

# ENVIRONMENTAL LAW & MANAGEMENT

SPECIAL ISSUE

UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION  
UKELA CONFERENCE PAPERS 2017

Cities of the Future: Legal challenges and opportunities for more sustainable living

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**UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION (UKELA)  
CONFERENCE PAPERS 2017**

Nottingham University, 7–9 July 2017

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## **Maria Adebowale-Schwarte**

*Director, Living Space project*

Maria Adebowale-Schwarte is a city and placemaking strategist, focusing on: sustainable development, local economies, green spaces, cross-sector collaboration, philanthropy and inclusive community participation.

She is the Director of the Living Space Project, an urban place making think tank and consultancy and a senior fellow of Projects for Public Spaces.

Her background is in sustainable development, environment and planning law. She is a former Commissioner of the UK Sustainable Development Commission and English Heritage.

Maria currently sits on several boards and committees including the Environmental Agency and the Heritage Lottery Fund. She's also a patron of the UK Environmental Law Association, an Ambassador of the Women's Environment Network, and a member of the Raynsford Review Taskforce on planning.

She's written articles and reports for organizations and publications including The Guardian, Prospect Magazine, Policy Press, and the World Bank. She is the author of the new non-fiction book 'The Place Making Factor: Disrupting social and environmental grantmaking'.

In her spare time, she collects old penguin paperbacks.

## **Michael Barlow**

*Head of the Environment, Burges Salmon*

Michael is Head of Environment at Burges Salmon. He has been advising both the public and private sectors on all aspects of Environmental law for over 16 years. Michael has a particular interest in issues relating to Energy Efficiency. In 2009 he chaired the legal working group of the UK Green Building Council's Task Group which produced the report "Pay As You Save- Financing Low Energy Refurbishment in Housing". This report was provided to all three major political parties. The principles were part of the manifestos for the 2010 election and the commitment in the Coalition Agreement to introduce the Green Deal. Since then Michael has advised numerous organizations in relation to the regulations relating to the Green Deal and the commercial agreements to deliver their objectives. Michael also advised DECC and Ofgem on the electronic ECO brokerage platform which was intended to form a bridge between Green Deal Providers and those obligated under ECO to enable the delivery of carbon savings.

## **Andrew Bryce**

*Solicitor and Founder, Andre Bryce & Co*

Andrew Bryce is a Solicitor who spent 25 years working in the City and became a Senior Equity partner in the major City law firm where he set up and headed its environmental practice.

Andrew left in 1994 to set up his own practice, Andrew Bryce & Co concentrating on regulatory and defense work on environmental and health and safety matters principally advising the waste, oil and gas and industrial sectors.

Andrew was a founder member of UKELA and was its second chairman from 1988 to 1991 and is an Honorary Life Member. Andrew has previously headed its Waste Working Party and is currently Co-Chair with Richard Macrory of the UKELA Brexit Task Force.

## **Seth Davis**

*Chair of the American Bar Association's Section of Environment, Energy and Resources*

Seth A. Davis is Chair of the American Bar Association's 10,000 member Section of Environment, Energy and Resources ("SEER"). Seth is a partner in Elias Group LLP in Rye, New York, co-chairing the firm's environmental and energy practice since 2004. He handles a wide variety of environmental issues arising out of a wide range of corporate and real estate transactions, regularly represents responsible parties in site remediation and cleanup negotiations, and counsels corporate and individual clients on compliance with all the environmental statutes. Since 1980, Seth has worked exclusively in the area of environmental law, in both law firms and corporate law departments.

Seth is an Adjunct Professor in Pace University's highly regarded environmental law program. He received his J.D from Harvard University in 1975, and his B.A., Summa cum laude, in 1972 from Wesleyan University.

When not busy protecting the environment of speaking at bar meetings, Seth may be found following his diverse passions at Yankee Stadium, Lincoln Center, and the Saratoga Race Course. He also avidly follows the English Premier League and is proud to be one of the few Americans who understand cricket.

## **Hugh Ellis**

*Policy Director, Town & Country Planning Association (TCPA)*

Hugh's responsibilities at the TCPA include leading on policy development, and briefings and engagement with central government departments and politicians. In 2011 Hugh co-authored a 'policy analysis of housing and planning reform' published by the TCPA for the Joseph Rowntree Foundation. He has also been closely involved in the passage of the 2004 and 2008 Planning Acts, including providing evidence to select committees and working closely with parliamentarians on both the Commons and Lords committee stages of both Bills. Hugh has given oral evidence to the House of Commons Select Committees on various planning inquiries. He led TCPA campaign work on the Localism Bill and NPPF. Hugh sits on the UK Government Department for Communities and Local Government (DCLG) Planning Sounding Board.

Hugh regularly delivers workshops to local authorities for the TCPA including the Oxfordshire County Council on Place-shaping, in Warrington as part of the North West Improvement and Efficiency Partnership climate change skills program, in Wales on climate change adaptation, supported by the Environment Wales Climate Change Fund Grant Scheme, and with the English Planning Advisory Service on planning

reform issues and strategic planning. Hugh has also delivered a number of local training sessions and local conversations on the invitation of Elected Members on planning committees, such as in Derbyshire, Oxfordshire and Sheffield.

Prior to joining TCPA in March 2009, Hugh had been national planning advisor to the Friends of the Earth England, Wales and Northern Ireland since 2000. After spending a number of years working for the Coalfield Planning Cooperative on community planning projects. Hugh took up a teaching and research post at the University of Sheffield where his key interests were sustainable development and community participation. He has a diploma in Town Planning, BA (Honors) in Urban Studies and a Doctorate in Land Use Planning from the University of Sheffield.

#### **Richard Honey**

*Barrister, Francis Taylor Building*

Richard Honey practices as a barrister at Francis Taylor Building in the fields of public law and environmental law, with particular specialisms in judicial review and High Court statutory challenges, infrastructure projects, compulsory purchase, and commons and village greens. He is called to the Bars of England and Wales and Northern Ireland. He is a member of the Attorney General's A Panel of junior counsel to the crown. In environmental law, Richard has been ranked as a leading barrister by both Chambers and Partners (2010-2016). He was listed as the leading junior barrister in environmental law by Who's Who Legal in 2016. Richard's experience includes town planning, habitats and protected species, statutory nuisance, waste, contaminated land, water, environmental permitting, nuisance, civil liability for pollution, and environmental crime and taxation. Clients include regulators such as Natural England and the Environmental Agency, utilities companies and the businesses of various types. Richard was instructed on the first case in the Court of Appeal Criminal Division under the Definitive Guidelines for Environmental Offences: *EA v Thames Water* [2015] 1 WLR 4411. He regularly appears for the Secretary of State for Communities and Local Government in public law cases.

#### **Richard Macrory**

*Professor of Environmental Law, University College London*

Richard Macrory is a barrister and Professor of Environmental Law at University College London. He was first chair of UKELA, and the founding editor of the journal of Environmental Law.

He was a member of the Royal Commission on Environmental Pollution 1991-2003, and a board member of the Environment Agency 1999-2004. Richard led the Cabinet Office Review on Regulatory Sanctions in 2006, which led to the new framework of civil sanction powers contained in Part III Regulatory Enforcement and Sanctions Act 2008. Between 1998 and 2004 he was hon. Chairman of Merchant Ivory Film Productions Ltd.

#### **Christian Nyerup Nielsen**

*Director, Ramboll Water, Denmark*

Christian Nyerup Nielsen has extensive experience with management of large scale projects within infrastructure planning, urban developments, resiliency planning and flood risk reduction for cities regions and infrastructure owners.

Christian's expertise in the field of climate adaptation and flood risk management from idea to detailed design has been developed and used on numerous projects internationally. Among these projects are Climate Change Adaptation of Singapore's industrial areas for JTC, Cloudburst Pilot in New York city for NYCDEP, low impact of developments in Copenhagen and the detailed flood protection master plans in Copenhagen and Gothenburg.

Furthermore, Christian Nyerup Nielsen has an advanced level of international expertise within the climatic adaptation at city/river basin scale as well as assistance to the insurance industry regarding protection of assets.

In the latter years, Christian has planned and designed numerous projects within the flood risk management to take care of extreme rainfalls and storm surges. The solutions have a holistic, multiple benefit approach aiming to create increased urban quality, biodiversity, better mobility, water supply safety etc. along with flood protection.

Christian has been a project director of engineering services on the Hans Tavsens Park and Sankt Annae Square – two of the most prestigious climate adaptation projects in Denmark.

# Climate adaptation and cloudbursts: learnings from Copenhagen

**Christian Nyerup Nielsen** *Global Service Line Leader, Climate Adaptation, Ramboll*

*Copenhagen is preparing for climate change and the impact of future extreme weather. Over the next 30 years, the city will implement a range of climate adaptation projects to protect the entire city against the damages of heavy rain. Copenhagen's approach is serving as inspiration for cities all over the world.*

The world is facing severe issues caused by climate change. Cities all over the world are increasingly plagued by flooding causing large damages to private and public space. From August 2010 to August 2011 Copenhagen was hit by three devastating cloudbursts, flooding major roads and other infrastructure facilities. Total damage from the most destructive of the three events left the City of Copenhagen with expenses of more than €800 million.

Climate models produced by the Intergovernmental Panel on Climate Change suggest that extremes of flood and drought will become more common this century, and we face the major challenge of making our national infrastructure more resilient to this changing climate.

In Copenhagen, an initial economic analysis indicated the cost of doing nothing would triple in 100 years due to climate change affecting weather patterns. The city therefore decided it had to do something to protect the city from future damage.

## Ambitious and award-winning climate adaptation plan

So, because of the disastrous 12 months, the municipality of Copenhagen and Greater Copenhagen Utilities (HOFOR) have, together with Frederiksberg Municipality and Frederiksberg Utility, developed an overall climate adaptation plan as well as a city cloudburst masterplan that divides Copenhagen and Frederiksberg into catchments to create the basis for the specific master planning and project identification.<sup>1</sup>

It was also decided to create and implement eight 'concretization plans' covering the whole city of Copenhagen. Ramboll created four of them covering around half of the whole area. The underlying modelling has been undertaken using an integrated hydraulic model of the sewers and watercourses, and it employs a digital elevation model of the city. Each catchment has been further subdivided by topography and sewer network to assess practical solutions on a local scale.<sup>2</sup>

The overall climate adaptation plan for the city of Copenhagen describes three methods to be used to adapt to heavier rainfall:

- 1) *Larger sewers, underground basins, and pumping stations:* The plan acknowledges that Copenhagen's drainage network today is at capacity. The cost to install new drains throughout the city is estimated to be 10 to 15 billion DKK (\$1.73 to \$2.6 billion) and an additional 3 to 5 billion DKK (\$521 million to \$868 million) to separate rain and wastewater in individual dwellings. For this reason, planners recommend method #2 below wherever feasible.
- 2) *Manage rainwater locally instead of guiding it to sewers:* The plan recommends that low-tech solutions that absorb rainwater locally, dubbed SUDS (Sustainable Urban Drainage System), will be adopted throughout the city. The estimated investment for this method is 5 billion DKK (\$868 million), and includes simple measures such as replacing concrete or tiles in a back yard or garden with grass and trees.
- 3) *Ensure that flooding takes place only where it does least damage:* The plan concedes that water on the streets and in public squares will be more common if, as expected, rainfall increases in Copenhagen. Planners want to direct water away from roadways, cellars, and commercial buildings and toward places such as parking lots, sports fields, and parks where water will do little or no damage.

The plan notes that just 1% of Copenhagen's buildings are replaced each year. Going forward, the plan recommends that climate adaptation be incorporated into the designs of new buildings. An example of this recommendation in action are rules adopted by the city in May 2010 mandating that new flat-roofed buildings be outfitted with green roofs capable of blunting the impact of heavy rains.

In 2013 the Copenhagen Climate Adaptation Plan won the prestigious INDEX award in the Community category. The INDEX Award jury's motivations was that in a year where climate adaptation plans are mandatory in all municipalities throughout Denmark – and a central focus of city administrations around the world – Copenhagen Climate Adaptation Plan really stood out with its main focus on considering flooding and climate adaptation as an asset rather than an issue, benefiting businesses and citizens alike.

The jury also found that the Copenhagen Climate Adaptation Plan stood out because it is based on public-private partnerships and, as opposed to many other

<sup>1</sup> City of Copenhagen: Copenhagen Climate Adaptation Plan 2011.

<sup>2</sup> City of Copenhagen: Cloudburst Concretisation Masterplan 2013.

climate adaptation plans, is of value because it has been passed in the Copenhagen City Council, in a city of relatively long-sighted planning.

### Green streets retaining the water

The *cloudburst concretisation plans* (that are based on the overall climate adaptation plan) are based on a few simple principles. The main principle is to keep the water on the surface and control it rather than installing large, expensive pipes underground. Instead, cloudburst streets will collect and transport the water away from the vulnerable, low-lying areas.

Adjacent to the cloudburst streets, secondary streets will be transformed into green streets that retain the water. In areas where the water simply cannot be managed over ground, large underground cloudburst tunnels up to three meters in diameter will be built instead of cloudburst streets.

The cloudburst concretisation plans intend to create synergy for the city through visionary solutions. This is achieved by using water-sensitive, blue-green solutions to increase the overall liveability of the city. The water on the terrain will serve as a resource in the city space. Benefits include increased recreational value from upgrading of parks and meeting places.

The design of the concretisation plans visualizes how cloudburst streets, retention streets and green streets will support the overall goal of increasing the liveability of the city of Copenhagen.

When fully implemented 30 years from now, the cloudburst concretisation plans will protect Copenhagen from severe storms and will take climate change into account as well. The concretisation plans aim at decoupling 30–40% of the storm water from sewer system to level out the effects of climate change predicted to cause 40% more extreme rainfall over a period of 100 years.

### St Jorgen's Lake and Sonder Boulevard

Multi-functional spaces are hence key elements in the plan, such as parks and playgrounds that can be flooded during heavy rainfall but in dry weather serve as recreational spaces for the citizens.

One of the more radical suggestions, developed by Ramboll, in one of the cloudburst concretisation plans is to transform one of Copenhagen's three inner-city lakes, Sankt Jorgen's Lake, into a beach park by lowering the water level in the lake. This creates a vast area for the collection of rain-water while improving Copenhagen's recreational value. At the same time, the park can be flooded during cloudbursts.

Taken together, this network of blue-green infrastructure aims to replicate the natural water cycle that has been disrupted through modern urban development.

A by-product is that water is increasingly brought to the surface where it is more visible, blockages can be more easily identified and managed, and the overall consequences of failure are reduced. As well as the flood relief and water management functions, the solutions also contribute to the amenity and liveability of the city by

increasing planted areas. Benefits such as additional habitat and urban cooling are also additional positive outcomes.

The St Jorgen's Lake project is not yet implemented, but is expected to be planned for over the coming years.

Another project example regards a boulevard in the Vesterbro neighborhood which could be changed into a 'cloudburst boulevard'. In this project, multifunctional space is wide enough to have a substantial retention volume in order to both store the water and transport it away.

As it stands currently, the street is a traditional boulevard with a green strip in the middle, which is common all over the world. The green strip is elevated a bit and has no other function than adding some green space to the city and providing space for the citizens to walk the dog. During cloudbursts, the water is likely to run from the green area and onto the street. The whole road profile is sloping toward the buildings and does nothing to prevent the cellars under the houses from flooding.

The vision Ramboll created for this boulevard is to change the whole road profile to a V-shaped profile, creating a large retention volume in the lowered green area in the center of the profile. When it rains, the water can run away from the houses and the street into the green area. The capacity of the urban river created during cloudbursts can carry up to 3.3 cubic meters of water per square meter. During normal rain and dry weather, the lowered green strip can serve recreational purposes.

### Blue-green infrastructure

The thoughts and ideas behind the cloudburst concretisation plans for Copenhagen including the St Jorgen's Lake project are to a large extent based on the concept of Blue-Green infrastructure (BGI).<sup>3</sup> BGI offers a feasible and valuable solution for urban areas facing the challenges of climate change such as cloudbursts and droughts. BGI connects urban hydrological functions with urban nature, landscape design and planning. Thereby using the blue (water) and green (nature, plazas and parks) to protect against flooding and other effects of climate change.

BGI design provides overall socio-economic benefits in terms of co-values and enhanced urban liveability. In addition to reduced damages, these benefits and values will typically exceed the sum of the individual components' construction and operating cost.

To make BGI projects as successful as possible, many of Ramboll's clients are using an integrated planning approach and start out by making a feasibility study including an assessment of the socio-economic potential, benefits and expected values.

BGI complements, and in some cases, replaces, the need for grey infrastructure (large storm water drains, hardscape flood walls, pumping stations etc.). When done right, the combination of socioeconomic benefits, values and lower costs from enabling natural/nature like hydrology instead of

3 Ramboll Liveable Cities Lab: Blue-Green Infrastructure and its impact on society.

only using expensive grey infrastructure leads to substantive cost savings.

A major study into BGI has been conducted by Ramboll's Liveable Cities Lab in conjunction with National University of Singapore, Zeppelin University in Germany, Harvard University's Graduate School of Design, Massachusetts Institute of Technology. The research reveals the main benefits of BGI:

- Improves water quality and instils effective stormwater controls
- Increase urban resilience to climate change, for instance, by reducing urban heat island effects and increasing biodiversity
- Create enhanced spaces for recreation and social activities, thereby reducing public health costs, improving wellbeing whilst also attracting residents, businesses and tourism

The study also provides cities with practical recommendations to enable successful BGI implementation:

- Articulate a clear vision of the liveability and prosperity advantages of BGI
- Initiate small-scale pilot projects, and actively engage key stakeholders to inspire, mobilize and create ownership for BGI solutions
- Identifying when old infrastructure is planned for renewal can be a timely opportunity for promoting BGI

Anchoring BGI initiatives at a leadership level whilst introducing integrated development policy and joint budgeting that cut across city institutions can overcome silos that inhibit BGI.

## Soul of Norrebro

'The Soul of Norrebro' is another visionary and cross-disciplinary project with a blue-green approach. Ramboll is Technical Lead and part of a team lead by Danish-based architects SLA.

Norrebro is a diverse and multicultural part of Copenhagen which also suffered from the cloudburst years ago. The Soul of Norrebro aims at adding the flood-related challenge in a way that also leverages urban regeneration and creates more recreational opportunities for local citizens.

In 2016 the project won the 'Nordic Built Challenge'<sup>4</sup>; an open, multidisciplinary, needs-driven competition to develop and visualize Nordic innovative solutions for liveable, smart and sustainable cities, initiated by the Nordic Council of Ministers. The project was awarded by an independent jury that emphasized its high aesthetic value and stressed the fact that the project provides a brand-new model for climate adaptation and cloudburst mitigation.

The project has been developed in a close collaboration with users and local citizens, and it might be an international beacon for climate adaptation in cities, since it brings together the right technical and social aspects.

When implemented, the project will transform the park into a series of multifunctional rainwater catchment basins from which the excess rainwater is lead to the adjacent Korsgade street into The Copenhagen Lakes. On its way, the water might also be purified biologically by city park greenery in Korsgade street.

In addition to SLA and Ramboll the project team also includes Arki\_Lab, Social Action, Gadeidræt, sociologist Aydin Soei and Saunders Architecture.

## Adapting the Copenhagen metro to the future climate

The Climate Adaptation Plan notes that Copenhageners should expect rising seas, up to 1 meter, over the next 100 years. Under such a scenario, the water level during storms will be higher than today and storm surges may lead to high tides in low-lying areas of the city. Flood calculations were made for the adaptation plan, illustrating how high-water levels would impact the city.

Absent action, the plan estimates that damage to buildings and infrastructure and lost earnings from storm surges and floods will total 15 to 20 billion DKK (\$2.6 billion to \$3.47 billion) over the next 100 years. But Copenhagen could hedge against rising sea level by investing 4 billion DKK (\$694 million) over the same period.

Rising seas and more – and more intense – precipitation comprise a threat for both buildings and infrastructure in general; as for instance the Copenhagen Metro.

Since the establishment in 2002 the Copenhagen metro has become a huge success, and the characteristic driverless white trains are now an important vehicle for the expanding number of commuting Copenhageners.

However due to revised prognoses from agents like the UN Intergovernmental Panel on Climate Change (IPCC) and the Danish Meteorological Institute, the Metro Company now expects to raise the level of storm surge protection.

Ramboll is hence to do an assessment that will show if it is necessary to raise the level of protection. The assessment will also include clear recommendations on measures to be considered in addition to the ones already planned for.

To ensure that the latest scientific findings are included in the work, Ramboll has teamed up with Karsten Arnbjerg-Nielsen, a leading professor and expert in climate change impacts at the Technical University of Denmark.

## New York seeks inspiration in Copenhagen's approach

The way Copenhagen is handling its climate adaptation challenges is also serving as inspiration for other cities around the world as for instance in the US. Hence the New York City Department of Environmental Protection (NYCDEP) has been studying the climate adaptation work Ramboll and other consultants have done for the City of Copenhagen, especially blue-green infrastructure projects.

Ramboll has conducted a best practice study to determine the most cost-effective ways to reduce flooding while

<sup>4</sup> Nordic Built Cities 2016.

improving water quality in a specific area in Jamaica, Queens, where heavy cloudbursts can cause rainwater to become polluted and sewage water to overflow.

New York City's main objective is to prevent pollution in the canals and waterways where several marinas and other recreational areas are located – and ultimately in some of the city's beaches.

With more than 400,000 residents, a portion of the New York City borough of Queens that drains to Jamaica Bay was chosen as the pilot area, because it has more flooding and sewer backups complaints on record than any other area of the city, and certain neighborhoods are flooded repeatedly.

Ramboll's study is meant to demonstrate how NYCDEP's current and future work in Queens and other parts of the city will pay off, and whether other cost-effective projects can be considered in the long term. And Ramboll is combining technical and socioeconomic competencies to support one of the world's most amazing cities in its important efforts with climate adaptation and blue-green infrastructure.

### Taking up the challenge in Miami

Ramboll is also part of a team winning a design challenge for flood-risk management in Miami-Dade County, US.

To become more resilient, the Miami-Dade County is looking for cost-effective approaches to manage stormwater to reduce flood risks.

One area in the county that has experienced more flooding historically is the Arch Creek Basin, a 2,838-acre drainage basin in an area with elevated groundwater. Therefore, the County arranged a challenge for ideas for creative proposals of all types on how to reduce flood risks in the Arch Creek Basin without significantly increasing energy demand for water management.

