

Air Quality Issues in Planning



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Introduction: some key points (1)

- AQ legislation and policy voluminous and complex, and increasingly so;
- AQ now an issue in many planning applications/appeals;
- Main issue: NO₂ - but not the only issue (ND, ammonia, PM);
- Main source of NO₂: transport (also power generation, industrial processes and domestic heating);
- An AQ issue thus potentially arises in respect of **any** new proposed net traffic generating development: see below;
- Result is increasingly:
 - (i) a popular ground of objection by third parties;
 - (ii) a RfR by local authorities;
 - (iii) a main issue on s. 78 appeals/call-ins;
 - (iv) developers being asked to provide via conditions and/or s. 106 obligations mitigation for potential AQ impacts.

Introduction: some key points (2)

- See, the PPG, para. 006, **What specific issues may need to be considered when assessing air quality impacts?**
 - (1) *“Lead to changes (including any potential reductions) in vehicle-related emissions in the immediate vicinity of the proposed development or further afield. This could be through ... altering the level of traffic congestion; significantly changing traffic volumes, vehicle speeds or both; or significantly altering the traffic composition on local roads”;*
 - (2) *“Introduce new point sources of air pollution ...”*
 - (3) *“Expose people to harmful concentrations of air pollutants, including dust. This could be by building new homes, schools, workplaces or other development in places with poor air quality”;*
 - (4) *“Give rise to potentially unacceptable impacts (such as dust) during construction for nearby sensitive locations; Have a potential adverse effect on biodiversity, especially where it would affect sites designated for their biodiversity value”.*

The legislative background (1) EU derived

- **The legislative background is complex, and getting ever more complex:**
- (1) The 2008 ambient air quality directive (2008/50/EC) (“the AQD”) sets legally binding limits for concentrations in outdoor air of major air pollutants that impact public health such as particulate matter (PM10 and PM2.5) and nitrogen dioxide (NO2).
- (2) Transposed in England by the Air Quality Standards Regulations 2010.
- (3) Other important EU legislation includes:
 - Directive 2004/107/EC of the European Parliament and of the Council relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air (the Fourth Daughter Directive) (transposed also by 2010 Regulations, above).
 - Directive 2015/1480/EC of 28 August 2015 amending several annexes to Directives 2004/107/EC and 2008/50/EC of the European Parliament and of the Council laying down the rules concerning reference methods, data validation and location of sampling points for the assessment of ambient air quality
 - Commission Implementing Decision 2011/850/EU.

The legislative background (2) EU derived

- (4) The National Emission Ceilings Directive (2001/81/EC), transposed as the National Emission Ceilings Regulations 2002, and now the National Emission Ceilings Regulations 2018: sets national emission reduction commitments for fine particulate matter (PM2.5), ammonia (NH3), nitrogen oxides (NOx), sulphur dioxide (SO2) and non-methane volatile organic compounds (NMVOCs) (and see also the Gothenburg Protocol to the UNECE Convention on Long-range Transboundary Air Pollution);
- (5) Industrial Emissions Directive: transposed by the Environmental Permitting Regulations

The legislative background (3): EU derived

- NB all the above “retained law” following Brexit ...
 - (1) UK free to repeal any and all retained law after Implementation Period over, unless any “deal” with the EU prevents this;
 - (2) UK not obliged update its legislation if amendments to EU AQ laws or new laws on AQ, again unless any “deal” with the EU prevents this;
 - (3) Post-exit case-law of CJEU not binding;
 - (4) Supreme Court (and maybe other Courts – see ongoing consultation) power to depart from pre-exit CJUE case-law.

The legislative background (4): domestic

- (1) Transposed – retained - EU law: see above;
- (2) Old but still in force: Air Quality (England) Regulations 2000;
- (3) Part IV of the Environment Act 1995 requires local authorities to review AQ in their area and designate air quality management areas (“AQMA”) where improvements are necessary. Where an AQMA is designated an air quality action plan describing the pollution reduction measures must then be put in place. These plans contribute to the achievement of AQ limit values at local level;
- (4) Clean Air Act 1993;

The legislative background (5): domestic

- New provisions proposed in the Environment Bill:
 - Cl. 2: requires government to set and meet an air quality target for fine particulate matter in ambient air;
 - See <https://airqualitynews.com/2020/08/19/government-to-introduce-legally-binding-environmental-targets/>
 - Also amendments to the Clean Air Act 1993
 - Also amendments to the 1995 Act – see Schedule 14: Local Air Quality Management Framework: *“the Bill will strengthen these duties by giving greater clarity on the requirements of action plans enabling greater collaboration between local authorities and all tiers of local government, as well as with Relevant Public Authorities, in the creation and delivery of those plans”*. Plus require regular review the National Air Quality Strategy: see below.

