Environmental considerations in planning

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In this paper I seek to explore how "environmental considerations" are taken into account by the planning system.
This is a huge area to cover in one paper so in order to focus my thoughts I have arranged the subject matter under three main headings:

- Procedural requirements
- Substantive requirements
- Human Rights

Under each of these headings I will examine how the planning system deals with the environment and assess how environmental considerations have been, or are proposed to be, taken into account, looking particularly at recent developments.

Before I launch into the main body of the paper, however, I would like to place a few thoughts in your minds, which I would ask you, if possible, to hold there until I have finished.

The first is this. I do not attempt to define what is the environment, for the purposes of this paper; that would be fruitless and too time-consuming. What I do ask you to consider is how the concept of "the environment" (however defined) has expanded over the last 10–15 years. The expansion of the concept of the environment has grown in tandem with the increasing level of environmental awareness and literacy of the general public.

The second thought concerns the planning system. Some, such as Paul Stookes in his paper "Getting to the Real EIA"[1] present the historical purpose of the planning system as giving priority for the development of land over other uses, such as habitats and benign agricultural uses. A purpose which he argues persists to the present day. I suggest a slightly different view. I suggest that the planning system was and is designed to mediate between competing interests *including* the environment. Whilst I understand the position taken by Stookes and others that the environment has for too long been under-represented within the planning system, I shall consider whether the various methods of asserting the significance, some would say pre-eminence, of the environment through the planning system have been successful. I shall explore whether asserting the pre-eminence of the environment could lead to an unbalancing of the planning system which, as I say, was designed to *mediate* between competing interests.

My third and final thought I would ask you to retain is perhaps the most obvious and concerns the undoubted politicisation of the planning system. I daresay this is related to the increased environmental awareness and literacy I referred to a moment ago, but any consideration of the contemporary planning system requires acknowledgement of the political background within which decisions are taken.

With these thoughts I proceed now to consider how the planning system has dealt with environmental considerations in relation to what I have termed procedural requirements.

[1] (2003) Vol.15 No.2 *Journal of Environmental Law* 141.

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Procedural requirements

What I wish to explore under this heading, simply put, is this. The planning system is vulnerable to having imposed on it many and various additional procedural requirements to give greater prominence to the environment. This, it could be argued, is because government, which introduces the additional procedural requirements (whether through purely domestic legislation or by transposition of obligations emanating from Europe), is itself open to political pressure, which in turn derives from the politicisation of the planning system and the expansion of the concept of the environment. This is perfectly proper; this is how democracy is manifested in planning, as in all areas of government.

What I am interested in is whether these additional procedural requirements could be said to lead to an unbalancing of the planning system. In two senses; first that a system designed to mediate may increasingly be required to give prominence to one element amongst many; and second, that the resources required to take account of the additional procedural requirements could be deflected away from the traditional role of the planning system, which is to provide that balance.

The best example of how complex the procedure may become is provided by the Government's Draft Guidance on Strategic Environmental Assessment (SEA), which arises from EU Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment. This is due to apply to plans/programmes whose formal preparation begins after July 21, 2004 (and to those where preparation has already begun by that date but adoption has not been reached by July 21, 2006).

SEA is very similar to, but not exactly the same as, the existing idea of Sustainability Appraisal (SA) of development plans. The Government's Draft Guidance seeks to amalgamate SEA and SA.

To illustrate my point I set out here comments on the paragraphs of the Draft Guidance on SEA which relate to the preparation and content of an "environmental report"

> "(a) An outline of the contents, main objectives of the plan, and relationship with other relevant plans and programmes."

It would be relatively easy for a local authority to summarise its own plan and at least the formal relationship with other relevant plans and programmes (*e.g.* using existing terminology, "this is a local plan that must be in broad conformity with the structure plan"). But is more required? If, using the above example, the structure plan had branched out into a new direction and had a number of radical policies concerning sustainability, would it be a requirement of the local plan to reflect or implement the structure plan's policies beyond broad conformity? In the context of the SEA Directive, which requires the local authority to consult on its draft local plan and the accompanying environmental report, there is much scope for consultees to raise objections at this stage.

> "(b) The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan."

