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Landmark Chambers'

Planning High Court Challenges, Part 2 webinar

Your speakers today

David Forsdick KC (Chair)

Jenny Wigley KC

Round-up of recent Planning Act 2008 legal challenges

Dan Kolinsky KC

R (Leicester NHS Trust) v Harborough DC and NHS s. 106 contributions

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Climate change legal challenges: update

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Alex Shattock

EIA and SEA case-law review of the year and a look ahead to EoRs

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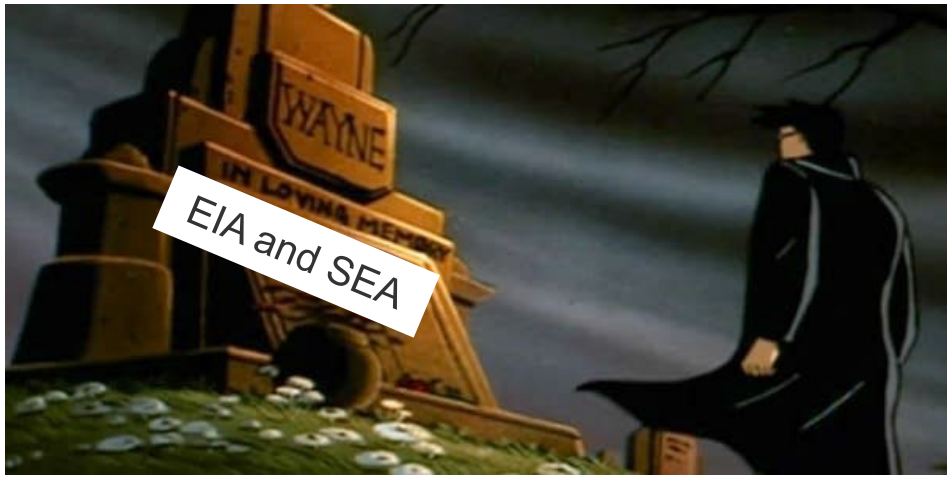
EIA and SEA case-law review of the year and a look ahead to EoRs

Alex Shattock

Introduction

- EIA and SEA no more?
- The primary legislation formerly known as LURB part 6 creates various broad powers to implement a new system of environmental impact assessment
- EIA and SEA to be replaced with Environmental Outcomes Reports: EORs



"I will avenge you"

Introduction

1. *R (Ashchurch Rural Parish Council) v Tewkesbury BC* [2023] EWCA Civ 101
2. *R (Hardcastle) v Buckinghamshire Council* [2022] EWHC 2905 (Admin)
3. *Bristol Airport Action Network Co-ordinating Committee v SSLUHC* [2023] EWHC 171 (Admin)
4. *Frack Free Balcombe Residents Association v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2548 (Admin)
5. *R (Greenpeace) v SSESNZ* [2023] EWHC 2608 (Admin)
6. Some thoughts on **EORs**

Where you think you're going, baby?

R (Ashchurch RPC) v Tewkesbury BC [2023] EWCA Civ 101

- The bridge to nowhere: challenge to grant of planning permission for a bridge over a railway, to enable housing development in a planned new garden town. EIA "Project" defined as the bridge alone, rather than the wider garden town scheme, and screened out for EIA.
- High Court: council's definition of the project was lawful.
- Court of Appeal: council had unlawfully "salami sliced" the project, noting that the sole justification for the bridge was the relationship with the future town, and uncertainties over that future town were relevant to the assessment of effects not the definition of the project.

I'd really, really, really, really, really, really like you (to properly screen this project)

R (Hardcastle) v Buckinghamshire Council [2022] EWHC 2905 (Admin)

Facts: challenge to the grant of planning permission for up to 170 homes in 2022 on basis of, among other things, deficiencies in 2015 screening opinion and failure to review.