The County was looking for small-scale interventions that can be used in neighborhoods, which will complement countywide, large-scale infrastructure projects. Ideally, these solutions would be passive and would require low or no continual energy inputs and they should be cost-effective so that they can be scaled up across the County.

In collaboration with ACF ENVIRONMENTAL, a custom design and manufacturing facility creating technology for the construction and stormwater industries, Ramboll's Liveable Cities Lab, based in Boston, decided to take up the challenge – and the design proposal was selected as one of the winners.

The proposed solution is to bring Blue-Green Infrastructure to the Arch Creek Basin by combining the Focal-Point technology removing pollutants from urban stormwater runoff with Ramboll's cloudburst stormwater design approach.

The added component of the Blue-Green Infrastructure (BGI) approach is to use the streets as stormwater conveyance and direct this water to detention green space. BGI is sustainable and results in multiple co-benefits for residents including more green space and improved recreation.

BGI is effective in improving water quality during every day rain events and in contributing to a controlled flooding of carefully selected detention areas during more extreme rain events, potentially caused by cloudbursts or hurricanes. This approach is, as described above, consistent and can accommodate a future city slough park concept that will be developed as the longer-term solution to flooding in this area.

In their acceptance, the challenge organizers stressed the Blue-Green Infrastructure element in the proposal as well as the focus on cost-efficiency.

The design competition was supported by the efforts of City Mart to help organize and publicize this competition for Miami-Dade County. Miami-Dade County is now considering possibilities for funding and implementing measures potentially based on the proposal from Ramboll and ACF ENVIRONMENTAL.

### Lessons

A lesson from Copenhagen is that as well as funding, the key issue is cross-department co-operation between the roads, water, parks and environment authorities. This is one of the reasons why Ramboll is often arranging workshops and other fora where relevant public institutions, organizations and private companies get the chance to meet, exchange knowledge and develop models for interaction, collaboration and financing.

Another lesson related to the importance of knowing the 'cost of doing nothing' when doing cost/benefit analyses. As an example, from a public-sector perspective, the potential value losses of a future with 6 degrees Celsius of warming are projected at USD 43 trillion in present value, or 30% of current assets, according to a 2015 report from The Economist Intelligence Unit. And in Copenhagen, the cost of doing nothing was, as mentioned above, estimated to triple within 100 years.

# An audacious goal: delivering on sustainable development goals in cities

**Maria Adebowale-Schwarte**

Director, Living Space Project

UKELA has never been shy about its objective to promote sustainable development for current and future generations. As Anne Harrison noted in a letter to Greg Clarke,<sup>1</sup> the former planning minister, the association has a 'long-standing commitment into future into tangible legislative and policy form'.

The UKELA conference on cities and environment rightly highlighted sustainable development and the sustainable development goals. The delivery of the goals is required across government and industry and additional scrutiny of its delivery will be part of the Environmental Audits Committee. Also, the UK has made a public commitment to provide a national review, albeit voluntary, to the United Nations in 2019.

More specifically for sustainable cities and communities, the government has agreed legally binding UK targets for emission reductions by 2020 and 2030. The government recently launched the Environmental 25 Plan estimates that the implementation of sustainable development goals (SDGs) could be worth £9 trillion pounds in the global market by 2030, in which the UK environmental and planning sector could share, which was also an issue recently highlighted at the 2017 UKELA Garner Lecture on Green Buildings.

The social and economic possibilities of the goals and targets array of challenges are different for the urbanised global world, particularly at the city level. Each city, depending on its own needs and priorities, will need to deliver not only on the national and global goals objectives, but identify at city level those most important to its own urban conurbations: the people, place, economy and environment – within Gro Harlem Brundtland's<sup>2</sup> schema for the collective future of all in meeting the needs of current and future generations. Cities are SDG 11's sweet spot at the heart of the 16 other interconnecting goals:

Goal 11: Make cities inclusive, safe, resilient and sustainable

Cities are hubs for ideas, commerce, culture, science, productivity, social development and much more. At their best, cities have enabled people to advance socially and economically.

However, many challenges exist to maintaining cities in a way that continues to create jobs and prosperity while not

straining land and resources. Common urban challenges include congestion, lack of funds to provide essential services, a shortage of adequate housing and declining infrastructure.<sup>3</sup>

The other 16 goals reflect (in particular, SDGs 12, 11 and 13) the focus on relieving what Osborn, Cutter and Ullah<sup>4</sup> state as the relief of human pressures on earth's natural systems. In doing this, the goals are best able to achieve good growth pathways, end inequality and protect the global and citywide ecosystems.

They have not been written as international or state law, but rather to illustrate the legal and ethical responsibilities that are predominantly for the so-called 'developing world' but also with the 'developed world' in mind. This means that environmental lawyers, planners and urban regeneration consultants must be able to support cities in developing the opportunities that allow them to thrive and grow, while improving resource use and reducing pollution and poverty. Ensuring this happens means being at the heart of creating cities that offer opportunities for all, with access to basic services, energy, housing, transportation and more.

The goals at a glance may seem like a nice to do' list. But they aren't: rather, they illustrate not only the challenges that face every country in the world but also set a radical agenda for action, policy, and potential legal frameworks. These frameworks are crucial to a rapidly urbanised world with over half of our current population living in urban conurbations and cities. In the UK alone, the urban population was estimated by the World Bank in 2016 as 82.84 per cent.<sup>5</sup>

The UK has already taken steps to assist cities to develop their SDG focused strategies. This includes 2017 SDG Office of National Statistics open source reporting and collation ('appropriate to the UK'). The integration of the data offers the potential to develop legal policy frameworks and public action to progress on climate change, sustainable energy and people and equality issues around education, gender, health and poverty.

I hope that it will provide a holistic picture of the measurable goals and indicators in relating to sustainable

1 Letter to Hon Greg Clarke from UKELA 'Presumption in Favour of Sustainable Development', Anne Harrison, 2011 <https://www.ukela.org/content/doclib/209.pdf>.

2 Brundtland Report *Our Common Future* (World Commission on Environment & Development 1987) <http://www.un-documents.net/our-common-future.pdf>.

3 Goal 11: Make cities inclusive, safe, resilient and sustainable <http://www.un.org/sustainabledevelopment/cities/>.

4 Derek Osborn, Amy Cutter and Farooq Ullah *Universal Sustainable Development Goals, Understanding the Transformational Challenge for Developed Countries, Report of a study by the stakeholder forum* (May 2015).

5 <https://tradingeconomics.com/united-kingdom/urban-population-percent-of-total-wb-data.html>.

cities and communities. This data will also be under global scrutiny when reported back to international agencies responsible for collecting comprehensive data and thence reported back to the United Nations.

It is likely that major cities, including London, for example, are publicly committed to the SDGs and will use this type of intelligence to shape current and future strategies. The London Sustainable Development Commission has already set the city's quality of life indicators against the Sustainable Development Goals<sup>6</sup>. Sadiq Khan, the London Mayor, has drafted a London Plan in which he highlights the need to create conditions for sustainable development that can deliver on what he terms 'good growth' for the London project for its 10.5 million residents in 2041.<sup>7</sup>

The goals' role in developing good growth was alluded to at the Environment Audit Committee enquiry into the SDGs by one witness, who stated:

[the goals] are a way to create a race to the top for corporation, whereby all sector and corporate league tables would be a valuable and visible commitment of putting words into action not only to SDGs but the challenge of developing sustainable development goals to cities in the UK, and outside from issues as connected and wide-ranging as sustainable urban finance.

There are many opportunities and issues of corporate responsibility in the public, commercial and third sector. Also, there is more that members of UKELA and the broader legal community can do to ensure the SDGs are equitably applied through robust legal frameworks. The advocates for international development law rightly suggest that these frameworks must be strong enough to expedite and not obstruct development at all levels, be they international, national or local. A4ID has also gone further by developing a legal guide to sustainable development and the goals.<sup>8</sup>

Arguably, UKELA could also provide a legal guide aligning environment and planning law to SDG 11 (and other SDG goals). UKELA's leadership role in environment and sustainable law and policy means we are a significant stakeholder. As such, we have a bold task in building our awareness and that of our stakeholders: clients, staff, partners, in the delivery of the goals, understanding the business and moral case.

The goals were designed to create aspirations for a fairer and urbanised world: to protect people and planet, as well as create good economic growth and social values that meet the needs of all. An audacious challenge, then – and one to which UKELA must continue to be committed.

6 [http://www.londonsdc.org.uk/documents/qol\\_reports/QoL\\_2017\\_Report\\_online.pdf](http://www.londonsdc.org.uk/documents/qol_reports/QoL_2017_Report_online.pdf).

7 [https://www.london.gov.uk/sites/default/files/new\\_london\\_plan\\_december\\_2017.pdf](https://www.london.gov.uk/sites/default/files/new_london_plan_december_2017.pdf).

8 <http://www.a4id.org/sdg/>.

# Brexit update: reviewing progress in the UK's exit strategy and UKELA's Brexit work

**Andrew Bryce**

*Consultant, Co-chair of UKELA Brexit Taskforce*

**Richard Macrory**

*Emeritus Professor of Environmental Law, University College, London*

The task force was formed after the referendum. We have had four meetings of that task force. It is composed of about 20 people, fairly representative across the face of representatives from devolved administrations, and in January we set out our basic strategy and our work programme for the immediate future.

The strategy we set was basically a two-part strategy. We focused on preparations for the Repeal Bill and the related legislation that will follow. We then had a second work phase, which related to producing a series of topic reports which Richard will talk about in a little bit more detail in a moment. In addition to that, we anticipate issuing short fact sheets as the Repeal Bill goes through and also on any other small topics that we feel need to be clarified for busting myths on the basic legal situation. I emphasise, I think UKELA does have an absolutely unique role and opportunity at this time. We are non-aligned, we are a charity, we do not have a political approach and we are not a lobbying NGO. However, we do have a great deal of technical capability within the organisation and we should be using that to provide impartial and detailed analysis. And that I think is where we have a unique role to play.

So, in focusing on the Repeal Bill, we have used the working groups to provide us with information as broadly as we can on individual areas that I named 'pinch points', which are those parts of rollover of the legislation upon the Brexit date which are providing particular difficulties. We have assimilated that information and it is an ongoing process – more information is coming in all the time, and people are raising issues with us. However, we have gathered together a considerable amount of information about those areas which will prove difficult for the government to translate easily into UK law.

We have tried to get our name into as many places as possible with a view to disseminating this information. Richard will talk about the timetable for the reports. However, we have worked hard on talking to influencers. We have talked to government, we have talked to regulators and we have told them what we are doing. We had a press launch on 28 June 2017, at which we had a very interesting group of people: not just press. For example, a representative from the House of Commons library attended, which is a very useful conduit if we want to get information through to MPs, and a whole range of other NGOs who have interests similar to our own. Hopefully,

we are making progress on the profile and people are beginning to take a little bit of notice. They are now starting to approach us to ask us what we are actually doing in detail.

We have also had some meetings with a number of other professional bodies. We had some very useful meetings and so we are trying to keep in contact with those people, but we are performing a completely different role. The more we talk to people, the more we realise that this is not being done by anybody else. We are trying to keep in touch with the devolved administrations as much as we can. I went over to Ireland and a colleague very helpfully set up a workshop which was very interesting in trying to get a feel for the issues that they are trying to wrestle with over Brexit.

Our current information on the Bill is a second reading on 20 July then Parliament rises. We then lurch into autumn and it will be interesting to see how much can be done in the autumn before we then get into the conference season, which will be from mid/end September for about a month through to the second half of October. That is the timetable at the moment.

There is clearly going to be a bumpy ride for all of this, but I think our approach is that we are trying to produce enough information and that we will have some access to people who will hopefully stop what will be a great deal of kite-flying in the parliamentary process, and also many lame excuses for not doing things. So, we are looking at those areas where government may turn round and say, 'well, that's too difficult'; we are hoping that we will find ways through there, as well as making people address issues which they just have no idea about at the moment. And try to illuminate generally.

We have a workshop at the end of July which is an invitation-only event, which we are doing with the Wildlife and Countryside Link, the Environmental Law Foundation and the Law Society at which many of these issues will be aired.

So, that is what we are doing at the moment. The next phase will be the rollout of the reports and Richard will now explain to you what they are and the likely timescale for their delivery.

As you probably know, rollover and the Repeal Bill is essentially concerned with the black letter of the law. It is very important, and it is going to be very difficult. So, I think one of the messages we want to get across is that rollover

by itself is not going to deal with a number of very significant issues and it is going to be vital to address those if we want to see an effective system of environmental law continue. Therefore, we have identified five particular areas which we want the government to address more convincingly than it has done to date. We plan to publish the first three of these before Parliament rises in July 2017, and the final two towards the end of the year. They will form the backdrop to what I think will be an important conference in October. So, I'm going to give you a very short outline of each.

### International environmental law

The UK is bound by some 40 international agreements concerning the environment, climate change, biodiversity, air pollution and so on. The government's intention, with the exception of the Fishing Convention, is that we will continue to be bound by these agreements. That seems to be a sensible intention. However, in the post-Brexit situation, the legal position is a little bit complex. There are some agreements, such as the Whaling Convention, which only the UK has signed. The EU is not a party because it has no competence. So, those Conventions will continue. There are other agreements where only the EU has competence – many of the fishing agreements. On Brexit, we will no longer be bound by those agreements unless we make a conscious decision to be so. However, the vast majority of environmental agreements are now what are known as mixed agreements, where there is a division of competencies, so both the EU and the Member States sign. One of the problems, and it is quite deliberate, is that that precise division of competencies is not very clearly divided. US lawyers are hugely frustrated by this, but that is the nature of the system.

So the question is, on Brexit, are we automatically bound by the whole of those mixed agreements and what is the position. Legal views differ on this. We have yet to see a definitive legal opinion from the government on what it thinks is the legal position. We are going to be calling for that. Ministerial statements have been made; however, frankly, when you read them carefully they are a bit ambiguous. So, what this report will do is systematically categorise all these agreements, state what the position is, and analyse the legal arguments. The position is a little bit more complex because some of these agreements are implemented by EU Regulations sometimes they are fleshed out by EU Regulations. We will examine the legal implications of that.

### Exit from the Euratom Treaty

The second report concerns Euratom. The Euratom Community and the European Union are strictly distinct legal entities governed by different treaties. Two of our UKELA members happen to be leading experts in nuclear law, Stephen Tromans and Paul Bowman, a partner at Freshfields, and have written a paper on the legal implications of leaving Euratom. The decision of the government to leave Euratom and the EU at the same time

was obviously something of a surprise to many in the industry.

Much of Euratom is concerned with security and safeguards, ie to ensure that fissile material is accounted for and is not diverted from more peaceful uses. But our focus is on the safety angle, the environmental implications, the standards and so on, which is an area that has not really been highlighted to date. Many of these safety standards are a reflection of international agreements and we assume the UK will want to continue to be bound by those, but there are also issues about the safe management of spent fuel, radioactive waste shipments which have to be addressed, and Stephen and Paul conclude there is much work to be done to secure very smooth transitional arrangements. Until we see the actual terms of the Nuclear Safeguards Bill we will not quite know if these are going to be addressed. But again, the title of that Bill suggests it will not be concerned with the environmental implications, and that is what this report will highlight.

### Enforcement and political accountability issues

The third report is concerned with enforcement and accountability. One of the most important functions of the European Commission to date has been to supervise how Member States actually implement their EU obligations and whether it is the government, local government or other public bodies. As many of you know, the Treaty provides special infringement procedures, which eventually allow the Commission to go before the European Court, which can impose penalty payments. Now, these procedures apply to all areas of EU law, but the vast majority of cases to date have been brought in the environmental field. I think there is a reason for that. In most areas of EU law, say in intellectual property, workers' rights, state aid and so on, there are very clear economic and other legal interests who will protect their rights. But the environment, as we know, in contrast is often unknown, and to quote Ludwig Krämer, 'the environment dies in silence'. So, there is a responsibility on government and public bodies to ensure that they comply with their legal requirements concerning the environment. It is precisely these bodies which are often compromised with conflicting duties, resource restraints and so on.

Regarding Brexit, the Commission will no longer have this supervisory function. It has developed a complaints procedure, where anybody for no cost can alert the Commission to a possible infringement, and that too will disappear. So the question is, will something similar be replicated after Brexit in this country? The government's response to date is frankly unimaginative and minimalist. In its view, for legal accountability, we can simply rely upon ordinary judicial review before the courts, brought by the environmental NGOs. Now JR is a very important long-stop, but we know it remains a costly and time-consuming procedure. NGOs have their own priorities. They do not cover all areas of the environment. I would question whether relying on JR by itself is a sufficient substitute for a

systematic and independent scrutiny, the function currently performed by the Commission.

The other aspect of this is that the vast majority of infringement proceedings considered by the Commission are resolved by discussion and negotiation with the parties involved, rather than by going to court. Again, it seems that current judicial review procedures, although parties do settle, are ill-suited for that sort of method of resolution. Other countries have now recognised the distinctive problem with environmental law. Our report will look at examples such as specialised environmental ombudsmen that exist, the New Zealand parliamentary commissioner, or rather closer to home the Welsh commissioner for future generations set up in 2015. At the same time, we will look at how we could strengthen our existing courts to deal with environmental matters without undue cost. But essentially we are not going to come, with one particular model. We are going to say there has to be a review on this question, but it is a question that cannot be ducked.

And then there are our last two reports, which we hope will come out towards the end of 2017.

### **Environmental standard setting**

The first concerns standard setting. We are conscious that many detailed environmental standards that currently apply in this country are developed under various institutional arrangements within the EU. Particularly important in this context is the so-called Seville process, which developed environmental standards for industrial processes such as waste facilities, cement and steel works. Now, if anyone has been involved in it, it is a very complex process; it is time consuming, it involves NGOs, industry and government. However, it is also very transparent. If you go to the website you can see what's going on, and once the standard is agreed, it provides for a considerable degree of regulatory certainty. So, the issue we will be asking and addressing is how will such standards be dealt with in this country after Brexit? Can we replicate the best attributes of the current EU processes? Or will we revert, which some of the older ones here may remember, to old habits where often what the government would do would be to commission a consultancy to come up with the standards and then publish them for comment, which is not the same thing at all?

### **UK and European environmental bodies**

Finally, we come to cooperative bodies. Our final report will identify over 20 existing European bodies which allow for various forms of cooperation and policy exchange and development in the environmental field. These include

institutions that were actually set up under EU law, such as the European Environment Agency and the European Chemicals Agency. However, they also include various less formal networks of officials or other bodies which have developed independently from EU law but are felt to be necessary. These would include the European Forum for Judges for the Environment and the recently established European Network for Prosecutors for the Environment, which our own Environment Agency in England was very instrumental in helping to set up. So, what happens after Brexit? It seems there are two questions. First, can we actually legally remain a member of such bodies or can we obtain an observer status or what is the position if not? Our report will identify the legal options available, which will require examining the institutional arrangements, if they're defined in law or in their own constitution.

Just to give two examples. The European Environment Agency, rather bizarrely, is open to full membership by non-Member States, while the constitution of the EU Forum for Judges for the Environment only permits judges who are members of a court or tribunal of the EU or an EFTA Member State.

The second question is, should we remain part of those bodies? Again, that is a kind of considered and subjective judgment. We have been discussing with the working groups and so on and we do plan to try and make recommendations accordingly.

So, I think these reports are going to be a very important complement to our other core Brexit work. Certainly, we had this impression when we trailed them at the press conference, and bodies such as the Institute for European Environment Policy, David Baldock, thought so. I've spoken to other people who have said they think these are going to be really important bits of work and nobody else is quite doing it the same way. So, as I said, we have trailed them, we have alerted the relevant secretaries of state that they will be coming and we have also alerted the European Commission. In preparing our enforcement report, I have been over to the Commission to talk to them about how they go about their work. However, what I had not realised is that, as part of the negotiations, whatever deal we have, whether it is a trade deal or some other deal, one of the questions that is already being trailed in negotiating is that they will be asking, 'how do we enforce our environmental laws?' The Commission will expect to see as good enforcement as happens in the rest of the EU, and is likely to ask what will replace the Commission in this context? They do know that JR by itself is not sufficient. So, there is a very important aspect to the debate and the Commission is very interested in our reports. So, we are working on many different levels.

This speech was delivered on 13th July 2017.

# Brexit and nature conservation fact sheet

## UKELA Nature Conservation Working Party

### Introduction

The UK Environmental Law Association is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1400 academics, barristers, solicitors, consultants and judges involved in the practice, study and formulation of environmental law across England, Scotland, Wales and Northern Ireland. UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection, UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review and full and open consultation on options for change. UKELA's full position on Brexit can be found on our website.

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts on environmental law, practice and enforcement in the UK. The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. With the assistance of UKELA's specialist working parties, the Task Force aims to inform the debate on the effect of withdrawal from the EU, and draw attention to potential problems which may arise. The UKELA Brexit Briefing Papers have been produced under the guidance and approval of UKELA's Brexit Task Force chaired by Andrew Bryce and Professor Richard Macrory, and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members.

The implementation of the EU Wildlife Directives has received 'bad press'. However, reviews undertaken at national and European levels conclude that their implementation does not impose an undue burden and that the measures are proportionate and effective. The legislation should therefore be retained in full post Brexit.

Misinformation, misconceptions, distortion and inaccuracy have long characterised the debate surrounding the provisions of the Habitats Regulations, which transpose the Habitats Directive from European law into national law. Although the government has committed to 'rolling-over' the UK's environmental laws after Brexit, there have been persistent rumours that habitats laws will go after Brexit. This factsheet sets out to debunk some common myths about this area of law.

### Does the Habitats Directive prevent development, such as important infrastructure projects because it might damage a protected site?

No. Whilst the framework is robust in setting out tests that must be satisfied, the aim of the directive is to prevent damaging plans and projects having a negative effect on the integrity of Natura 2000 sites, a network of vital breeding and resting sites for rare and threatened species. These tests ensure that only those schemes for which there are no alternatives and are imperative for reasons of overriding public interest (IROPI), are permitted. Where development is permitted, then compensation is required to ensure that the overall coherence of this important ecological network is maintained.

### Does the European Commission block developments in the public interest?

No. For the most protected sites, where there has been a negative assessment of the implications for the site and in the absence of alternative solutions, development may nevertheless be carried out if it is for IROPI, but the European Commission must be consulted for its opinion as to whether the tests have been satisfied. The Commission's opinion, even if negative, is not legally binding on EU Member States; however, in practice, in the vast majority of cases in which the Commission has given an opinion, it has been a positive opinion allowing development. In a case before the European Court of Justice in 2012 the British Advocate General, Eleanor Sharpston QC, noted that 'whilst the requirements laid down [to justify IROPI] are intentionally rigorous, it is important to point out that they are not insuperable obstacles to authorisation. The Commission indicated at the hearing that, of the 15 to 20 requests so far made to it for delivery of an opinion under that provision, only one has received a negative response'.