From DEFRA: *Air Pollution in the UK 2015*

2 Legislative and Policy Framework

The UK air quality framework is derived from a mixture of domestic, EU and international legislation and consists of three main strands:

- 1) Legislation regulating total emissions of air pollutants – the UK is bound by both EU law (the National Emission Ceilings Directive) and international law (the Gothenburg Protocol to the UNECE Convention on Long-range Transboundary Air Pollution to which both the UK and the EU are parties);
- 2) Legislation regulating concentrations of pollutants in the air – implementing the EU Air Quality Directive; and
- 3) Legislation regulating emissions from specific sources such as legislation implementing the Industrial Emissions Directive and the Clean Air Act. Reducing air pollution requires action to reduce domestic emissions as well as working closely with international partners to reduce transboundary emissions (pollutants blown over from other countries) which, at times, can account for a significant proportion of pollutant concentrations experienced in the UK (for example, it is estimated that sources outside of the UK account for 35-50% of measured ambient particulate matter concentrations)

Policy (1): Planning

- (1) 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, and the cumulative impacts from individual sites in local areas. Opportunities to improve air quality or mitigate impacts should be identified, such as through traffic and travel management, and green infrastructure provision and enhancement. So far as possible these opportunities should be considered at the plan-making stage, to ensure a strategic approach and limit the need for issues to be reconsidered when determining individual applications. 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”

Policy (2): Planning

- (2) PPG: see Paragraphs: 001 - 008 Reference ID: 32-001-20191101: see above
- (3) National Networks NPS;
- (4) Airports NPS, see **Spurrier** [2019] EWHC 1070 (Admin), AQ not issue on the appeal ... NB air quality policy does not need to, and should not, set out legal requirements for AQ ...
- (5) Myriad of local planning (and other) policies on AQ...

Policy (3): Other

- (1) UK plan for tackling roadside nitrogen dioxide concentrations (July 2017) and Supplement to the UK plan for tackling roadside nitrogen dioxide concentrations (October 2018) – this is the Article 23 Plan under the AQD – the subject (product of) of the many Client Earth JRs over last few years;
- (2) Clean Air Strategy – complements three other strategies - the Industrial Strategy, the Clean Growth Strategy and the 25 Year Environment Plan;
- (3) Reducing emissions from road transport: Road to Zero Strategy;
- (4) The Air Quality Strategy for England, Scotland, Wales and Northern Ireland (under s. 80 of the 1995 Act).

Refusing PP on AQ grounds (1)

- Two Court of Appeal cases help set parameters for this:
- (1) ***R (Shirley) v SSHCLG*** [2019] PTSR 1614 and
- (2) ***Gladman Developments Ltd v Secretary of State for Communities and Local Government*** [2020] P.T.S.R. 128
- **Summary:**
- (i) AQ is an important material consideration in planning;
- (ii) PP can be refused on the basis of potential AQ impacts;
- (iii) BUT whatever the position is in the area (zone) in terms of compliance with the AQD and irrespective of whether under the 1995 Act there is an AQMA declared there is not ever a legal obligation to refuse PP for a development that worsens AQ. Question of planning balance ...

Refusing PP on AQ grounds (2)

- **Shirley:**
- **FACTS**
- (1) Challenge to refusal by the Secretary of State (“S/S”) to call-in following LPA’s resolution to grant permission for 4,000 homes on outskirts of Canterbury;
- (2) In April 2006 the city council declared an AQMA in part of the City after high levels of nitrogen dioxide had been recorded there. The AQMA was extended in November 2011 to include most of the area within the city centre ring road;
- (3) Local measurements for the 1995 Act showed the NO₂ exceeded 40 micrograms per cubic metre;
- (3) In terms of the AQD – Canterbury in the South East zone. The monitoring station near Canterbury where monitoring etc done in accordance with the Directive showed no exceedance of the NO₂ annual mean limit value. But the South East zone was a non-compliant zone. This is largely because of exceedances elsewhere most notably in the centre of Oxford.
- **NB: cannot rely on local measurements to say Directive limits values breached, need to look at DEFRA data.**

Refusing PP on AQ grounds (3)

- Argument was if a zone not compliant in terms of NO₂ (as Article 13 required) and development would further add to pollution (“*Mr McCracken submitted that the potential effects of proposed development on air quality are material considerations in planning decisions. Major development can prolong or worsen exceedances of limit values*”) then the S/S must call-in and refuse PP or impose such strict conditions as mean no adverse AQ impact (suggestion was a complete ban on car ownership for residents!)...
- Court of Appeal rejected these arguments:
 - AQD contains its own remedy for breaches of Article 13: the requirement under Article 23 to establish and implement an Air Quality Plan (“AQP”) which is effective and reduces any periods of exceedance; and
 - Therefore there is no basis for reading in a duty to take particular actions in relation to permits or development consents e.g. call-in and/or refuse ...