High Court: dismissed the ground as none of the alleged failures would have made any difference to the outcome of the opinion:

I'd really, really, really, really, really, really like you (to properly screen this project)

R (Hardcastle) v Buckinghamshire Council [2022] EWHC 2905 (Admin)

-the concept of a development having been the subject of a screening opinion broad enough to include a previous screening process for an earlier version of the proposal, so long as the changes did not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through: *R (on the application of CBRE Lionbrook (General Partners) Ltd) v Rugby BC* [2014] EWHC 646 (Admin)

-Cumulative effects: need to show objective evidence that the screening opinion would not reasonably have been negative if the omitted potential cumulative effects had been considered*: Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302, [15]

-criticism of talking about substantive/substantial effects too legalistic an approach

Before non-CO2 emissions came into my environmental statement, I missed them so bad:

Bristol Airport Action Network v SSLUHC [2023] EWHC 171 (Admin)

Facts: challenge to the grant of planning permission for the expansion of Bristol Airport on the basis that the ES did not cover non-CO2 emissions.

High Court: dismissed the claim, finding that:

-No irrationality in giving the issue of local carbon budgets no weight in the ES

- the Secretary of State's panel of inspectors lawfully did not undertake an assessment of non-CO2 emissions due to significant scientific uncertainty regarding assessment and the scope for such emissions to be considered in an action plan secured by planning condition.

It's always a good time (to argue that GHG emissions weren't properly considered)

Frack Free Balcombe v SSLUHC [2023] EWHC 2548 (Admin)

- Challenge to the grant of PP for an exploratory hydrocarbon well
- One of the grounds alleged a failure to comply with the EIA Regulations because there was no express consideration of GHG emissions from flaring
- The judge:

> *"The screening opinion suggests that the LPA did not expressly consider the GHG emissions that would result from the development. However, relative to the indicative thresholds the scale of this development was small. **It is important to have an element of realism in cases such as this**. The LPA would obviously have known that the flare would emit GHG and must have had this in mind. But for the development to be EIA development there needed to be "significant likely effects". **It is extremely unlikely that the GHG emissions alone or in combination with other effects would have met this threshold**. There are some impacts which are sufficiently unpredictable, or potentially completely ignored, which might need to be expressly referred to. But climate change, and the impact of GHG emissions, are matters which every planning officer and LPA is acutely aware of. "*

Here's my impacts: so SEA me (maybe)

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R (Greenpeace/ Uplift) v SSESNZ [2023] EWHC 2608 (Admin)

- Two linked JRs concerned with licensing new offshore oil and gas exploration and production
- Key issue was whether scope 3 (end user) emissions should have been considered under SEA. Government scoped them out on a *Finch* basis. Cs argued this was irrational because the use of oil and gas as energy was an essential feature of the proposal
- Judge accepted SEA and EIA were different but considered they were analogous enough that key aspects of *Finch* could be applied

Here's my impacts: so SEA me (maybe)

R (Greenpeace/ Uplift) v SSESNZ [2023] EWHC 2608 (Admin)

- the Plan under challenge only set the framework for licensing oil and gas exploration and production (and the other offshore energy development referred to) within the geographical area it covers. It does not set a framework for decisions on development consents for downstream development such as refinement, storage and distribution, or electricity generation or other land uses involving the consumption of oil and gas extracted pursuant to a UK licence [105]
- Therefore not irrational to fail to assess scope 3 emissions

Takeaways

- Court will look at whether the error alleged would have made a difference- always worth focusing on this on both sides
- Excessive legalism always a good complaint in response to a claim
- Courts are keen to emphasise the narrowness of EIA and SEA regimes- not intended to limit economic activities, not intended to cover all kinds of plans and projects, limited to land use etc
- Scientific uncertainty or disagreement is usually in D's favour (Mott v EA lives!)

Environmental Outcomes Reports ('EORS')

- Consultation with outline plans finished on 9 June this year
- Foreword and introduction:

  "Leaving the European Union gives us a once in a lifetime opportunity to create an improved framework of environmental assessment which properly reflects our country's needs and the unique characteristics of our environment."

  "We will simplify and streamline the assessment process to make it more effective as a tool to support the delivery of our environmental commitments."

EORs

- “3.5 From our engagement to date, we want to focus reform on addressing a number of central issues:
- inefficiency
- duplication
- risk aversion
- loss of focus
- issues with data”

EORs

- “4.1 The Levelling Up and Regeneration Bill has been drafted to allow the Secretary of State to set outcomes which a plan or project will have to report against (clause 138).”
- 4.3 We intend for outcomes to be set in secondary legislation with a supporting suite of indicators set out in guidance. There will be a number of indicators for each outcome.
- 4.4 Draft outcomes will be subject to parliamentary scrutiny and public consultation.”

