Landmark Chambers

Welcome to Landmark Chambers' 'Current Issues in Environmental Law Part 2: Public Participation, SEA, and SSSIs' webinar

The recording may be accessed here.

Interactive section of the webinar

Landmark Chambers

- Go to pollev.com/landmarkc980
- You should come through to a screen which tells you that our presentation is about to begin. If you are asked to “Join a presentation” enter “landmarkc980”.
- All usernames will be automatically generated to ensure anonymity.

Your speakers today are…

Landmark Chambers

David Elvin QC (Chair)

Jacqueline Lean

Topic:
Public participation and Aarhus protections: an update

Andrew Byass

Topic: SEA: scope of application and standard of review – an update

Matthew Dale-Harris

Topic:
The domestic habitats regime: where now for SSSIs in post-Brexit Britain?

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Public participation and Aarhus protections: an update

Jacqueline Lean

Introduction

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- Topics today
  - Access to Environmental Information
  - Standing
  - ‘Effective’ public participation
  - Costs

But first….

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Warm-up quiz

Get ready to compete!

How many countries are signatories to the Aarhus Convention?

How many countries are signatories to the Aarhus Convention?

46

42

38

How many countries are signatories to the Aarhus Convention?

Leaderboard

Which of the following is NOT a signatory to the Convention?

Which of the following is NOT a signatory to the Convention?

North Macedonia

Tajikistan

Turkey

Which of the following is NOT a signatory to the Convention?

North Macedonia

Tajikistan

Turkey

Leaderboard

According to Tripadvisor, what is most popular attraction in Aarhus?

According to Tripadvisor, what is most popular attraction in Aarhus?

- The Aarhus Musikuset
- The Moesgaard Museum
- The Latin Quarter
- The Marselisborg Deer Park

According to Tripadvisor, what is most popular attraction in Aarhus?

The Aarhus Musikuset

The Moesgaard Museum

The Latin Quarter

The Marselisborg Deer Park

Leaderboard

Access to environmental information

Landmark Chambers

- Who is a public authority?
- Mixed information
- Exemptions

Access to environmental information

Who is a public authority?

- ***E.ON UK plc v (1) Information Commissioner (2)Fish Legal*** **[2019] UKUT 132 (AAC)**
  - Appeal against an Information Notice under s.51 FOIA
  - Was it open to ICO to serve information notice in order to establish whether a body was a public authority, with right of appeal to the FTT even where status as public authority not established where E.ON asserted it did not hold the information?
  - UT: Yes

- **ICO decision FER0678164 – 29 January 2020**
  - E.ON is a public authority

Access to environmental information

- **ICO decision FER0844872 – Heathrow Airport Ltd**
  - Heathrow Airport Ltd = owner/occupier of Heathrow Airport
  - Q: (1) does HAL have functions of public administration (reg 2(2)(c)) or (2) is it under the control of a public authority (reg 2(2)(d))?
  - ***Fish Legal*** [2015] UKUT 0052 & ***Cross v ICO*** [2016] UKUT

Access to environmental information

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- Functions of public administration (reg 2(2)(c))
  - Empowered with a relevant function under statute?
    - Yes – Airport Act 1986. *"…based on HAL's explanation, there appears to be a direct and continuing link between the original transfer of functions, powers and responsibilities from the British Airport Authority in 1986 to HAL."* [22]
  - Are (at least some) of the functions it is entrusted with related to the environment?
    - Yes – *"[the ICO] considers that for a function to relate to the environment it is only necessary that the delivery of the service or function has to have an impact on the environment. The function or service does not have to be one which is granted specifically to manage the environment….. The operation of an airport, particularly a major international airport such as Heathrow, undoubtedly has an impact on the environment…"* [24-25]

