***Wealdon*** and the Airports NPS challenge (***Spurrier***)



Plan making challenges

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- ***Wealdon***
- Challenge to decision of two LPAs to adopt a joint core strategy (JCS). Claim made by Wealdon DC to the JCS prepared by Lewes DC and the South Downs National Park Authority
- 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 since the JCS AADT was anticipated to be below 1,000 cars per day
- Two LPAs accepted that advice and examining SSCLG inspector did not challenge it

Plan making challenges

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- 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? If had done so, traffic would have exceeded the notional 1,000 cars per day
  - 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)

Plan making challenges

- ***Airports NPS challenge***
- Air quality challenges made up 2 of the 22 main issues considered by the Divisional Court; six distinct grounds of challenge with overlapping issues
- Grounds covered alleged failures to:
  - update modelling based on higher projected passenger numbers
  - take a sufficiently precautionary approach (by relying on AQ plans delivering on their promises)
  - decide rationally that there would be no breach of the Air Quality Directive when there was a high risk of non-compliance with limit values in a 2026 year of opening
  - Specify in the Airports NPS what the legal test for compliance constituted

Plan making challenges

- All challenges rejected and found unarguable
- In part, claims were based on assertions that the technical judgments made were unreasonable. Expert evidence had been sought to be adduced, but this was rejected: the evidence was being sought to be relied upon not to show a serious technical error but rather in areas where there was room for reasonable experts to disagree: see ***R (Law Society) v Lord Chancellor*** [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649
- The court also applied ***R (Mott) v Environment Agency*** [2016] EWCA Civ 564: the court should accord an enhanced margin of appreciation to decisions involving or based upon “scientific, technical and predictive assessments” by those with appropriate expertise. The degree of that margin will of course depend on the circumstances: but … [can] be substantial

Plan making challenges

- So the expert assessments as to modelling were given a substantial margin of appreciation
- The reliance upon the AQ plans (which might have been questionable; see ClientEarth litigation) was ultimately academic since the Airports NPS provides robust policy requirements: "*in order to grant development consent, the Secretary of State will need to be satisfied that, with mitigation, the scheme would be compliant with legal obligations that provide for the protection of human health and the environment*" (paragraph 5.42); and, more starkly, "*failure to demonstrate [that the scheme will not affect the UK's ability to comply with legal obligations] will result in refusal of development consent*" (paragraph 5.32). This latter requirement was described as being "*the reddest of red lines*".

Plan making challenges

- So far as the alleged error in not setting out what was required to comply with legal obligations, at para. 276, the court held: "*Insofar as the scope of any of the requirements is controversial, the construction of the relevant provisions is a matter for the court not the Secretary of State. If the Secretary of State were required to set out the meaning of the requirements, his paraphrase could not in any event be authoritative.*"
- The approach in the Airports NPS does not seek to answer the question of what is acceptable, but does at least ensure that a plan can be found to be lawful.
- Air quality (at least) was one of the grounds not pursued to the CoA

Plan making challenges

- Further ClientEarth litigation?

  "Monday 2nd September 2019

  Lawyers from ClientEarth are putting 100 local authorities across England on notice, warning them that they will violate their legal obligations and risk legal challenge if they do not introduce proper climate change plans.

  The environmental lawyers are writing to each local authority that is currently developing a new local plan, giving them eight weeks to explain how they will set evidence-based carbon reduction targets and ensure these targets are then central to their new planning policy.

  Amid growing pressure for local governments to declare 'climate emergencies', ClientEarth launched the campaign in light of the massive shortfall in compliant local planning policy across the country and to advise authorities of their legal duties under planning and environmental law.

  …"

Plan making challenges

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Plan making challenges

- There are several climate change focussed grounds of challenge still being pursued with the Airports NPS (see below)
- The legal obligation being referred to by ClientEarth? Likely s. 19 of the PCPA 2004:

"19 Preparation of local development documents

(1) …

(2) (1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change."

- An area likely to be challenged further

Decision-making challenges

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- Two cases to consider: ***Shirley*** and ***Gladman Developments***
- ***Shirley*** the more far-reaching:
- 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.