EORs

CONTENT OF AN EOR (5.7)

- Introduction
- Short summary of reasonable alternatives and mitigation hierarchy
- Assessment of contribution towards achieving an outcome
- A summary of the contribution of the cumulative effects of the project as a whole on outcomes and how this relates to the conclusions of any strategic or plan level assessment
- Guidance will set out the detail

EORs

LESS SCREENING

- ‘Screening’ decisions for the smaller number of “Category 2” consents (likely to be broadly EIA Schedule 2 consents) will remain for the judgement and discretion of the consenting authority, but “regulations will narrow the scope for discussion by being more prescriptive on how borderline cases should be considered.” (6.4)
- Government is considering for Category 2 consents whether proximity to a sensitive receptor should be part of the test (6.7)

EORs

- Likely requirement for more monitoring
- Likely requirement for standardised, publicly available environmental data

EORs

- The EIA process is a bit unwieldy and can usefully be modified
- However, the EOR regime allows for a very stripped-back approach to environmental assessment. Less detail= less effort required/ no need to show workings? Will depend on what the secondary legislation says and how prescriptive the guidance is
- Meaning of guidance is a matter of law so likely to be plenty of opportunities for legal challenge
- Emphasis on more and better monitoring a welcome step but, as always, creating a lot of new duties without any funding to pay for them is not likely to end well

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Issues around consent to judgment and re-determination in planning high court challenges

Nick Grant

Consent Orders

Requirements: Admin Court Guide 2023 para 24.4

- File 3 copies of (a) draft agreed order with (b) short statement of matters relied on justifying order and (c) authorities/statutory provisions.
- Order and statement must be signed by all parties (incl IPs).
- Order must make provision for costs or will be deemed no order as to costs
- Court must be satisfied order should be made. May also require hearing and consideration of whether there should be public access to documents. See e.g. *R (Fairey) v East Riding of Yorks* [2023] EWHC 361 (Admin); *R (DLR Holdings Ltd) v York Magistrates Court* [2023] EWHC 2817 (Admin).

Reminder: inform court as soon as you become aware of possibility of settlement: 24.6.1

Consent Orders – do you fight on?

Court does not like academic claims – i.e. if the case will no longer directly affect rights and obligations of parties: *Admin Court Guide* 6.3.4. See e.g. *R (Gassa) v Richmond Independent Appeals Service* [2020] EWHC 957 (Admin).

But its not never:

- Generally, courts may continue to hear issues of public importance: e.g. *Save Britain's Heritage) v SSCLG* [2018] EWCA Civ 2137, [4] (whether need to provide reasons when calling in app)
- *R (D2M Solutions Ltd) v SSCLG* [2018] PTSR 1125, [2]: JR of application to PINS for payment under ex gratia scheme. SoS conceded on one ground in AoS; Holgate J granted permission for JR on all grounds as necessary for resolution prior to redetermination.

Consent Orders – parties wont concede

D1 won't concede but IP/2D will – rare, but fight on.

D1 concedes but IP/2D wont?

- If 2D/IP wont concede cannot be a "consent" order. If s. 288, fight on.
- *R (Reading BC) v Admissions Appeal Panel for Reading BC* [2006] ELR 186: IP given time to object in writing to object to consent order and seen as enjoying right to insist on oral hearing.

D1 does not concede but wants to "play no part" for financial reasons

- *R (Midcounties Co-Operative Ltd) v Forest of Dean DC* [2015] EWHC 1251 (Admin) [151]: (1) consider compliance with DofC; (2) whether that requires filing w/s; (3) whether it should file AoS with SGR (even in outline form); (4) whether representative should be present so authority knows what happened, can answer Qs, and "take steps".

Consent Orders - costs

Admin Court Guide 25.5.3: Parties to follow ACO costs guidance (2016).