Access to environmental information

- Functions of public administration (reg 2(2)(c))
  - Special powers?
    - Yes. A number of powers as an ‘airport operator’ and ‘statutory undertaker’ under the Civil Aviation Act 1986 [30-31] and a number of other powers, including power to make byelaws, power to charge for use of the airport, and power to levy financial penalties for breach of noise abatement requirements imposed by the SoS [32].
  - Cross check
    - “When considering whether HAL’s function as an airport operator was the performance of a service of public interest the Commissioner took account of the importance the efficient provision of operation of Heathrow Airport had to the economy and citizens of the UK. It is also notable that up until 1986 the operation of the airport was directly under the state control of the British Airport Authority. The Commissioner therefore considers that given the continuing significance of Heathrow airport to the UK’s transport network, there is a sufficient connection between its operation and the functions performed by the state.” [35]

Access to environmental information

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- Under the control of a public authority? (reg 2(2)(d))
  - ICO did not consider, given conclusions on reg 2(2)(c)

- **NB – ICO decision is currently under appeal**

Access to environmental information

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- ‘Mixed’ information & exemptions

  - ***Department for Transport v Information Commissioner*** **[2019] EWCA Civ 2241**
    - Confirmed that the approach to be applied to “mixed information” was that articulated by CA in ***Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*** **[2017] EWCA Civ 844**

  - ***Brookshank v Information Commissioner*** **EA/2018/0226**
    - LPA ordered to disclose instructions to counsel – public interest in disclosure outweighed public interest in LAP

Access to Environmental Information

When survey is active, respond at **PollEv.com/landmarkc980**

0 surveys done

0 surveys underway

Standing

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Article 9(2) of the Aarhus Convention

"*Each Party shall, within the framework of its national legislation, ensure that members of the public concerned*

(a) having sufficient interest or,

(b) maintaining impairment of the right, where the administrative procedural law of a Part requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6, and where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention."

Standing

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- "Sufficient interest" = to be determined in accordance with national law, "*and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.*" (Article 9(2))

- NGOs – expressly included (Article 9(2))
- Individuals / companies – if they are "persons aggrieved" (statutory challenges) or have "sufficient interest in the matter to which the claim relates" (judicial review)

- What about unincorporated associations?

Standing

- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 45 (Admin) – Lieven J

  - Did the Neighbourhood Development Forum (an unincorporated association previously designated under s.61F TCPA 1990) have standing to bring a s.113 challenge to a Site Allocations Plan?
  - D argued (inter alia) the Forum was not a “person” (and thus not a “person aggrieved” for the purposes of s.113)
  - IP2 argued (in addition) that there was a distinction between judicial review and statutory review proceedings

Standing

- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 45 (Admin)
- Lieven J concluded:
  - Unincorporated associations did have legal capacity to bring both judicial review and statutory review proceedings
  - There was a distinction between private and public law proceedings: "*the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision not to be a mere busybody*" [29]

Standing

- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 45 (Admin)

> "[31] *I also take into account the wider public policy issues which have over time led to a more flexible approach to the issue of standing. Groups of residents or interested people, may choose to group together to make representations, or attend inquiries, on a matter of interest and importance to them. This is particularly the case in matters concerning planning or the local environment, where the nature of the impact may often fall most directly on a group of people living in a particular area. It would be unfortunate if the law prevented them challenging the decision which they had participated in, in the same grouping as they had made the representations.* ***I accept that the Aarhus Convention is not an overwhelming factor, because challenges can still be brought by individuals, but it and the general policy position would support a finding that a claim can be brought by an unincorporated association****."*

Standing

- **C-197/18 *Proceedings brought by Wasserleitungsverband Nordliches Burgenland & ors*** [2020] 1 CMLR 39
  - Did (1) the Water Association (public law body legally required to carry out the task of public supply of water in a specifically defined territory) (2) Mr Prandl (who owned a domestic well) and (3) Municipality of Zillingdorf (which operates a municipal well with water that is deemed unfit for drinking due to high nitrate levels) have standing to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions, provided for in article 5(5) of the Directive, in order to attain a maximum nitrate level of 50mg/l at each intake point.

Standing

30. According to settled case law of the Court, it would be incompatible with the binding effect conferred by art.288 TFEU on a directive to exclude, in principle, the possibility that the obligations which it imposes may be relied on by the persons concerned …..