"The relevant aspects of the current state of the environment" requires, surely, preparation of a 'state of the environment' (SOE) report, *i.e.* a snapshot of the condition of a number of key indicators of baseline environmental state. This in itself is a huge task. Again, in the context of the requirement to consult, what is required to be included in the SOE report will only increase in the hands of a cautious local authority, and what is objected to as having been left out can only increase in the hands of an environmentally aware constituency. Add to that complexity the requirement then for the local authority to speculate on the likely evolution (with the attendant interventions from consultees) of the

current state of the environment *without* the implementation of the plan. This amounts to exploration of the control position, the do-nothing option and is likely to be just as contentious and time-consuming as assessing the state of the environment itself.

> "(c) The environmental characteristics of areas likely to be significantly affected."

Setting out the environmental characteristics of areas likely to be significantly affected (by the plan) would not itself be particularly onerous were it not for the consultation and explanation requirement placed on the plan-making body. The environmentally aware and literate resident will know that the sooner his/her issue (protection from development of a certain area because of its environmental characteristics, for example) is fixed and established in the plan-making process the more likely s/he is to succeed.

> "(d) Any existing environmental problems which are relevant to the plan including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409 and 92/43."

In respect of existing environmental problems, in particular those relating to areas of "particular environmental importance", the comments set out at (c) above are just as pertinent.

> "(e) The environmental protection objectives, established at international, Community or national level, which are relevant to the plan and the way those objectives and any environmental considerations have been taken into account during its preparation."

Identifying the international, Community or national environmental objectives which are relevant to a plan may not be a difficult task but, as with the requirement referred to in para.(a) above, the question of whether the emerging plan has adequately taken account of them could be more difficult.

> "(f) The likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors (these effects should include secondary, cumulative, synergistic, short, medium and long-term, permanent and temporary, positive and negative impacts)."

It is para.(f) which appears to require the most from plan-makers. The effect of the plan (and that must mean the individual effect of every single policy) must be assessed against the environment. Note that the environment is characterised as *including* those elements set out (biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage and landscape); the list is not exhaustive and each of those categories must include many more sub-categories for them to be meaningful. Then, the requirement is made that the interrelationship between the various effects of the plan are also to be assessed, including (again the list is not exhaustive): secondary, cumulative, synergistic [*sic*], short, medium, long term, permanent, temporary, positive and negative impacts. Consider how many permutations of effects required to be taken into consideration would arise from a plan of, say 50 policies and a SOE report of 50 environmental indicators. $50 \times 50 = 2{,}500$ impacts. Add to that the interrelationships between the 50 environmental effects, one against the other, which is another $49 \times 49 = 2{,}401$. That is a total of nearly 5,000 individual "impacts", which represents a colossal amount of data.

> "(g) The measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan."

This requirement, to set out the measures envisaged to prevent, reduce and as fully as possible offset any

significant adverse effects on the environment of implementing the plan, would not present too many difficulties for the plan-maker.

> "(h) An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information."

But this requirement, outlining how and why certain alternatives were selected, would cause difficulties, for the reasons set out above in respect of paras (c) and (d).

> "(i) A description of the measures envisaged concerning monitoring."

Monitoring of this process amounts, I submit, to a regular repetition of the process described at (f), that is to re-assess the 5,000 or so individual impacts that lie at the heart of this exercise.

> "(j) A non-technical summary of the information provided under the above headings."

A meaningful non-technical summary of something as complex as what is required would, I suggest, be quite an achievement!

Don't forget that what I have described is only one part of the overall process. In addition to preparing an environmental report, the plan-making authority must also consult (the public, environmental authorities and other EU States in some circumstances) and then after the decision (the adoption of the plan) is made, it must provide information about the decision, monitor the plan's significant environmental effects and finally ensure the environmental report is quality assured.

To assess my central thesis that these additional procedural requirements could unbalance the planning system, I consider the following.

Positives

1. The environment will genuinely be considered from the outset of plan making with the result that "better" environmental decisions will be made.
2. Local populations will move up the public-participation ladder and become informed about all land-use planning policies and feel a sense of "ownership" of resultant plans.
3. Government is correcting decades of imbalance in the planning system in which the environment was undervalued and underrepresented.
4. These procedures will be as effective for plans as EIA has been for individual schemes.