- Parties should try and settle first. Principles set out in *M v Croydon* [2012] EWCA Civ 595 [75]-[77] and *R (Tesfay) v SSHD* [2016] EWCA Civ 514.
- (1) C who obtains all relief is successful party and should normally get costs
- (2) if C obtains *some* relief then consider (i) how reasonable of C to pursue unsuccessful claim, (ii) how important it was compared to successful claim and (iii) how much costs increased as result of unsuccessful claim. If court cannot easily determine what would have happened at trial, no order for costs appropriate.
- (3) if parties settle on totally different terms, stronger argument for no order as to costs unless clear on underlying claim who would have won.

Redetermination – legal provisions

Procedure: Rule 19 Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624)

SoS

- Shall send those who appeared at inquiry statement of matters on which further representations are invited
- Shall give those persons the opportunity to make written reps on those matters or asking for inquiry to be reopened
- May reopen inquiry (with same or different inspector)

Written reps to be received in 3 weeks

Redetermination – scope of reps to be made

R (Dawes) v SST [2023] EWHC 2352 (Admin)

- Redetermination of Manston Airport DCO
- Developer (IP) introduced a new report at late stage in multi-stage consultation. SoS did not ask for comments on it but then relied on it.
- C alleged procedural unfairness
- SoS and IP argued nothing to prevent C making reps about the IBA report: [69].
- Dove J accepted: (1) nothing in the rules to prevent (2) the various letters from the SoS made clear representations being received outside the specified stages of the process which would be published: [77].

Redetermination – whether to reopen inquiry

R (Hammerson UK Properties plc) v SSETR [2002] EWHC 270 (Admin)

- A matter of ordinary rationality judgment
- If disputed issues of fact need to be redetermined, or there is disputed new evidence, or new (potentially determinative) issues arise, inquiry may be appropriate: [47]
- Simple fact there *may be* new matters which could arise, unlikely to require re-opening: [47]

e.g. of reopening: ***East Quayside 2 LLP v SSLUHC*** [2023] EWCA Civ 359

Redetermination - relevance of the first inquiry

Ikea Properties v First Secretary of State [2005] EWHC 208 (Admin)

- "*when a decision is quashed and the inspector again sets up an inquiry, this is a reopening of the original inquiry and not strictly a second and distinct inquiry... The FSS cannot simply ignore the evidence received at the initial stage.*": [3]
- No obligation to specifically refer to first Inspector's Report unless failing to do so shows an issue not dealt with: [12]

Redetermination – does it make a difference?

Forthcoming paper from Alistair Mills

- C. 2/3 of redeterminations following judgment lead to a different result for the Claimant

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R (Leicester NHS Trust) v Harborough DC and NHS s. 106 contributions

Dan Kolinsky KC

R (University Hospitals of Leicester NHS v Harborough DC [2023] EWHC 263 (Admin)

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- Judgment of Holgate J dated 13.2.23
- Challenge to LPA decision to grant planning permission for urban extension (2750 dwellings) without a s.106 contribution for hospitals
- Contribution claimed was to address a claimed (revenue) “funding gap” due to the way in which (it was said) NHS Trusts are funded based on population registered to GP
- Premise of claim was that there was a lag in funding which would lead to an irrecoverable deficit in respect of cost of treating new residents in their first year of occupation

Implications

- Similar claims have been made at planning inquiries and before LPAs with a reasonably high success rate
- The decision does not address the situation where there is an identified capital/infrastructure shortfall; it is only relevant where similar type of revenue shortfall contribution is sought.

Legal context

- Development plan (opportunity to identify contributions)
- S.106
- Reg 122 of CIL Regulations - is obligation
- **Necessary to make the development acceptable in planning terms**
- **Directly related to the development**
- **Fairly and reasonably related in scale and kind to the development**

- NHS funding regime (bewildering complicated blend of legislation, regulations and guidance – analysed by Holgate J in paras 42-74 of the judgment)

“funding gap” is critical

- Para 14 of judgment:

“As [Counsel for the Trust] rightly accepted, if the Trust could not point to a funding gap for the provision of health services attributable to the occupation of housing on the site, there would be no relevant impacts from the [proposed development] to justify a s.106 contribution”

“Funding gap” not substantiated (1)

- Holgate J:-

- Undertakes careful analysis of funding framework
- Concludes that the Trust had not established there was a funding gap

The Trust’s argument was:

- Trust funded by local NHS commissioners (Clinical Commissioning Groups (CCG) (now Integrated Care Boards (ICB))