### If the UK weakened habitats law after Brexit would this be good for business?

Not necessarily. The Department for Environment, Farming and Rural Affairs (Defra) undertook a review of the implementation of the Habitats and Wild Birds Directives in England in 2011. Particular reference was made to the burdens placed upon business by the authorisation process. The report concluded that in the large majority of cases the implementation of the directives worked well, allowing both development and key infrastructure and ensuring a high level of environmental protection is satisfied (paragraph 27). It was recognised that there is a need for

improvement in addressing national infrastructure projects, the provision of guidance, use and availability of data and customer experience (Chapter 3). In all, 28 measures were identified in the review; 25 of which had been implemented as of June 2013.

**Outside the EU, would the UK have the opportunity for taking a more innovative and less restrictive approach to protecting habitats?**

This is already underway. In 2017, Natural England announced that an innovative approach to the conservation of great crested newts trialled with Woking Borough Council in Surrey was to be rolled out across England. In May 2016, Natural England awarded the Council an organisational licence allowing it to authorise operations that may affect newts on development sites at the same time as granting planning permission, thereby removing the need for expensive surveys prior to building works and individual licences to disturb newts if they are present. As part of the project, newt habitat is enhanced or created prior to any development taking place, saving developers time and money, and making newt populations more healthy and resilient. This has been achieved under the current legislative regime.

**Does the EU want to remove the Habitats Directive?**

No. In 2014, the European Commission initiated an evaluation of the EU Birds and Habitats Directives under the regulatory fitness and performance programme.

The review addressed relevance, effectiveness, efficiency, coherence and EU added value. Following an extensive consultation process, the European Commission published its report in 2016. The overall conclusion reached was that, within the framework of broader EU biodiversity policies, the directives remained highly relevant and fit for purpose; however, to meet the objectives of the directives in full, Member States would be required to make improvements to deliver practical results on the ground for nature, people and the economy in the EU (at p 96). Following this evaluation, an action plan for nature, people and the economy was developed by the Commission to address these issues. Most of these 15 actions were launched in 2017 so that the Commission can report on their delivery before the end of its current mandate in 2019. The Commission has also published a factsheet providing more information on each action.

**Will the UK need to change its nature conservation rules anyway as we take back control over agriculture and fisheries?**

No. It is likely that the prescriptions to accompany those policies replacing the EU Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP) will be developed in the context of the existing legal framework. Policies not underpinned by law may be weakened and possibly vulnerable to challenge. A review of wildlife (species only) legislation in England and Wales was undertaken by the Law Commission. That report, together with a draft Bill, was published in 2015. These will be key documents to inform any future review of EU derived and national legislation.

# What's going on with the Trump administration?

**Seth A. Davis**

*Partner, Elias Group LLP, Rye, New York*

*Chair, American Bar Association Section of Environment, Energy, and Resources*

To put my talk in context, we are in the process now of motivating our members in a way that goes beyond the normal course of business for a bar association. It is not a political step; it is not a legal advocacy step, but in many ways a defence of the rule of law, a defence of a legal system that protects the environment in a way that we as environmental lawyers find unique and very special. We too have moved from a government that might be described, in the words of the previous speaker, as 'benign'. I would say that the true antonym of the word 'benign' is 'malignant', and I think that quite accurately describes what we have.

What I would like to do here is to outline some of the political bases, or at least what I see as a political base for what is going on, but more importantly the legal issues of what is going on in the environment, energy and resource area. There are some significant issues.

How did this happen? We have a sort of eight-year pendulum swing in our politics. We have just finished eight years of Democratic administration. It was to my mind very difficult for the Democrats to hold on to the White House. Somehow, they made it close, but there is more to it than just having a Republican come in. The interesting and disturbing question is how did Donald Trump take control of the Republican Party, such as it is? We are talking about rampant distrust of government and, if anything, the Democrats who were leading the party in Congress were less popular than Trump. The vote for Trump was more of a populist expression than a doctrinal conservative point of view, but if you look at what has been going on in the last six months, there is not much populism going on. Look person for person in the cabinet, our most right-wing cabinet ever.

So we have an electorate nationally that is basically 50/50. How did Trump manage such a tectonic shift? Of course, remember Hillary Clinton won the popular vote. With Trump, what we see is white ethnic resentment of what is perceived as the other America. While that other America is, man for man, an actual majority of Americans, that majority was not replicated in the electoral college that actually elects the president. That is, to quote an important work, an inconvenient truth. The small states, the rural parts of the country, truly mistrust the big cities and the coast and they are truly offended by elitists like me looking down on them, which, I have to face the fact, indeed I do. And it is something that needs to be overcome.

So, what does this majority stand for? In many cases they are out for the outright destruction of the federal agencies that they are controlling. And there are about five in particular: the Environmental Protection Agency is one, and actually some more egregious examples like the

Department of Education. The people that are put in these departments have been outspoken critics of what these departments have been doing for years. And they are out to destroy them. There is an explicit denigration of science. If you look at what is going on at the Environmental Protection Agency (EPA), they have been decimating the scientific panels, and most of them are not going to be replenished. Some of the ones that are going to be replenished are being replenished with people that, to be charitable, have scientific views more in keeping with the president's.

They stand for a shift of power to the states. A couple of things to remember. You know, we do not have a sovereignty of the United States: we have 50 sovereigns. The federal government is not sovereign. The power of the sovereign resides in each of the states. Federal law can establish standards – within certain constraints – but our federal government is, at root, a union of sovereign states. The heads of Trump's executive departments all want to shift power to the states. So, in the environmental area, the question becomes, to exactly which states is power being shifted? If you give power to a state like New York, where I practise, the power shifts to a very robust system of environmental regulation. If you give it to a state like Oklahoma, which puts the Bible and the oil well on a comparative footing, you get a very different result. We had the head of the Oklahoma Environmental Agency come and speak at our ABA Spring Conference a couple of years ago when they were talking about the fact that they have all of these seismic incidents coming out of fracking for natural gas exploration. The question is whether there should be federal control over it: 'Who knows better how to take oil out of the ground in Oklahoma than the Oklahomans?' And implicitly, if Oklahomans say a few earthquakes are acceptable, the federal government should let them accept that. There is some logic to that. The problem with giving power to the state, even a state like New York, is that the states have already stripped down their enforcement capabilities. We had a 35 per cent cut in the area of environmental enforcement – this was under an outwardly pro-environmentalist governor. In a state like Florida, a key state which has many important environmental issues going on and has produced past administrators of the EPA, there is practically nothing left of environmental enforcement.

And then there is the concept, outwardly reflected throughout the campaign, specifically mentioned in Trump's inaugural speech, of 'America First'. Now, I want you to know how repugnant that is to me personally. And this is said in all seriousness. Even as one of the oldest people here, I only heard about what was going on in my country

in the 1930s prior to the Second World War. The America First movement, specifically called that, was a concerted effort to keep the United States out of the war, and an under-the-surface effort to support the Germans. In many respects, it stood for everything in my mind that America should not have stood for. And, of course, as events came about, it did not happen that way. My worldview comes from my father. He fought in the Second World War and came over here to the UK across the ocean in a troop transport. He was a young man from New York City who had hardly ever left New York City. He was so thrilled to come here, so thrilled to come to London for the first time and he developed a great love for England and for London, which he passed on to me. And I am most definitely not America First. And to hear that as our policy – and you will see it goes through the official statements – is scary.

So, there is a specific effort now to undo what Obama's administration tried to do over eight years of environmental regulation. And the question here is: how do you undo it? How do you unring a bell? – the same way it was rung. Which means, starting up from the bottom, if there is a statute passed you need an act of Congress to do it. Well, we have not had many statutes passed over the last few years because we have had total deadlock on our Congress. We did pass a very decent revision of our Toxic Substances Control Act recently, but that is the only thing. Nothing else on the environment. Most importantly, no climate change legislation. More about that later.

As for agency action, there was plenty of that. We have a very specific statutory administrative procedure that has to be followed. When a full rule-making process takes place, it has to be on record, for public comment, and that record is there. And any effort to undo that is going to have to set up its own record and, in effect, rebut the old record.

Executive orders can simply be done by a stroke of the pen. The president can simply issue an executive order. Obama had to do a huge amount through executive orders. And Trump is now proceeding to issue even more.

The key thing to watch is, of course, the Paris Agreement. Trump announced that we were pulling out of it. The key thing to me is that Trump could have done it the minute he finished that inaugural address. Why didn't he do it right away? There was a tremendous battle going on behind the scenes. And the more we heard, it may well have been that the scales were tipped by the awkward reception that the president received over here, every bit of it earned. These are world-affecting decisions that are made in terms of personal spite.

What is interestingly happening now is, and this is harkening to the remarks of the deputy mayor of London earlier, that we are seeing action at the municipal level, at state and other sub-national levels. The day after Trump's executive order retreating on the environment came out, the Attorneys General of most of the large populated states got together and said they were going to oppose that every step of the way. Governor Brown of California has gone even further, talking about setting up his own standards on climate change. Interestingly, California has a regional cap and trade system on carbon. Of course,

California is big enough to be a region of itself, but it has been joined by two Canadian provinces, and not just any two provinces: Ontario and Quebec, not exactly connected geographically to California, but economically there is a tremendous impact. When you think about the amount of money that can go into an allowance trading system, cap and trade, it is quite heartening.

Another key area to watch is our own regulation of power plants. We had a case in the Supreme Court called *Massachusetts v EPA*. This case dealt with the whole question of how the government can regulate carbon dioxide emissions when there is no specific statutory mandate to do so. The Supreme Court held that if the Environmental Protection Agency (EPA) issued a finding of endangerment from carbon dioxide pollution, it could then regulate those emissions. In effect, the Supreme Court said there was enough evidence on the record to show that there was such endangerment. In fact, they required the EPA to issue their finding, and there is a whole scientific record to support it. To remove that finding, which underpins the whole Clean Power Plan that President Obama put into effect, the EPA is going to have to revoke that prior record and set up a new one. And that is going to be key. There is very little movement on that.

I would like to say a few words about Trump's main executive order on the environment. Just a point of timing: I believe it was 29 March 2017 you had your official statement of withdrawal from the EU. The executive order came down the day before our spring conference began and that afternoon the California Attorney General joined several other Attorneys General and said they were going to oppose it, and he was our keynote speaker the very next day.

To look at some specific passages in the executive order:

#### 28 March Executive Order

- It is in our national interest to promote clean and safe development of our nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth and prevent job creation.
- It is further in the national interest to ensure that the nation's electricity is affordable, reliable, safe, secure and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water and other domestic sources, including renewable sources.
- 'national interest to promote clean and safe development': that is fine; 'at the same time avoiding regulatory burdens': that sounds good to me; 'unnecessarily encumber energy production': I guess it comes down to what is 'unnecessarily'? The second point is that they still think it is in the national interest 'to ensure that the nation's electricity is affordable', that it can still be produced from, and note the order here, coal, natural gas, nuclear material, et cetera et cetera. And here's the best part:
- It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean

water for the American people, while also respecting the proper roles of Congress and the States concerning these matters in our constitutional republic.

- It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

'Agencies should take appropriate action ... when permissible.' It is interesting here that the word 'permissible' applies only to the second of these paragraphs and not the first. I take it to read that the 'greater benefit than cost' has to be subject to a standard of permissibility. There is some coherence there. Definitely, there is promotion of coal. Definitely, there is an effort to get away from a clear fossil fuel avoidance policy. And the justification for that shift is purely economic, with the protection of health and the environment secondary.

What happens next? It is going to be fought out in the courts. We have environmental groups that are challenging all this; we have states that are challenging a good part of this. The one point that I hold out some hope on is that there is nothing explicit here on the rolling back of the basic environmental laws. Maybe that is the foundation on which we can agree. In other words, clean water, clean air – that is good. And there are some interesting issues about where the water gets cleaned up, and the battles which come out of that. The substantive battle, the next step there: what happens with carbon emissions? The whole concept of the 'waters of the United States' – I do not know how familiar you are with that concept – we have an interstate commerce clause in our Constitution which is

the only way in which the federal government could regulate such activities as air and water pollution. And it is clear, if you have a river that flows between two states, that is inter-state commerce. It is clear that something flowing into it, that gets in there too. The question is, what about a stream that is totally enclosed within a state: what is the degree of control there? And there was a whole effort to define 'waters of the United States' – where is all that going?

What is going on with climate change? One thing is clear. In the next four years, the United States government will not be a worldwide advocate for addressing climate change. And, interestingly, the Chinese seem to be very happy to jump into that role. The main themes are going the other way. The America First thing, the power to the states, curtailing the power of the federal agencies, energy independence. And what about coal? Well, let us say, for coal, for nuclear, that free market that the Republican Party is so fond of is probably going to have the last say, because coal just does not pay. Nuclear power, seeing some of these studies coming out, does not pay. Some recent papers have come out that show that the overall cost of nuclear power puts away the benefits that come to it, so we shall see. It is going to be a battle every step of the way. We had hoped to see some sort of attempt to find any kind of middle ground, but we do not see it at all. And I guess I will just close with the few words of John of Gaunt that may not be remembered by all of us as well as the 'sceptred isle' speech that followed, but I think they apply very well today:

Light vanity,  
insatiate cormorant,  
Consuming means,  
soon preys upon itself'.

# Energy efficiency in buildings – policy and regulation

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## Introduction

Whilst improving the sustainability of our cities can only be achieved through a combination of methods, improving the energy efficiency of our buildings is a particularly important area for focus. As urban populations grow, the demand for housing and office space intensifies. By ensuring that regulation and policy is established to control the design and construction of new buildings and to improve the energy efficiency of current building stock, our cities can start to become more sustainable.

According to the WHO's Global Health Observatory data,<sup>1</sup> the urban population in 2014 accounted for 54 per cent of the total global population, an increase from 34 per cent in 1960. As this number continues to grow, it is becoming more important to look at the ways in which the negative environmental impacts of our cities can be minimised and how such urban locations can become more sustainable.

Emissions from homes, commercial and public buildings account for 17 per cent of the UK's direct greenhouse gas (GHG) emissions,<sup>2</sup> 43 per cent of the UK's total carbon dioxide emissions and approximately 40 per cent of the EU's total energy consumption. The Climate Change Act 2008 initiated a commitment by the UK to reduce GHG emissions and, consequently, the UK is required to cut its GHG emissions by 80 per cent by 2050, from 1990 baseline figures. One of the ways in which both the EU and the UK government propose to meet GHG emission reduction targets is through greater energy efficiency.

In 2016, the Department for Business, Energy and Industrial Strategy published the Building Energy Efficiency Survey (BEES) to update our understanding of how energy can be reduced across non-domestic buildings. The BEES was undertaken between 2014 and 2015 and reports on the non-domestic building stock in England and Wales. One key finding was that there was 63,160 GWh/year of total energy efficiency potential,<sup>3</sup> which could mean a 39 per cent reduction from current energy consumption.

## The challenges

BEES identified a number of perceived barriers to energy efficiency, which were mainly economic, such as low capital

availability and investment costs. A number of barriers were 'organisational', such as a lack of internal control, lack of time and a perceived low status of energy efficiency. There was found to be a general perception that energy efficiency measures were not 'sufficiently profitable' for organisations.

Within the hospital, industrial, retail and education sectors, it was evident that the key barrier to energy efficiency was that key stakeholders had 'other priorities' or that there was a general understanding that energy efficiency conflicted with 'central organisational priorities'. These barriers will need to be tackled before energy efficiency can be significantly improved.

Such barriers are evident in the UK Government's own attempts to introduce policies and regulations to improve energy efficiency. In 2007, the Department for Communities and Local Government (DCLG) introduced the Code for Sustainable Homes, an 'environmental assessment method for rating and certifying the performance of new homes'.<sup>4</sup> The Code set out a series of sustainable building standards (including energy efficiency), against which new homes would be rated nationally.

In 2014, DCLG announced that the Code would be scrapped and that a number of its initiatives would be incorporated into building regulations. The decision was driven by an overall aim to simplify the house-building process and to rationalise the technical standards that apply to it. DCLG's decision to repeal the Code attracted widespread criticism from MPs. The chair of the Environmental Audit Committee stated at the time that the Code had been 'a big success in driving up home-building standards' and that the decision favoured 'a one-size-fits-all approach designed to benefit developers who want to build homes on the cheap', potentially highlighting the low priority of energy efficiency on the government's agenda.

The implementation of the Green Deal, a government initiative to improve the energy efficiency of buildings by removing the up-front cost of such measures, also highlights the barriers facing the introduction of such policies. In 2015, the government announced that it would no longer provide financial support to the Green Deal Finance Company (GDFC), owing to a low take-up on Green Deal loans, highlighting how a lack of investment and wider political issues can contribute to the challenges faced when implementing energy efficiency policies.

Whilst there are clearly a number of significant challenges, BEES also identified a number of areas which could

1 [http://www.who.int/gho/urban\\_health/situation\\_trends/urban\\_population\\_growth\\_text/en/](http://www.who.int/gho/urban_health/situation_trends/urban_population_growth_text/en/).

2 <https://www.theccc.org.uk/charts-data/ukemissions-by-sector/buildings/>.

3 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/565745/BEES\\_Executive\\_Summary\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565745/BEES_Executive_Summary_FINAL.pdf).

4 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/5976/code\\_for\\_sustainable\\_homes\\_techguide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5976/code_for_sustainable_homes_techguide.pdf).

help to implement energy efficiency measures. These include improved energy management knowledge, increased availability of funding and increased investment from stakeholders.

## Overarching policy and regulation

### EU regulation and policies

The Energy Performance of Buildings Directive 2010 (EPBD 2010) and the Energy Efficiency Directive 2012 (EED 2012) are the overarching pieces of EU legislation relating to reducing the energy consumption of buildings. The EPBD 2010 is aimed at improving the energy performance of all buildings, both commercial and residential. The EPBD 2010 stipulates that Member States should ensure that all new buildings (and existing buildings which are subject to renovations) meet certain minimum energy performance requirements. For example, there is a requirement that energy performance certificates (EPCs) are to be included in all advertisements for the sale and rental of all buildings. There are also requirements that boilers and air-conditioning systems must be inspected regularly.

In November 2016, the EU Commission proposed an update<sup>5</sup> to the EPBD 2010 to extend (beyond 2020) the obligation on energy suppliers and distributors to save 1.5 per cent of energy every year. The update emphasises the notion of the 'smart city' and the importance of smart technologies, which will make it possible to control and actively manage energy consumption.

The EED 2012 sets rules and obligations to help the EU reach its target of a 20 per cent increase in energy efficiency by 2020.<sup>6</sup> Under the directive, all EU countries are required to use energy more efficiently at all stages of the energy chain, from the production of goods to their final consumption.

Article 5 of the EED 2012 requires that an exemplary role is set by central government. To achieve this, the government of each Member State must annually renovate 3 per cent of the total floor area of the buildings they own and occupy, in order to ensure that they 'meet the minimum requirements set under the EPBD 2010'.<sup>7</sup>

### UK regulation and policies

The Energy Efficiency (Eligible Buildings) Regulations 2013 implement Article 5 of the EED 2012, by requiring the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Northern Ireland departments to achieve an energy-saving target of 163.6 gigawatt hours in eligible buildings that are owned and occupied by central government, by 31 December 2020.

In January 2015, the Department for Energy and Climate Change (DECC) published a Guide to Energy Performance Contracting Best Practices<sup>8</sup> to help public sector organisations improve the efficiency of their buildings, by installing energy conservation measures. The guidance promotes the use of EPCs, which are designed to assist public sector organisations with retrofitting their buildings. The guidance emphasises that such contracts can help deliver guaranteed energy savings, create opportunities for renewable energy generation and help invest in buildings and green technologies to help generate local jobs and improve skills.

The Energy Efficiency (Building Renovation and Reporting) Regulations 2014 (EER 2014) implements provisions outlined in Article 24(1) of the EED 2012 within the UK. The EED 2012 requires Member States to establish long-term strategies for mobilising investment in the renovation of existing residential and commercial buildings. Member States were required to publish their strategies and must update them every three years, as part of their national energy efficiency action plans (NEEAPs).

The UK published its NEEAP in 2014, which confirmed that the government would introduce a legislative framework for the Energy Savings Opportunity Scheme, introduce requirements in relation to the heat networks sector and host information regarding energy performance on the GOV.UK website. The Energy Act 2011 confers powers upon the Secretary of State to create new energy efficiency obligations and provides the statutory basis for the Green Deal and the Energy Company Obligation, which will be explored in more detail below.

In Scotland, the Scotland Act 2016 confers powers on Scottish Ministers to devise and implement supplier obligations relating to energy efficiency (including the Energy Company Obligation). Such measures will be achieved by making amendments to the Gas Act 1986, the Electricity Act 1989 and the Energy Act 2008.

### Regulations/policies in practice: new buildings

In July 2015, the government scrapped the long-standing target for all new homes to be 'zero carbon' by 2016. Additionally, the government's Housing Standards Review, which was completed in March 2015, removed the ability of local authorities to set higher standards for housing in their area (such as higher energy efficiency standards). The more detailed aspects of planning will not be explored in this article.

The removal of the above measures, alongside the repealed Code for Sustainable Homes, means there is now limited policy and regulation in relation to the physical design and construction of new buildings. Additionally, in 2015, the UK Green Building Council (UKGBC) began a campaign entitled 'Homes Fit for the Future', which sought to create a sustainable market and to 'scale-up' the delivery of energy efficient homes, by making it a national infrastructure priority. The UKGBC also attempted to initiate a commitment to achieve one million 'deep retrofits' a year, by 2020. However, the campaign was unsuccessful in

5 [http://eur-lex.europa.eu/resource.html?uri=cellar:fa6ea15b-b7b0-11e6-9e3c-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:fa6ea15b-b7b0-11e6-9e3c-01aa75ed71a1.0001.02/DOC_1&format=PDF).

6 <https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficiency-directive>.

7 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1399375279076&uri=CELEX:52013DC0762>.

8 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/395076/guide\\_to\\_energy\\_performance\\_contracting\\_best\\_practices.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395076/guide_to_energy_performance_contracting_best_practices.pdf).

convincing the new Conservative government that energy efficiency was an infrastructure priority, and there have been minimal regulations or policies introduced since 2015 in respect of energy efficient requirements for new homes and buildings.