31. In particular, where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of action, the effectiveness of such action would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in deciding whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out therein ….

32. It follows, as the Advocate General observed in AG41 of her Opinion, that at least the natural or legal persons directly concerned by an infringement of provisions of a directive must be in a position to require the competent authorities to observe such obligations, if necessary by pursuing their claims by judicial process."

Standing

"33. In addition, "where they meet the criteria, if any, laid down in [the] national law, members of the public" have the rights provided for in art.9(3) of the Aarhus Convention . That provision, read in conjunction with art.47 of the Charter of Fundamental Rights of the European Union, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law (see, to that effect, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation EU:C:2017:987 at [45]).

34. The right to bring proceedings set out in art.9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of "members of the public", a fortiori "the public concerned", such as environmental organisations that satisfy the requirements laid down in art.2(5) of the Aarhus Convention , were to be denied of any right to bring proceedings (Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation EU:C:2017:987 at [46])."

Standing

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Just for interest!

- Administrative court decision in Montreuil, in case brought by individuals, finding that the state had failed to fulfil its air protection plan intended to counter pollution
- https://www.theguardian.com/world/2019/jun/25/france-loses-landmark-court-case-over-air-pollution?CMP=share_btn_tw

“Effective” public participation

- **C280-18 *Flausch & ors v Ypourgos Perivallontos kai Energeias*** [2020] 2 CMLR 7
  - Proposed hotel & spa on Ios, subject to EIA. Notice published in the local newspaper circulating on Syros. EIA file kept on Syros. Decision approving the project published (1) in the local newspaper (2) at the regional headquarters in Syros; & (3) on Minister’s website.
  - Cs challenged decision outside the national timescales for such proceedings.
  - A number of questions referred to CJEU on interpretation of the EIA Directive
  - The Court stressed that arrangements to implement public participation under EIAD were for the member state to determine (and effectiveness for the national reviewing court in the first instance)

“Effective” public participation

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However:

“*29. As regards the principle of effectiveness, on the other hand, the referring court wonders about three aspects of the procedure at issue in the main proceedings.*

30. It mentions, first, the way in which the public was informed of the project’s existence and of the consultation that was to take place on it.

31. In that regard, it should be pointed out that, under art.6(4) of the EIA Directive , the opportunities that the public concerned is granted to participate early in the environmental decision-making procedure must be effective.

32. Consequently, as the Advocate General has observed at AG53 of her Opinion, any communication on the matter is not in itself sufficient. The competent authorities must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure.

33. It is for the referring court to determine whether such requirements were complied with in the procedure prior to the main proceedings.

Aarhus - post Brexit

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0 surveys done

0 surveys underway

Costs

- ***Campaign to Protect Rural England – Kent Branch v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1230**

  - CA confirmed that the approach in *Mount Cook* (costs of acknowledgment of service where permission refused) applies to both of Defendant and Interested Party (*Bolton* approach that there should only be more than one set of costs in "exceptional circumstances" does not apply)
  - Approach to awarding costs is the same in cases where there is an Aarhus cap as where there is no Aarhus cap. The CPR does not provide for staged caps.
  - Permission to appeal to SCt granted. Appeal listed January 2020

Costs: Interested Parties

- ***Q Unintended consequences?***
  - ***CPRE Kent para 47:***
  - *“"47. I am in no doubt that the absence of any express reference to interested parties in CPR Pt 45 is of no consequence. It was probably deemed unnecessary by the draftsmen to refer to "and/or interested parties" after the reference to "defendant" every time the latter was mentioned. But in any event the omission makes no difference to the application of the Aarhus cap. That is because, as Ms Lean pointed out, rule 45.4.3 limits the costs exposure to the claimant; it is the claimant who "may not be ordered to pay more than …" It does not spell out to whom the claimant might be paying the costs up to the limit of the cap. The obvious answer is: any defendant or interested party who is otherwise entitled to their costs.*
  - ***R (on the application of Kent) v Teeside Magistrates Court*** [2020] EWHC 304 (Admin)

