

The Impact of Environmental Law on Planning Decision-Making

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Abstract

This paper seeks to explore the influence of international, European and national environmental law on the English planning system. It will examine how far the wide aspirations for “spatial planning” have been realised in the environmental sphere. It contends that “soft law” and policy statements may well have had as much impact on the decision-making process as coercive laws, and that what has been achieved is a process of structuring decision-making. It argues that the corpus of environmental law has had two important effects at the level of substantive planning law, in expanding the scope of the planning system while narrowing the discretion of decision-makers. The impact of EU environmental law has also had a profound effect upon the ability of persons successfully to challenge planning decisions in the high court. It explains why further work in this direction is probably desirable. Lastly, it calls for cross-disciplinary empirical research into the impact of existing laws upon the decision-making process.

Introduction

The subject matter given to me by your Conference Committee is extremely daunting in its sheer scale. Indeed, I am reminded about what Douglas Adams said about “space”: “Space is big. Really big. You just won’t believe how vastly, hugely, mind-bogglingly big it is. I mean, you may think it’s a long way down the road to the chemist’s, but that’s just peanuts to space.” Defining even the outer bounds of this topic is fraught with difficulty. However, fortified again by some other words of the great Douglas Adams that: “The impossible often has a kind of integrity which the merely improbable lacks,” I have sought to embrace the challenge set me.

Environmental Law

In assessing the impact of environmental law upon town and country planning decision-making it is important to examine what we mean by “environmental law”. Whilst Albert Einstein’s definition that “the environment is everything that isn’t me” is perhaps too wide, it nonetheless reflects its wide canvass. There have been various legal attempts to define what is meant by the environment.¹ Section 1(2) of the Environmental Protection Act 1990, defines the “environment” as consisting “of all, or any, of the [media] the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.”

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¹ The UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters commonly known as the “The Aarhus Convention” seeks to grapple with the meaning of the environment when defining “environmental information”. Article 2(3) stated “Environmental information” means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subpara.(a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subpara.(b) above;

The practice of environmental law too spans a vast array of legal disciplines, from public law, European Union, property and criminal law to the torts of nuisance and negligence. Environmental law is a complex and interlocking body of international treaties (conventions), statutes, regulations, and common law or national legislation (where applicable) that operates to regulate the interaction of humanity and the natural environment, toward the purpose of reducing the impacts of human activity. The discipline however may very broadly be divided into two major subjects: pollution control and remediation, and resource conservation and management.

Town and Country Planning Law

Indeed, on one view, planning law might simply be said to be a form of environmental law concerned with the management of natural resources, but I do not think that would be entirely right, at least not, as far as the origins of planning law in this country are concerned. True, it has always been the case that the system governed by the Town and Country Planning Acts has had a profound influence in regulating our environment, even if that was not its expressed intention and it is particularly interesting to note that in 1923 the “new” concept of town planning was a function of the Ministry of Health². But I think John Alder’s introduction to his seminal work *Development Control*³ got it about right when he said:

“Few people would deny that in this crowded island it is proper for Government to impose restrictions upon the way land is used. What is controversial is the form such restrictions should take and the extent to which the ordinary citizen should have a say in the matter. Since 1947 there has been in force a system of town and country planning which is probably the most sophisticated in the world. The Town and Country Planning Act 1947 conferred wide discretionary powers upon local and central government to prohibit undesirable use of land by private landowners, and more restricted powers to take positive steps to insure that land is used for projects which are thought desirable in the public interest ...”

“Development control” is one core aspect of planning law, something which Alder called “essentially a method of licensing ...” whereby the licensing authority, more commonly known as “the planning authority”, was given a wide discretion. Over the years environmental law in particular that derived from the European Union has to some extent prescribed that wide discretion given to planning authorities by the traditional English planning system. An obvious example is the Habitats Directive and the limits imposed upon the granting consent for development that would adversely affect a European protected area. As Lord Carnwath has recently said of the Habitats Directive:

“It is particularly significant for the town and country planning systems in the United Kingdom because it imposes obligations not only on how the decision-making process must be carried out but also on the decision making outcome.”⁴