- CCG/ICB are not funded for new residents in area

- so can’t fund Trust for population growth

- hence – unbridgeable funding lag until new residents reflected in funding based on GP registrations

Funding gap” not substantiated (2)

But – Holgate J rejects proposition that no allowance for population growth in CCG/ICB funding (see para 62) – funding reflects allowance for population growth

Trust also fails to establish that funding regime precludes Trust from taking account of population growth in area when negotiating with CCG/ICBs

- **Holgate J concludes that on a proper analysis of the provisions, the Trust was not precluded from receiving funding from the CCG (now ICB) which took account of population projections (para 73)**

Funding gap not substantiated (3)

Holgate J at para 159 :

“ The problem is that the Trust continued to assert there was a funding gap without demonstrating that there was [such a gap]”

Wider reflections

NB - Due to the approach in the decision under challenge, the argument proceeded on the basis there a revenue contribution is not ruled out per se but was not demonstrated in this case

- Holgate J at paras 31-42 discussed the relevance of alternative sources of funding for the contribution

- He noted that the Trust had asserted that funding arrangements were immaterial
- If right, that would have "wide ramifications for the development control system" (para 32)
- Proposition said to be supported by Lord Hoffmann's speech in Tesco v SSE [1995] 1 WLR 759 at 776G-77A (market forces are distorted if developments are not required to *bear their own external costs*".

Wider reflections (2)

- Holgate J at paras 37-42 emphatically rejected the proposition that this comment from the speech of Lord Hoffmann gives rise to any general principle

- Not part of reasoning of Lord Hoffmann – but part of his contextual explanation of developments
- Lord Hoffmann is not the majority speech in Tesco
- This passage has not been relied upon in any subsequent cases as giving rise to a general rule
- The position now is governed by Reg 122 – the application of which is a matter for the planning authority to consider (see e.g. para 147)

What next

- Paras 147-151 of Holgate J's judgment also puts down a market as to the obstacles which a similar claim for contributions may face even if the funding gap were to be established:-

- **Matter for LPA to consider whether it would be appropriate to require a financial contribution to be made, after taking into account other requirements and impact on viability (para 147)**
- **LPA may be able to rely om "systemic problem" even if local impact; LPA reference to funding distribution issues in this case was a "perceptive contribution to a proper understanding of the issue" (para 150)**
- **May need to wrestle further with how population growth projections work at CCG/ICB level in future cases (para 151)**

The sequel

- *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC* [2023] EWHC 1996 (Admin) – Holgate J judgment dated 31.7.23 refusing permission to proceed with JR claim on equivalent funding gap challenge.

The Future

- NHS bodies still claiming contributions seeking to distinguish Leicester case on the facts
- However, Holgate J ‘s judgment

- **provides rigorous analysis of funding regime;**
- **invites a rigorous analysis of whether the premise of a funding gap is legally substantiated;**
- **sets out further obstacles in the way of such contributions even if a funding gap is established (paras 147-151).**

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Round-up of recent Planning Act 2008 legal challenges

Jenny Wigley KC

A Story of Ten Cases

- *Tidal Lagoon (Swansea Bay) plc v. SSBEIS* [2022] EWCA Civ 1579
- *R (Substation Action Save East Suffolk Ltd) v. SSBEIS* [2022] EWHC 3177 (Admin)
- *R (Aquind Ltd) v. SSBEIS* [2023] EWHC 98 (Admin)
- *R (Bristol Airport Action Network) v. SSLUHC* [2023] EWHC 171 (Admin)
- *R (Durham CC) v. SSLUHC* [2023] EWHC 1394 (Admin)
- *R (Together Against Sizewell C Ltd) v. SSESNZ* [2023] EWHC 1526(Admin)
- *R (Boswell) v. SST and National Highways* [2023] EWHC 1710 (Admin)
- *R (Suffolk Energy Action Solutions SPV Ltd) v. SSESNZ* [2023] EWHC 1796 (Admin)
- *R (Dawes) v. SST and Riveroak Strategic Partners* [2023] EWHC 2352 (Admin)
- *R (CPRE) v. SST and National Highways* [2023] EWHC 2917 (Admin)

Breakdown of the Ten

- Seven JRs of DCOs – all dismissed
- One JR of Decision to Refuse DCO - granted
- Two applications for declarations - refused
- CA (1), Holgate J (x2), Thornton J (x2), Lang J (x1), Dove J (x1), Lieven J (x1), Lane J (x1), Chamberlain J (x1)
- Energy (x6), Road Schemes (x2), Airports (x2)
- Of Energy: Offshore wind (x2), solar (x1), tidal (x1), interconnector (x1), nuclear (x1)
- Issues: EIA/HRA, carbon/climate change, alternatives, procedural fairness/ jurisdiction.