### Regulations/policies in practice – existing buildings

#### Energy performance certificates and display energy certificates

The EPBD 2010 introduced the requirement for certain buildings to maintain an EPC. The EU regulations were implemented in England and Wales by the Energy Performance of Buildings (England and Wales) Regulations 2012, which affect both residential and commercial properties. An EPC is a certificate issued by an assessor which shows information about the energy efficiency of the property to which it relates. When determining the EPC rating of a building, the assessor will generally recommend how the property can be made more energy efficient through retrofitting or by making minor amendments to certain building elements.

EPCs are required when buildings are built, sold, altered or rented out. In addition, a number of energy efficiency initiatives rely on the existence of an EPC, such as payments for the generation of renewable energy (for example where solar panels are installed on the roof of a property). The rate of such payments is often dependent on the EPC rating of the property.

Additional alternatives that are dependent on EPCs include determining funding from electricity suppliers under the Energy Company Obligation (ECO) scheme, potential funding for energy efficiency improvements under the Green Deal and restricting the freedom of property owners to rent out properties which have an EPC rating of F or G. These initiatives will be explored in more detail below.

A separate regime exists for all public buildings within the UK, which are required to display a display energy certificate (DEC) to show how the energy use in such buildings compares to performance benchmarks. A DEC is distinctive from an EPC, in that it provides an accurate assessment of the energy efficiency which is actually being achieved in the property in its current use. Conversely, EPCs only provide information relating to a prediction of energy and do not comment on how the property is being operated or used. Government guidance<sup>9</sup> states that the purpose of DEC is to 'raise public awareness of energy use and inform visitors to public buildings about the energy use of a building'.

This measure encourages owners and occupiers of public buildings to consider the energy efficiency measures in place and to improve them accordingly. The government's justification for such an initiative was that if members of the public are able to compare the energy

efficiency of public buildings, this will create pressure on the owner/occupier and will ensure that energy efficiency becomes (and remains) a priority.

### ECO and the Green Deal

The Energy Companies Obligation (ECO) is an obligation on certain electricity and gas suppliers to improve domestic energy efficiency, by achieving certain targets. The ECO applies only to existing domestic homes. The ECO scheme was established in 2013, with the first phase (ECO 1) running from January 2013 to March 2015.<sup>10</sup> The second phase of the scheme (ECO 2) ran from 1 April 2015 to 31 March 2017, with the government recently granting an 18-month extension to ECO 2, to run until September 2018 (this phase has been named ECO 2t). Beyond 2018, the government has confirmed that a supplier obligation to improve domestic energy efficiency will run until at least 2022, but there has been no guidance regarding the detail of this scheme.

ECO consists of two targets, which focus on the installation of energy efficiency measures in lower income/vulnerable households and in domestic properties that require cost-effective measures (but do not meet the financing requirements under the Green Deal).

The two targets are:

- (a) an overall carbon emission reduction target (CERO) of 20.9 million lifetime tonnes of CO<sub>2</sub>. Under CERO, suppliers must promote 'primary measures', such as installing roof and wall insulation and connections to district heating systems
- (b) an overall home heating cost reduction target (HHCR) of £4.2 billion of cost savings. Under HHCR, suppliers must promote measures that improve the ability of low income and vulnerable households to heat their homes, for example by the replacement of a boiler.

Until March 2017, suppliers also delivered a further obligation called the carbon saving community obligation (CSCO), which was expected to deliver carbon saving measures equivalent to expenditure of £190 million a year. Suppliers were required to meet their CSCO targets by 31 March 2017.

Ofgem allocates three individual targets to each ECO supplier, which makes up a small proportion of the overall targets outlined above. The individual targets are based on the amount of gas and electricity which each ECO supplier supplies. The supplier is able to decide which energy efficiency measures they fund and which installer they work with. The level of funding available to households will depend on the type of measure used and, in some cases, the householder will still be required to contribute towards the cost of installation.

ECO works closely alongside the Green Deal, as it provides support to homes in situations where the Green Deal is not applicable. The Green Deal is a government initiative that is designed to help make energy-saving

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/452481/DEC\\_Guidance\\_\\_rev\\_July\\_2015\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452481/DEC_Guidance__rev_July_2015_.pdf).

<sup>10</sup> <https://www.ofgem.gov.uk/environmental-programmes/eco/overview-previous-schemes>.

improvements within homes and find the best way to pay for them. The process for obtaining Green Deal finance and the relevant parties involved are summarised as follows:

- (a) A Green Deal assessor will visit the relevant property and make an assessment, based on the characteristics and energy consumption of the building. This assessment is based on an improved version of the EPC rating given to properties.
- (b) After the assessment has taken place, a Green Deal advice report will be produced, which will recommend a number of energy saving measures for the property, which would be likely to qualify it for finance under the Green Deal.
- (c) The report will set out whether the measures would be compatible with the golden rule (the fundamental principle that energy efficiency improvements to properties should be able to pay for themselves through savings on electricity and gas bills). The golden rule requires that the cost of repayment of the energy efficiency measures should not exceed the estimated financial savings resulting from installing the measure. Additionally, the length of the repayment period should not exceed the lifetime of the improvements.
- (d) Taking the recommendations and costs into account, a Green Deal provider will then produce a Green Deal plan, outlining how the energy efficiency measures will be paid for.
- (e) Once the Green Deal plan is agreed and signed, the Green Deal provider will arrange for the energy efficiency measures to be installed by an authorised Green Deal installer.
- (f) Once the energy efficiency measures have been installed, the relevant electricity supplier will begin to add the cost to the electricity bill for the relevant property.

A Green Deal arrangement agreement (GDAA) governs the administration of repayments through energy bills between electricity suppliers, finance parties (such as the GDFC) and green deal providers.<sup>11</sup>

The Green Deal applies to specific energy efficiency measures, which fall very generally into five categories: heating, ventilation and air conditioning (eg warm air systems or solar blinds), building fabric (eg cavity wall insulation), lighting, water heating and micro generation (eg air/ground source heat pumps, biomass boilers and micro wind generation).

In July 2015, DECC announced that it would not be providing any more financial support to the GDFC as a result of limited uptake of Green Deal loans. By 31 December 2015, 14,000 households had taken Green Deal loans, which was only 1 per cent of the total number of homes which had been subject to energy efficiency improvements.<sup>12</sup>

In 2016, the National Audit Office (NAO) produced a critical report which stated that the Green Deal had not achieved value for money. The report concluded that the design and implementation of the scheme did not persuade householders that energy efficiency measures would be worth paying for. The NAO report sets out a number of recommendations to the government regarding energy efficiency policies, which include testing proposals with consumers and establishing a clear long-term vision for household energy efficiency.

Whilst the government has withdrawn its funding for the GDFC, the Green Deal has not been withdrawn or made redundant. The board of the GDFC announced in January 2017 that the GDFC had been sold to Greenstone and Aurium, who stated their intention to commence the financing of new Green Deal loans.

### The minimum energy efficiency standard (MEES)

In 2015, almost 10 per cent of England and Wales' privately rented homes fell below the EPC E rating, meaning that buildings had a very low energy performance. The rating takes into account estimated energy use, carbon dioxide emissions, insulation and heating controls. The poor energy efficiency of private rented homes in England and Wales has been targeted by the Energy Act 2011, which required the Secretary of State to make regulations that ensure landlords achieve a certain level of energy efficiency within such buildings.

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (the 2015 Regulations) introduced a requirement that landlords must ensure that their domestic and non-domestic private rented properties reach minimum energy efficiency standards (MEES) before they can be rented out. A landlord will be prevented from granting or renewing a tenancy of a property which is sub-standard (ie where the EPC is below band E) on or after 1 April 2018.

MEES does not apply to certain buildings, including those which are not required to have an EPC (such as industrial sites, workshops and certain listed buildings), buildings with tenancies of less than six months and tenancies of over 99 years. Landlords are able to let a building to which the MEES Regulations apply, but which is below the minimum standard, if any exemptions apply. These exemptions are as follows:

- (g) The 'golden rule': where an independent assessor determines that all relevant energy efficiency improvements have been made to the property or that improvements that could be made (but have not been made) would not pay for themselves through energy savings within seven years. There are numerous examples of relevant energy efficiency improvements which include double-glazing and pipework insulation. Additionally, wall-insulation measures are not required where an expert determines that these would damage the fabric of the property.
- (h) Devaluation: where an independent surveyor determines that the relevant energy efficiency improvements that could be made to the property are likely to

<sup>11</sup> <https://www.ofgem.gov.uk/licences-codes-and-standards/codes/electricity-codes/green-deal-arrangements-agreement-gdaa>.

<sup>12</sup> <https://www.nao.org.uk/wp-content/uploads/2016/04/Green-Deal-and-Energy-Company-Obligation.pdf>.

reduce the market value of the property by more than 5 per cent.

- (i) Third party consent: where consent from persons such as a tenant, a superior landlord or planning authorities has been refused or has been given with conditions with which the landlord cannot reasonably comply.

The 2015 Regulations also enable a tenant of a domestic, private rented property to request the landlord's consent to the tenant making energy efficiency improvements to the property. The landlord may not unreasonably withhold consent, despite such improvements potentially being contradictory to provisions or restrictions within the lease.

These measures were described by John Alker, the acting CEO of the UK Green Building Council as potentially being the 'single most significant piece of legislation to affect our existing building stock in a generation, affecting a huge swathe of rented properties'.<sup>13</sup> The measures may have significant benefits for private tenants, helping to ensure that buildings are warmer and more energy efficient, whilst driving down energy bills and carbon emissions.

## What does the future hold?

### Political uncertainty

There has been significant political uncertainty over the past year, which has resulted in energy efficiency measures becoming a low priority for the government. The Conservative manifesto did briefly mention two proposed energy efficiency measures, which included a commitment to 'upgrading all fuel poor homes to EPC Band C by 2030',<sup>14</sup> along with reviewing energy efficiency requirements on new homes. The Conservative manifesto also stated that because an 'energy efficiency business is a more competitive business', the government will be committed to 'establishing an industrial energy efficiency scheme to help large companies install measures to cut their energy use and their bills'.<sup>15</sup> The Queen's speech iterated that the government will 'help to tackle unfair practices in the energy market to help reduce energy bills', but failed to refer to any energy efficiency or climate change mitigation proposals.

The UK Green Building Council has also suggested a number of policy recommendations for the new government, which would help to tackle the energy efficiency of our buildings. These include tightening building regulations to require all new homes and other buildings to be 'zero carbon' from 2020 and introducing mandatory operational energy ratings.

However, with a minority government and Brexit negotiations taking precedence, it will be interesting to see whether such proposals are implemented.

### Smart cities

As mentioned above, in November 2016 the EU Commission proposed an update to the EPBD 2010, in which there was a strong emphasis on the notion of the 'smart city'. The EU Commission Communication outlined a European buildings initiative with a smart financing for smart buildings component, which can 'unlock an additional 10 billion euros of public and private funds until 2020'.<sup>16</sup> Governments may well start to think about the way in which smart technologies can be used further to improve the energy efficiency of our buildings. Measures such as smart meters, for example, are starting to provide intelligent ways to track energy use.

### Enforcement and incentives

Whilst there are currently no proposals in place to link stamp duty with the efficiency of homes, there have been some calls for such a policy to be introduced.<sup>17</sup> A recent report by a think tank company<sup>18</sup> suggested that up to 270,000 households a year could be encouraged to undertake energy efficiency improvements based on linking stamp duty to energy performance. There are no precedents within the UK for using land taxes to encourage retrofitting of properties, or to incentivise making properties more energy efficient. However, tax-based energy efficiency measures have been widely used in other areas, such as through the introduction of vehicle excise duty, where the tax is varied according to the CO<sub>2</sub> emissions of the vehicle.

## Conclusions

Improving the energy efficiency of our buildings will undoubtedly take us one step closer to achieving sustainability within our cities. However, it is evident that there are significant barriers preventing us from carrying out the necessary retrofitting of existing buildings, or from implementing regulations to help improve the energy efficiency of new buildings.

The UK government has implemented a wide range of energy efficiency initiatives over the years, but such policies have not necessarily taken us any closer to changing the views of individuals, businesses and organisations or to encourage them to make energy efficiency a priority. Policies such as EPC/DEC requirements, MEES and ECO are helping to improve the UK's approach to energy efficiency, but more stringent requirements may be needed to improve efficiency further. Initiatives such as amending stamp duty or implementing smarter technology are concepts which could take us one step further towards improving the energy efficiency of our buildings and, consequently, our cities. However, it is perhaps unlikely in the short term that such proposals will become priorities for government and that it will probably be left to individual organisations to take action.

<sup>13</sup> <https://www.theguardian.com/environment/2015/feb/05/landlords-draughty-homes-ban>.

<sup>14</sup> <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf> 60.

<sup>15</sup> <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf> 22.

<sup>16</sup> [http://eur-lex.europa.eu/resource.html?uri=cellar:fa6ea15b-b7b0-11e6-9e3c-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:fa6ea15b-b7b0-11e6-9e3c-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>17</sup> <https://www.theguardian.com/environment/2016/mar/02/report-calls-for-lower-stamp-duty-on-uks-energy-efficient-homes>.

<sup>18</sup> <https://policyexchange.org.uk/press-release/give-home-buyers-a-stamp-duty-reduction-for-more-energy-efficient-homes-says-think-tank/>.

# The Raynsford Review: Planning 2020 – a requiem for the English planning system?

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## Introduction

Since 2010, the English planning system has gone through an extensive period of 'radical' reform and deregulation, although the outcomes for communities, the environment and the economy remain uncertain. Planning departments are under growing pressure to perform, but many do not have sufficient skills or capacity. Research by the Town and Country Planning Association (TCPA)<sup>1</sup> suggests that local plans have downgraded or removed policy on climate change and social inclusion and have not yet responded to growing evidence regarding the links between public health and the built environment. Perhaps most worrying is the outcome of the rapid expansion of permitted development rights to allow the conversion of office and commercial buildings to residential. This is leading to families living in industrial estates without the most basic access to shops and schools. All of this is increasing concerns over the kinds of places that are being built and their impact on the long-term public interest. Are we building the kinds of places the nation needs and deserves?

It was in this context that TCPA established a review of English planning chaired by its president, the Rt. Hon. Nick Raynsford. The task force began work in May 2017 and will publish its final report, entitled *The Raynsford Review*, in autumn 2018. The primary focus of the review is a holistic appraisal of the kind of planning system the nation will need by 2020. From a very early point in the task force's work, it became clear that there was need for a fundamental reconsideration of the English planning system. Many of the early engagement events highlighted concerns about the 'endless tinkering' with the system, without a clear sense of what reform was meant to be achieving. This article provides a provisional flavour of the evidence presented to the review along the emerging policy challenges that the interim report, to be launched in May 2018, will need to confront. The article describes the nature of the evidence and the seven-key policy and legal issues which flow from that evidence.

## The evidence to date

The Raynsford Review conducted a series of roundtable meetings around the country, along with a large number of individual meetings. The review also received over 200 written submissions from a wide range of organisations. One important caveat about the nature of the 'conver-

sations' surrounding the roundtable events is the clear gap between what stakeholders will say publicly and what they care to tell us informally and off the record. For example, interviews with public sector planners reinforce a desire not to be seen to talk down planning in their own authority and so not to express their private conclusions about how challenging planning practice is. Similarly, some developers have reflected publicly on the value of the plan-led system, while they recognised privately that land speculation 'off plan' has been a highly lucrative part of their business model. The danger for the review is that there is a lack of quality and impartial evidence from government on many of these issues and, as result, a risk that reform proposals are driven by what is essentially hearsay based on the understandable corporate priorities of the differing sectors.

The nature of the written evidence presented to the review is complex and diverse but, in general, is marked by profound disagreement between landowners, developers, NGOs, professional bodies, communities and government about almost every aspect of the spatial planning system. Insofar as there is any agreement, it surrounds shared criticism of the current state of planning practice. Ironically, both communities and parts of the private sector are equally frustrated by uncertainty and confusion in the system, although often for very different reasons. The key areas of concern are:

1. the purpose and objectives of the system
2. the degree to which the current system is delivering on its objectives
3. how much power spatial planning should have (positive and negative)
4. how the balance of planning powers should be distributed between central and local government
5. the right spatial structure for planning, including local government structure and boundaries
6. the degree to which communities should have meaningful control over their own local environment and the nature of community rights
7. the issues of betterment and fair land taxation.

In addition to these principal policy questions, there has been a range of other related issues consistently raised in the evidence, including:

- concern about skills of planners and the content of planning education
- the poor morale of the planning service about confusion about the role of the town planner

<sup>1</sup> <https://www.tcpa.org.uk/planning-for-the-climate-challenge>.

- the widespread confusion about key policy and practice changes including, for example, the viability test, the legal weight of the development plan, the impact of devolution, the duty to cooperate and the significant change to the status of the green belt
- the failure of planning adequately to ensure the coordination of investment in a wider range of social, transport and utilities infrastructure
- the funding of the planning service.

It is significant that the resourcing of the planning service to enable a positive and informed response to users was by far the most significant issue raised by the private sector. Resolving this problem would undoubtedly contribute more in the short term to the concerns regarding delivery than any other single measure. Some of the other issues are plainly much more fundamental and the complexity and controversy which surrounds many of them explains why many have remained unresolved for decades. In this context, it is useful briefly to set out the dimensions of each of these seven emerging policy themes.

### The purpose and objectives of the planning system

There is a broad division between those stakeholders who support a view of planning as being designed to uphold public interest outcomes with the objective of achieving sustainable development<sup>2</sup> and those, including successive governments since 2010, who see the objective of planning as being to support private sector housing delivery in support of the wider economic growth. Background Paper 2<sup>3</sup> pointed out that there has been an even longer debate about the role of the state in the land question and the balance between private property rights and the public interest. However, it appears that in recent years that particular argument has been settled in favour of a system focused on production of the quantum of housing by empowering private property interests, which has largely ignored many of the other dimensions of planning. One aspect of this change has been the assumption that the allocation of housing units for private sector providers equates directly with the public interest, and a significant stand of evidence concluded that the public and private interest are essentially the same.

There is no doubt that the overwhelming feedback from public sector planners was that sustainable development was no longer an operational principle of planning and that the allocation of housing was now often taking place on sites that were clearly judged to be unsustainable prior to the adoption of the NPPF in 2012. It may be self-evident to many that sustainable development is no longer important to planning decisions and there is no doubt that the NPPF marginalised the idea as an operational principle by downplaying core aspects of the concept, including the promotion of equality and concern for future generations. The degree to which unsustainable outcomes are being

produced is harder to quantify without further detailed research.

The tension between a public interest system focused on sustainable development and market-led objectives for planning reinforces the current reality of a system whose purpose is, at best, confused. This problem is reinforced by the remnants of the wider public interest agenda in planning, including mechanisms for assessment of sustainable development. Neither has the legal duty to uphold sustainable development in planning legislation<sup>4</sup> had any mediating impact, owing to the fact that it is based entirely on a definition made in policy in the NPPF. In moving forward, the review team will need to consider several questions, including:

- What the purpose of a new planning system might be?
- How that purpose could be given long term and meaningful expression in law and policy?
- How cross-sector agreement could be reached on such a purpose?

This brief summary disregards the call from some respondents to refocus on a more positive and 'people-centred' planning system. Since this is a TCPA objective, care is needed not to overemphasise the significance of this call. It is a view that is often expressed by politicians, younger participants, NGOs and community organisations. Another significant view expressed in conservation and amenity groups, as well as in certain political circles, was an essentially traditional and conservative model based on a notion of stewardship of land and framed by meeting local needs and emphasising a broad pattern of continuity. There was some welcome agreement on the case for planning as a rational tool for the coordination of public and private investment and, in particular, on the role of plans in supporting asset values.

### Is the current system 'successful'?

The degree to which the current system can be described as successful depends entirely on the objective which it has been set. If we accept the government's claim that the purpose of planning is to increase the allocation of housing units, then the system is plainly delivering, with 321,000<sup>5</sup> housing units granted in 2017, thereby bringing the total to an estimated 600,000,<sup>6</sup> as well as an unrecorded additional number of units allocated in adopted and draft local plans.<sup>7</sup> Permissions alone are now running in advance

2 This view is best summarised in the definition of planning expressed in PPS1, which was revoked by the National Planning Policy Framework (NPPF) in 2012.

3 <https://www.tcpa.org.uk/raynsford-review>.

4 Section 39 of the 2004 Planning Act.

5 LGA/Glenigan data <https://www.local.gov.uk/about/news/more-423000-homes-planning-permission-waiting-be-built>. This data relates only to permissions on sites which have started building. This is therefore a conservative view of total permissions.

6 Research for the LGA in January 2018 indicated there were 365,000 unimplemented permissions in 2015–16 and 423,000 in the following year. Our estimate crudely projects a conservative view that we are adding about 80,000 unimplemented permissions to this figure every year since 2014 (ie the gap between 321,000 consented and 220,000 completed in 2017).

7 Permissions continue to run in advance of completion by around 80,000 per annum, which suggests that we exceeded 500,000 unimplemented permissions.

of demographic needs, which has been the case since at least 2014.<sup>8</sup> In fact, the government's own test of 'success' is more nuanced, focusing on homes completed; here, the record is less impressive. In 2015–16, 139,000 new homes were built. By adding the number created by conversion, the figure reached a total 190,000 housing units completed in 2016 and 220,000 in 2017.<sup>9</sup> Whilst quality and sustainability have not been policy priorities for government, affordability clearly has and here the record is extremely poor, particularly on tenures such as social rent.

The government's other indicators of success present a mixed picture. Neighbourhood planning must be judged as a success in terms of the number of plans being prepared (2,000 are now under preparation). The preparation of local plans is also moving forward, although the level of adopted post-NPPF plans remains only about 50 per cent.

Development management has been subject to review and reform and, indeed, the performance on planning applications is impressive. For major housing schemes in 2005, 66 per cent were approved. In 2016–17 that figure had increased to 80 per cent, and 84 per cent of major housing applications were agreed within the 13-week deadline (or a deadline agreed with the applicant).<sup>10</sup> However, issues of delay and service quality are now emerging strongly from applicants and the tension between speed and quality remains a shared concern across the sectors.