But the influence of environmental law both in terms of hard and soft law goes simply beyond the regulatory and development control field. It has always been the case that the system governed by the Town and Country Planning Acts has had a profound influence on our environment. It is perhaps not so much that the interplay of environmental law with land use planning has only recently occurred; it is rather that the nature of the discussion has changed. The planning system pre-dates environmentalism as we understand that term today. It is striking that if we look at the bare bones of the Town and Country Planning Act 1990, it is above all a set of procedures and regulatory tools. It required permission for carrying out building, engineering or similar operations. It did not specify the policy content of the plans. Nowhere in

² See Ministerial Circular 368 of 1923.

³ John Alder, *Development Control* (Sweet & Maxwell, 1979), p.1.

⁴ Foreword to Gregory Jones (ed), *The Habitats Directive: A Developer’s Obstacle Course?* (Hart, 2012).

that statute was environmental protection expressed to be an objective of the system. The legislation was, for the most part, more or less value-neutral.⁵ It left it to the plan-makers to decide their own priorities.

Other, parallel legislation existed which served to protect the natural environment, although any protective effect was usually a by-product of a desire to achieve other goals such as the protection of health, property or amenity. The Green Belt (London and Home Counties) Act 1938; the National Parks and Access to the Countryside Act 1949; the Public Health Acts; the Clean Air Act 1956 and its successors such as the Control of Pollution Act 1974; the licensing regulations; and the common law of nuisance all regulated different aspects of the environment. But it is fair to say that these other measures were however by and large reactive. Marie-Louise Larsson⁶ is thus probably correct when she says:

“Before the Brundtland Report was published the discussion centered [sic] on an issue-by-issue approach and environmental threats were thought of as rather distinct. Today, ecology and development are clearly linked to gain ‘sustainable development’. Environmental issues are to be integrated into all other discussions in line with a ‘multi-media’ approach, and efforts are made to change consumer behaviour.”

This paper examines how environmental law has increasingly impacted upon planning decisions in terms of dictating outcomes by a process of integration driven to a significant extent by the implementation of international law and in particular EU law. It sketches out some of the trends, and touches on some of the challenges involved in integrating environmental law requirements with the decision-making process that is carried out pursuant to planning law.

European and international environmental influences on aspirations for the planning system

If we take a step back and consider the international influences on our planning system, we can identify three significant trends. The first is the elevation of the concept of “sustainable development”; the second is the increasing emphasis on public involvement in environmental decisions; and the third is the adoption of a philosophy of “spatial planning”. Each trend in turn has had repercussions on the manner in which decisions are expected to be made under our system of planning law.

The discourse of sustainable development and the Rio Convention

Perhaps the most important trend in terms of the impact of environmental law in planning law has been the adoption of the discourse of “sustainable development”. This, of course, stems from the Brundtland definition⁷:

“Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future.”

At the United Nations Conference on Environment and Development, the United Kingdom subscribed to the declaration which proclaimed:

“In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

⁵ The privileged position given to agricultural development in the post WWII planning legislation being an exception.

⁶ *Legal Definitions of the Environment and of Environmental Damage* at <http://www.scandinavianlaw.se/pdf/38-7.pdf> [Accessed September, 2012].

⁷ Report of the World Commission on Environment and Development: *Our Common Future* (OUP, 1987), Ch.1 para.49, but which although appearing in the NPPF does not apparently expressly form part of the government’s definition of “sustainable development.” On the precautionary principle as applied to planning see further Lee, *Precautionary Tales: Risks, Regulation and Precautionary Principle* Ch.9 in *Economics Ethics & the Environment* Boswell & Lee (eds) (Cavendish, 2002).

It further declared that:

“the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁸

The United Kingdom also committed itself to the Rio Convention on Biodiversity (“CBD”). Article 6 of the Convention states:

“Each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and
- (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.”

Article 8 of the CBD is entitled “In-Situ Conservation” and says:

“Each Contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity:
[...]
- (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;
- (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies;
[...]
- (i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components.”

Article 10 was of also direct relevance:

“Each Contracting Party shall, as far as possible and as appropriate:

- (a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;
- (b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.”