Costs: Interested Parties

- ***Q Unintended consequences?***

  - ***R (on the application of Kent) v Teeside Magistrates Court*** [2020] EWHC 304 (Admin)
    - IP disputed that claim was an Aarhus Convention Claim. IP ordered to pay costs of determining the point – CPR r.45.43(b)

  - **IP applications to vary default costs caps**

Aarhus costs caps and Interested Parties

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0 surveys done

0 surveys underway

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SEA: scope of application and standard of review – an update

Andrew Byass

Introduction

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- Three topics today:
  - Consultation in the time of Covid-19
  - Scope of application of SEA: Friends of the Earth v SSHCLG [2019] P.T.S.R. 1540
  - Standard of review of environmental statements: Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214
- First, however, there are some questions to warm us up on these topics

Consultation Q1

Get ready to compete!

In principle, do you think that there should be an option for internet-only consultation on environmental statements, for example on a dedicated website?

Yes

No

In principle, do you think that there should be an option for internet-only consultation on environmental statements, for example on a dedicated website?

Yes

No

Questions

Landmark Chambers

- If your answer was no, can you try to identify the main reason. I've given some options here:
  - The internet is not sufficiently accessible to enough, or all, members of the public;
  - Reviewing material online is not the same as (not as good as) reviewing a hard copy;
  - There should always be multiple ways to review environmental statements;
  - Some other main reason.

Consultation Q2

Get ready to compete!

What was your main reason for saying that there should NOT be an option for internet-only consultation?

What was your main reason for saying that there should NOT be an option for internet-only consultation?

- The internet is not sufficiently accessible to enough, or all, members of the public
- Reviewing material online is not the same as (not as good as) reviewing a hard copy
- There should always be multiple ways to review environmental statements
- Some other main reason

What was your main reason for saying that there should NOT be an option for internet-only consultation?

The internet is not sufficiently accessible to enough, or all, members of the public

Reviewing material online is not the same as (not as good as) reviewing a hard copy

There should always be multiple ways to review environmental statements

Some other main reason

Consultation provisions for ESs

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- The consultation provisions relating to environmental statements ("ES") are:
- EIA: regulation 23 of the EIA Regulations (Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571):

> "23. Availability of copies of environmental statements
>
> An applicant for planning permission or subsequent consent, or an appellant, who submits an environmental statement in connection with an application or appeal, must ensure that a reasonable number of copies of the statement are available at the address named in the notices published or posted pursuant to article 15 of the Order, articles 13 and 14 of the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 20131 or regulation 20."

Consultation provisions for ESs

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- SEA: regulation 13 of the SEA Regulations (Environmental Assessment of Plans and Programmes Regulations 2004/1633):

  "13.— Consultation procedures

  (1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report ("the relevant documents") shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.

  (2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall–

  …

  (c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained;"

Scope of SEA - Questions

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- Something for the planoraks: when may an SEA not be required? Is it when the plan or programme:
  - Relates to small areas?
  - Is a minor modification of an existing plan or programme?
  - Is a financial or budget plan or programme?
  - All of the above?

SEA Question

Get ready to compete!

When may an SEA not be required?

When may an SEA not be required?

Relates to small areas

Is a minor modification of an existing plan or programme

Is a financial or budget plan or programme

All of the above

When may an SEA not be required?

Relates to small areas

Is a minor modification of an existing plan or programme

Is a financial or budget plan or programme

All of the above

Scope of SEA

Landmark Chambers

- Much existing guidance:
  - Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (2002) (http://ec.europa.eu/environment/eia/sea-legalcontext.htm)
  - CJEU caselaw – helpfully reviewed in Friends of the Earth – which has emphasised (unsurprisingly) a purposive approach to the scope of SEA and not compromising the objective in Article 1 of the SEA Directive to the effect that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment.