Negatives

1. The plan-making process will be slowed down by and burdened with the extra requirements placed on the plan-making authority.
2. Scarce resources that are required to make the planning system function properly are diverted away from the front line.
3. As a result the planning system will operate less and less effectively, with a concomitant fall in public regard for (or awareness of) what it seeks to do.
4. Much case law will be generated about whether or to what extent the environmental statement has done properly what it is required to do. This will further slow the plan-making process and divert more resources away from where they're most acutely required.
5. The new procedures will be appropriated by the articulate middle class who will use them to prevent that with which they do not hold. It is a moot point whether this accords with "good planning".

The rationale for the undertaking of all of this SEA work is that the environmental report and the results of the consultation are taken into account in the decision-making. In this respect there are obvious parallels with the current system (under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999) which requires decision makers when dealing with individual development schemes to take into account environmental information and to state in their decision that they have done so.

Recent EIA case law could therefore provide us with a glimpse of how these additional procedural requirements, as I have characterised them, might affect the planning system.

In the *Lewisham*[2] case the Court of Appeal showed, essentially, that it is prepared to intervene forcefully to determine that a local planning authority has applied the EIA regulations wrongly and that it falls to the courts to right that wrong. The Court of Appeal held in the *Lewisham* case that the local planning authority was wrong to find that what was proposed was not Sch.2 development, and that no EIA was required.

This is significant, I submit, because it indicates that first, as we already knew, it is for the local planning authority to take the decision about whether a development is an EIA development, not the courts. See *per* Buxton L.J. at para.[7]:

> "Although the application becomes a Sch.2 application by decision of the authority; and does not thereafter become an application for EIA development unless the authority further so decides; the authority cannot avoid the implications of the application being for EIA development simply by not taking the preliminary decisions at all."

The judgement goes on to say, however, that not only must the authority take the decision but in legal terms it must get it right. Buxton L.J. is at pains to make clear that the court is concerned that the decision is right in law; see para.[8]:

> "However fact sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgement. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulations. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgement as embodied in *Wednesbury* simply has no part to play."

It is likely that similarities will emerge between how the courts have interpreted the EIA regulations and how they will, in time, interpret the SEA implementing regulations (when these are enacted).

If I were concerned to see the environment being given greater prominence through the "procedural" route, whether through EIA or SEA regulations, I would take comfort from the *Lewisham* case.

Ultimately, however, the question to be asked is whether these procedures will serve to protect and enhance the environment. Are we in effect constructing a concurrent means of scrutiny (alongside the planning system) to deal with anything concerned with "the environment"? If an EIA were allowed or required to consider the socio-economic dimension of proposed development (as Stephen Tromans contemplates in the June 2003 UKELA journal, "e-law"), then this process would be all but complete.

I don't know whether I run a greater risk of censure in seeking to answer these questions or in not answering them, so I propose to play safe and leave them unanswered!

[2] *R. (on the application Goodman) v Lewisham LBC* [2003] EWCA Civ 140; [2003] J.P.L. 1309.

Substantive requirements

Let us now consider how decision makers are required, substantively, to handle the environmental information in their possession. Is there evidence that the courts are requiring greater priority to be given to environmental considerations?

I consider this question through an analysis of the recent decision in *Thornby Farms*.[3]

An interesting feature of this case, I submit, is that the judges begin to at least address the distinction between the types of consideration that the decision maker is required to take account of. And, crucially, the case addresses the question of whether to make a distinction between them at least partly on the grounds of their provenance; in short, the question was posed in *Thornby Farms,* should objectives have a greater weight because they are derived from EU Directives?

At this stage, however, I would urge a little caution. Whilst *Thornby Farms* suggests that environmental objectives in some contexts might edge slightly ahead of other considerations, that is far from a universal principle. And, as I have suggested, regard also needs to be had to what the effect would be on the planning system of seeking to enhance the status of some considerations over others.