It is hard to conclude that the system is not producing enough consents or that planning consent is subject to a general problem of delay, although there is obviously frustration with regard to individual schemes. However, it is also hard to conclude that, even when tested against the residualised policy ambitions of the NPPF, that the current system can be judged to be wholly 'successful'. Given the level of intensive reform devoted to the system over the course of the last seven years, the results on the overarching government priority of housing delivery are unimpressive. Reform has been intensive but also piecemeal, adding to a sense which some respondents have described as 'bewilderment' as to the overall objective of government. Insofar as there has been a narrative, respondents felt it was about getting planning 'out of the way'. Some respondents in the private sector approved of this culture, although others believed it added to a general sense of demoralisation in the planning service. One emerging paradox about this reform is that, whilst it has deregulated some aspects of planning, it has added a great deal of procedural complexity, as illustrated by the labyrinthine amendments to planning legislation and perhaps most obviously in the complex new mechanisms such as 'permission in principle'. There remains an important question of whether any of this new complexity has been worthwhile.

8 Estimates of demographic needs vary but can be crudely benchmarked as between 250,000 and 275,000 pa. Levels of approval have now reached the level achieved in 2008 under a very different planning system.

9 DCLG (now the Ministry of Housing, Communities and Local Government (MHCLG)) Live Tables 209 and 120.

10 DCLG Live Table P120A.

The adoption of a broader test for the planning system based on the kinds of objectives reflected in traditional notions of spatial planning and sustainable development provides an even more challenging picture. The broad concern surrounds an abandonment of notions of holistic place-making. Respondents have raised a range of concerns, including:

- the lack of affordable and social housing
- the exclusion of communities from key planning decisions on housing and energy
- private sector frustration with an ever-changing system and poor service
- poor build and design quality
- abandonment of zero carbon and wider climate change considerations
- the lack of a sustainable transport infrastructure
- the lack of a basic social infrastructure
- complex and regressive taxation measures through section 106 agreements and the Community Infrastructure Levy (CIL).

The TCPA's problem is that many of these alleged problems are not verified or quantified by any reliable research. Therefore, whilst it is possible to identify a wealth of examples of poor quality design outcomes, we cannot be sure how significant these problems are or if the quality of delivery is significantly worse than it was prior to 2010.

### The powers of the existing system

There was a clear consensus in the evidence that the planning system is significantly less powerful than it was in 2010 or, indeed, at any time since 1947. On this issue, there is clear evidence in terms of the changes to permitted development. Care is needed not to describe these routes to consent as not requiring any form of permission. Prior approval for permitted development does require consent but the core issue is the fundamental limitation on the kinds of issues local planning authorities can consider. As well as the tangible reduction in legal powers of the system, there are other indicators of a system that no longer functions as a positive framework for decision-making. The very high level of successful appeals for major housing is one signal, and the related legal and policy weaknesses of the development plan is another. These issues were noted in Provocation Paper 1<sup>11</sup> and, while the majority of feedback from all sectors is that plans now carry less weight in relation to housing, there was a view that a fully up-to-date plan meeting all the NPPF tests could, in theory, deliver on the ambition for a plan-led system. The problem is that achieving this position is extremely difficult and not within the gift of local planning authorities, as they have no effective control over build-out rates. In practice, this means that, in most places and for most of the time, the development plan is easily overturned.

It is significant that, while other positive instruments of the planning system, including the new towns legislation,

11 <https://www.tcpa.org.uk/raynsford-review>.

which were designed to deal with rapid housing growth are still available, central government has, so far, made no attempt to use them. There may also be danger in focusing too much on the recent reduction in the powers of the existing system and ignoring longer-term questions regarding the scope of the spatial planning system, as well as the case for expansion of powers over land uses that are of importance for issues including climate change and biodiversity. There remains a positive opportunity to reflect how a new spatial planning approach might engage with wider land use change in dealing with issues such as flood risk.

### The balance of power between central and local government

It is perhaps inevitable that respondents from local government felt a strong sense of disempowerment in relation to many aspects of planning. The complaint that there was too much central government interference in detailed policy was particularly acute amongst local councillors. This is another issue defined by complexity and confusion. For example, central government has always had extensive reserve powers over local planning, and differing administrations have chosen to exercise them more or less extensively. There is clear evidence in the content of policy that central government is exercising very tight control over some key planning issues, such as energy and housing. The deadline and sanctions over local plan preparation is another indication of this trend. It seems likely, therefore, that the current period reflects a high-water mark in this centralising tendency.

Because there has never been a clear constitutional settlement of powers between central and local government, which is a feature of many other EU nations, it is hard to make a judgment about what the right balance of power should be. This problem is exacerbated because central government no longer plays a clear and effective role in regional or national planning on key planning challenges such as housing delivery. In the absence of national programmes for new towns, for example, the full weight of delivery must fall upon local plans. In this context, national government is also inevitably going to involve itself closely in the outcomes of these plans. Many of the current reforms are driven by central frustration at what ministers regard as the poor performance of local planning authorities and the issue is that such involvement raises serious questions regarding the rationale of local democracy and which often leads to tensions that are in themselves a barrier to outcomes.

### The English spatial planning framework

The background papers for the Raynsford Review<sup>12</sup> have made clear that the structure of the English planning system has been bound up with the complex history of

local government reform. Respondents suggested that the secretariat re-examine the 1969 Redcliffe-Maud Report into local government in England, which remains the most recent example of central government seeking a comprehensive reassessment of the principles and structures of local government. The conclusions of the Redcliffe-Maud Report<sup>13</sup> remain insightful, particularly in relation to the number of planning authorities and the differing tiers of strategic and local plans. The implementation of the report would have meant, amongst many other things, a reduction in the number of planning authorities and a greater fit between the administrative and functional geography of England. Why the Redcliffe-Maud Report was never implemented has been the subject of much lengthy discussion but, with hindsight, it seems to have been attributable to the failure on the part of the Royal Commission to match its understanding of economic geography with a grasp of political reality. Subsequent changes to local government created the confused legacy that is now in place. The only serious attempt to deal with the strategic regional question came with proposals for elected English regions in 2004. The rejection of such an option in the North-east ended the regional governance debate and, whilst the reasons for the failure were complex, the result was that administrative logic was defeated by the aspirations and loyalties of communities. We should of course recognise that the rest of the UK has achieved a very great deal in relation to devolution and that London remains a powerful exemplar of regional government.

The core problem for the review is that little or no progress can be made in developing a sensible planning structure for England unless a parallel process of local government reform is undertaken. Powerful constituencies of interest, such as the district councils, would need a compelling incentive to give up their planning powers to more rational strategic bodies. The review team will need to create a 'picture' of how planning structures from national to neighbourhood might work and what kind of governance might give the new system political legitimacy.

### The power of local communities

One of the major challenges of the review is to reach out beyond the 'insiders' in the planning system to communities and individuals who are the ultimate consumers of the system. The feedback received from the community sector has been very strong and mostly very negative about planning practice. So far, this is mainly from established groups who might be expected to have the resources to engage more effectively. However, to date respondents have raised a variety of issues which they feel act as barriers to participation. These issues include:

- the power of developers to 'game' and exploit the system
- complex language and procedures
- the lack of support in responding to planning applications

<sup>12</sup> These papers provide a historical summary of the development of English planning <https://www.tcpa.org.uk/raynsford-review>.

<sup>13</sup> Including the minority reports.

- anger at unequal rights and developers appealing decisions
- confusion at why elected members can support them
- difficulty in engaging with plan preparation processes and anger that consultation responses are not taken seriously
- frustration that neighbourhood plans can be overturned
- anger at the 'purchase of planning permission' through section 106 agreements.

All of these aspects contribute to a sense of grievance that planning does not reflect community needs. Some of these feelings may stem from a lack of knowledge of what planning is trying to achieve and this is most obvious in relation to green belt development; however, it also relates to a disconnect between the values and practice of planning and the communities they serve. The background papers<sup>14</sup> for the review explore these issues in more detail, including how procedural and substantive rights might be enhanced and how current practice relates to the obligations of the Aarhus Convention.

There has been an intense debate during the roundtables about the merits of neighbourhood planning, with conflicting views about whether this should form the core of the planning framework in England. On the whole, the feedback was positive about the potential role of national plans, although there are challenges and lessons which cannot be ignored. These include the legal relationship with other strategic plans and the lack of any requirements for national plans to take responsibility for key measures on issues such as human health and climate resilience.

### The collection of betterment values through fair land taxes

The issue of land tax and betterment has featured in many of the engagement events, both as a matter of principle and in relation to the opportunity to provide vital infrastructure. Whilst there is tremendous policy 'noise' around the issue and a good deal of interest from government, there is as yet no consensus about how land values might be captured. Of all the issues before the review, the issue of land value capture is probably the most difficult because it impacts directly on the interests of landowners. There is now a separate and detailed provocation paper<sup>15</sup> on these issues, which framed a useful seminar that revealed starkly differing views about how to proceed in a way that meets the requirements for transparency and progressive taxation outcomes.

### Conclusion

One positive view of the evidence the review has received is that it confirms the need to ask fundamental questions about what the English planning system is meant to be for. The process of weakening the planning framework,

particularly through the expansion of permitted development, is exposing the consequences of a 'light touch' permissive consent regime. The consequences, in some cases, are truly shocking and will drive wider political attention to restoring a system capable of upholding the wider public interest.

The Raynsford Review is now beginning to consider the broad scope of solutions that might contribute to an effective and principled planning system. Here the dilemma is between the logical and the politically acceptable. For example, no planning reform can take place without a final and lasting settlement of local government structure issues in England, firmly based on some relationship with functional geography. The current system is simply illogical and confused. The same might apply to betterment taxation and to clarifying the plan-led system, as well as a host of other issues where there is no difficulty in finding technical solutions. But, of course, all of these solutions require a logic and rationality absent from our current debate on the future of England in general and spatial planning in particular. Given that further and radical deregulation of planning is a government priority, the Raynsford Review at least benefits from being in a position to offer a timely investigation of the system. It remains to be seen whether the final report marks a positive rebirth of the system or simply an extended requiem.

### The Raynsford Review terms of reference

*To examine the performance of the English planning system in relation to the key challenges facing the nation, to identify key areas of underperformance and to offer positive recommendations for reform. Specifically, the review will:*

*Examine the objectives of the planning system in relation to delivering sustainable development in the long-term public interest and reflect on how sustainable development should be manifest in the key objectives in local and national policy. In particular, to examine how the application of the NPPF has affected the outcomes of the planning system and how effective changes can be made.*

*Examine the extent of the application of the land use planning system and case for comprehensive long-term approach. In essence, this reflects both the original question asked in 1947 and the Royal Commission on Environmental Pollution (RCEP) reports of 2002 as to whether land use control should apply to all land uses. This is particularly relevant for flood risk. It would also pick up the widespread extension of permitted development rights that have significantly reduced the scope of planning.*

*Examine the structures of the planning system in relation to its application to the national, sub-regional, local and neighbourhood scales. This theme picks up the devolution and national planning debate, as well as the case for a role for the new towns legislation. The dilemma is defining a narrative and an effective relationship between the spatial scales.*

*Consider the appropriate governance structures of the system in relation to democratic accountability and citizen rights. This*

<sup>14</sup> <https://www.tcpa.org.uk/raynsford-review>

<sup>15</sup> <https://www.tcpa.org.uk/raynsford-review>

will now be substantially dealt with the Labour review of People and Planning.

*Consider how the substantial values which arise from land use regulation can be effectively captured and distributed in the public interest. This is the key betterment question and relates to section 106 and CIL and to the wider question of land value capture.*

*Consider the key delivery issues which can aid effective implementation. This theme will include how the planning services can be resourced and the appropriate skills and expertise of planners and what this implies for planning education.*

# Case law update

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## Introduction

This case law update has sought to identify cases which have some connection to the theme of the conference, namely sustainable living in cities. The approach to selecting cases to discuss in this paper has been to seek interesting cases which are illustrative of some wider problem. There are no shortage of environmental issues which face sustainable city living. The paper covers air quality, air transport, fracking, protected habitats, basements, gardens and listed buildings. The cases identify a range of legal challenges to be grappled with in relation to cities of the future.

## Air quality

One of the greatest challenges for sustainable living in cities is air quality. Exceeding the limits for nitrogen dioxide causes a real risk of substantial harm to a very large number of people.

The *ClientEarth* litigation arises out of the admitted and continuing failure by the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European law, under Directive 2008/50/EC on air quality.<sup>1</sup> The Directive sets legally binding limit values for nitrogen dioxide emissions and requires that, when limits are exceeded, air quality plans are published aimed at reducing such emissions to achieve the limit values.

Article 23 of the Directive provides that 'in the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible.'

This is echoed in Regulation 26 of the Air Quality Standards Regulations 2010, which provides that 'the air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time'.

The first round of the litigation ended in 2015 with rulings that the air quality plan must contain effective, proportionate and scientifically feasible measures to address the specific emissions problems as swiftly as possible, subject to judicial review by the domestic courts. A failure by a member state to do so would result in the infringement also of Article 23(1) of the Directive, alongside Article 4(3) TEU. The Supreme Court ordered that the Secretary of State had to prepare new air quality plans under Article 23(1), in accordance with a defined timetable, to end with delivery of the revised plans to the Commission not later than 31 December 2015, and that

there should be provision for liberty to apply to the Administrative Court for variation of the timetable, or for determination of any other legal issues which may arise between the parties in the course of preparation of the plans.

In *R (ClientEarth (No 2)) v SSEFRA* [2016] EWHC 2740 (Admin), the 2015 Air Quality Plan (AQP), which followed the Supreme Court's decision, was challenged. Relying on EU law, and the domestic regulations which give effect to it, *ClientEarth* challenged the lawfulness of the AQP, seeking a declaration that it failed to comply with Article 23(1) of the Directive, and Regulation 26(2) of the Air Quality Standards Regulations 2010, and an order quashing the AQP.

There were essentially two points advanced. First, that it was unlawful to publish a plan which did not keep periods of exceedance as short as possible. Secondly, that considerations of cost, political sensitivity and administrative difficulties should be secondary considerations. *ClientEarth* argued that the Directive and Regulations required the Secretary of State to adopt measures which maximise the prospect of achieving compliance by the soonest possible date. Garnham J held that the Government's discretion under Article 23 was narrow and greatly constrained. He held that the Government was obliged to ensure that the plans are devised in such a way as to meet the limit value in the shortest possible time and that it must select measures which will be effective in achieving that object.

On cost, Garnham J said:

In my judgement, there can be no objection to a Member State having regard to cost when choosing between two equally effective measures, or when deciding which organ of government (whether a department of central government or a local government authority) should pay. But I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another. In those respects the determining consideration has to be the efficacy of the measure in question and not their cost. That, it seems to me, flows inevitably from the requirements in the Article to keep the exceedance period as short as possible.

In short, it was held that, on its proper construction, Article 23 of the Directive meant that the Secretary of State was required to seek to achieve compliance of the Directive by the soonest date possible, that she must choose a route to that objective which reduced nitrogen dioxide as quickly as possible, and that she must take steps which meant meeting the values prescribed by the Directive were not just possible but likely.

<sup>1</sup> See *ClientEarth v SSEFRA* [2013] UKSC 25, [2015] UKSC 28.

As to the contents of the plan, the Judge concluded that measures could be introduced sooner than was being proposed and that the plan should have been aimed at achieving compliance in the shortest possible time, regardless of administrative inconvenience or the costs of making the necessary investigations. He said:

the Secretary of State fell into error in fixing, for what was little more than administrative convenience, on a projected compliance date of 2020 (and 2025 for London) and thereby deprived herself of the opportunity to discover what was necessary to effect compliance by some earlier date and whether a faster route to lower emissions might be devised.

On criticisms of the modelling, Garnham J concluded:

by the time the plan was introduced the assumptions underlying the Secretary of State's assessment of the extent of likely future noncompliance had already been shown to be markedly optimistic. In my judgement, the AQP did not identify measures which would ensure that the exceedance period would be kept as short as possible; instead it identified measures which, if very optimistic forecasts happened to be proved right and emerging data happened to be wrong, might achieve compliance.

In a subsequent judgment dealing with relief,<sup>2</sup> Garnham J ordered that the draft modified AQP, accompanied by the relevant technical information, including details of the modelling techniques and assumptions employed, should be published by 24 April 2017. The Judge said that although consultation is important, where public health is at stake it may be necessary to shorten substantially the period for such consultation. He concluded that the date by which the final plan should be published should deliberately be made demanding, given that the need for an early report is paramount.

On the degree of oversight that the court should retain over the process, Garnham J accepted that it is normally not part of the function of the Administrative Court to monitor, regulate or police the performance of statutory functions on a continuing basis. He went on, however, to say that the particular nature of this case, the fact that it turns on a European Directive, and the precedent set by the Supreme Court in the first *ClientEarth* case, lead him to conclude that there should be liberty to apply on notice for further or additional relief for determination of any other legal issues which may arise in the course of preparation of a modified plan.

The Judge rejected the suggestion by ClientEarth that the liberty to apply provision should encompass permission to challenge a new plan. He said that, if there were further complaint about a new plan, resolution of that issue would plainly be a matter of great urgency, but that it would not be appropriate to evade, by means of an extended liberty to apply, the usual and entirely healthy discipline that is provided by the Administrative Court procedures in managing and regulating the grant of judicial review.

Standing back, and looking at the case as someone who was taught administrative and EU law almost 20 years ago, it is possible to see how far environmental law has come in this time. That a court would reach conclusions such as those noted above was unthinkable then. It is still perhaps surprising today. Whilst there are no doubt many who seek to make towns and cities better places to live who will applaud this outcome, it may prove to be a pyrrhic victory. The absolute nature of the courts' approach to the Directive, and the virtual exclusion of policy and financial constraints, provides an illustration of why some people voted for Brexit and to 'take back control'.

The process of voting also features in the *ClientEarth* litigation. In April 2017,<sup>3</sup> the SSEFRA applied to postpone the date for publishing the draft plan from 24 April to 9 May 2017 on account of Purdah restrictions in place as a result of the forthcoming local elections. Following the announcement of the General Election, a fresh application was made to postpone the date to 30 June 2017. ClientEarth did not oppose the former postponement, on the basis that local authorities were important consultees on the draft and the consultation should not commence until new councillors were in post. It did, however, oppose the postponement for the General Election period.

Purdah was described by the Judge – Garnham J again – as the period before an election in which controversial decisions should not be taken, which serves an important function in protecting the electoral process from interference, intended or accidental, by those holding elected public office. He noted, however, that it was not a principle of law, does not affect the legal duties of Ministers and does not provide a defence for a failure to comply with an order of the court.

Garnham J accepted that the publication of the draft AQP would risk influencing the General Election because, in the constituencies where the proposals might bite, the AQP will inevitably be controversial. He also accepted that the general principles set out in the Cabinet Office Guidance did apply in the present case and in general terms did support the Secretary of State's application. The Judge concluded, however, that there were exceptional circumstances in this case, including that there was a subsisting duty under both domestic and EU law to achieve compliance with the law by the soonest possible date and that the steps were necessary in order to safeguard public health:

For the reasons given in my November judgment, the continued failure of the government to comply with the Directive and the Regulations constitutes a significant threat to public health. According to an analysis conducted by the Department itself, the effects of exposure to nitrogen dioxide on mortality is equivalent to 23,500 deaths annually in the United Kingdom. That is, on average, more than 64 deaths each day of the year. Other studies suggest even higher figures but I am content to work for present purposes on Defra's own figures. That alone can properly be said to constitute circumstances which are wholly exceptional and make immediate publication of the plan essential.

<sup>2</sup> [2016] EWHC 3613 (Admin), 21.11.16.

<sup>3</sup> See [2017] EWHC B12 (Admin), 27.4.17, Garnham J.

At the end of May 2017 it was announced that ClientEarth was challenging the consultation on the draft plan on the basis that the consultation does not include measures which the Government's technical data shows are the best way to bring down air pollution as soon as possible. Seen in light of the outcome of the preceding litigation, *ClientEarth (No 3)* might succeed. If it does, it will be interesting to see what if any effect this has on the Government's willingness to carry forward the air quality regime, and its enforceability, through the Great Repeal Bill.<sup>4</sup>

## Air transport

Cities depend on transport to be able to function, both within and between cities. Transport, however, has environmental impacts. None is more contentious in the media than air travel. The local authorities around Heathrow oppose a third runway there. The Boroughs of Hillingdon, Wandsworth, Richmond-upon-Thames and Windsor and Maidenhead challenged the decision by the Secretary of State for Transport to include this proposal in the draft airports national policy statement.<sup>5</sup>

The grounds of challenge were that the proposal involved a flawed approach to air quality and that the decision was contrary to their legitimate expectations because the government had made repeated promises over a number of years that there would be no third runway at Heathrow. The SSFT applied to strike the claim out on the basis that the court did not have jurisdiction to entertain it.

Section 13 of the Planning Act 2008 provides that a court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if the proceedings are brought by a claim for judicial review, and the claim form is filed before the end of the period of 6 weeks beginning with the day after publication. The claimants argued that this did not apply to their judicial review on the basis that a narrow interpretation of the provision should be adopted as it was akin to an ouster clause. The Judge concluded that the effect of s 13 is to suspend, rather than to exclude, the right of access to the court, and the power of the court to perform its judicial review function, so that there was no basis to give the section a narrow construction rather than its ordinary and natural meaning.

The claimants made two further points. First, that s 13 set an end date but did not rule out earlier claims. Cranston J held, however, that the meaning of the words

of s 13, when understood in their context, was that proceedings can only be brought in the six week period once the NPS is designated or published, so that judicial review challenges both before and after that six week period were prohibited. Read as a whole, the words of s 13 convey an intention to preclude a challenge at any time before the start date.

Secondly, the claimants argued that s 13 did not apply to policy-making antecedent to the preparation of a NPS. The Judge held that there was no basis to confine acts or omissions in the course of preparing an NPS to the exercise by the Secretary of State of his statutory functions under the 2008 Act, or to separate out what were characterised as preceding policy-making. He considered that the words 'anything done, or omitted to be done, by the Secretary of State in the course of preparing' an NPS were clear and encompassed the decision in this case.

Overall, Cranston J said that:

I have reached the clear conclusion that under section 13 of the 2008 Act the court has no jurisdiction to hear the claim. That follows from the language of the section, the legislative purpose and the overall statutory context and history. Once the Secretary of State adopts and publishes an NPS the court will have jurisdiction to entertain the challenges the claimants advance. For the present this claim must be struck out.

The local authorities will need to wait some time to have their legal arguments determined. No doubt they will be making them in the meantime as part of the consultation on the draft airports NPS.

## Fracking

Cities consume vast amounts of energy, most of which is generated outside those cities. Energy proposals for the future include the recovery of gas from shale rock by hydraulic fracturing or fracking. There have been two cases in the last six months or so where fracking consents have been challenged.

