cornerstone barristers

Local Plans series: SA/SEA and Spatial Strategies

James Findlay QC, Robert Williams, Emma Dring

- Introduction
- Guildford case and overarching lessons

- The SA/SEA process

Habitats Regulations Assessment:

- Legal update
- Practical tips

James Findlay QC

Introduction, *Guilford* and overarching lessons

Local Plans Webinar – Future sessions

2. **Joint planning across authority lines** - 16 July – Michael Bedford QC, Dr Ashley Bowes

3. **Green Belt release** - 23 July – Paul Shadarevian QC, Jonathan Clay, Wayne Beglan

4. **Viability and funding infrastructure, including in relation to Garden Communities** – 30 July – Michael Bedford QC, Wayne Beglan, Clare Parry.

COMPTON PC & others v GUILDFORD BC & Others[2019] EWCA Civ 3242 (Admin)

- 8 issues raised, 5 QCs & 6 barristers, 1 Judge
- At paragraphs 108-132, issue 7, taken out of turn, dealt with SA challenge.
- No challenge to “original” SA but, given OAN reduced from **12,426** to **10,678** as a result of update household projections (which came out mid plan examination), Claimant asserted there should have been further SA examining reasonable alternatives.

COMPTON PC & others v GUILDFORD BC & Others[2019] EWCA Civ 3242 (Admin)

- Guildford BC produced a Note, setting out why no further SA needed (and no further consultation required on reduced OAN). Essentially the strategy (in effect OAN + buffer) remained unchanged, and proposed housing was within range previously considered.

- Inspector accepted approach, albeit decision was Guildford's.

COMPTON PC & others v GUILDFORD BC & Others[2019] EWCA Civ 3242 (Admin)

- Ouseley J rejected challenge. No change to objectives and the alternative of OAN with no buffer had been rejected.
- Whether change in buffer was a significant change likely to have significant effects or not was a matter of planning judgment.
- Decision could only be challenged on public law grounds
- Judgement that it was not significant was reasonable.
- Challenge refused on discretion as well

COMPTON PC & others v GUILDFORD BC & Others[2019] EWCA Civ 3242 (Admin)

- Issue 8, air quality & appropriate assessment, reached by paragraph 191.
- HRA updated to take account of the *Sweetman* case after it came out. (Mitigation only to be considered at assessment not screening stage.)
- HRA further updated to take account of *Holohan* and *Dutch Nitrogen* cases, dealing particularly with anticipated reductions in background air quality and whether that could be considered in assessment.

COMPTON PC & others v GUILDFORD BC & Others[2019] EWCA Civ 3242 (Admin)

- Challenge which in effect equated forecast background improvements with mitigation not pursued.
- Challenge pursued on basis that exceedences of critical loads meant adverse effect likely.
- Rejected. Assessment properly considered whether such exceedences would have a significant impacts on SPA birds.

- Guildford acted lawfully and reasonably.

COMPTON PC & others v GUILDFORD BC & Others[2019] EWCA Civ 3242 (Admin) - Lessons

- Keep under review
- React appropriately
- Keep Inspector informed (& other parties)

Robert Williams

The SA/SEA process

Content

- 1. Role of SA at Examination
- 2. Review of Core Principles & *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214
- 3. Curing defects in the SA
- 4. Lessons from Leeds - *Aireborough Neighbourhood Dev. Forum v Leeds City Council* [2020] EWHC 1461

Role of SA at Examination

Dual-role of the SA

- At examination, inspectors focus on SA for two main reasons:
  - (1) To assess whether the SA is **legally adequate**;
  - (2) When determining whether the plan is **sound**
- In practice, the intensity of focus on the SA varies from plan to plan (and inspector to inspector)

1. Legally Adequate?

- Obligation on INS to determine legal compliance of the plan (s.20(5)(a) PCPA 2004) has been interpreted as including assessing whether the SA is **legally adequate**
  - In particular, whether it meets the requirements of the SEA Regulations/Directive
- Not unusual for there to be detailed legal argument on this matter before the inspector

2. Soundness – as a matter of law

- As a matter of **law** the SA process is procedural in nature. It informs decision-making, rather than dictating outcomes.

  "By contrast [to the Habitats Directive] *the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature… The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process."*

  (***Spurrier v The Secretary of State for Transport*** [2019] EWHC 1070)

2. Soundness – in practice and policy

- But **in practice** SAs often form a key part of the evidence-base against which the **soundness** of the plan is tested
  - In particular, whether 'the most' (NPPF, 2012) or 'an' (NPPF, 2019) '**appropriate strategy'** when considered against reasonable alternatives.
- Recognised in PPG:

"[The SA] can help make sure that the proposals in the plan are appropriate given the reasonable alternatives. It can be used to test the evidence underpinning the plan and help to demonstrate how the tests of soundness have been met"