Decision-making challenges

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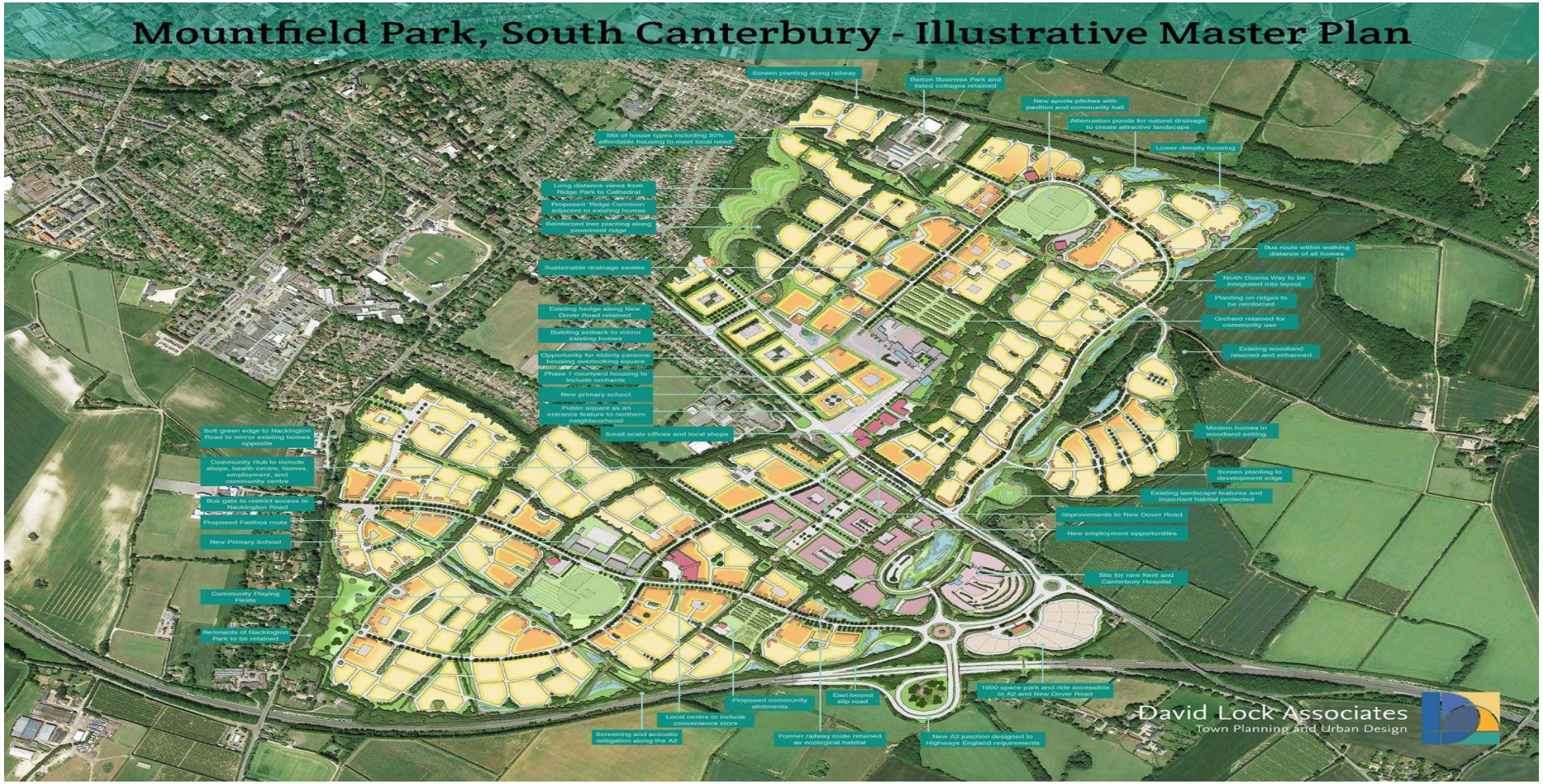

Decision-making challenges

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- 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.

Decision-making challenges

- Court of Appeal (Lindblom, Singh and Coulson LLJ) rejected the claim and upheld the decision of Dove J at first instance:
  - 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.
  - Therefore no basis for reading in a duty to take particular actions in relation to permits or development consents

Decision-making challenges

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*"33. Dove J's description of article 23 as providing the "specific and bespoke remedy" for a breach of article 13 therefore seems apt... **The case law does not suggest**, for example, **that** in such circumstances [i.e. a breach of article 13] **a member state must ensure that land use planning powers and duties are exercised in a particular way—such as by imposing a moratorium on grants of planning permission for particular forms of development**, or for development of a particular scale, whose effect might be to perpetuate or increase exceedances of limit values, or by ensuring that decisions on such proposals are taken only at ministerial level."*

Decision-making challenges

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And also later:

“40. If a proposed development would cause a limit value to be breached, or delay the remediation of such a breach, or worsen air quality in a particular area, neither the Air Quality Directive nor the 2010 Regulations states that planning permission must be withheld or granted only subject to particular conditions. ***These may of course be material considerations when an application or appeal is decided…”***