Scope of SEA

- Friends of the Earth: the challenge was to the National Planning Policy Framework, and more particularly to the revised NPPF that was published on 24 July 2018. It was argued that the NPPF was a plan or programme as so defined in regulation 2 of the SEA Regulations and the SEAD.
- The Secretary of State's arguments in response were that the NPPF fell in areas where a plan or programme is not required.
- Issues were:
  - First, was the NPPF "**required by** legislative, regulatory or administrative provisions", within article 2(a) of the SEA Directive; and
  - Second, did the NPPF "**set the framework for** future development consent of projects", within the meaning of article 3(2)(a) of the SEA Directive

Scope of SEA

Landmark Chambers

- Was the NPPF "*required*" in the sense that the SEA Directive had been interpreted by the CJEU (in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale C567/10 [2010] ECR I-5611 and following cases)?

- FoE sought to argue it was, since it was an integral part of the planning system: the preparation of local development plan documents are judged against national policy (see s. 19(2) of the PCPA 2004). And other provisions such as those relating to neighbourhood orders and plans, and the duty to contribute to sustainable development under section 39 of the PCPA 2004, were said to reinforce this submission by presuming the existence of that national policy

Scope of SEA

Landmark Chambers

- The argument was rejected by Dove J. In respect of the s. 19(2) point:

  > "[T]he statutory provisions … do not either mandate or regulate the production of national planning policy. For instance, in relation to section 19(2)(a) a development plan document could continue to be produced even if national policy did not exist. … The absence of national policy would not mean that the preparation of local development documents would have to be abandoned. … Thus, section 19(2)(a) and its reference to national policy does not regulate or prescribe the need for the existence of national planning policy"

- And while there is a power to produce national policy, that cannot be in effect read as either a duty or regulatory provision for the production of national planning policy.

Scope of SEA

- Does the NPPF "**set the framework for** future development consent of projects"?
- Yes: there are multiple areas in the NPPF which set a framework:
  - Green Belt policy, "which has its foundation in national planning policy…"

Scope of SEA

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- Other areas in which a “framework” is set:
  - Sequential flood risk test;
  - Criteria and tests for development in national parks, the Broads and AONBs
  - Tests for approval relating, e.g., to irreplaceable habitats and heritage assets

Scope of SEA

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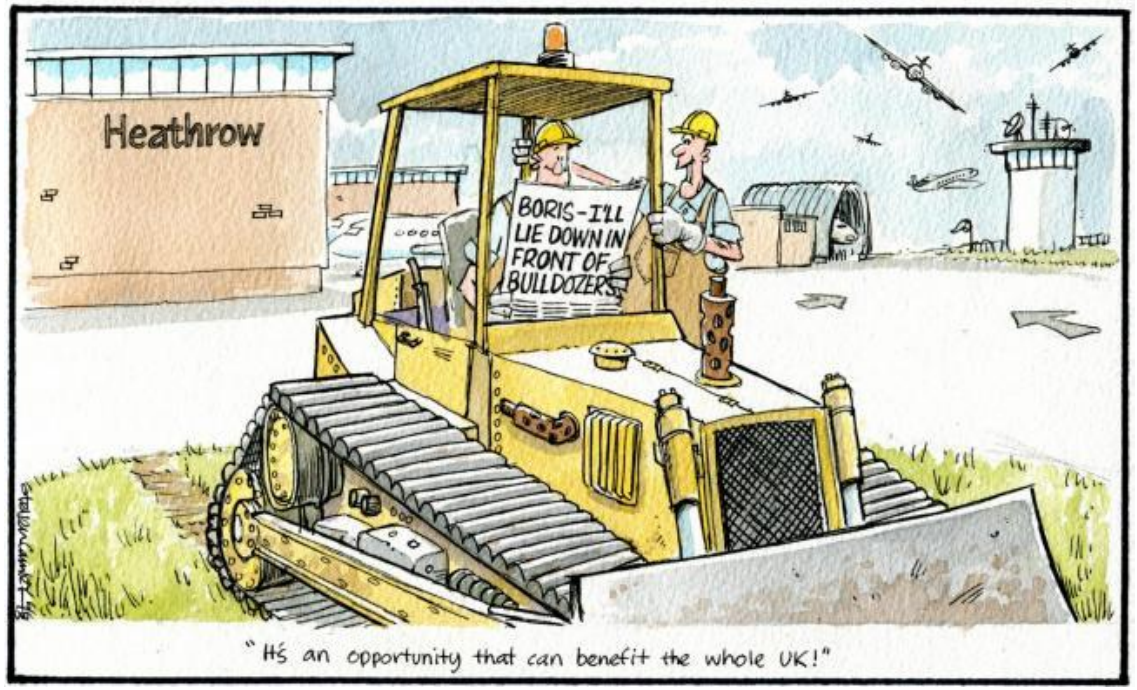
- Ongoing issue? Potentially:
  - Required or regulated, in a post-Brexit world
  - Potential challenge to the Road Investment Strategy 2 by Transport Action Network includes a potential ground arguing SEA is required. This from its pre-action letter:

