

**Welcome to Landmark Chambers’
‘Levelling-Up and Regeneration Bill – Session 2’
webinar**

Tuesday 31 May 2022

The recording may be accessed [here](#).

Your speakers today are...



Jenny Wigley QC (Chair)



Neil Cameron QC

Topic:
Changes to
Section 38(6)
PCPA 2004



Matthew Henderson

Topic:
Environmental
Assessment



Katharine Elliot

Topic:
Design and
historic
environment

Changes to Section 38(6) PCPA 2004



Neil Cameron QC

Decision making- the current system

Section 38(6) Planning and Compulsory Purchase Act 2004

(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.



The Proposed New System

To be inserted in Section 38 PCPA 2004 – Clause 83(2)

“(5A) For the purposes of any area in England, subsections (5B) and (5C) apply if, for the purposes of any determination to be made under the planning Acts, regard is to be had to –

- (a) the development plan, and
- (b) any national development management policies.

(5B) Subject to subsections (5) and (5C), the determination must be made in accordance with the development plan and any national development management policies, unless material considerations strongly indicate otherwise.

(5C) If to any extent the development plan conflicts with a national development management policy, the conflict must be resolved in favour of the national development management policy.”

(My underlining)

The Proposed New System (2)

- (1) When does the section 38(5A) requirement apply
- (2) What is the development plan
- (3) What are national development management policies
- (4) What difference will the new system make to decision making

When does the section 38(5A) requirement apply?

Section 38(5A) applies

If, for the purposes of any determination made under the planning acts, regard is to be had to:

- (a) the development plan; and
- (b) any national development management policies.

Section 70(2) of the Town and Country Planning Act 1990 will be amended by adding at (azb)

any national development management policies, so far as material to the application,”

(Schedule 6 paragraph 3)

What is the development plan?

Clause 82 – inserts subsection (2A) in section 38 PCPA 2004

Supplementary Plans and the Policies Map are to be added to the list of documents which comprise the development plan



What are national development management policies? (1) [「]Landmark Chambers_」

Clause 83(4) After subsection (9A) (inserted by section 82(4) of this Act)
insert —

“(9B) National development management policy must be construed in accordance with section 38ZA.”

Clause 84

“38ZAMeaning of “national development management policy”

(1) A “national development management policy” is a policy (however expressed) of the Secretary of State in relation to the development or use of land in England, or any part of England, which the Secretary of State by direction designates as a national development management policy.

What are national development management policies? (2)

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At the time that the Bill was published the Government published a policy paper
Levelling Up and Regeneration: Further Information

Most fundamentally, we will need to identify and consult on the National Development Management Policies which will sit alongside plans to guide decision-making. They will be derived from the policies set out currently in the National Planning Policy Framework, where these are intended to guide decision-making, but we will also identify and seek views on any gaps in the issues which are covered. The rest of the National Planning Policy Framework will be re-focused on setting out the principles to be taken into account in plan-making, whilst also streamlining national policy, making it more accessible and user friendly.

What difference will the changes make? (1)

- National development management policies will be 'derived' from policies on decision making in the NPPF.
- NDMP will no longer be an 'other material consideration'- they are to be given equivalent status to the development plan under the current system.
- In the event of conflict NDMP will prevail.
- A proposal which conflicts with the development plan and any NDMP will only be granted consent if material considerations strongly indicate that a decision should be made otherwise than in accordance with the NDMP and the development plan.

What difference will the changes make? (2)

- In the initial operation of the system (before development plans have been prepared under the new arrangements) there is likely to be much debate on whether the development plan conflicts with NDMP.
- Those proposing development are likely to argue that proposals comply with the NDMP, and are not likely to rely on other material considerations outweighing the indication given by the development plan and NDMP.
- This is a change from a local plan led system to a NDMP led system.

Design and historic environment



Katharine Elliot

Levelling Up Heritage Asset Protection: 'Special Regard'

- TCPA 1990 amended to insert (at s.58B) requirement for LPA/SoS to have “*special regard to the desirability of preserving or enhancing*” any designated heritage asset / its setting affected by proposed development.
- Covers scheduled monuments, registered parks and gardens, protected wreck sites and World Heritage Sites.
- Includes preserving/enhancing any feature/quality/characteristic of asset/setting which contributes to asset’s significance.

Levelling Up Heritage Asset Protection: ‘*Special Regard*’

- Impact: to secure same level of consideration as for conservation areas (s.72 P(LBCA)A 1990).
- Listed buildings also secured same level of consideration via amendment to s.66 P(LBCA)A 1990 to cover “*preserve and enhance*”.
- Wealth of case law on s.66 and s.72 to refer to on approach to be taken to assessments (e.g. *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) (considering both)).

Levelling Up Heritage Asset Protection: HERs

- LPAs obligated to maintain Historic Environment Record ('HER') for their area (clause 185).
- System for storing / making available information about designated heritage assets / any local site of relevant interest / investigations or studies in the local area *etc.*
- LPA must take reasonable steps to obtain information / keep HER updated.
- SoS to put in place regulations about fees LPAs can charge those wishing for advice/assistance/copies of HER records.

Levelling Up Heritage Asset Protection: TSNs

- Introduction of temporary stop notices ('TSNs') in England (s.44AA P(LBCA)A 1990)
- Authority to LPAs to issue TSN where it appears that:
 - Works have been/are being executed r.e. a listed building in contravention of s.9(1) (breach of s.7 prohibition on unauthorised demolition/alteration/extension) or s.9(2) (breach of listed building consent condition under s.8); and,
 - Having regard to effect of works on the character of the building they consider it expedient that works/part of them be stopped immediately.