Thornby Farms concerned a decision by a local authority under Pt I of the Environmental Protection Act 1990 to vary an authorisation for an incinerator. By virtue of the Waste Framework Directive (75/442, as amended by 91/156 and 96/350), as implemented domestically by Sch.4 to the Waste Management Licensing Regulations 1994, the authority had to discharge its function "with the relevant objectives", and those objectives are defined (so far as relevant) as:

> "Ensuring that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without:-
> (1) risk to water, air, soil, plants or animals; or
> (2) causing nuisance through noise or odours; or
> (3) adversely affecting the countryside or places of special interest."

In commenting on this requirement, Pill L.J. (with whom Robert Walker L.J. and Laddie J. agreed) said at para.[53]:

> "An objective in my judgement is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the Concise Oxford Dictionary the meaning now adopted is given only a military use: 'towards which the advance of troops is directed'. A material consideration is a factor to be taken into account when making a decision, and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create a hierarchy of material considerations whereby the law would require decision makers to give different weight to different considerations."

[3] *R. (on the application of Thornby Farms Ltd) v Daventry DC* [2002] EWCA Civ 31; [2001] J.P.L. 228 (Note).

In the context of the discussion in this paper the *Thornby Farms* decision presents grounds for caution; it appears that the courts are not yet prepared to accept an enhancement of the status of "environmentally friendly" EU Directives. But that is not necessarily to say that the environment is not being adequately protected.

An interesting further perspective on how Government regards the intersection between EU Directives and the domestic planning system is provided by the consultation paper on the integration of the Habitats Directive with the planning system in England.[4] The Habitats Directive 92/43 is transposed into domestic law by the Conservation (Natural Habitats) Regulations 1994.

The aim of the Government, and the subject on which the consultation paper seeks opinion, is "to bring the planning permission process under the TCPA 1990 and the wildlife licensing regime under the Directive together in a single streamlined process in order to enable effective consideration of all the relevant issues by a single body at one time".

Currently, licence applications (that is for a licence to do work on a site where a protected species is found) are determined by the licensing authority, Defra, on the advice of English Nature, after planning permission, determined by the local authority in the normal way, is granted. The Government is of the view that the two systems overlap considerably, and it proposes that the local authority alone should determine whether the requirement for a licence arises from the granting of planning permission. As the consultation paper puts it:

> "This would mean that all of the issues relevant to a development proposal would be considered as part of a single process rather than in two separate regimes as currently occurs. This would ensure effective implementation of the Directive, remove the need for a separate application for a licence and provide a more efficient overall service."

I am not here concerned with the detail of what is proposed now to fall to local authorities under the new arrangements for wildlife licensing, although my observations on the extra work required of them in respect of the proposed SEA Directive, set out above, might well apply here too.

I am interested here in the question how the courts might approach this new "merged" system if it transpires.

Under the heading *Detail of legislative proposals* the consultation paper states:

> "The Government proposes to introduce new legislation amending the 1994 regulations to place a specific obligation on local planning authorities (or other planning decision makers) to satisfy the requirements of the Directive with respect to European protected species and for derogations to be issued as part of the planning decision process."

Clearly all will turn on the actual wording of the amended 1994 regulations, but the phrase quoted above suggests that this would succeed in giving the "Directive element" of the merged system an enhanced status. Compare the language of, for example, s.43(5) of the Airports Act 1986 and s.2(4) of the Police Act 1997, which impose an obligation merely to have regard to specified objectives.

Human Rights

As you are aware this is in itself a huge area. However, such is its importance to consideration of the environment in the planning system that it cannot go without comment.

[4] Consultation paper on legislative proposals for integration of the Habitats Directive provisions on conservation of European protected species into the land-use planning regime, Defra/ODPM, October 2002.

Essentially, now that *Begum*[5] has been heard in the House of Lords, the Art.6 points are more or less settled. Applying the findings of *Begum* to planning one can see that the House of Lords, although accepting that the local planning authority is not an independent tribunal, is ruling that it would be inappropriate for the findings of fact required for determining a planning permission to be made by anyone but a local authority planning officer. That is someone with experience of the local planning conditions who is able to exercise his or her discretion. The decision in *Begum* of course depends, in its application to planning, upon the High Court's review jurisdiction; in cases however where Art.6 is the only human right engaged, there is no need to adopt a more intensive scrutiny of the decision maker's conclusions of fact than would occur upon such a review.