It almost goes without saying that the Rio CBD was “soft” law, with no enforcement mechanism for these obligations, which only applied “as far as possible and as appropriate”.⁹ However, the concept of sustainability was incorporated into national policy guidance after the Convention had entered into force.

⁸ Rio Declaration on Environment and Development (June 14, 1992) principles 4 and 15.

⁹ For a recent critique of the effectiveness of the CBD see MacKenzie: A Comparison of the Habitats Directive with the 1992 Convention on Biological Diversity in Ch.2 of Gregory Jones (ed), *The Habitats Directive: A Developer’s Obstacle Course?* (Hart, 2012).

PPG1

PPG1 contained a sub-heading entitled “Sustainable Development” and four paragraphs of policies including substantively encouraging use of urban and previously-developed sites, and concentrating trip-generating uses in town centres.¹⁰

PPS1

PPG1 was replaced by PPS1, which was entitled Delivering Sustainable Development.¹¹ The title indicated increased importance being accorded to the concept, and para.3 asserted that “Sustainable development is the core principle underpinning planning.” There was a raft of specific policies aimed at plan-making and decision-making. Most relevant for our purposes, para.19 stated that:

“planning decisions should be based on:

- up-to-date information on the environmental characteristics of the area;
- the potential impacts, positive as well as negative, on the environment of development proposals (whether direct, indirect, cumulative, long-term or short-term); and,
- recognition of the limits of the environment to accept further development without irreversible damage.

Planning authorities should seek to enhance the environment as part of development proposals. Significant adverse impacts on the environment should be avoided and alternative options which might reduce or eliminate those impacts pursued. Where adverse impacts are unavoidable, planning authorities and developers should consider possible mitigation measures. Where adequate mitigation measures are not possible, compensatory measures may be appropriate. In line with the UK sustainable development strategy, environmental costs should fall on those who impose them—the ‘polluter pays’ principle.”

At para.29, it said:

“In some circumstances, a planning authority may decide in reaching a decision to give different weight to social, environmental, resource or economic considerations. Where this is the case, the reasons for doing so should be explicit and the consequences considered. Adverse environmental, social and economic impacts should be avoided, mitigated, or compensated for.”

Accordingly, by 2005 a very strong emphasis on “sustainability” had developed, at least in terms of language, not least by requiring decision makers to set in terms of reasoning. Planning decision makers were being enjoined to ensure that they had environmental information before them, to consider carefully all the environmental effects, to avoid significant adverse effects and fully to explain their reasoning for giving more or less weight to the environmental considerations in reaching their decision.

NPPF

Ostensibly, it appears that this emphasis on sustainability has been carried over, albeit accompanied by rather less detailed practical guidance, into the new National Planning Policy Framework (“NPPF”) adopted on March 27, 2012.¹² This now states that “The purpose of the planning system is to contribute to the achievement of sustainable development.”¹³ “Sustainable development” is defined with the Brundtland

¹⁰ Planning Policy Guidance (PPG) Note 1: General Policies and Principles (February 1997) paras 4–7.

¹¹ ODP, PPS1: *Delivering Sustainable Development* (HMSO, 2005).

¹² See <http://www.communities.gov.uk/publications/planningandbuilding/nppf> [Accessed September, 2012].

¹³ DCLG, *National Planning Policy Framework* (March 2012) para.6.

definition but apparently does not expressly form part of the government's definition of "sustainable development" for the purposes of the NPPF.¹⁴

There is, though, a certain tension between the ministerial foreword which says, "Development that is sustainable should go ahead, without delay",¹⁵ and the definition of the so-called "presumption in favour of sustainable development" at para.14, which is to the effect that unless material considerations indicate otherwise, permission should be granted for development unless the adverse impacts of doing so would "significantly and demonstrably outweigh the benefits"—something that is usually very difficult to prove when it relates to environmental harm, and may hark back to the pre-Rio policy. The origins of the NPPF have been traced back to the Conservative Party Policy Green Paper, *Open Source Planning*, which called for "an entirely permissive planning approach" where local plans were not up to date but development conformed to national guidance, and to the 1988 version of PPG1 which stated:

"There is always a presumption in favour of allowing applications for development ... unless that development would cause demonstrable harm to interests of acknowledged importance ... if the planning authority consider it necessary to refuse permission, the onus is on them to demonstrate clearly why the development cannot be permitted."¹⁶

That policy made no allowance for the "precautionary principle", and where it is applied in cases where the science is unproven, it in effect places a burden of proof on objectors which is impossible to discharge.¹⁷

This brief look at the policy guidance illustrates the major trend, which is that the United Kingdom's international obligations under the Rio Convention and the sustainability approach have had an influence on planning decisions through the medium not of new law but of revised policy guidance. Since the Planning and Energy Act of 2008, when drawing up development plan documents planning authorities have been placed under a statutory duty to act "with the objective of contributing to the achievement of sustainable development".¹⁸ However, there has not been felt to be a need to impose a similar statutory duty on decision-makers, because relevant national policy has long been treated by the courts as a consideration to which decision-makers must have regard.¹⁹

Whether the NPPF has diminished the degree of environmental protection built into the planning system will not become clear for some time. However, what the controversy over the NPPF does indicate is the fragility of basing environmental protection upon policy norms. This fragility does not arise solely because the policy may change. It also arises because even the most stringent and sensible policies may be departed from by decision-makers, provided that they give a rational reason for doing so. It has recently been seen fit to reverse the effect of the House of Lords' judgment in *Tesco Stores v Secretary of State for the Environment*,²⁰ which had held that authorities were entitled to take extraneous benefits offered by way of planning obligations into account when determining applications, by putting the policy tests for use of planning obligations into statute.²¹ Given the importance that is supposedly attached to "sustainable development" as a core principle of the planning system, it might be thought appropriate to introduce a statutory duty to expressly adopt a test of sustainability in relation to individual planning decisions.

¹⁴ DCLG, *National Planning Policy Framework* (March 2012) pp.ii, 2.

¹⁵ DCLG, *National Planning Policy Framework* (March 2012) p.ii.

¹⁶ Morag Ellis, "Green growth: do blue and yellow really make green?" [2011] J.P.L. 11, 1433at 1434 and 1441.

¹⁷ See the comments on the effect of similar policies in *Vicarage Gate Ltd v First Secretary of State* [2007] EWHC 768 (Admin) at [44]–[49] per H.H. Judge Gilbart QC.

¹⁸ Planning and Compulsory Purchase Act 2004 s.39(2), added by s.183 of the Planning Act 2008.

¹⁹ *EC Gransden & Co Ltd v Secretary of State for the Environment* (1987) 54 P. & C.R. 86 at 94 per Woolf J.

²⁰ *Tesco Stores v Secretary of State for the Environment* [1995] 1 W.L.R. 759.

²¹ Community Infrastructure Levy Regulations 2010 (SI 2010/948) reg.122.

Public participation and the Aarhus Convention

A second significant shift has been influenced by international “soft” law: an effort to increasingly involve members of the public in the planning process in relation to environmental matters. The Rio Declaration stated:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”²²

Under the auspices of the UN Economic Commission for Europe, the United Kingdom subscribed to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Aarhus Convention”) in June 1998. This came into force in October 2001. The European Union also acceded to this Convention.

Article 6 of the Aarhus Convention requires provision for public participation in “decisions on whether to permit proposed activities” which are either listed in Annex I to the Convention (large-scale industrial, farming, mining, infrastructure or waste-disposal activities), or are such as the State Party considers “may have a significant effect on the environment”. It then sets out detailed requirements, as follows:

- “2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:
 - (a) The proposed activity and the application on which a decision will be taken;
 - (b) The nature of possible decisions or the draft decision;
 - (c) The public authority responsible for making the decision;
 - (d) The envisaged procedure, including, as and when this information can be provided:
 - (i) The commencement of the procedure;
 - (ii) The opportunities for the public to participate;
 - (iii) The time and venue of any envisaged public hearing;
 - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and
 - (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.
3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

²² Rio Declaration on Environment and Development (June 14, 1992) principle 10.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.
6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure ... The relevant information shall include at least ... :
 - (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
 - (b) A description of the significant effects of the proposed activity on the environment;
 - (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
 - (d) A non-technical summary of the above;
 - (e) An outline of the main alternatives studied by the applicant; and
 - (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.
7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.
8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.
9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.”