Levelling Up Heritage Asset Protection: TSNs

- Subject to various procedural requirements as to content/service/publication/display of TSN.
- Effective from date of first display at property for a maximum of 56 days.
- Post-expiry, LPA can only issue fresh TSN if have taken alternative enforcement action first (e.g. injunction under s.44A).
- Criminal liability imposed for breach of TSN (subject to limited defences (e.g. reasonable lack of knowledge)) (s.44AB).

Levelling Up Heritage Asset Protection: TSNs

- Right to compensation for those with interest in building for any loss/damage (inc. breach of contract) directly attributable to TSN if:
 - Works not found to be in breach of s.9(1) or (2); or
 - LPA withdraws TSN other than after granting listed building consent.
- Unless C required to provide information under relevant provision and loss/damage could have been avoided by providing it/otherwise co-operating with LPA.

Levelling Up Heritage Asset Protection: Other Changes

- Urgent listed building works - amending s.54 P(LBCA)A 1990 to allow works to be carried out on buildings in residential use if would not unreasonably interfere with use, subject to giving 7 days' written notice.
- Compensation for building preservation notices – amends s.29 P(LBCA)A 1990 to apply to Wales only (i.e. no longer right to claim compensation in England).

Securing ‘*Good Design*’

- Amending PCPA 2004 so LPAs required to put in place design code(s) for every part of their area as part of development plan (s.15F).
- Does not need to be exhaustive for all development categories / design aspects but must include steps for compliance in local plan timetable (s.15B).
- Powers to SoS to intervene in event of LPA non-compliance (s.15HB) (including temporary directions (s.15HE)).
- SoS entitled to seek reimbursement from LPAs for costs incurred (s.15HC).

Environmental Assessment



Matthew Henderson

Topics

1. How did we get here?
2. What explanation has been provided?
3. Outline of the new process.
4. Key concepts.

1. How did we get here?

- Planning For the Future – White Paper @ [3.22] – [3.35]
- “Ambitions in our 25 Year Environment Plan”
- “Pro-active role in promoting environmental recovery and long-term sustainability”
- “vital the environmental considerations are considered properly”
- “current frameworks” [EIA, SEA, SA] “can lead to duplication of effort and overly-long reports which inhibit transparency and add unnecessary delays”
- “outside of the European Union, it is also important that we take the opportunity to strengthen protections”
- “quicker and speed up decision-making”
- “considered early in the process and to clear timescales”
- requirements need to be “simpler”; “consolidated”; “same impacts and opportunities do not need to be considered twice”
- “meeting our domestic and international obligations”

2. What explanation has been provide?

- Levelling Up and Regeneration: further information
- “foster better environmental outcomes”
- Environmental Outcome Reports (“EOR”) to replace EIA, SEA and SA.
- “clearer and simpler process”
- assessment “against tangible environmental outcomes set by government, rather than in Brussels”
- “join up between strategic and project scale assessments”
- “deliver more, not less, for the environment”

3. Outline of the new process

- **cl. 116** – specified outcomes relating to environmental protection in UK (or relevant offshore areas) – referred to as “specified environmental outcomes”
- **cl. 117** – requirement for EOR to be prepared in relation to relevant consent or plan – including prohibition on proceeding without an EOR
- **cl. 119** – assessment and monitoring of impact on environmental outcomes
- **cl. 123** – enforcement
- **cl. 124** – reporting by public authorities
- **cl. 126** – duty to have regard to new guidance

4. Key concepts (1)

- **cl. 116(1) - “specified environmental outcomes”**
 - “environmental protection” -
 - protection, maintenance, restoration, enhancement, monitoring, assessing, considering, advising or reporting;
 - natural environment; cultural heritage; landscapes; people – from the effects of human activity
 - “natural environment” – plants; wild animals; other living organisms; habitats; land (not buildings/structures); air; water; and their natural systems, cycles and processes.
 - “cultural heritage” - building; structure; other feature natural or built environment; “of historic, architectural, archaeological or artistic interest”
 - mandatory regard to current environmental improvement plan (Pt. 1 EA 2021).

4. Key concepts (2)

- **cl. 117 – “environmental outcomes report” (subject to EOR regulations)**
 - in writing
 - extent to which proposed consent/plan “would, or is likely to, impact on the delivery of specified environmental outcomes”
 - steps to: increase delivery EO; avoid non-delivery EO; mitigation of effects on EO (if not avoided); remediation of effects on EO (if not avoided or mitigated); compensation for effects on EO (if not avoided, mitigated or remediated)
 - steps to monitor or secure impact on EO
 - “steps” includes reasonable alternatives

4. Key concepts (3)

- **cl. 118 – “relevant consent” and “relevant plan”**
 - prescribed by EOR regulations
 - “category 1 consent” – will always be a relevant consent
 - “category 2 consent – may be a relevant consent – subject to criteria
 - “relevant plan”:
 - relates or may relate to a project or to environmental protection
 - and specified in EOR regulations
 - “consent”: consent; approval; permission; authorisation; confirmation; or decision; that is required or otherwise provided for, by or under any enactment in relation to a project
 - “project”: construction, engineering, demolition, dismantling, decommissioning, installation, depositing, removal, exploitation of natural resources, change of use, any other activity capable of affecting natural environment, cultural heritage or landscape

4. Key concepts (4)

- **cl. 120 – non-regression & safeguards**
 - power to make EOR regulations - “only if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed”
 - no inconsistency with international obligations
 - keep public informed of any proposed relevant consent/plan – sufficient detail – sufficiently early stage – “adequate public engagement” - “as the SoS considers appropriate”
- **cl. 120 – exemptions**
 - national defence or preventing or responding to civil emergency
 - power to make exempting directions

Thank you for listening

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