R (Together Against Sizewell C) v. SESNZ

- JR of DCO for Sizewell C nuclear power station. Grounds of challenged centered around lack of identified potable water supply;
- Habitats Regulations grounds concerning definition of the 'project', cumulative environmental impacts, NE advice, alternative solutions and IROPI;
- GHG ground concerning whether contribution to long term reduction in GHG emissions was supported by any evidence;
- Ground alleging irrationality/ lack of adequate reasons for conclusion that site would be clear of nuclear material by 2140;
- Ground alleging error of law in conclusion that development's GHG emissions would not have a significant effect on UK's ability to meet climate change obligations;
- All grounds dismissed, matters of evaluative judgement, cumulative assessment would happen at stage of statutory process for water company's WRMP, adequate reasons re NE, could not be said any part of decision was irrational.

R(Bristol Airport Action Network) v. SSLUHC

- JR of DCO for expansion of Bristol Airport's passenger capacity
- climate change / carbon reduction: 4 grounds - relating to policy interpretation, NPPF para 188/ pollution control regime, local carbon budgets, non-CO2 GHG emissions)
- Habitats – 1 ground – replacement habitat outside the SAC - mitigation or compensation, reg 63 or 64?
- All grounds dismissed – some take aways:
- Not irrational to apply para 188 – CCA comprised a national emissions control regime for GHG emissions from aircraft;
- Entitled to give no weight to evidence on local carbon budgets which had no basis in law or policy;
- Sufficient evidence re new habitat being mitigation which would avoid harm.

R (Dawes) v. SST – Manston Airport

- redetermination of quashed DCO for reopening of Manston Airport and operation as a dedicated air freight facility
- challenge to conclusions on need concerned allegations of procedural unfairness as to evidence and as to consultation on redetermination
- Challenge to reliance on Jet Zero Strategy and Decarbonising Transport Plan
- All grounds dismissed.

R (Boswell) v. SST and National Highways Limited

- DCO for three road schemes on A47 in Norfolk within 12 miles of Norwich
- Grounds of challenge concerned allegation that there should have been a cumulative assessment of carbon impacts under the EIA Regulations 2017
- Challenge dismissed
- Extent of cumulative assessment for EIA purposes a matter of evaluative judgement
- Given that impact of GHG emissions is global, not local, entirely rational not to undertake cumulative assessment of local schemes – no established local targets or budgets
- PTA granted

R (Aquind Ltd) v. SSBEIS (electricity interconnector)

- Challenge to refusal of DCO (contrary to recommendation of EA), based on SoS view that developer failed to properly consider alternative substation with less harm
- Developer proposed using Lovedean substation as Mannington intended for a windfarm
- Windfarm subsequently refused so Mannington became a potential possibility – but NGET report: Mannington still not appropriate for other reasons
- Court (Lieven J) held:
- SoS failed to take into account relevant evidence from NGET;
- SoS failed to apply NPS (para 4.4.3) re consideration of alternatives (i.e whether realistic prospect of delivering same energy capacity in same timescale)
- SoS failure to make further inquiries as to feasibility of Mannington was irrational and in breach of his *Tameside* duty.