Of greatest note for present purposes are the requirements for “early ... timely, adequate and effective” provision of information, the affording of a reasonable period of time to prepare and participate, and the taking of “due account” of the outcome of the public participation.

In particular, there is good cause to wonder whether the notification requirements under the Town and Country Planning (Development Management Procedure) (England) Order 2010²³ comply with art.6. Under the 2010 Order, the applicant for permission must notify owners or tenants of the land individually, but otherwise the local authority need only to publish the existence of the application on its website, by site display, and by advertisement in a local newspaper. None of these methods are particularly satisfactory, as very often potentially affected people do not read the small advertisements at the back of local newspapers, make a point of logging on to the planning section of the Council website, or pass directly by the site. Indeed, the wider the impacts of the proposed development, the less adequate these measures seem.

The Convention provides a mechanism for members of the public to refer its Parties to an independent Compliance Committee if they consider that the Parties are not applying the Convention. However, the Committee can only make non-binding recommendations, and the peer pressure from other States/Parties

²³ Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184).

to the Convention is limited to “non-confrontational, non-judicial and consultative measures”.²⁴ As of last year, only 11 complaints had been submitted to the Committee against the United Kingdom, and only two decisions were made relating to public participation, one of which related to Scotland and one to Northern Ireland²⁵ so it is too early to say how compliant the English procedures will be found to be.

Insofar as an EU Member State’s national law implements EU law relating to the field covered by the Aarhus Convention, the Court of Justice of the European Union has held that it is incumbent upon the national courts to interpret their national implementing law “to the fullest extent possible” consistently with the objectives of the Convention.²⁶ However, provisions of the Aarhus Convention will not have direct effect in EU law unless they impose “a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”²⁷ Accordingly, the Aarhus Convention does not for the most part have any direct legal enforceability in England and Wales.

The United Kingdom and European Union have taken various steps to implement the Aarhus obligations which have repercussions for making sure planning decisions are compatible with the Convention. In relation to access to environmental information, Council Directive 2003/4²⁸ on public access to environmental information has been implemented by means of the Environmental Information Regulations 2004.²⁹ Public authorities, including planning authorities, must progressively make easily accessible by electronic means all the environmental information which they hold, and must supply environmental information upon request as soon as possible and within 20 days.³⁰ There are exceptions where the information belongs to a list of categories and the public interest in non-disclosure outweighs the interest in disclosure.³¹ These Regulations enable members of the public to obtain information relating to a proposed development which the planning authority has received from other sources. It therefore enables members of the public to make representations on matters which would otherwise not be part of the planning application and available for consultation. An example might be a proposal for redevelopment of a site in a low-lying area, where the local authority is in possession of information relating to flooding.

In relation to public participation in decision-making, additional provisions were incorporated into the procedures for environmental impact assessment by Directive 2003/35,³² and through this into the national implementing regulations. That procedure will be considered later on.

Spatial Planning: a means to achieving “sustainable development”

The third important trend has been a change in the way that planners conceptualise their own discipline. It is perhaps easy to forget that the concept at the very heart of Town and Country Planning in this country over the last decade has been “Spatial Planning” and, theoretically, it still is. Many may be unaware that the phrase in English seems to have originated in a Council of Europe publication, the European Charter of Regional and Spatial Planning³³ which was published in 1984. This said as follows:

“Regional/spatial planning gives geographical expression to the economic, social, cultural and ecological policies of society. It is at the same time a scientific discipline, an administrative technique and a policy developed as an interdisciplinary and comprehensive approach directed towards a

²⁴ Aarhus Convention, art.15; Decision 1/7 of the First Meeting of the Parties held at Lucca Italy, October 21–23, 2002, and Annex to Decision 1/7 at paras 14 and 37(h).