Core Principles

(Some) Core SA Principles

The Plan

- Identify, describe and evaluate likely significant effects
- Information required set out in Sch 2 to SEA Regs…
- Only so far as "may reasonably be required" taking account: (i) current knowledge; (ii) contents of plan; (iii) stage of plan; (iv) extent to which more appropriate assessed at different level.
- But no requirement for "full information"
- Reasons for preferred option required

Reasonable Alternatives

- Alternatives to meeting the objectives of the plan, not alternative plans
- "Reasonable alternatives" does not include all possible alternatives.
- Reasons must be given for selecting alternatives dealt with
- Reasonable alternatives must be assessed in a comparable manner to the preferred option

Plan B Earth

- Challenge to ANPS – concerning proposed third runway at Heathrow
- Grounds very wide-ranging
- Succeeded on *Climate change* grounds – failure to take into account Paris Agreement as relevant consideration
- SEA – main conclusion:
  - Confirmed the court's approach when considering whether environmental report complies with SEA Directive
  - When reviewing adequacy Courts will apply a "Wednesbury" standard of review

To what extent can defects in the SA be cured?

To what extent can defects be cured?

- As a matter of law, defects in SAs are capable of being cured post-submission for examination (up to adoption): ***No Adastral New Town Ltd v Suffolk Coastal DC*** *(approving* ***Cogent LLP v Rochford District Council****)*
- There is some dispute as to whether fundamental defects in the SA can be cured at a late stage, given the importance of the consultation on the SA being sufficiently "early" to influence the final form of the plan (see ***Re Seaport Investments***)
- In practice, examining inspectors tend to (or at least should) pay close regard to post-submission SAs to ensure that (a) they have been objective; and (b) that the LPA has not approached them with a 'closed mind'
- **Eg Hart LP** which concluded that a post-submission SA was not robust.

Lessons from Leeds - *Aireborough Neighbourhood Dev. Forum v Leeds City Council* [2020] EWHC 1461

Factual Background (a simplified version) (1)

- Context
  - Leeds second largest LPA in country
  - 2/3rds designated as Green Belt
- Leeds Core Strategy (adopted 2014) –
  - Housing requirement of circa 70,000 / 4,700dpa
- Site Allocations Plan (SAP) – submission draft (2017)
  - Allocated sites to meet requirement
  - Included circa 13,000 dwellings removed from GB

Factual Background (a simplified version) (2)

- Core Strategy Review (2018)
  - Annual requirement reduced to 3,247dpa (reduction of over 25%)

- SA for SAP
  - Large number of iterations
  - So many that some iterations not consulted upon, nor even mentioned in SA Adoption Statement
    - Inc. SA which considered alternative approaches following reduction in housing numbers

Factual Background (a simplified version) (3)

- SAP examination/INS report
  - Following CSR only GB sites to 2023 should be released from GB, not beyond.
  - BUT note - reduction in CS requirement up to 2023 (7,265), significantly greater than all GB releases in SAP during same period (3,778)
- Legal challenge
  - Large number of grounds
  - Central issue – how proposed reduction in housing requirement dealt with

Judgment (1)

- Non-SEA grounds
  - Grounds 1/4 – quashed on basis of inadequate reasons to justify GB release
    - Degree of housing requirement was key part of exceptional circs. justification
    - Ins required to give reasons why, following significant reduction in housing numbers, still exceptional circumstances to justify release GB sites to 2023
  - Ground 7 – significant errors of fact in relation to updated supply figures

Judgment (2)

- SEA grounds
  - (1) Failure to consider/consult on alternative of suspending SAP in light of falling housing requirement
  - (2) Irrational to undertake site-selection exercise within HMCAs instead of across entire Plan area

Judgment (3)

- Reasonable alternatives challenge
  - Drop in housing requirement by *"very significant amount"* and would have *"on any approach, a very significant impact on GB release that would be required"*
  - Suspending SAP, pending adoption of CSR was an *"obvious possibility and should…have clearly and transparently been consulted upon".* Breach of Regs.
  - BUT as point had been made during examination process, inevitable outcome the same. Relief refused.

Judgment (4)

- Site selection challenge
  - Rejected C's argument that was "*necessarily irrational to assess the most sequentially preferential sites for GB release against reasonable alternatives within each HMCA rather than across the local authority area as a whole*."
  - In principle approach is a rational and lawful one
  - BUT neither Council nor Inspector set out adequate reasons for the approach

Lessons from Leeds

- 1. Be ready for changes in circumstances post-submission
- 2. If significant changes do occur, address them explaining clearly the rationale for continuing with strategy and/or any necessary modifications
- 3. Re-evaluate SA, especially whether reasonable alternatives have changed
- 4. Don’t (a) hide an updates of the SA and (b) forget their existence
- 5. Ensure updates – particular in relation to housing figures – are easy to follow
- 6. Courts will be very slow to interfere with any element of SA which entails an exercise of judgement

Emma Dring

Habitats Regulations Assessment

Habitats Directive Art 6(3)

"Any plan or project not directly connected with or necessary to the management of the site but **likely to have a significant effect** thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment … the competent national authorities shall agree to the plan or project only after having ascertained that it **will not adversely affect the integrity of the site** concerned …"

- See reg. 63, Conservation of Habitats and Species Regulations 2017

The process

1. Screening: a very low threshold - any risk of significant effects. “Should we bother to check?”

2. Appropriate assessment: a thorough assessment of the effect of the plan on the integrity of the SPA/SAC, considering the best available scientific knowledge.