*R (Friends of the Earth) v North Yorks CC* [2016] EWHC 3303 (Admin) concerned a judicial review of a planning permission for the production of gas by fracking. It raised two grounds. First, that NYCC had failed to take into account climate change impacts from the burning of the gas produced. Secondly, that NYCC had misdirected itself to the effect that it could not require the developer to provide a financial bond in relation to any long term environmental pollution impacts arising from the fracking.

The first argument was advanced as a requirement of environmental impact assessment, but the Judge rejected the claimants' submission that the EIA scoping opinion included such impacts. She also held that NYCC was entitled, in the exercise of its judgement, to conclude that an assessment of the environmental impacts of burning gas from the well site was not required. She noted that the gas supply from the site would be indistinguishable from the gas piped from other well sites, and so its environmental impact could not be separately quantified. Ultimately, the Judge took the view that councillors were well aware that

<sup>4</sup> In his March 2017 response to the Government's Brexit White Paper, the Mayor of London, who was an interested party in the 2016/2017 *ClientEarth* litigation, said: 'The European Commission's enforcement mechanisms have played a key role in improving London's environment. I urge the government to provide clarity on how the implementation of regulations that have been transposed into UK law will be independently monitored, regulated and enforced. As we withdraw from the current EU arrangements, government will need to ensure that the necessary powers and resources are provided for their replacements to allow continued improvement in vital areas such as air quality.'

<sup>5</sup> [2017] EWHC 121 (Admin).

there would be carbon dioxide emissions caused by burning gas to generate electricity and that they were in a position to evaluate the merits of the objections without specific advice from the officers on the detail of them.

On the second issue, the Judge concluded that officers were entitled to advise the committee that this was not an exceptional case which would justify a financial guarantee, in accordance with national planning policy. They also proposed conditions to achieve financial protection in another way, which the Judge thought went beyond guidance and would afford a considerable degree of protection to residents.

*Preston New Road Action Group v SSCLG & Cuadrilla* [2017] EWHC 808 (Admin) concerned a challenge to the grant of planning permission for exploratory work over a period of six years comprising drilling up to four exploratory wells, hydraulic fracturing of the wells, testing for hydrocarbons, abandonment of the wells and restoration.

The challenge was in large part on the usual grounds for challenging planning decisions, including a lack of reasons and misinterpretation of planning policy following *Tesco v Dundee CC* [2012] UKSC 13.<sup>6</sup> On one of the latter points, Dove J held that the claimants' reading of development plan policy was too literal and did not pay enough regard to its nature or context, including that it was a broad strategic policy.

There was also a fairness ground, where it was said that the developer changed position from that set out in a statement of common ground (SOCG) during the inquiry in respect of a development plan policy. The argument in defence was that the fact that the position of the developer had shifted during the course of the inquiry so as to depart from the SOCG was, or ought to have been, obvious. The Judge concluded that the issue should have been apparent from the cross-examination by the claimant's barrister of the developer's planning witness. The point did not come out of the blue but rather had been foreshadowed in the oral evidence.

Another ground in the case was to the effect that the EIA was unlawful because it did not provide a comprehensive assessment of the cumulative impacts, said to be greenhouse gas emissions from the extended flow testing period and the potential for future continued use for gas extraction.

The first issue was similar to that raised in the *NYCC* case. Dove J rejected it on the basis that there was no evidence to support any suggestion that the provision of gas from the site to residential or industrial users will lead to any increase in the consumption of gas and therefore the generation of additional greenhouse emissions in the UK. He said it was a perfectly sensible assumption that any gas provided to the grid during the extended flow phase will simply replace gas that would otherwise be consumed. There were, therefore, no additional environmental effects to assess.

<sup>6</sup> Which now needs to be understood in light of the clarification given by the Supreme Court in *Suffolk Coastal DC v SSCLG & Hopkins* [2017] UKSC 37.

The second issue included an argument that the planning practice guidance on minerals was unlawful as it advised that assessments 'should not take account of hypothetical future activities for which consent has not yet been sought, since the further appraisal and production phases will be the subject of separate planning applications and assessments'. Dove J concluded that there simply were no effects which had to be assessed arising from the suggestion that there might be some continuation of the use of the site for gas extraction after the completion of the development for which permission was sought, because the application was strictly limited and there would be a need for further permission for continuation.

The final argument in the case was that it was irrational for the SSCLG to approve the application on the basis that, in the light of the evidence, and applying the precautionary principle, he could not have rationally concluded that it was appropriate to grant consent, nor that public health and other associated impacts would be reduced to an acceptable level and effectively controlled by the regulatory regime. Dove J cited a long line of case law from *Gateshead MBC v SSE* [1995] Env LR 37 to *R (An Taisce) v Secretary of State for Energy & Climate Change* [2013] EWHC 4161 (Admin) and *R (Frack Free Balcombe) v West Sussex CC* [2014] EWHC 4108 (Admin), to the effect that matters covered by other regulatory regimes could be left to be dealt with by those regimes. He held that, having considered whether there was a gap in the regulatory regimes, and concluded there was not, the inspector was perfectly entitled to conclude that the regulatory regime could be relied upon to operate effectively so as to safeguard human health. The Judge also held that the precautionary principle made no difference to this assessment, as the inspector had taken the concerns of objectors into account. The Judge did not regard this ground as even arguable.

Overall, the challenges reflected in these two cases have failed entirely to demonstrate that there was anything unlawful in permitting fracking. The challenges failed as they did in the case of *Frack Free Balcombe*. Permission to appeal has been granted in the *Preston New Road* case, so we will see how that is concluded.

### Protected habitats: Ashdown Forest

In *SSCLG & Knight v Wealden DC* [2017] EWCA Civ 39, the Court of Appeal considered an allegation that, in granting permission for a housing development, a planning inspector had erred when considering the possible effects on the Ashdown Forest Special Area of Conservation and Special Protection Area. Ashdown Forest contains one of the largest continuous blocks of lowland heath in south-east England, protected for both its heaths and its birds.

The development included 103 houses and 10 hectares of suitable alternative natural greenspace (SANG). The issues arose under the Habitats Directive (92/43/EEC) and the Conservation of Habitats and Species Regulations 2010. The local authority contended that the development would have an adverse effect on the integrity of the SPA, in combination with other developments, from

recreational use of the heaths and nitrogen deposition from traffic.

In seeking to uphold the Inspector's ultimate decision, the SSCLG argued in effect that he had taken 'a super-precautionary or ultra-precautionary approach', not least as he had taken a more precautionary approach than Natural England had taken. The Court, however, held that the Inspector had taken a suitably precautionary approach having regard to the case law (eg *Sweetman* [2015] Env LR 18 and *Waddenzee* [2005] Env LR 14).<sup>7</sup> He was entitled to conclude that, in considering whether an appropriate assessment was required for this particular proposal, it was necessary to take into account the mitigation and also to find that mitigation essential in reaching his conclusion that an appropriate assessment was not required. The mitigation, including heathland management, was essential to his conclusion that there was no need for appropriate assessment.

The issue, therefore, was whether the Inspector was right to conclude that the financial contribution proposed would deal with the harmful effects of nitrogen deposition, rather than the recreational effects. The developer argued that a contribution was being made for habitat management work which could be included in future management projects. The Court concluded that the Inspector had failed to explain how he thought the contribution was in fact going to be translated into practical measures to prevent or overcome the possible effects of nitrogen deposition. He did not say what he thought was actually going to be done, by whom, and when, despite the point being the basis for his conclusion that no appropriate assessment was required.

Lindblom LJ said: 'It was necessary for him to establish with reasonable certainty that the relevant mitigation, including heathland management, would actually be delivered. But he did not do that'. There was no evidential basis for a conclusion that any of that money was going to be spent by the conservators on heathland management, including mitigating the effects of nitrogen deposition. The Court was also surprised that the Inspector said nothing about the authority's case which challenged the effectiveness, deliverability and consequences of heathland management, which all went to the possibility of mitigating the effects of nitrogen deposition.

The developer and the SSCLG also argued that the Court should exercise its discretion not to quash the decision. This was on the basis that any appropriate assessment would have found no significant effect on the integrity of the SAC. The Court concluded that this was not a case in which it could be confident that, even if the decision-maker had not fallen into error, the decision would have been, or would likely have been, the same. Such an exercise would have involved a decision-maker's judgement on the evidence, which was not the function of the court.

7 See also eg *Smyth v SSCLG* [2015] EWCA Civ 174 and *R (Champion) v North Norfolk DC* [2015] UKSC 52. There is a strict precautionary approach and the threshold under the first limb of Art 6(3) of the Habitats Directive for an appropriate assessment is very low.

The Court of Appeal endorsed the approach that the views of Natural England on nature conservation issues deserve great weight, and that, although an authority is not bound to agree with them, it needs cogent reasons for departing from them. It said, however, that, in this case, Natural England had not positively advised the local authority to consider the proposal on its own, rather than in combination with other development, and so the Court could not be sure what the outcome would be if the matter was re-considered.

The case demonstrates a key consideration in public law challenges to decisions: is there a flaw in the chain of logic in the decision. In this case, the Court of Appeal held that there was and also that there was no escaping the effect of it.

A similar issue arose in the case of *R (DLA Delivery) v Lewes DC* [2017] EWCA Civ 58, which was a challenge to the referendum on the Newick Neighbourhood Plan in the Lewes District. Newick is some 7 km from the Ashdown Forest SPA and SAC. There had been a screening report which concluded that an appropriate assessment under the Habitats Directive was not required for the plan, on the basis that the plan would not cause a likely significant effect to the Ashdown Forest SAC/SPA, either alone or in combination with other plans, from either recreational disturbance (given mitigation via SANGs) or nitrogen deposition.

The claimant argued that the making of the plan was vitiated by the lack of evidence to demonstrate that the requisite SANGs would actually be provided. Reliance was placed on the requirement for 'sufficient information at that stage' to enable the decision-maker to be satisfied 'as to the achievability of the mitigation ...'.<sup>8</sup>

The Court of Appeal did not accept this argument. It found that the need for mitigation by way of SANGs had been recognised as part of the judgement on whether the plan met the basic conditions. It was open to the plan examiner to conclude, even with a strict precautionary approach, that mitigation in the form of suitable SANGs would be required to be in place before development on the allocated sites could go ahead (or at least before the new dwellings could be occupied) and that the requisite SANGs would be provided.

It was relevant that efficacy of SANGs as mitigation seems not to have been in dispute and that work was being done to seek to provide SANGs locally. It was also relevant that the judgement was being made at the plan-making stage. One point which was also relevant was the absence of substantive evidence to demonstrate that it would not be possible to meet the proposed requirements. Lindblom LJ said that the examiner had properly asked and answered the question whether, on all the material before him, he was satisfied that the proposed mitigation could be achieved in practice.

The Court observed that the degree of uncertainty might be an obstacle to the grant of planning permission, but not to the allocation of land for housing in a plan

8 *No Adastral New Town v Suffolk Coastal DC* [2015] EWCA Civ 88, at paragraph 72.

running over a period of some 15 years into the future. It also said, however, that the examiner ought to have given proper reasons for reaching the conclusion he did, in light of the lack of positive evidence about the provision of SANGs.

The Court declined to grant relief, however, on the basis that the provision of fuller reasons would have no bearing on the conclusion reached, even if they amplified it. This was reinforced by the fact that, before the Court of Appeal hearing, planning permission had been granted for a 12 hectare SANG in Newick.

There were a number of other issues raised in the case, but they were all rejected by the Court of Appeal, including on strategic environmental assessment (SEA) under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment and the Environmental Assessment of Plans and Programmes Regulations 2004. A SEA scoping report had concluded that SEA was not required, as the plan was not likely to have significant environmental effects. Reliance was placed on the SEA undertaken for the District's emerging core strategy, which encompassed the developments envisaged in the plan.

The Court recorded that a screening decision was essentially one of expert judgement, with which the Court could only interfere on public law grounds, reading the document benevolently. Examples of such grounds include where the screening was perfunctory or superficial, or where the reasons were inadequate. In this case, the Court was satisfied that the screening decision was within the range of reasonable judgement, even though it contained errors. The errors were unfortunate but were not enough to invalidate the judgment reached.

The Court did, however, conclude that there was a lack of reasons given for the conclusion on significant environmental effects. But it went on to consider withholding relief on the basis of its discretion. It did not think that there was any real prejudice to anyone in the lack of express reasoning – where it was inconceivable that the outcome of the SEA screening exercise might be any different if the reasons were amplified – whereas there would be real prejudice to good administration and the local community if a remedy was granted.

The Ashdown Forest SAC was also the focus of *Wealden DC v SSCLG & Lewes DC & SDNPA* [2017] EWHC 351 (Admin) in which Wealden DC challenged the adoption of the Lewes local plan. The issue again related to the effect on the SAC of increased traffic flows from development, this time in the Lewes District. Wealden DC said that the other authorities had acted unlawfully in concluding that the local plan would not have a significant effect on the SAC in combination with the already adopted Wealden core strategy. It was not in dispute that Article 6(3) of the Habitats Directive requires an assessment of possible in-combination effects.

Hickinbottom J held that in-combination effects were potentially relevant at both the scoping and the appropriate assessment stages, but considered that they had not been ruled on an in-principle basis in the Habitats Regulations Assessment (HRA) undertaken. He went on,

however, to conclude that they had not properly been considered.

Natural England had advised that, if the expected increase in traffic flows was less than 1,000 cars per day, then the effect on the protected sites would not be of significance. If flows were above that, then the need for an appropriate assessment would be triggered. On the relevant part of the relevant road (the A26, adjacent to Ashdown Forest), the Lewes plan led to 190 new movements. But the Wealden core strategy, albeit adopted some years previously, already gave rise to 950 additional movements. These two figures had not been aggregated for the Lewes plan's consideration under the Habitats Directive, so no in-combination assessment had in fact been undertaken.

The Judge said:

I appreciate that this is a specialist area and that the court must avoid delving into the minutiae of expert opinion evidence which is beyond its competence. The court should be doubly slow to criticise expert opinion where there is no contrary evidence being advanced by WDC. Even so, these self-denying ordinances, although salutary, are by no means absolute.

He then went on to criticise the expert opinion before the court, saying:

I do not know the empirical basis for this professional judgment, but it is not scientific. To the extent that it is a planning judgment, it is anecdotal and little more than an assertion.

The Judge concluded that the two figures ought to have been added together, to cross the 1,000 threshold. He said that 'however artificial it may be to take a fixed threshold, and however minor in reality any predicated environmental impact may be', it would be right to proceed to the appropriate assessment stage. This was said to be the case, even if the 1,000 figure was 'robust and extremely precautionary'.

As the Judge concluded that the advice the authority accepted was flawed, he also concluded that the plan should have been found unsound, for failing to comply with relevant legal requirements. He judged that it was *Wednesbury* irrational to accept the advice of Natural England in the circumstances when making the judgements within the HRA process.

An added complication in the case was that the Judge held that Wealden DC was out-of-time to challenge the adoption of the plan by Lewes DC but was in time to challenge its adoption by the SDNPA. So, the plan was quashed only to the extent it applied to the South Downs National Park and not the part of Lewes District which lies outside the park.

Whilst these cases arise in the context of Ashdown Forest, there are of course European protected sites in cities.<sup>9</sup> The same issues are likely to arise for major

<sup>9</sup> In London for example there are the Lee Valley and South West London Waterbodies SPAs and the Epping Forest, Richmond Park, and Wimbledon Common SACs.

development in cities near to such sites. The question arises whether decisions like these really contribute to good decision-making and seeking to ensure that we have sustainable places to live. There is a risk that the rules become nothing more than legal obstacle courses. But in *DLA Delivery* there was a sound injection of common sense. In circumstances where the legal framework flowing from European Directives will come under scrutiny in relation to Brexit, the more common sense involved in such decisions the better.

## Basements

The intensification of development in cities through the construction of basements has given rise to considerable litigation in recent months. As it was put by Cranston J in the *Eatherley* case considered below, such issues arise 'particularly frequently in central London because of economic and social factors, in general terms, the increasing pressure for space'. In a number of cases, planning permissions for the construction of basements have been quashed.

In *R (Eatherley) v Camden LBC* [2016] EWHC 3108 (Admin) a lawful development certificate for the construction of a basement was quashed where it was held that the planning authority had not asked itself if the excavation for the basement was an engineering operation which required permission separate from the construction of a basement as an enlargement of the dwelling. Unlike the construction of an extension above ground, a basement necessarily entailed excavation and underpinning which could amount to a separate activity of substance and not merely something ancillary to the enlargement.

When interpreting the General Permitted Development Order, the plain meaning of the words should be applied, having regard to the context and the purpose of the order. The judgement was one of fact and degree, but the authority had not asked itself the right question. If the planning committee had asked itself the right question, it would have needed to assess the additional planning impacts of the engineering works to decide whether they amounted to a separate activity of substance.

*R (Shasha) v Westminster CC* [2016] EWHC 3283 (Admin) concerned the grant of planning permission by officers for a development including a basement under delegated powers. The main issue was whether the council was obliged under Reg 7 of the Openness of Local Government Bodies Regulations 2014 to give reasons for the grant under delegated powers. The court concluded that the answer was 'yes'. This is an important exception to the current position that there is no obligation to give reasons, detailed or summary, for the grant of planning permission. Reasons would only otherwise have to be given if circumstances demanded reasons as a matter of fairness.

The court also held that an authority could bring evidence to elucidate its reasons, but only exceptionally to add to or correct the reasons given at the time, and not to contradict its reasons. The reasons given in the delegated report showed that the officer had wrongly

taken an earlier grant of permission as meaning she was bound by it, and had wrongly understood and applied policy.

In *R (Stefano) v Westminster CC* [2017] EWHC 908 (Admin) the development proposed involved alterations to a house in Mayfair which included the construction of a three-level basement. What was to be done represented a change from an earlier planning permission. The main argument was that the council had failed to have regard to a new policy on basement development. This arose because the planning officer wrongly said he would only consider the revised elements of the design, because the rest already had permission, rather than the whole development. Gilbart J said that it was 'on any view remarkable that a policy of such obvious and direct application to the proposal earned not a single mention in the report on the planning application, not least when an objection had been made which specifically referred to it'. The permission therefore had to be quashed.

In each of these cases, when the contentious basement developments were challenged, they were found to be unlawfully authorised. It is perhaps a feature of city living that the more densely populated environments will contain more potential claimants on average per square metre to challenge developments which they regard as unacceptable.

## Gardens

Whether gardens are to be preserved or treated as previously-developed land, and therefore more open to development, was an issue in *Dartford BC v SSCLG* [2017] EWCA Civ 141. The definition of PDL in the NPPF includes 'land which is or was occupied by a permanent structure, including the curtilage of the developed land' but excludes 'land in built-up areas such as private residential gardens'. The local authority argued that all private residential gardens should be taken to be excluded from the definition of previously developed land, whether or not they are in a built-up area. The Court of Appeal decided that 'private residential gardens' was an example of 'land in built-up areas'. Unsurprisingly perhaps, it said that "'land in built-up areas" cannot mean land *not* in built-up areas'.

The local authority sought to rely on statements made by ministers to argue for a different meaning, but the Court held that statements made by ministers about previous iterations of policy could not detract from the clear words of the definition of previously developed land. The result is that gardens in built-up areas are not PDL, whereas gardens elsewhere are PDL. This makes redevelopment and intensification of cities less likely, and development in rural areas more likely.

## Listed buildings

A challenge for development in urban areas is to ensure that it does not undermine the historic environment. There has been a considerable amount of litigation in recent years related to the effect of development on the setting of listed buildings and the statutory duty in s66 of the Planning

(Listed Buildings and Conservation Areas) Act 1990. Section 66(1) requires that 'special' regard must be paid to the desirability of preserving a listed building or its setting.

The courts' interpretation of the statutory duty is now more rigorous than it was, although it was perhaps relaxed a little following the case of *Mordue v SSCLG* [2015] EWCA Civ 1243. In *R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061 it was alleged that insufficient consideration had been given to the effect of a development on the setting of a listed building, including 'non-visual harm', in that case noise and smells from a development of chicken sheds. It was common ground that, in principle, the setting of a listed building may be harmed by noise or smell.

The Court concluded, however, that the local authority's judgement had been that, taken in the round, the setting would not be harmed. In those circumstances, the Court found that the duty in s66 was complied with. It also made the point that although the statutory duty requires special regard to be paid to the desirability of not harming the

setting of a listed building, that cannot mean that any harm, however minor, would necessarily require planning permission to be refused. It may well be that following *Mordue* and *Palmer* there will be a more pragmatic approach to the setting of listed buildings, which will allow more development to take place in the historic core of cities.

## Conclusion

As the few subjects addressed in this paper show, there is no shortage of environmental litigation at the moment, especially relating to the various regimes for consenting developments and activities. It is likely that this will be the position in the future. In particular, if the on-going debate about the Aarhus Convention and costs protection leads to further changes, then we can look forward to more litigation seeking to hinder the growth and development of cities, or perhaps in some cases at least make that development more sustainable.

12 June 2017

# Working party presentation

## Protecting nature in Nottingham

### Laura Hughes

*Partner Browne Jacobson LLP*

### Janice Bradley

*Head of conservation*

*Nottinghamshire Wildlife Trust, C.Env., MCIEEM*

A joint presentation was given by Laura Hughes partner at Browne Jacobson LLP, chair of the East Midlands Regional Group and a member of the Nature conservation working party, and Janice Bradley, Head of conservation at Nottinghamshire Wildlife Trust. Laura introduced the statutory and policy context to urban conservation together with a description of the situation at Nottingham. Janice followed with case studies from within the city.

Wildlife and nature conservation is perceived as a rural issue but is also important in urban areas; probably more so, because it is under greater pressure and is of greater value as Green space, supporting health and well-being within communities. To address separation anxiety, under the nature diet people should experience international conservation every year or longer, nationally important wildlife every month, regionally important wildlife every week and local wildlife every hour. However, these are very unrealistic objectives.

The statutory framework for urban nature conservation is much the same as for rural areas with the key legislation for the protection of habitats and species being the Wildlife and Countryside Act 1981 as amended. Habitats and species of European importance are further protected by the Conservation of Habitats and Species Regulations 2010. Local Nature Reserves declared by local authorities under the National Parks and Access to the Countryside Act 1949 as amended, are more numerous in urban areas where many have been created on old industrial sites and have been established for educational purposes. Under section 40 of the Natural Environment and Rural Communities Act 2006 there is a general duty placed upon local authorities to have regard to biodiversity in the exercise of their functions. Other mechanisms such as byelaws are also useful mechanisms with which to protect wildlife. Local Wildlife Sites are designated by local authorities following advice from NGOs and the Government's statutory advisers on nature conservation. They are protected as a matter of policy not law.