R (Substation Action Save East Suffolk v. SS BEIS (offshore windfarms & associated devt)

- Challenge to DCO (which included onshore substations) re: (1) failure to apply flood risk sequential test; (2) failure to give sufficient weight to heritage harm; and (3) failure to consider alternative sites for substations;
- On (1) matter of planning judgement for SoS how to apply sequential test re: risk of different types of (non fluvial) flooding. No requirement to apply ST for surface water flooding;
- On (2) Duty to 'have regard to desirability of preserving LB…' under reg 3 of Decision Regulations 2010, did not include higher duty in s.66(1) LB Act.
- On (3) No principle of law that in any case where need/beneficial effects relied on to outweigh adverse effects, existence of alternative sites became a mandatory material consideration – only relevant in exceptional circs (see Save Stonehenge)
- NPS 4.4.3 only required consideration of alternatives to extent that 'important and relevant' – matter of planning judgement

R (CPRE) v. SST and National Highways (road scheme) - Hot off the press!

- Rolled up JR, Ground (1) (re climate change / GHG emissions) stayed pending outcome of CA appeal in *Boswell;*
- Ground (2) – Alleged failure by SoS to consider for himself the merits of alternatives put forward by objectors;
- Relied on Holgate J in *Save Stonehenge* – i.e that NPS para 4.27 does not override 4.26
- Claimant drew back from pressing that consideration of alternatives always necessary in Green Belt cases (policy differences – landscape / heritage);
- Primary argument: DCO promoted and determined on basis of lack of alternatives, so SoS required to consider alternatives for himself – not arguable on the facts
- Secondary argument: consideration of alternatives in this case was a mandatory consideration – arguable and granted permission but JR dismissed – review of caselaw –e.g Langley Park - factors for being mandatory mc not present here.

R (Suffolk Energy Action Solutions) v. SSESNZ (offshore windfarms and associated onshore dev't)

- In granting DCOs, SoS had rejected C's complaints that developers had stifled or neutralized landowners from presenting objections to and information about the scheme;
- Landowners had signed heads of terms re CPO including promise to not appose DCOs and withdraw objections;
- Consideration of concept of 'chilling effect' –not applicable here (alleged lack of environmental information rather than unfairness / impact on fundamental rights);
- Complaints as to unfairness rejected by SoS and no challenge to that;
- SoS not irrational to deal with complaints in that way and no obvious need for SoS to conduct and investigation or inquiry.

R (Durham CC) v. SSLUHC (solar development)

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- Inspector adjourned a s.78 appeal inquiry re dispute as to whether she (on behalf of SoS) had jurisdiction to determine the appeals under 1990 Act;
- LPAs brought a JR seeking declarations that appeal applications for solar development (near consented solar farm promoted by same developers) comprised a NSIP (by being extension to an NSIP) and outside jurisdiction of Inspector/SoS on a s.78 appeal;
- HELD: Court had jurisdiction (even if involved evaluative planning judgement) to determine whether development was an NSIP (notwithstanding s.55(3)(c) of the 2008 Act which required SoS to consider whether a project required development consent;
- In this case, solar farm development was not an NSIP as was not an extension to the existing solar farm (transmission/ distribution apparatus not part of the 'generating station). Relevant, but not determinative factors: whether contiguous, whether promoted separately at different times; contractual/metering agreements; capable of independent operation, contractually and physically, whether generating capacity interconnected.
- Obiter: 2008 Act does not oust jurisdiction under the 1990 Act

Tidal Lagoon (Swansea Bay) v. SSBEIS (CA)

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- s.120 (5) 2008 Act – "A DCO may.. apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the DCO"
- s. 154(1): "Development must be begun before the end of (a) the prescribed period [five years] or (b) such other period as is specified in the DCO"
- DCO Requirement: "Development must commence no later than expiration of five years beginning with the date the DCO comes into effect"
- DCO Definition of 'commence' excluded ground investigation and survey works.
- Common Ground: Had 'begun' in time but not 'commenced' in time
- Which requirement applied? Consequences??
- Answer: DCO displaced statutory requirement (under s.120)
- DCO Lapsed – CA affirmed decision of Judge Jarman QC

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Climate change legal challenges: update

Siân McGibbon

R (Finch) v. Surrey County Council & Ors [2022] EWCA Civ 187

An appeal to the Supreme Court heard in June 2023:

- The critical issue is whether, under Directive 2011/92 EU of the European Parliament and of the Council and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, it was unlawful for the Council not to require the environmental impact assessment for a project of crude oil extraction to include an assessment of the impacts of downstream greenhouse gas emissions resulting from the eventual use of the extracted oil.
- The Court of Appeal dismissed the appeal, holding that the question is one of the degree of connection between the development and its putative effects, so that the question whether 'scope 3' emissions required assessment was one of fact and evaluative judgment for the planning authority (at [57]).
- But the Court of Appeal could not agree (Moylan LJ dissenting) as to the application of these principles of the facts. Judgment from the Supreme Court is awaited…