    "54. It is clear that RIS2 is required by law (see: s. 3 of the IA 2005). It is nevertheless required in the sense that it is regulates funding commitments in relation to road building of this kind.

    55. It is also clear, from the following excerpts, that RIS2 sets a framework for future operations, maintenance and development consent:…

    56. … it stipulates a locational and funding framework for the schemes that will be taken forward"
  - Other challenges?

Standard of review



Heathrow

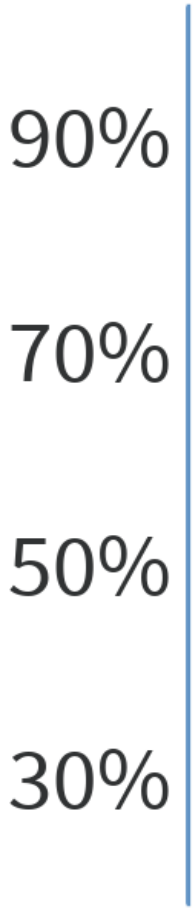
Get ready to compete!

By how much did passenger numbers reduce in March 2020 compared to March 2019 at Heathrow?

By how much did passenger numbers reduce in March 2020 compared to March 2019 at Heathrow?

- 90%
- 70%
- 50%
- 30%

By how much did passenger numbers reduce in March 2020 compared to March 2019 at Heathrow?



Standard of review

- Plan B Earth
- The argument by the Boroughs / the Mayor / Greenpeace: there is a legal requirement under the SEA Directive that the information in an environmental statement is sufficient for the purposes of the SEA Directive. This is a question for the court. The decision maker needs to be given “as full a picture as possible”.
- Which meant:
  - in legal terms, a normal *Wednesbury* approach was insufficient;
  - in practical terms, competing expert evidence on topics, arguments about sufficiency of analysis, detailed evidence before the courts, and so the lengthening of hearings

Standard of review

- The Divisional Court (Hickinbottom LJ and Holgate J) rejected these submissions.
- The approach taken in the EIA can and should be applied by analogy to SEA. That approach is classically set out in Blewett [2003] EWHC 2775 (Admin), per Sullivan J:

> "In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case), but they are likely to be few and far between."

Standard of Review

- The Court of Appeal agreed. They pointed to the terms of Article 5 of the SEA Directive:
- Article 5(2) provides as follows:

> The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

Standard of review

- Per the Court of Appeal, at [136]:

  “The court's role … must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to – first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. …”

Landmark Chambers

The domestic habitats regime: where now for SSSIs in post-Brexit Britain?

Matthew Dale-Harris

What percentage of England has been notified as a SSSI?

What percentage of England has been notified as a SSSI?

0.7%

7%

17%

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Which Act of Parliament first introduced Sites of Special Scientific Interest?

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- National Parks and Access to the Countryside Act 1949
- Countryside Act 1968
- Wildlife and Countryside Act 1981
- Countryside and Rights of Way Act 2000

Which Act of Parliament first introduced Sites of Special Scientific Interest?