²⁵ Ole Pedersen, *Price and participation: the UK before the Aarhus Convention’s Compliance Committee*, [2010] Env. L. Rev. 13(2), 115–123 at 116–117.

²⁶ *Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky* (C-240/09) [2012] 3 W.L.R. 278 at [50].

²⁷ *Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky* (C-240/09) [2012] 3 W.L.R. 278 at [44].

²⁸ Directive 2003/4 on public access to environmental information and repealing Council Directive 90/313 [2003] OJ L41/26.

²⁹ Environmental Information Regulations 2004 (SI 2004/3391).

³⁰ Environmental Information Regulations 2004 (SI 2004/3391) reg.4(1); reg.5(1) and (2).

³¹ Environmental Information Regulations 2004 (SI 2004/3391) reg.12(1).

³² Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337 and 96/61 [2003] OJ L156/17.

³³ *Recommendation Rec (84)2E of the Committee of Ministers, Council of Europe*, January 25, 1984.

balanced regional development and the physical organisation of space according to an overall strategy. ... Regional/spatial planning should be democratic, comprehensive, functional and orientated towards the longer term. Democratic: it should be conducted in such a way as to ensure the participation of the people concerned and their political representatives. Comprehensive: it should ensure the co-ordination of the various sectoral policies and integrate them in an overall approach. Functional: it needs to take account of the existence of regional consciousness based on common values, culture and interests sometimes crossing administrative and territorial boundaries ... Long-term oriented: it should analyse and take into consideration the long-term trends and developments of economic, social, cultural, ecological and environmental phenomena and interventions ...”

Significantly, the Charter went on to say that “The achievement of regional/spatial planning objectives is essentially a political matter”.³⁴ By implication, this was a matter calling not for *laws* dictating an answer, but for policy choices made by representative institutions. This is something which the House of Lords was later to emphasise in respect of planning in the *Alconbury* case. Lord Hoffmann for instance said:³⁵

“In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. Sometimes the subject matter is such that Parliament can itself lay down general rules for enforcement by the courts. Taxation is a good example: Parliament decides on grounds of general interest what taxation is required and the rules according to which it should be levied. The application of those rules, to determine the liability of a particular person, is then a matter for independent and impartial tribunals such as the general or special commissioners or the courts. On the other hand, sometimes one cannot formulate general rules and the question of what the general interest requires has to be determined on a case by case basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved.”

At a European Union institutional level, Member States and the Commission debated and agreed the European Spatial Development Perspective (“ESDP”) as a framework for their policies, although it was unanimously agreed that this would not provide for any new responsibilities at Community level.³⁶ It is worth noting that ever since the Maastricht Treaty there has been express reference to there being European Union competence in matters affecting town and country planning. Legislative initiative in this field must be passed by unanimity rather than qualified majority voting,³⁷ which in addition to the sentiment that planning should be a “political” matter, may go some way towards explaining why there has been no effort to translate the ESDP into a legislative programme.

The ESDP was to a considerable extent preoccupied with the forthcoming realisation of European monetary union. In a manner that many might think prescient in the light of subsequent events, the document adverted to the fact that there would be no ability to devalue currencies to maintain competitiveness and stated that a fundamental objective of policy should be to ensure that growth was balanced, so that countries’ economies and societies did not diverge. This was to be achieved through fomenting competitiveness.³⁸

³⁴ Recommendation Rec (84)2E of the Committee of Ministers, Council of Europe, January 25, 1984, p.2.

³⁵ *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2001] 2 W.L.R. 1389 at [69] per Lord Hoffmann.

³⁶ This was recognised in the Final Conclusions issued by the German Presidency at the close of the Informal Council of EU Ministers responsible for Spatial Planning who had approved the European Spatial Development Perspective (Potsdam, May 10–11, 1999) para.(5) at http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/pdf/concl_en.pdf [Accessed September, 2012].

³⁷ Originally in art.130s of the Treaty Establishing the European Community, as inserted by art.G, sub-para.38 of Title II to the Treaty on European Union (Maastricht, February 7, 1992). Currently this is art.192 sub-art.2 para.(b) of the Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty in 2007).