Decision-making challenges

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- Air quality is a material consideration under national policy and frequently within local development plans
- NPPF para 181

  "Planning policies and decisions should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and Clean Air Zones ... Planning decisions should ensure that any new development in Air Quality Management Areas and Clean Air Zones is consistent with the local air quality action plan…"
- See also NPPG for Air Quality

Decision-making challenges

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- ***Gladman Developments Ltd v SSCLG*** [2018] P.T.S.R. 616
- Proposed development of 330 dwellings plus 60 care units; appeal dismissed on grounds including the impact on air quality
- Inspector took into account the quashing of the Government's air quality plan; found it would be unsafe to rely on vehicle emissions falling between 2015 and 2020 to the extent assumed in the developer’s models.
- Despite proposed mitigation measures, the proposals would have an adverse effect on air quality

Decision-making challenges

- ***Gladman cont.***
- High Court challenge failed: – duty to produce and implement an air quality plan did not mean that local planning authorities had to presume that the UK would become compliant with the Directive in the near future – absent a national plan Inspector could not reach view as to whether compliance would be secured by any particular date.
- Why different to the Airports NPS challenge? Recall that part of the challenge was an alleged failure to take a sufficiently precautionary approach in that there was reliance on the AQ plan. But the answer there was that the policy in the Airports NPS put off the actual assessment of air quality impacts to the DCO stage, at which point legal compliance with legal obligations will have to be shown. In Gladman, the assessment stage had been reached

Decision-making challenges

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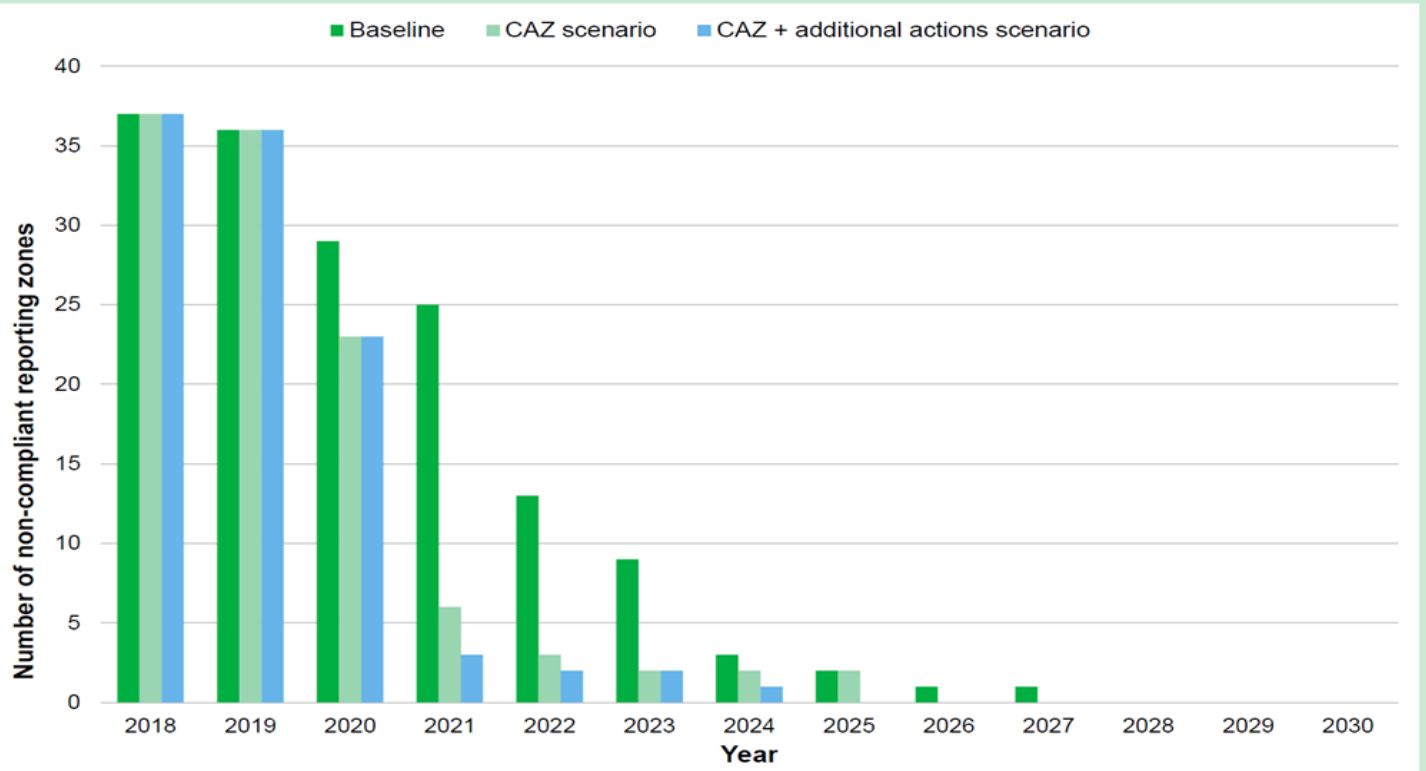
Figure Ex.2: Comparison of the number of reporting zones projected to be non-compliant with no further action (baseline), with the modelled CAZ (CAZ scenario) and with additional abatement (CAZ + additional actions scenario)