R (Friends of the Earth) v. Secretary of State for Levelling-Up, Housing, & Communities (judgment awaited)

A three day rolled-up hearing in October 2023 in this challenge to a decision to grant planning permission West Cumbria Mining Ltd for a new coalmine just south of Whitehaven:

- Carbon offsetting – whether reliance on international projects is permitted in assessing the net carbon impact of the new development as 'net zero'.
- International impact – whether the Secretary of State was required to consider the 'negative international impact' of the decision in terms of 'the UK's claims to climate leadership' and the 'damaging precedent' which it is said to establish.
- Demand for coal – whether the Secretary of State had adequately considered evident of global demand for coal which challenged the claim that the new mine would substitute for US coal and therefore have a 'net neutral' impact.
- And finally the question of assessment of end-use emissions, the answer to which we await from the Supreme Court in *Finch*…

Bristol Airport Action Network Co-Ordinating Committee & Secretary of State for Levelling Up v. Bristol Airport Ltd & Anor [2023] EWHC 171

Statutory review of the government's decision to allow an expansion to Bristol Airport dismissed by the High Court. Lane J recognised that climate change is "a matter of very great importance", but:

- Consideration of the impact of additional aircraft fell to be considered within relevant local plan policies;
- The policy focus was on whether the aviation emissions would be likely to have a material impact on the Secretary of State's ability to meet his obligations under the Climate Change Act 2008, including the carbon budgets. The Panel had lawfully concluded that the additional emissions would not have such an impact.
- The Panel lawfully excluded consideration of non-carbon-dioxide emissions from that assessment.

R (Dawes) v. Secretary of State for Transport [2023] EWHC 2352

The High Court rejected a challenge to the Secretary of State's decision to grant development consider for the reopening of Manston Airport as a freight facility:

- The ground relating to climate change was based on the advice from the Climate Change Committee that there should be no net expansion of airport capacity unless the aviation industry was on a trajectory to outperform net emissions targets, which would enable additional demand to be accommodated.
- Dove j rejected this argument and held that the Secretary of State had been entitled to rely on the newly adopted "jet zero strategy" as justification for his conclusion that he could expect an acceleration in the decarbonisation of the aviation sector.
- On the evidence as a whole the Secretary of State was entitled to place very little weight on the potential for expansion at other facilities in making his decision – this potential was not obviously material given the level of uncertainty involved.

R (Boswell) v. (1) Secretary of State for Transport (2) National Highways [2023] EWHC 1710

Clarity on the approach to assessment of cumulative carbon emissions from infrastructure development:

- Failure to carry out an assessment comparing combined carbon emissions from three major road projects (all along the A47 in Norfolk) against national carbon budgets was *not* a breach of environmental impact assessment requirements under Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
- It is for the Secretary of State to determine what (if any) impacts should be assessed cumulatively, and how they should be assessed is a matter of evaluative judgement.
- Thornton J: A reminder that "the courts must be astute to avoid being drawn into the arena of the 'forbidden merits'. Decisions [regarding infrastructure projects' and their effect upon climate change is a subject attracting many widely differing views, whether for or against" (at [84]).

And look out for…

Levelling-Up and Regeneration Act 2023

- New duties for the planning system to have 'special regard' to the need to 'mitigate and adapt to' climate change and secure public health and wellbeing;
- Additional scrutiny of proposed national development management policies.

Net Zero Litigation

- Following the judgment in ***R (Friends of the Earth Ltd & Ors) v. Secretary of State for Business, Energy, and Industrial Strategy*** [2022] EWHC 1841 (Admin), the government has revised it's net zero strategy;
- The revised strategy now faces a fresh challenge lodged in July 2023 by the same three organisations. The claim is based on the lack of detail as to the level of risk posed by each policy and alleged breach of the sustainable development duty.

And beyond the planning context – Client Earth v. Shell Plc & Ors **[2023] EWHC 1137**

Thank you

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