³⁸ Commission, *European Spatial Development Perspective: Towards Balanced and Sustainable Development of the Territory of the European Union* (Luxembourg, Office for Official Publications of the European Communities, May 1999) p.7–11, 19.

The planning ministers who adopted it considered that there were “three fundamental goals of European policy” to be achieved in all regions of the European Union : “economic and social cohesion”; “conservation and management of natural resources and the cultural heritage”; and “more balanced competitiveness of the European territory”.³⁹ What was significant was its call for what it described as “an integrated spatial development”, which was explained as follows:

“Member State government and administrative agencies as well as EU services should consider, at an early stage, sectoral and spatial conflicts and timing difficulties and set the right priorities ... There is thus a need for close co-operation amongst the authorities responsible for sectoral policies; and with those responsible for spatial development at each respective level (horizontal co-operation); and between actors at the Community level and the transnational, regional and local levels (vertical co-operation ...). Co-operation is the key to an integrated spatial development policy and represents added value over sectoral policies acting in isolation.

Integrated spatial development policy at EU scale must, therefore, combine the policy options for development of certain areas in such a way that national borders and other administrative hurdles no longer represent barriers to development. The ESDP provides the framework for integrated application of the policy options. Its application is not the responsibility of one authority but of a wide range of spatial development (land use, regional planning, urban planning) and sectoral planning authorities.”⁴⁰

By the end of the 1990s, there was a significant degree of frustration among planning professionals in this country about a failure to integrate environmental assessment into plan-making at an early stage, and a failure to integrate planning with public investment programmes. Academics in the United Kingdom advocated a shift away from what they described as a “sectorally isolated, “development-led”, “lean and mean” regulatory system”.⁴¹

In 2001, the Royal Town Planning Institute published its paper *A New Vision for Planning*, which argued:

“[T]he range of issues affecting the future of any particular locality is no longer restricted to narrow land use matters but also involves for example, health, energy and urban and landscape design. If planning decisions are to be relevant new approaches are required, to encompass this wider agenda, that provide genuinely *SUSTAINABLE* frameworks for the management of change in society.”⁴²

As the paper itself explained, this had been heavily influenced by the Rio Convention on Biodiversity. We have seen already that the concept at the heart of that Convention, “sustainable development”, has come to be the dominant paradigm through which the planning system is viewed. However, it took until this millennium for this European approach to really be reflected on a legislative level in the United Kingdom, and the “spatial” discourse was reflected in the reforms of the Planning and Compulsory Purchase Act 2004. The Government guidance on the new system in PPS1 stated as follows:

“The new system of regional spatial strategies and local development documents should take a spatial approach. Spatial planning goes beyond traditional land use planning to bring together and integrate policies for the development and use of land with other policies and programmes which influence the nature of places and how they function. That will include policies which can impact on land use, for example by influencing the demands on or needs for development, but which are not capable of being delivered solely or mainly through the granting or refusal of planning permission and which may be implemented by other means. Where other means of implementation are required these should

³⁹ Final Conclusions issued by the German Presidency at the close of the Informal Council of EU Ministers responsible for Spatial Planning who had approved the European Spatial Development Perspective (Potsdam, May 10–11, 1999) para.(3).

⁴⁰ Commission, *European Spatial Development Perspective*, p.35.

⁴¹ Geoff Vigar and Patsy Healey, “Territorial Integration and ‘Plan-led’ Planning”, (1999) *Planning Research and Practice* 14:2, 153–169 at 168.

⁴² Royal Town Planning Institute, *A New Vision for Planning Delivering Sustainable Communities: an Agenda for Action* (2001).

be clearly identified in the plan. Planning policies should not replicate, cut across, or detrimentally affect matters within the scope of other legislative requirements, such as those set out in Building Regulations for energy efficiency.”⁴³

The concept reflects the aspiration to have “joined-up government”. Since policies in one sphere will often impact upon those in other spheres it is obviously sensible for these cross-impacts to be taken into account when land-use policies are formulated. The policy clearly recognised that the planning system was not the only regime controlling development, and was intended to ensure that there should be synergy between the various regimes. We shall look at the practical difficulties with this approach later.