National Parks and Access to the Countryside Act 1949

Countryside Act 1968

Wildlife and Countryside Act 1981

Countryside and Rights of Way Act 2000

Introduction

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Current Position

- Overview
- *Natural England v Warren*

Future Issues

- Possible role post-Brexit

Overview: a brief history

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- SSSI regime originally created by the National Parks and Access to the Countryside Act 1949
- Overhauled by Wildlife and Countryside Act 1981 ("**WCA**"), implementing:
  - 1979 Bern Convention on the conservation of European wildlife and natural habitats
  - Directive 79/409/EEC on the conservation of wild birds
- Subject to significant amendments particularly through Part III of the Countryside and Rights of Way Act 2000 (in E&W). In part to reflect UK obligations under Rio Convention on Biodiversity and the Habitats Directive.
- Since then, SSSI regime has operated in tandem with Habitats Regime. In England at least, all SACs/SPAs are SSSIs: see ***R (Aggregate Industries UK Limited) v English Nature and others*** [2003] Env. L.R. 3

Overview

Landmark Chambers

Regulation of SSSIs

•Owner/occupier activity

- Notification of Potentially Damaging Operations by Natural England (“PDOs) (s.28(4))
- Consenting requirement for PDOs (s.28E)
- Offence to breach without reasonable excuse (s.28P(1))

Third party activity

- Power to make byelaws (s.28R)
- Prosecution for damage (s.28P(6) or s.28P(6A)
- Statutory undertakers’ duties to take reasonable steps and seek consent where risk of damage (s.28G and H)

Proactive management

- Statements (s.28(4))
- Schemes (s.28J)
- Notices (s.28K)

Other systems

- Habitats Regime: assessment of plans and project giving rise to LSE
- Environmental Liability Regime
- Planning:
  - Natural England statutory consultee under DMPO
  - NPPF 175(b)

Overview

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Regulation of SSSIs

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Proactive management

- Statements (s.28(4))
- Schemes (s.28J)
- Notices (s.28K)

Other systems

- ***(Habitats Regime: assessment of plans and project giving rise to LSE)***
- Environmental Liability Regime
- Planning:
  - Natural England statutory consultee under DMPO
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Overview

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Regulation of SSSIs

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- ***(Habitats Regime: assessment of plans and project giving rise to LSE)***
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- Planning:
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  - NPPF 175(b)

Strengths/weaknesses post Brexit?

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- **<u>Inside SSSIs</u>**:
  - All activities *may* be controlled if they are within “Potentially Damaging Operations”
  - Management statements and schemes can continue to be made, as well as byelaws
  - Requires proactive work by Natural England
  - However, while development proposals will have to address NPPF 175, if permission is granted under Part III of the TCPA 1990 that will be a defence to prosecution (s.28P(4) and (7) WCA).

NPPF para 175

- “175. When determining planning applications, local planning authorities should apply the following principles:

  a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;

  …”

NPPF para 175

Landmark Chambers

- “175. When determining planning applications, local planning authorities should apply the following principles:

  a) …

  b) development on land within or outside a Site of Special Scientific Interest, and which is **likely to have an adverse effect on it** (either individually or in combination with other developments), **should not normally be permitted**…”

NPPF para 175

- “175. When determining planning applications, local planning authorities should apply the following principles:

  a)…

  b) … The only exception is where the benefits of the development in the location proposed **clearly outweigh** both its likely impact on the features of the site that make it of special scientific interest, and any broader impacts on the national network of Sites of Special Scientific Interest;”

NPPF para 175 - comments

- Additionally, tilted balance excluded under footnote 6 of NPPF.
- On its face a much lower test than as applied under the Habitats Regime – notwithstanding the requirement for mitigation or compensation under para 175(a).
- Allows harm to SSSI to be outweighed by other benefits.

Strengths/weaknesses as post Brexit? (2)

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- **<u>Outside SSSIs</u>**:
  - Same position re proposals for development inside
    - Will have to address NPPF 175,
    - if permission is granted under Part III of the TCPA 1990 that will be a defence to prosecution (s.28P(4) and (7) WCA).
  - What about other activities not constituting development?
    - Needs to be considered in light of ***Natural England v Warren*** [2019] UKUT 300 (AAC)

What kind of bird is this red-legged gamebird?