Note: Figure **4.4** provides an estimate of the uncertainty around these projections

Decision-making challenges

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- The air quality position then is improving though there remain some very difficult areas
- For present, air quality remains a matter that is a potentially material consideration which can result in planning permission being refused
- But NOT because of any breach of the Air Quality Directive (see ***Shirley***), but rather because of the particular assessment of the application scheme

Climate change

NET ZERO

Climate change

- Planning Act 2008, s. 10

  "(2) The Secretary of State must, in exercising those functions [i.e. including developing a NPS], do so with the objective of contributing to the achievement of sustainable development.

  (3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of— (a) mitigating, and adapting to, climate change; (b) achieving good design.

- PCPA 2004, ss. 19(1A) and 39(3) comprise similar obligations for local development plans

Climate change

- The Airports NPS challenge included several climate change related grounds of challenge (unlike air quality, pursued to the Court of Appeal). Include:
  - The SST was required to take into account the Paris Agreement, which implies that more ambitious aims to tackle climate change are needed
  - Contributing to the objective of sustainable development required the SST to take into account the ability of future generations to meet their needs, which includes taking into account international agreements such as the Paris Agreement and the underlying science of climate change which bear upon that question
  - Sustainable development is an international law term with an autonomous meaning which requires consideration of other international legal principles (WWF intervention in the Court of Appeal)

Climate Change

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- Divisional Court's conclusion:
  - As an unincorporated international treaty, it was a matter for the SST's discretion whether he took account of the Paris Agreement
  - The decision not to taking account of Paris was reasonable (para. 648) given:
    - The scheme of the Climate Change Act 2008 ("CCA") (which provides domestic carbon targets and mechanisms for how these might be changed)
    - The work being done at the time of designation of the ANPS to consider whether the CCA's carbon target should be amended
  - Also the prospect of reviewing the ANPS under s. 6 of the Planning Act 2008 if circumstances change in the future

Climate change

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- In the Court of Appeal, the same arguments were made
- Part of SST's response remains that climate change impacts will be judged against the now amended carbon target in the CCA, which is net zero by 2050 (i.e. by s. 1 of the CCA, "*It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline*.")
- See the Airports NPS at 5.82: *"Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets*
- Judgment is pending

Climate change

- Additionally, WWF given leave to intervene. It argued:
  - Sustainable development is an international law term with an autonomous meaning
  - The Divisional Court applied this meaning when referencing the "Brundtland definition" from UN Resolution 42/187 as mentioned in the NPPF: "… *At a very high level, the objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs*."
  - Because of its international law content, other international provisions should guide the meaning, in this context the rights of the child (as a future generation)

Climate change

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- Effect of arguments may have implications whenever sustainable development is considered in plan-making or decision-taking
- Previous case-law on sustainable development has not considered any international law dimension. Instead, domestically, what amounts to sustainable development never being precisely defined (save recently in Wales, at least to some extent) but rather being a matter of broad evaluative judgement: see, e.g., ***Pairc Crofters Ltd*** [2012] CSIH 96 at [56, 59-60], [75] and [112]; ***Scrivens*** [2013] EWHC 3549 (Admin), at [16]; and ***I.M. Properties*** [2014] EWHC 2440 (Admin), at [100]

Climate change

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- Can expect at least greater reference to climate change and any supporting development plan policies in future plan-making and decision-taking
- ***R (McLennan) v Medway Council*** [2019] EWHC 1738 (Admin): the Council contended that the impact of a residential extension on neighbouring solar panels (by overshadowing) was not a material consideration
- Per Lane J, in quashing the Council's decision and rejecting this submission: "*What emerges from section 19(1A) [of the PCPA 2004] and the NPPF [148, 153, 154] is that mitigation of climate change is a legitimate planning consideration"*
- Can expect the Court of Appeal's judgment in the Airports NPS challenge to add to the debate

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