Refusing PP on AQ grounds (4)

- 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.”***
- “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...***”

Refusing PP on AQ grounds (5)

“48. This is not to deny that the likely effects of a proposed development on air quality are material considerations in the making of the decision on the application for planning permission, to be taken into account alongside other material considerations weighing for or against the proposal. Indeed, the Secretary of State acknowledges in these proceedings that the effects of development on air quality in the local area, or more widely, or the likely consequences of the development for compliance with limit values under the Air Quality Directive, are capable of being, in a particular case, a decisive factor in the determination of an application for planning permission—no matter whether the decision-maker is the Secretary of State himself or, as it will normally be, the local planning authority.”

Refusing PP on AQ grounds (6)

- **Gladman**: an example of this ...
- **FACTS**:
 - PP refused by LPA for 330 dwellings plus 60 care units;
 - S. 78 appeal made;
 - Inspector took into account the fact that the Article 23 AQP (December 2015) had at that point been quashed (Client Earth litigation) and no new Plan at that point adopted;
 - He found that it would be unsafe to rely on vehicle emissions falling to the extent assumed in the models relied on by the claimant and that, despite proposed mitigation measures, the proposals would have an adverse effect on AQ;
 - Refused PP on appeal;
 - That decision challenged under s. 288.

Refusing PP on AQ grounds (7)

- C argued that:
 - (1) The inspector should have proceeded on the basis that the Government would comply with the law, rather than assuming that the breaches of the AQD and the 2010 Regulations would continue; and
 - (2) The Inspector failed to give effect to the principle, in paragraph 122 of the NPPF (2012) that the planning system presumed that other schemes of regulatory control were legally effective.
- Claim failed on both grounds.
- Focus on (1) below, but (2) also of interest, so other controls relevant e.g. Environmental Permit for new point source emission but not for AQ issues more generally e.g. with a housing scheme.
- NB at date of decision the 2015 AQP (Article 23 Plan) had been quashed and new one was not in place ...

Refusing PP on AQ grounds (8)

- Held:
- (1) the duty to produce and implement an AQP by the earliest possible date did not mean that planning decision makers were to presume that the UK would become compliant in the near future;
- (2) that, where it was not known what measures the new national AQP would contain, the inspector could not know how any new national measures might relate to local measures or what might be “the soonest date possible” by which the new plan would aim to achieve compliance;
- (3) that the Inspector therefore could not have reached any view as to whether compliance would be secured by any particular date, and thus was not required to assume that local AQ would improve by any particular amount within any particular time frame;
- (4) that in such circumstances the inspector had been entitled to consider all the evidence in forming his own judgment as to what the AQ would be likely to be in the future, including the latest available monitoring data..

Mitigation (1)

- To avoid getting refused on AQ grounds mitigation is important:
- (1) In **Gladman** Inspector not satisfied re efficacy of the mitigation ... :
 - *“The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO2 emissions.”*
- But such mitigation accepted elsewhere ...
- (2) In **Shirley** developer was at a cost of approximately £3.7m providing an “*air quality mitigation package*” that would include the installation of domestic electric vehicle charging points in both the residential and commercial/retail areas, monitoring and the provision of “*an electric bicycle per dwelling*”. Accepted by LPA.

Mitigation (2)

How can an impact on air quality be mitigated?

Mitigation options will need to be locationally specific, will depend on the proposed development and need to be proportionate to the likely impact. It is important that local planning authorities work with applicants to consider appropriate mitigation so as to ensure new development is appropriate for its location and unacceptable risks are prevented. [Planning conditions](#) and [obligations](#) can be used to secure mitigation where the relevant tests are met.

Examples of mitigation include:

- maintaining adequate separation distances between sources of air pollution and receptors;
- using green infrastructure, in particular trees, where this can create a barrier or maintain separation between sources of pollution and receptors;
- appropriate means of filtration and ventilation;
- including infrastructure to promote modes of transport with a low impact on air quality (such as electric vehicle charging points);
- controlling dust and emissions from construction, operation and demolition; and
- contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development.

Paragraph: 008 Reference ID: 32-008-20191101

Revision date: 01 11 2019

Mitigation (3)

1. Encouraging non-car based trips: cycling, walking etc.
2. Travel plans;
3. Routing – if a particular AQ black spot?
4. On-site cycle infrastructure;
5. Electric car charging points;
6. Discouraging/preventing car ownership other than electric cars;
7. Green infrastructure;
8. Providing electric bikes;
9. TROs reducing speed limits.

Need to think creatively ...

Habitats

- Not focused on this but issues with nitrogen deposition and impact on European sites;
- Led to moratorium on development around Ashdown Forest and also Epping Forest;
- See in relation to Ashdown Forest cases like:
- (1) ***Wealden DC v Secretary of State for Communities and Local Government*** [2017] Env. L.R. 31;
- (2) ***Wealden DC v Secretary of State for Communities and Local Government*** [2018] Env. L.R. 5
- See also ***Compton Parish Council v Guildford BC*** [2020] J.P.L. 661, despite ***Dutch Nitrogen*** case can properly rely on anticipated reductions in background AQ levels, if evidence supports the view they are sufficiently certain to happen ... NB contrast decision in ***Gladman*** above ... a question of judgment ...
- A whole talk in itself ...

Thank you for listening

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