   “Must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects” (*People Over Wind*)

3. Compensatory measures: Only become relevant where (i) no alternative solution and (ii) IROPI exist.

Mitigation measures: screening stage

People Over Wind: C-323/17

- Screening opinion: no LSE due to distance and "protective measures … built into the works design of the project"
- CJEU: "It is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site."

1. Inclusion of such measures presupposes LSE
2. 'Screening out' avoids rigour of AA, precludes public participation

Application to plan making

- Guidance following *People Over Wind* has mainly focussed on projects.
- ‘Integral features’ vs. avoidance measures: relevance to plans?
- Check structure and language of AA to make sure the two stages are clear.
- Effects of mitigation must be considered fully and at the right stage - not an assessment of ‘residual’ LSE.

Examples of commonly used habitats mitigation measures, to be excluded from screening (in plans or projects):

- Strategic suitable alternative natural green space (SANG)
- Strategic access management and monitoring (SAMM) policy/contributions
- Policies requiring contributions towards on-site measures to improve status of SPA/SAC
- Protective draft policies/wording e.g. limiting development in zones of influence
- Existing/proposed avoidance strategies

Mitigation measures: appropriate assessment stage

Grace and Sweetman: C-164/17

- AA: Took account of proposed habitat restoration and ongoing management strategy, concluded there would be no adverse effect on integrity.
- CJEU:

> "distinction between protective measures … intended avoid or reduce any direct adverse effects … and measures which … are aimed at compensating for the negative effects of the project on a protected area".

- A measure can only be taken into account in AA “when it is sufficiently certain that [it] will make an effective contribution to avoiding harm”.
- Measures which do not avoid/reduce harm, but offset negative effects, must be considered, if necessary, under Article 6(4) (compensation).
- Need to avoid states allowing “so-called ‘mitigating’ measures’ - which are in reality compensatory measures - in order to circumvent the specific procedures laid down in Article 6(3)”

Application to plan-making

- Avoidance vs. compensation
- Art 6(4) imposes a high hurdle:

  "If, in spite of a negative assessment of the implications for the site and in the **absence of alternative solutions**, a plan or project must nevertheless be carried out for **imperative reasons of overriding public interest**, including those of a social or economic nature, the Member State shall **take all compensatory measures necessary** to ensure that the overall coherence of Natura 2000 is protected."

Appropriate assessment: ‘future benefits’

"Dutch Nitrogen": C-293/17 and C-294/17

- Permitting scheme for agricultural activities.
- Defines critical thresholds for nitrogen deposition. Controls whether prior authorisation needed/can be granted.
- Scheme includes site-specific restoration measures: measures directed at sources of nitrogen (e.g. use of fertiliser); monitoring and adjustment.
- Scheme subject to AA, no AA for individual agricultural 'projects'.

CJEU:

- Scheme involves long term measures; some in the future, some requiring regular renewal. “Those measures have not yet been taken or have not yet yielded any results, so that their effects are still uncertain.”
- AA must not take account of **future benefits** of any measures if they are uncertain, whether because scientific knowledge does not allow certainty, or “because the procedures needed to accomplish them have not yet been carried out”.

Application to plan making

- Full implications of ‘future benefits’ point remain unclear.
- Need for certainty – how can this be achieved in respect of local plan mitigation?
- Relevance of multi-stage planning process?
- “Subjective certainty”

Measures or improvements outside scope of plan/project

- “Autonomous measures” – things happening outside the scope of the plan which may have an effect.
- Referred to in *Dutch Nitrogen* as one aspect of the calculations underpinning the permitting scheme.
- *Compton v Guildford* – AA took account of expected improvement in NOx concentrations and nitrogen deposition rates by 2033.

Content of appropriate assessment

Holohan v An Bord Pleanála: C-461/17

AA must identify and examine implications for:

- All habitats and species for which the site is protected

and

- species present on that site, but for which that site has not been listed,
- habitat types and species to be found outside the boundaries of that site,

provided the implications for those species/habitats are liable to affect the conservation objectives of the site.

Brexit

- Amendments to Habitats Regs are due to come into force on 31 December 2020 (end of implementation period).
- At present, no proposed changes to the substance of the duties to conduct AA etc. (NB same applies to SEA)
- PM recently referred to “newt-counting delays” as “a massive drag on prosperity” - so watch this space.

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