In the city of Nottingham there are more than 400 acres of natural or semi-natural open space, 60 biological and 16 geological Local Wildlife Sites, 14 Local Nature Reserves and 3 Sites of Special Scientific Interest (SSSIs). Important species found in the city include Peregrine falcon, bats, Smooth snake; Great crested newt, Water voles and Badger. The local policies are driven by the National Planning Policy Framework, the Local Plan and the

Biodiversity position statement: ambition for wildlife. Initiatives include Wildlife in the city, Bee-friendly Nottingham and Nottingham open spaces forum. To support the implementation of policies the city employs two ecologists who work with the Wildlife Trust, Universities, Groundwork and various friends groups. The Wildlife Trust manages 11 sites for the city under a service level agreement. The Police and Crime Commissioner Mr Paddy Tipping, previously Environment Minister, actively support the protection of wildlife in the city. In conclusion the city is rich in wildlife which is protected and managed by an enthusiastic and appreciative community. However, there is always more that can be done.

## Case studies

**Beeston sidings** is a Local Nature Reserve managed by the Wildlife trust on behalf of the City Council. It is a narrow strip of land which includes a pond adjacent to railway sidings on one side and University sports fields on the other. At the end of the 19th century the sports fields were farm land and the sidings small. By the middle of the 20th century the sidings had expanded considerably and the University sports fields were established. The Reserve is therefore a relic habitat which hosts a variety of amphibians such as toads, frogs and smooth newts, over 80 invertebrate species, scarce plants such pale toadflax, twiggie mullein and perennial rocket and birds such as kingfisher, little grebe and heron.

The site also hosts slow worms. These were translocated from Victoria quarry in the city centre in the 1990s to accommodate a car park. The population was monitored and over the early years was doing well with a thriving breeding population. However, the population collapsed and by 2013 none were recorded. Some individuals probably remain but the population does not appear viable despite having suitable habitat and plentiful food. In recent years the University playing fields have been extensively utilised and network rail cleared scrub from the adjacent rail sidings. The cause of the decline in the slow worm population may never be known.

**Wollaton Badgers.** This case involved a housing development adjacent to St Thomas More Church near to Wollaton Park and on land that hosted a badger set; the proposals would have resulted in the loss of foraging habitat for the badger and in the partial closure of the main set and consequentially impact upon the church cemetery and surrounding gardens.

The proposed mitigation measures were considered by the Wildlife Trust to be insufficient. The City Council refused the application whereupon the developer appealed. At appeal the Wildlife Trust provided additional information on the likely impact on the badger population affected and

also noted that the proposed development was contrary to Natural England Guidance. However, it did suggest that reducing the scale of the development so that the partial closure of the set was not required would be acceptable. The appeal was dismissed with the Planning Inspector concluding that 'the proposal would have a significant adverse effect on the badgers occupying the site and that practical and realistic changes to the development which would provide mitigation have not been adopted. The proposal is therefore contrary to the approach in the NPPF and the objectives of Policy 17 of the emerging Core Strategy'. The developer subsequently made an application for a reduced number of houses at the site. This was approved with conditions placed with regards to the management of ecological enhancement areas.

The houses have been constructed and earlier this year another planning application was made for an extension to the church, the construction of a church hall and car park at the site. The Wildlife Trust have objected and a decision on the application is pending.

**Urban Peregrine falcons.** Nottingham has had Peregrine falcons nesting in the city since 2002 and has a breeding pair nesting on top of the Trent University Newton building. They are one of 60 urban breeding pairs in the UK. During the breeding season the nest has webcam coverage including infrared filming at night. In 2016 4 chicks were raised, However, not everyone is pleased with some pigeon racers threatening the birds and even Wildlife Trust staff. In 2012 a pair of Peregrine falcons nested on a church tower in the city but the female and chicks were killed. Whilst it is accepted that Peregrines will take racing pigeons, in urban areas they are more likely to take the larger and slower feral pigeons. The Wildlife Trust has had meetings with pigeon racers but the threat remains.



## Wind farms and the law of nuisance

Francis McManus

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### Introduction

Possibly, one of the outstanding and enduring features of common law nuisance is that it has traditionally suffered from definitional problems. Indeed, both academics and judges have struggled to give a comprehensive definition of the expression 'nuisance'. Possibly, the pronounced difficulty which has been experienced by authors, in proffering a convincing definition of nuisance, is expressed by Prosser and Keaton, who argue that: '[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'.<sup>1</sup> Indeed, Judge Langan, in the statutory nuisance case of *Elvington Park Ltd v City of York Council*<sup>2</sup> stated that the relevant definitions of nuisance were frequently framed in order to illuminate the particular question arising for decision. The learned judge added that no definition, which was to be found in the textbooks, can be presented as a code which must be applied to all cases. Indeed, with respect, his Lordship seems to be parodying the decision in the oft-cited case of *Bamford v Turnley*,<sup>3</sup> where the court expressed the view that:

[t]he nuisance for which an action will lie is incapable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances ... as to make it impossible to lay down any rule of law applicable to every case.

As far as judicial authority is concerned, in the most-cited Scottish nuisance case of *Watt v Jamieson*,<sup>4</sup> Lord President Cooper stated that the critical question as to whether the relevant adverse state of affairs ranks as a nuisance is whether what the pursuer is exposed to it *plus quam tolerabile*, when due weight has been given to all surrounding circumstances of the offensive conduct and its effects. His Lordship went on to add that any type of use which subjects adjoining proprietors to substantial annoyance, or causes material damage to property, is *plus quam tolerabile* (more than can reasonably be endured). A common theme which underpins liability, in terms of the law of nuisance, is that of unreasonableness. However, the concept of unreasonableness is, indeed, amorphous and has been described as one of the most controversial control devices within the law of private nuisance.<sup>5</sup> Another common theme which runs through nuisance cases centres around the court attempting to ascertain whether a given adverse state of affairs has some form of negative impact (loosely defined) on the enjoyment of the pursuer's land.

1 W Keeton (ed) *Prosser and Keaton on Torts* (5th edn St Paul 1984) 616.

2 [2011] EWHC 2213 at [49].

3 (1862) 3 B and S 66 at 79.

4 1954 SC 56 at 57.

5 J Murphy *The Law of Nuisance* (OUP 2010) 1.14.

## Wind farms

From what has just been said, it is clear that what constitutes a nuisance is difficult to define in the abstract. The law of nuisance has been criticised as being steeped in the Victorian era (when the law was crystallised) and that the law reflects, in some ways, at least, the rights of the landed proprietor of that era. This raises the question as to whether the law of nuisance is capable of meeting modern day challenges. The advent of wind farms must surely rank as one such challenge. Wind overtook hydropower in 2007 as the UK's largest renewal energy source. However, wind farms cause noise. They also have a negative visual impact, that is to say, that they are not visually attractive. While, at the time of writing, there is a pronounced paucity of case law which concerns noise from wind farms and also, their negative visual impact, it seems likely that the law will be invoked in the future.<sup>6</sup>

## Wind farms and noise

As far as noise pollution from wind farms is concerned, the majority of complaints from opponents of wind farms mainly relate to what is commonly described as 'amplitude modulation', or a 'whooshing' or 'whooping' sound which can be heard close to turbines as they cut through the air.<sup>7</sup> In some circumstances, the rotation of the blades through the air may create a more noticeable 'whoomph' or 'thump'. This feature is commonly known as 'enhanced' or 'other' amplitude modulation.<sup>8</sup> There may also be audible low frequency tones. These are associated with the mechanical noise which is generated by rotating components (such as the generator or the gearbox), which are contained within the nacelle of the turbine, and have sometimes been described as a 'hum'.<sup>9</sup>

At the time of writing,<sup>10</sup> there is no UK case law where noise from wind farms is the subject matter of a private nuisance action. However, a wide variety of sources have been held to constitute a nuisance at common law. For example, noise from print works,<sup>11</sup> a sawmill,<sup>12</sup> cattle,<sup>13</sup> an oil refinery,<sup>14</sup> an unruly family,<sup>15</sup> a military tattoo<sup>16</sup> and military aircraft<sup>17</sup> have all been held to constitute a nuisance. What one can derive from the variety of noise sources which have been the subject of successful nuisance actions is that the courts have refrained from differentiating between different types of noise which have been

the subject of a nuisance action. Unreasonably loud noise from a wind farm would, therefore, be capable of ranking as a nuisance in law. This almost seems like a statement of the obvious.

## The visual impact of wind farms

We look here at whether the law of nuisance could provide a remedy to those who claim that the presence of a windfarm has a negative visual impact or is unattractive. Indeed, Tromans observes that a perennial ground for challenge in a town and country planning context is that the proposed wind farm would have an adverse visual impact on the surrounding landscape.<sup>18</sup> The learned author also observes, however, that to generalise is unhelpful. The matter will turn on the size of the turbines, the design of the site and the topography of the landscape. However, as far as the law of nuisance is concerned, there are very few cases in the UK where the claimant, or the pursuer, has succeeded in a nuisance action simply on the basis that the defender is carrying out an activity which is visually unattractive. Generally, in order that the pursuer or claimant can successfully raise a nuisance action, the adverse state of affairs must comprise some form of pollution, such as noise, smoke, smell etc, which emanates from the defender's, or the defendant's premises.

A fundamental issue here, of course, is whether one can successfully raise an action in nuisance in relation to a state of affairs which, although visually unattractive, is simply confined to the land of the defender or the defendant? However, in *Hunter v Canary Wharf Ltd*,<sup>19</sup> the House of Lords held that the mere presence of a building, which interfered with reception of television signals, did not rank as a nuisance in law.<sup>20</sup> Unfortunately, there was little discussion as to whether an emanation from the defendant's premises was a condition precedent to liability in nuisance, in general. However, Lord Goff expressed the view<sup>21</sup> that, occasionally, activities which take place on the defendant's land are so offensive to neighbours that they can constitute an actionable nuisance in law. In short, and importantly, in the context of the present discussion, there was no doctrinal reason why a state of affairs which poses simply a negative visual impact to the neighbourhood cannot rank as a nuisance.

However, the obvious difference between tall buildings and wind farms, in the context of the present discussion, is that wind-turbine blades revolve, and can, therefore, have a strobe effect. Whilst wind turbines potentially present a greater negative visual impact than the mere physical presence of a tall building, in the final analysis the straightforward question which requires to be answered,

6 For a general discussion of wind farm noise and private nuisance see S Ring and B Webb 'Wind farm noise and private nuisance: a return to common sense' [2012] JPL 892.

7 *The Guardian* (16 December 2013).

8 See W Norris 'Wind farm noise and private nuisance: issues arising in *Davis v Tinsley* [2012] JPL 230, 230.

9 For anecdotal evidence of claims made by those living in the vicinity of windfarms to the effect that their health has suffered by being exposed to low frequency noise see *The Times*, (13 August 2017).

10 August 2017.

11 *Rushmer v Polsue and Alfieri* [1906] 1 Ch 234.

12 *Gilling v Gray* [1910] TLR 427.

13 *London, Brighton and South Coast Railway v Truman* (1886) 11 App Cas 45.

14 *Allen v Gulf Oil Refinery Ltd* [1981] AC 1001.

15 *Smith v Scott* [1973] Ch 314.

16 *Webster v Lord Advocate* 1984 SLT 13.

17 *Dennis v MoD* [2003] EHLR 297.

18 S Tromans 'Legal issues in assessing wind turbine impacts' (September 2010) 59 *United Kingdom Environmental Law Association* 6, at 11.

19 [1997] 2 All ER 426.

20 See also *Williams v Network Rail Infrastructure Ltd* [2017] PLCS 94, where the county court held that the mere presence of Japanese knotweed in close proximity to the claimants' property ranked as a nuisance at common law, in that such presence had a negative impact on the ability of the claimants to dispose of their property at a reasonable value.

21 *ibid* 432.

in doctrinal terms, is whether the law of nuisance regards an impact on the visual senses as capable of falling within its scope. There is some authority, albeit paltry, to the effect that a visually offensive activity which takes place on the property of the defender can rank as a nuisance in law. For example, according to Bell, a nuisance could consist of a state of affairs which was 'intolerably offensive to individuals in their dwelling houses or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor) or by indecency (as a brothel next door).'<sup>22</sup>

As far as case law is concerned, in *Smith v Cox*<sup>23</sup> it was held that the drying of cow hides within the sight of a public road was a nuisance. In *Thomson-Schwab v Costaki*<sup>24</sup> it was held that since the claimant, who resided in property which was situated close to a brothel, could see prostitutes and their clients leaving and entering the premises, this state of affairs ranked as a nuisance. Similarly, in *Laws v Florinplace*<sup>25</sup> the defendants established a sex shop in the vicinity of the claimant's premises. It was claimed, on behalf of the claimant, that the defendant's activities would threaten the ordinary enjoyment of family life in the street where the claimant lived and would also be an embarrassment and a potential danger to young persons, especially young girls who might meet with indecent suggestions.<sup>26</sup> It was held that cases of nuisance were not confined to cases where there was a physical emanation from the premises of the defendant. Furthermore, there was a triable issue as to whether the sex shop, which was the subject matter of the instant case, ranked as a nuisance.

Unlike a nuisance action which is based on noise pollution, odour or light pollution, one of the main problems which would confront the courts in addressing the negative visual impact of wind farms on neighbouring proprietors, in terms of the law of nuisance, is that the courts would have difficulty in recognising an individual interest which is really capable of being measured by an objective standard.<sup>27</sup>

Indeed, Pound argues that the law can recognise an interest in the peace and comfort of one's thoughts and emotions, but only to a limited extent.<sup>28</sup> The learned dean goes on to argue that a hurdle which stands in the way of the courts is that an objective is required by the social interest with which the interest must be balanced. More recently, Osbourne has argued that the courts are more reluctant to impose liability for a non-intrusive state of affairs that interferes with the comfortable enjoyment of land.<sup>29</sup> In the learned author's opinion, the recognition of such rights poses a much greater threat to the defendant's freedom of land use. Unfortunately, Osbourne does not elaborate on this point. However, the gist of his argument seems to be that beauty lies in the eye of the beholder. Therefore, to allow one to recover for what is, in effect, an

assault on the eye, would set a dangerous precedent. However, there is some authority to the effect that an unpleasant sight can rank as a nuisance in law.<sup>30</sup>

By way of conclusion as to whether the law of nuisance would recognise a claim which was based on the negative visual impact of a wind farm, whilst there is little direct authority on the point, there is no doctrinal reason, *prima facie*, why such a claim could not succeed. This proposition is founded on the simple fact that the law makes no distinction, in terms of the form by means of which the pursuer's interest in land is invaded. In short, the law adopts a stoically neutral stance. Whilst, as just stated, the law could, theoretically, regard the negative visual impact of a wind farm as a nuisance, the author must, perforce, consider if the modern law can do so.

### The flexibility of the law of nuisance

In order to determine whether the law of nuisance could be successfully invoked to deal with both the noise and, especially, the visual impact which is presented by wind farms, one must now examine the flexibility of the law.

Whilst the development of the law is, to say the least, pedestrian it has, in the past, certainly shown itself capable of rising to new environmental challenges. The leading 19th century case of *St Helens Smelting Company v Tipping*<sup>31</sup> serves as a pristine example of how the courts have developed the law, in order to take account of advances in industry and technology. In that case, the claimant, who owned an estate which was situated in the Black Country, raised an action against St Helens Smelting Company. The former claimed that the effluvia from the defendant's works had damaged shrubs on his premises. By way of a defence, the latter claimed that, by reason of the fact that the locality was industrial in nature and heavily polluted, this factor should be taken into account by the court when considering if the user of the defendant's land was unreasonable and, therefore, ranked as a nuisance. The House of Lords, in deciding in favour of the claimant, held that the locality factor, in terms of the law of nuisance in circumstances where the claimant had sustained sensible (or physical) damage to his property, could not be taken into account. In short, whereas one could take into account the nature of the locality if one was considering whether any adverse state of affairs (for example noise) simply impacted on the personal comfort of the claimant, the locality factor was redundant if the defendant's activities caused physical, or sensible, damage to the claimant's property.

The next important development in terms of the law of nuisance came with the House of Lords case of *Sedleigh-Denfield v O'Callaghan*.<sup>32</sup> Here, a local authority trespassed

22 G J Bell *Principles* (10th edn Morrison & Gibb Ltd 1899) para 974.

23 5 July 1810 FC.

24 [1956] 1 WLR 335.

25 [1981] 1 All ER 659.

26 *ibid* 663.

27 Anon 'The Modern Tendency Towards the Protection of the Aesthetic' (1937) *WVa LQ* 58, at 59.

28 R Pound 'Interests in Personality' (1915) 343 *Harv L Rev* 343, 362.

29 P Osbourne *The Law of Torts* (3rd edn Irwing Law 2007) 366.

30 See *Parkersburg Builders Material Company v Barrack* 118 *WVa* 608; 191 SE 368 (1937).

31 (1865) 11 HL Cas 642. For a stimulating discussion of this case see A W Brian Simpson 'Victorian judges and the problem of social cost: Tipping v St Helens Smelting Company (1865)' in A W Brian Simpson *Leading Cases in the Common Law* (Oxford University Press 1995) 163.

32 [1940] AC 880. For a useful discussion of this case see M Lunney '*Goldman v Hargrave* (1967)' in C Mitchell and P Mitchell (eds) *Landmark Cases in the Law of Tort* (Oxford University Press 2010) 199.

on the land of the defendant. The former proceeded to construct a culvert on a ditch. One of the employees of the defendant knew of the existence of the culvert. Furthermore, the defendants also used the culvert, in order to get rid of the water from their own property. However, the culvert was not properly constructed, and the upshot was that it became blocked with detritus. A heavy thunderstorm caused the ditch to flood. The claimant's land became flooded. The House of Lords held the defendant liable in nuisance, by virtue of both continuing, and also adopting, the nuisance.

The Privy Council had an opportunity to consider the law relating to nuisances which were created on the defender's land by third parties in the celebrated case of *Goldman v Hargrave*.<sup>33</sup> In that case, a tall gum tree, which was situated on the defendant's land, was struck by lightning, and then caught fire. The defendant cut the tree down the following day. However, he did not take any further steps to stop the fire from spreading, preferring simply to let the fire burn itself out. Several days later the weather changed. The wind became stronger and, also, the air temperature increased. This caused the fire to revive. The fire then spread to the claimant's land, which was damaged. The Privy Council held that the defendant was liable for the damage, in that he had failed to remove the nuisance from his land. However, in deciding whether the defendant had failed to attain the standard of care which the law demanded of him, one was required to adopt a subjective approach. One would, therefore, be required to take into account the resources of the defendant. In turn, one would expect less of the occupier of small premises than of the owner of larger property. Again, less would be demanded of the infirm than of the able-bodied.

The learning in *Goldman* was followed in *Leakey v The National Trust*.<sup>34</sup> In that case, the claimants owned houses which were situated at the base of a steep conical hill, which rejoiced in the name of the 'Burrow Mump'. Part of the hill, which adjoined the claimant's land, had become unstable. The condition of the hill was made known to the defendants by the claimants. However, no remedial action was taken by the defendants. A few weeks later, there was a substantial fall of earth and tree stumps from the hill, onto the claimant's land. The claimants brought an action in nuisance. The Court of Appeal held the defendants liable in nuisance. The court refused to draw a distinction between an adverse state of affairs which had been foisted on the defendants, and one which had arisen by the operation of nature. The judgment of Megaw LJ is particularly interesting, in terms of the affirmative duty which the law imposes on the occupier of land, in relation to nuisances which have been foisted upon him. In his Lordship's view, the practicability of preventative action, the cost of the relevant works and also the time which is available to take the necessary remedial action were all relevant factors which fell to be taken into account in determining liability on the part of the defendant.<sup>35</sup> One

would also take into account the defendant's age and personal means.<sup>36</sup>

This now famous trilogy of cases, the learning in which was endorsed by the House of Lords in the Scottish case of *Smith v Littlewood Organisation Ltd*,<sup>37</sup> provides evidence that the law of nuisance is not static, and is quite capable of change, at least in relation to different forms of activities which take place on the defender's land. The trilogy also demonstrates how the law of nuisance was capable of reforming itself in order to balance the duties which are owed by the occupier of land to his neighbour, in the context of a tripartite situation: that is to say, one in which that occupier has an adverse state of affairs on his land, which is created by an external source (whether human, as in *Sedleigh-Denfield*, or by virtue of nature, as in *Goldman*) foisted upon him. In the last analysis, the trilogy demonstrates the flexibility of the law of nuisance. However, not only does this, now almost famous, trilogy of cases demonstrate the flexibility of the law, but it provides authority for the proposition that the law of nuisance, in reforming itself, is reluctant to draw a distinction as to the nature of the external threat which is posed to the enjoyment of the pursuer's land.

*Willis v Derwentshire DC*<sup>38</sup> illustrates another interesting development in the law of nuisance and, furthermore, demonstrates its flexibility in dealing with different forms of negative external circumstances. This case concerned a claim for damages in nuisance, negligence and, also, under the rule in *Rylands v Fletcher*. In *Willis*, the claim arose from the escape of 'stythe' gas from a disused drift or adit, which was situated in land, which was owned by the defendant. The claimants owned a house and a smallholding on adjacent land. The defendant discovered that the adit was emitting stythe gas. However, it delayed in taking appropriate remedial measures for some months. The claimants claimed that the stythe gas had caused the death of some of the animals which the claimants kept on their premises. The claimants claimed that the defendant was liable in nuisance, in that it had failed to take immediate action, on discovering the existence of the adverse state of affairs. It was held that, whereas the defendant had not created the nuisance, the defendant came under an obligation to remedy the cause of the escape of the gas, after it became aware of it. Of interest was the fact that the obligation on the part of the defendant to abate the nuisance involved providing the claimants with information about the causes of the escape, the levels of gas being emitted and also the design of the remedial works, which were planned to be abated. Since the claimants were not provided with such information, the upshot of which was that they were compelled to take independent advice at their own cost, it was held, therefore, that the claimants should be compensated for this expenditure. *Willis* does take the law further forward, and also illustrates a more

33 [1967] 1 AC 645.

34 [1980] QB 485.

35 *ibid* 524.

36 *ibid* 526.

37 [1987] AC 241. The learning in the trilogy has since been applied by the English courts in a number of cases which include *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 and *Bybrook Barn Centre Ltd v Kent County Council* [2000] BLGR 302.