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- Pheasant
- Grouse
- Partridge

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Pheasant

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Partridge

Warren: the facts

- Mr Warren ran commercial shoot in Suffolk. Part of estate designated as a SSSI for which the notifies PDOs included release into the site of any wild animal.

- Natural England believed the scale of operation had significantly increased and (amongst other matters) alleged that gamebird releases risked causing harm to breeding and wintering protected birds, invertebrates and heathland vegetation.

- They served stop notice alleging commission of offence under s.28P and seeking cessation of releases both (1) within SSSI and (2) within 500m of SSSI.

Relevant issue

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- Mr Warren appealed to the FTT, which varied the notice in part.

- On Natural England's appeal to the UT a number of issues were raised including whether Natural England had the power to serve a stop notice in relation to releases in the 500m zone at all.

- That turned on whether releases outside the SSSI could (as a matter of principle) constitute an offence under either:
  - S.28P(1) : contravention of s.28E(1) without reasonable excuse; or
  - S.28P(6) : intentionally or recklessly damaging features of special interest.

Section 28E(1)

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- “(1) The owner or occupier **of any land included in a site of special scientific interest** shall not while the notification under section 28(1)(b) remains in force carry out, or cause or permit to be carried out, **on that land** any operation specified in the notification unless—

  (a) one of them has, after service of the notification, given Natural England notice of a proposal to carry out the operation specifying its nature and the land on which it is proposed to carry it out; and

  (b) one of the conditions specified in subsection (3) is fulfilled.

Arguments

- Mr Warren argued that the duty (and therefore offence) only applied to an operation on “any land within a [SSSI]”.

- Natural England argued that it would be absurd if the legislation were construed such that birds could be released just outside of a SSSI and fall outside of s.28E. There was no logical reason to treat matters differently on the basis of where the release pen sat – the question was where the birds went.
- It would significantly undermine the SSSI regime if such operations could only be addressed by a prosecution or stop notice under s.28P(6).

Decision of UT K Markus QC

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- Language of s.28E(1) was clear. Duty not to carry out operations within PDOs without consent only applied to land within SSSI.

- Natural England's argument that releases which were "likely" to result in birds entering the SSSI were within s.28E(1) introduced an inappropriate degree of uncertainty in the application of the provision – given that breach can give rise to criminal liability. Even if this meant that "*such activities could not be controlled under that Act in advance of their occurring, but could only be addressed after the event by way of prosecution for an offence under section 28P(6)"* this was a consequence of the legislation.

Consequences – what controls exist around SSSIs?

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- In light of ***Warren***,
  - PDO notification and consent regime does not apply
  - It seems likely that Natural England's powers in relation to management schemes and notices are similarly limited to land within SSSIs. Although language different, s.28J only provides for service of notice upon owners and occupiers of land within the SSSI.
  - Section 28(4) also appears to elide the land within the SSSI and the land in relation to which a management statement can be given.
  - Going back to our overview…

Limitations on activity outside SSSIs post Brexit

Landmark Chambers

Regulation of SSSIs

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Overview

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Regulation of SSSIs

~~•Owner/occupier activity~~	Third party activity	~~Proactive management~~	Other systems

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How will the SSSI regime function in the future?

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- Clear political appetite for some form of watering down – see removal of commitment to “non-regression” (discussed by DE Q.C. in Part 1 Webinar)
- Questionable why the Government would keep both the SAC/SPA and SSSI regimes in their current form.
- SSSI regime not capable of replacing 2017 Regulations as it stands.
  - On basis of ***Warren***, difficult to protect SSSIs from cumulative effect of activity which does not constitute development. Very different from approach per CJEU in ***Dutch Nitrogen***
  - For development, NPPF 175 sets a lower threshold for development proposals both within and outside SSSIs.
- Consistent with Bern Convention?

Article 4 of the Bern Convention

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"1 Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats.

2 The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas."

What has happened to the part of Forevan Links SSSI within the Trump International Golf Course ?

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It has been protected and enhanced.

Scottish Natural Heritage have proposed its denotification.

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Landmark Chambers

Thank you for listening

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