It is also clearly established, at least at the level of the Court of Appeal, that proportionality does not exist as a separate ground of judicial review in domestic law in a case which does not concern EC law or the Human Rights Convention. In such a case the *Wednesbury* test of unreasonableness remains correct[6].

Perhaps the most high-profile recent human rights case and one which is more relevant to our consideration of how "the environment" has fared in the courts is the decision of the Grand Chamber of the European Court of Human Rights in Hatton.[7] Here it was found that the Art.8 rights of residents close to Heathrow airport had not been infringed by the implementation of a new night noise scheme at the airport.

As was noted by Maurice Kay J. in his judgement in the airport consultation case:[8]

> "There are numerous examples of industrial land use interfering with the right of respect for a person's life or home. Reliance is placed on authorities such as *Sporrong and Lonreth v Sweden* (1982) E.H.R.R. 35, *Lopez Ostra v Spain* (1995) 20 E.H.R.R. 277, *Powell and Rayner v United Kingdom* (1990) 12 E.H.R.R. 355, *Hatton v United Kingdom* (2002) 34 E.H.R.R. 1 and *Marcic v Thames Water Utilities* [2002] 2 W.L.R. 932. ... *Lopez Ostra* was concerned with a polluting factory, *Powell and Rayner* and *Hatton* with aircraft noise generated by flights at Heathrow and in *Marcic* the claimant's house had been damaged by flooding from sewers. *Guerra v Italy* (1998) 26 E.H.R.R. 357 (toxic emissions) and *S v France* (1990) 65 DR 250 (nuisance from a nuclear power station) are to like effect."

In the particular context of *Hatton*, however, the ECtHR did not feel able to find that, in substance, the Government had overlapped its margin of appreciation and failed to strike a fair balance between the right of individuals to respect for their private and family life and home, and the conflicting interests of others and of the community as a whole. More controversially, the ECtHR attached importance to the fact that (as the Court suggests):

> "...in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *Lopez Ostra* the waste treatment plant at issue was illegal in that it operated without the necessary licence, and it was eventually closed down (*Lopez Ostra* judgement pp.46, 47, paras [16–22]). In *Guerra*, too, the violation was founded on an irregular position at the domestic level, as applicants had been unable to obtain information that the State was under a statutory obligation to provide (*Guerra* judgement p.219, paras [25–27])."

[5] *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 W.L.R. 388; [2003] 1 All E.R. 731.
[6] *R. (on the application of Association of British Civilian Internees (Far East Region) v Secretary of State for Defence* [2002] EWHC 2119.
[7] *Hatton v United Kingdom* (App. No.36022/97) (2002) 34 E.H.R.R. 1.
[8] *R. (on the application of Medway Council) v Secretary of State for Transport Local Government and the Regions* [2002] EWHC 2516; [2003] J.P.L. 583.

This would preclude any Art.8 argument by those potentially affected by a planning decision, and it is doubtful whether *Hatton* should be regarded as going so far.

Finally, I should mention the forthcoming House of Lords hearing of the case of *Marcic*, which may throw some further light on this area. This case concerns the liability of Thames Water for repeated flooding of the home of an individual, Mr Marcic. The Court of Appeal[9] found that the failure of Thames to address the repeated flooding constituted a violation of Mr Marcic's rights under Art.8 and Art.1 of the First Protocol, as well as a common law nuisance.

Conclusions

Referring back to my opening remarks, it can perhaps be concluded that the burgeoning importance of environmental considerations in planning, induced by a range of political and legal pressures, has not been an unmixed blessing, even from the viewpoint of those who place great value upon the protection and enhancement of our environment.

My other observation in conclusion is that in the face of increasing demands being placed on it by Europe and the challenges posed by the Human Rights legislation, and bearing in mind the three points I referred to at the beginning of this paper, the planning system has proved to be very adaptable and resilient. Perhaps it is this adaptability and resilience that ultimately will serve to protect the environment most effectively in the future.

[9] *Marcic v Thames Water Utilities* [2002] EWCA Civ 64; [2001] All E.R. 698.