38 [2013] EWHC 738.

general point to the effect that the law of nuisance is flexible, not least in its willingness to allow the claimant to recover pure economic loss.

### Nuisance and environmental regulation

We have seen how the law of nuisance has adapted to different challenges which have been posed by the physical environment. However, to what extent, if any, has the law of nuisance been influenced by the regulation of the external environment? This question fell to be considered in *Barr v Biffa Waste Services Ltd*,<sup>39</sup> the facts of which case could not have been simpler. The defendant waste company operated a landfill site, which accommodated pre-treated waste. The claimants, who lived in the vicinity of the site, had been affected by odours which emanated from the site for a period of five years. They brought an action in nuisance against the defendant. Biffa, by way of a defence, claimed that, first, if the smell from the site ranked as a nuisance, it could avail itself of the defence of statutory authority, and secondly, by virtue of the fact that the defendant complied with both the terms of its permit, which had been issued by the Environment Agency under the Pollution Prevention and Control Regulations and also with the conditions which were attached to its licence under Part 2 of the Environmental Protection Act 1990, the use of the land where the adverse state of affairs existed was reasonable and, therefore, did not rank as a nuisance in law. At first instance it was held that the duties which the defendant owed to the claimants under common law were four-square with the defendant's obligations in terms of its compliance with the relevant permit. The claimants successfully appealed. The Court of Appeal held that there was simply no principle to the effect that the common law should march in step with a statutory scheme which covered a similar matter. In the last analysis, the statutory scheme could not cut down private rights.

The relationship between the law of planning and the law of nuisance has taunted and teased the courts since the early 1990s. The question the courts were required to consider was, in short, did the implementation of planning permission have the effect of notionally transforming the character of the relevant land, the upshot of which would be, for example, that which was of a non-industrial nature could be notionally transformed into one which was industrial in nature? One of the factors, of course, which is required to be taken into account by the courts in determining if a nuisance exists is the nature of the relevant locality, that is to say the more the adverse state of affairs is in keeping with the nature of the locality, the less likely it will be castigated as a nuisance in law.<sup>40</sup>

There was English authority (there is no Scottish authority) to the effect that certain forms of planning permission could change the character of the land for the purposes of the law of nuisance.<sup>41</sup> The relevant case law

was reviewed in the Supreme Court case of *Lawrence v Fen Tigers Ltd*.<sup>42</sup> This case related to the claimant raising an action in nuisance in respect of noise which emanated from the conduct of motor sports, at a stadium and track. The requisite planning permission had been obtained by the defendants. The Court of Appeal, in reversing the decision of the judge at first instance, held that the implementation of planning permission had changed the character of the land for the purposes of the law of nuisance in such a way that the noise from both the stadium and track was to be regarded as simply an established part of the character of the locality. The claim in nuisance, therefore, failed. The claimants successfully appealed to the Supreme Court. As far as the relationship between planning permission and the law of nuisance is concerned, in the author's view, all that can be stated with confidence after *Lawrence* is that, whereas planning permission cannot per se authorise the creation of a nuisance, it can be accorded some significance by the courts in a private nuisance action. In the last analysis, the relevance of planning permission in a private nuisance action still remains a notoriously grey area of law.

### Nuisance and human rights

In considering the general flexibility of the law of nuisance, one must, of course, address the impact on the law by human rights jurisprudence. In short, to what extent, if any, has the law been influenced by the development of the law relating to human rights? Thus far, however, there is a paucity of case law on the subject. However, the impact of human rights law on the law of nuisance was considered in first instance case of *Dennis v MoD*.<sup>43</sup> In that case, the claimants owned and lived on a large estate which was situated in close proximity to an RAF airfield, home to the famous Harrier jet, which is a very noisy aircraft. The claimants were affected by the noise from aircraft. They brought an action in nuisance against the MoD. The claim that the noise in question amounted to a nuisance was readily accepted by the court. However, given the fact that it was in the interest of the country that pilots should continue to be trained at the airbase, the public benefit or social utility of such an activity should be taken into account, not as a factor which one was required to take into account in determining if the noise in question amounted to a nuisance but, rather, when one was considering the appropriate remedy which the court should grant. Such an approach was in conformity with human rights jurisprudence. Therefore, damages were awarded to the claimants. However, whether *Dennis* represents the law of Scotland is unclear.<sup>44</sup>

To what extent, if any, human rights law has influenced the development of the law of nuisance, therefore, remains

39 [2012] EWCA Civ 312.

40 *Bamford v Turnley* (1862) 31 LJQB 286, at 286 (Pollock CB).

41 See eg *Gillingham v Medway (Chatham Docks) Ltd* [1993] QB 343; *Wheeler v Saunders* [1996] Ch 19; and *Watson v Croft Promo-Sport* [2009] EWCA Civ 15.

42 [2014] 2 WLR 433.

43 [2004] Env LR 34.

44 In the Outer House case of *King v Lord Advocate* [2009] CSOH 169 at [17], which concerned a nuisance action in relation to noise from low-flying military aircraft, Lord Pentland did not express a view as to whether *Dennis* represented the law of Scotland.

uncertain. In *Fadayeva v Russia*,<sup>45</sup> which concerned pollution, including noise from a steel works, the court held that, in determining whether the pollution in question infringed Article 8 of the ECHR (which guarantees inter alia the right to respect for one's home), one was required to consider whether the adverse state of affairs which was complained of was typical of modern life. However, thus far, there is no authority as to whether this is a factor which falls to be considered in relation to the law of nuisance. If it were to be accepted that the development of the common law should be in conformity with human rights jurisprudence, and that one should weigh whether the adverse state of affairs which is complained of is typical of modern life in determining if a nuisance exists, the author would support such an approach, in that the law of nuisance should be responsive to circumstances which have become accepted by society as being a feature of the modern world. Such an approach would also allow the law to become dynamic, and also responsive to the needs of society and, at the same time, facilitate a fairer balance being struck between competing uses of land, a concept which underpins the law of nuisance.

However, as far as wind farms are concerned, whilst the presence of wind farms is becoming more common on our landscape, one cannot claim, at present, that they are typical of modern life and, therefore, if it is judicially accepted that one should take such a factor into account in determining if a nuisance exists, a court would be more inclined to decide that any wind farm ranks as a nuisance.

## Conclusions

By way of conclusion, whereas there is little doubt that unreasonably loud noise from a wind farm would rank as a nuisance in law, which is a statement of the obvious, much more problematic is whether the visual impact of a wind farm could rank as a nuisance in law. In the author's view, however, what is arguable is whether noise from a wind farm which is not per se sufficiently loud to constitute a nuisance could, in conjunction with the visual impact presented by the presence of the wind farm, be regarded as a nuisance. In the author's view, the court would not be acting contrary to authority if it did so. The law of nuisance possesses the flexibility to adopt such an approach. Indeed, in *Sturges v Bridgman*<sup>46</sup> Thesiger LJ observed that the law of nuisance is to be determined 'not merely by an abstract consideration of the thing itself, but in reference to its circumstances'.

## Rights of nature and wild cities – river rights in Frome: a case study

Michèle Perrin-Taillat

*Wild Law SIG co-convenor*

The Wild Law Special Interest Group co-convenors thought it appropriate to present the Frome case at their UKELA Annual Conference 2017 Session not only because it is about nature, ecology, the diversity of animals and plants that thrive locally, as well as the ways in which the local farmers and landowners manage the common heritage and their own heritage, but also because Frome is a town whose Parish Council has to handle these matters with the legal instruments that are available to such a local community. The river that flows through the small town of Frome, Somerset, has been suffering from various sources of pollution and, despite all the actions taken, is failing to attain good ecological quality status, as required under the EU Water Framework Directive. The issue therefore seemed to fit both the Annual Conference theme, on a small town scale, and the core interests of UKELA's Wild Law SIG members: conservation, protection of nature, balancing the interests of farmers and the local people with the interests of the flora and fauna, and the need for recreation amenities.

The SIG meeting was chaired by Michèle Perrin-Taillat, co-convenor of the SIG. Mumta Ito, also co-convenor of the SIG and founder of Rights of Nature Europe, now Nature's Rights,<sup>1</sup> introduced the theme of Wild Law and more particularly that of the Rights of Nature. She also outlined a project to apply for a pioneering 'test' byelaw that recognises ecosystem rights in Frome, initiated by Nature's Rights. This was followed by the intervention of a special invited guest, Professor Massimiliano Montini from Siena University, Italy, currently working at Cambridge University, and a Nature's Rights trustee. He spoke about why environmental law is failing to meet the challenges of our times and the opportunity that ecological law and governance brings. He introduced the new Ecological Law and Governance Association (ELGA)<sup>2</sup> and briefly explained its purpose and impending constitutive meeting in Siena on 13 October 2017. As part of his introduction he explained that the focus of attention was shifting in environmental law towards a more holistic and ecological approach. The main theme of the meeting was then addressed by Colin Robertson in more detail.

## The Frome issue: the wider context

Rights of nature, and other related terms, are developing notions still in the making for new concepts underpinning a new legal order.

In 2009, 22 April was designated as International Mother Earth Day (Resolution A/RES/63/278<sup>3</sup> of the General Assembly of the United Nations), and on 22 April

45 App No 55723/00 judgment of 9 June 2005.

46 (1879) 11 Ch D 853, at 859.

1 <http://natures-rights.org>.

2 <https://www.elga.world>.

3 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/487/47/PDF/N0848747.pdf?OpenElement>.

2010 a Proposal for a Universal Declaration of the Rights of Mother Earth<sup>4</sup> was adopted at the World People's Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia.

The United Nations Harmony with Nature Programme has been steadily gaining strength since the first UN General Assembly Resolution on Harmony with Nature (Resolution A/RES/64/196<sup>5</sup>) was adopted in 2009.

Rights of nature law and policy have already been put in place in various countries around the world. Many examples can be found on the Harmony with Nature website (Rights of nature section<sup>6</sup>). For instance, in New Zealand a national park has the same rights as a legal person: 'Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person' (Te Urewera Act 2014, section 11<sup>7</sup>), and the Whanganui River, of cultural and spiritual importance to Maori people, was also given rights as a legal entity (Te Awa Tupua (Whanganui River Claims Settlement) Act 2017<sup>8</sup>); in March 2017, the Uttarakhand High Court in India accorded the status of 'living human entities' to two sacred rivers, the Ganges and the Yamuna. So why not give UK parks, mountains and rivers legal personality? At the John Muir Trust 2017 Annual General Meeting in Fort William, it was suggested that Ben Nevis become a legal person.<sup>9</sup> So why not give the River Frome in Somerset and its ecosystem legal personality too?

'Frome is a good test case – there is serious and sustained pollution and/or threat of pollution, and a willing and active local community.'<sup>10</sup>

### The Frome issue: the local context

Sustainable Frome,<sup>11</sup> a group of people living in and around the Somerset town of Frome who want to build a greener future, first proposed that the town council look into nature rights. On 27 July 2016, Frome Town Council (FTC) Town Matters Committee held a well-attended meeting and published a report drafted by Sustainable Frome on its website.

Sustainable Frome has requested the Council make a new type of bye law which recognises the River Frome as a subject of the legal system, capable of bearing rights in the same manner as humans and companies. This report has been drafted by them and the recommendation from the Town Clerk is that FTC work with Sustainable Frome to develop the idea with a view to establishing a nature rights byelaw.<sup>12</sup>

On 10 May 2017, Councillor Peter Macfadyen wrote an update on the project,<sup>13</sup> underlining that 'the concept of Nature Rights is rapidly gaining traction (in part because of unknown changes to environmental protection post Brexit)'.<sup>14</sup>

Meanwhile, Satyadasa David Waterston, the key adviser on the project locally, had started working on a draft byelaw conferring rights on the River Frome and its ecosystem with help from Mari Margil at CELDF<sup>14</sup> and with support from Nature's Rights Mumta Ito. Inspired by the CELDF work, Nature's Rights started the Frome project to test the water in the UK as a way of seeing whether this kind of local level law-making is possible here. Nature's Rights lawyers Satyadasa David Waterston and Mumta Ito have been advising FTC and local stakeholders. Mari Margil from CELDF has been involved in advising Nature's Rights from the perspective of her experience in drafting rights of nature municipal laws in the USA. It has been a long process and the project is getting closer to submitting a test application to the Department for Communities and Local Government (DCLG) for approval.

UKELA Wild Lawyers were also contacted for support: Colin Robertson responded. His idea is to turn the Frome issue into a case study with a wider consultation processes, and he provided a provisional plan<sup>15</sup> on which he expanded at the UKELA Annual Conference:

Title: Conferring Legal Personality on River Frome and Rodden Meadow: a Discussion Paper

1. Introduction
2. The Ecology of Frome River and Rodden Meadow
3. The Problems that Beset Frome River and Rodden Meadow
4. The Success / Failure of Current Approaches
5. New Approaches: Conferring Legal Personality on Nature
6. Legal Personality for Frome River and Rodden Meadow.
7. Conclusion

Annex 1: draft Byelaw<sup>16</sup>

Annex 2: Lists of relevant Scientific Publications<sup>17</sup>

Annex 3: Relevant legislation and case law<sup>18</sup>

References

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The idea was further developed into a discussion paper submitted to the Frome group and the UKELA Wild Law SIG co-convenors.<sup>19</sup> The discussion paper and the byelaw provide two complementary approaches rather than

4 <https://pwccc.wordpress.com/2010/04/24/proposal-universal-declaration-of-the-rights-of-mother-earth/>.

5 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/64/196&referer=http://www.un.org/fr/ga/64/resolutions.shtml&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/196&referer=http://www.un.org/fr/ga/64/resolutions.shtml&Lang=E).

6 <http://www.harmonywithnatureun.org/rightsofnature.html>.

7 [www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183705](http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183705).

8 [www.legislation.govt.nz/act/public/2017/0007/latest/whole.html/](http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html/).

9 Colin Robertson 'Matters in practice: Wild lawyers join John Muir Trust at their AGM and ask if Ben Nevis has personality' (2017) 101 UKELA e-law.

10 Satyadasa David Waterston, email communication (27 April 2017).

11 <http://transitionfrome.org.uk>.

12 [www.frometowncouncil.gov.uk/wp-content/uploads/2016/07/Agenda-item-6-For-decision-Establishing-nature-rights-bye-law-for-the-River-Frome.pdf](http://www.frometowncouncil.gov.uk/wp-content/uploads/2016/07/Agenda-item-6-For-decision-Establishing-nature-rights-bye-law-for-the-River-Frome.pdf).

13 [www.frometowncouncil.gov.uk/wp-content/uploads/2017/05/Agenda-item-4-For-information-Nature-Rights.pdf](http://www.frometowncouncil.gov.uk/wp-content/uploads/2017/05/Agenda-item-4-For-information-Nature-Rights.pdf).

14 <https://celdf.org>. The Community Environmental Defense Fund has specialised in pioneering municipal laws in the USA that affirm the rights of communities and the rights of nature.

15 Colin Robertson, email communication (27 April 2017).

16 Still in the making by Nature's Rights lawyers in compliance with FTC and local Frome people.

17 To be provided by local ecologists in Frome, as well as documents showing the pollution incidents and what sort of action has been taken by the Friends of River Frome and the Environment Agency.

18 To be provided by Nature's Rights lawyers and FTC.

19 Colin Robertson, email communication with the discussion paper attached (1 July 2017).

competing ones, particularly so because consultation will have to take place at some stage, whatever strategy is adopted. In addition, it is up to the Frome people to choose which approach they prefer, or in which order, or whether they will go for both in parallel. The idea is to empower the local community, rather than to impose a strategy from external organisations. Nature's Rights legal advisers<sup>20</sup> and Colin Robertson will seek further information from local sources, which will guide their next steps.

With regard to the byelaw:<sup>21</sup>

The grounds for application would be stronger at District level – as they can use the grounds for Good Governance which are wide. The original intention was to create a by-law to protect the river as it is polluted from a variety of sources, including agricultural nutrients, sewage and greywater from domestic and business properties. However, the department that deals with by-law applications<sup>22</sup> advised us that a Parish council cannot use the Good Governance clause as grounds and also that they feel rivers are covered by national legislation – which is why we went for the ecosystem instead of the river – relying on some tenuous grounds under the protection of parks and open spaces. However, there are also general powers of wellbeing – which we are now looking into.<sup>23</sup>

In addition, in a byelaw application form, it is necessary:

- to define the specific local problem to be addressed
- to explain the nature, location, extent and incidence of the problem, as well as existing measures to combat the problem, and why these are not working
- to list other measures that have been taken to address the problem
- to explain the reason why the Council is satisfied that the problem is so great as to merit a criminal offence (as byelaws are accompanied by some sanction or penalty for their non-observance).

A three-level approach could be taken:<sup>24</sup>

1. People's Declaration/Charter declaring Frome a Nature's Rights Zone. The declaration should include practical steps to improve the ecological status of the meadow and river based on the principles of earth jurisprudence, ie a community ecological governance plan. This can be done using the local council powers to promote the well-being of an area (although this power cannot be used to make byelaws it can be used to bring in other forms of governance).
2. Submit byelaw for approval, which incorporates the Declaration/Charter by reference.
3. Consultation, which can be used to propose the byelaw at district level in any event (ie whether successful or not on first application).

20 Satyadasa David Waterston, Mumta Ito, James Kunz, Tom West.

21 Mumta Ito, email communication to Wild Law SIG co-convenors (12 May 2017).

22 Department for Communities and Local Government (DCLG).

23 Mumta Ito, email communication to UKELA Wild Law SIG Co-convenors (12 May 2017).

24 Mumta Ito, email communication to Frome Group (23 May 2017).

Suggested next steps:<sup>25</sup>

Frome bye-law precedent and any drafting guidance available.

1. Calendar of steps to implementation.

Notice in FTC Publication.

All external actors agree with the following, emphasising the importance of involving the local community at large:<sup>26</sup>

[t]he project is over public consultation. I think it very important that a consultation is done, for three main reasons:

1. DCLG requirements. As I understand from Jamie (and from law-making processes at different levels) there is no chance of it being passed unless a proper consultation has been done.
2. Writing a law vs having a law. Even if it were possible to sneak the law through under the radar, once people found of its existence, they will be much more likely to reject it if they have not been involved in it. It will be alien to them, and so pushed out just as a body rejects and pushes out alien objects.
3. Better law. As far as I know, none involved in the drafting or technical discussion to date is from Frome. The people who live work and rest with the meadow will better know its needs and interests. We can improve the law by working with those people.

Yet organising a public consultation can require a phenomenal effort for a small parish council such as Frome's. The general consensus is therefore to opt for a less labour-intensive option. At the time at which this article was written, the decision was to take the first step for a request for a byelaw: revise the current draft byelaw and submit it at a Frome full council meeting. FTC will decide whether to go ahead with the procedure. Whether it fails or succeeds, the byelaw proposal will have had the benefit of alerting the local community more widely and reduce the work involved in calling for a public consultation that everybody is well aware must and should take place, for both administrative and ethical reasons. The draft byelaw will be rewritten with closer attention to both local community wishes and legal/administrative style requirements.<sup>27</sup>

## Conclusion

The question is, how can granting legal personality to an element of nature come about in Western legal systems? If we look at places where this new legal paradigm has been introduced, there seem to be two underlying factors: one is a strong community, and the other a situation where nature has been abused to such an extent that the situation has become unbearable. In the Western world, there had been hope that environmental law would contain such abuses. European law has indeed had its successes but, more recently, environment and nature NGOs have been denouncing a breakdown in the system, sadly facing the fact

25 Colin Robertson, email communication (27 July 2017).

26 Tom West, email communication (31 July 2017).

27 <https://www.gov.uk/guidance/local-government-legislation-byelaws>.

that environmental law is constantly thwarted in many places, even in EU Member States.<sup>28</sup> Current methods and tools are not solving our problems. Climate change is threatening the very existence of mankind and biodiversity is being eroded at a tremendous pace. More needs to be done. This is where the concept of Wild Law, Rights of Nature, ecological law and governance, Earth jurisprudence etc enter the picture.

We have a duty to care for the other, whether it is human or non-human, and whether we are landowners or simple land users in one capacity or another. The concepts of duty of care and ownership as a form of guardianship have been elaborated upon in a Human-Nature Declaration Project drafted by the author of the present article.<sup>29</sup> Whether we are landowners or not, we must stop being land abusers. We must all be carers of Mother Earth for generations present and future. More and more Western citizens are becoming aware of the fact that the way we have been managing the world is spiralling down to our own destruction and that we need to reconnect to a reality we had forgotten, and to which we are beginning to reconnect being inspired by both new scientific discoveries and old traditions of indigenous peoples. Wherever we might be on Earth, have we not reached the stage of an unbearable situation? The ecosystem of the River Frome, like many others across lowland Britain, has been adversely impacted by a diversity

of pressures, including water abstraction, intensive farming and pollution from housing and industry. The problems affecting the river, including its meadow, are well known and FTC has been in dialogue about them for years. The difficulty is to define efficient legal instruments that will solve these problems promptly and prevent more problems arising in the future. The Frome community in Somerset, noted for its industry and activism in past centuries, is ready to take up a new challenge. Anybody wishing to support them may contact the FTC, FoRF<sup>30</sup> or the Wild Law SIG co-convenors.<sup>31</sup> Will little Frome lead the way? Our future can only be as good as our dreams.

Please note that the author of this article has tried to reflect the views of everyone involved in supporting the Frome River community initiative. It has taken into account new developments that took place after the Wild Law Special Interest Group Session at the UKELA Annual Conference 2017 and the meeting that took place at Frome Town Hall on Monday 10 July 2017, followed by a visit to the river and its meadow in the afternoon (on that day, Nature's Rights legal advisers as well as Colin Robertson and the author of this article engaged in a friendly exchange with members of the local community). To the author's knowledge, all legal advice has been provided free of charge as a gift to the Frome people and their river ecosystems.

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28 The European Environmental Bureau (EEB) points to various ways in which loopholes are used to bypass environmental legislation. The EEB is the largest network of environmental citizens' organisations in Europe. It currently consists of around 140 member organisations in more than 30 countries.

29 Available on request at [declhumanat@gmail.com](mailto:declhumanat@gmail.com).

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30 River Frome: [improvethesomersetfrome@gmail.com](mailto:improvethesomersetfrome@gmail.com) Sue Everett.

31 [gomezshehana@yahoo.co.uk](mailto:gomezshehana@yahoo.co.uk); [mumtaito@gmail.com](mailto:mumtaito@gmail.com); [michele.wildlaw@gmail.com](mailto:michele.wildlaw@gmail.com).



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