As “sustainable development” came to be seen as the central objective of the planning system, so the newly integrated “spatial planning” became an instrument to achieve this. Tewdwr-Jones, Gallent and Morphet observed in 2010 that “Planning ... is no longer 'in the lead' but it is a key component and facilitator of delivery”.⁴⁴ Paragraph 28 of PPS1 explained how sustainable development was to be achieved through effective plan-making guiding decisions. It said:

“Considering sustainable development in an integrated manner when preparing development plans, and ensuring that policies in plans reflect this integrated approach, are the key factors in delivering sustainable development through the planning system. Planning decisions should be taken in accordance with the development plan unless other material considerations indicate otherwise. Planning decisions taken in accordance with the plan are therefore key to the delivery of sustainable development.”

The present government through the Localism Act 2011 has continued to emphasise the importance of joined-up governance in promoting sustainable development, by adding a mandatory “duty to co-operate in relation to the planning of sustainable development” where matters affect multiple planning authorities.⁴⁵

This “spatial planning” approach has come to influence micro-level decision-making too: since any particular development of land can impinge upon the achievement of policy objectives in any number of spheres, applying the logic of this approach, it makes sense to consider all of them when deciding whether to grant permission. And so it has come to pass that the legislature has seen fit to require planning decision-makers to consider all sorts of matters when reaching their decisions.

Requiring more considerations to be treated as material

It has always been the case that decision-makers were required to take into account “relevant considerations”. However, ordinarily in English planning law while “any consideration relating to the use and development of land is capable of being a planning consideration”,⁴⁶ where no list of mandatory relevant considerations is stipulated by legislation it is for the decision-maker to decide whether something is relevant and the courts will not interfere unless that decision is unreasonable. That will be done where the matter in question was:

“fundamental to the decision, or ... it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision.”⁴⁷

⁴³ ODPM, *PPS1: Delivering Sustainable Development* (HMSO, 2005) para.30.

⁴⁴ Mark Tewdwr-Jones, Nick Gallent and Janice Morphet, “An Anatomy of Spatial Planning: Coming to Terms with the Spatial Element in UK Planning” (2010) *European Planning Studies* Vol.18(2), 239–57 at 249.

⁴⁵ New s.33A of the Planning and Compulsory Purchase Act 2004 added by s.110(1) of the Localism Act 2011.

⁴⁶ *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281 per Cooke J. at 1294.

⁴⁷ *Bolton MBC v Secretary of State for the Environment & Greater Manchester Waste Disposal Authority* (1991) 61 P. & C.R. 343 at 352 per Glidewell L.J.

What environmental legislation has done is to broaden the range of considerations that decision-makers must take into account as a matter of law, and increase the volume of information relating to those considerations.

Protected areas/designations

The main means of protecting biodiversity has historically been through targeted protection of individual species or areas. Most important among these is the SSSI designation. Special Sites of Scientific Interest may be designated as such under s.28 of the Wildlife and Countryside Act 1981 by reason of their fauna, flora, geological or physiographical features. By virtue of s.28E of that Act, no operation specified in the notification designating the site may be carried out without the written consent of Natural England.

A planning authority will also owe a duty under s.28G(1) and (2) of the Wildlife and Countryside Act:

“to take reasonable steps, consistent with the proper exercise of the authority’s functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.”

Under s.28I of the Act, before granting permission for operations “likely to damage” the features or which the SSSI was designated, whether or not they take place on the land comprised in the SSSI, the authority is required to consult Natural England and give 28 days for it to respond. The planning authority has to take Natural England’s representations into account in deciding whether to grant permission and if so, on what conditions. It must notify Natural England of the terms of the permission and must not permit works to start within 21 days of that notification. This gives Natural England time to intervene to protect the site.

It is an offence to carry out notified operations without reasonable excuse (s.28P(1)), but if planning permission has been obtained pursuant to s.28I this counts as a reasonable excuse (s.28P(4)(a)). If the planning authority grants permission without complying with the s.28I procedure, it will be guilty of an offence itself (s.28P(5A)). These offences are subject to an unlimited fine.

What we see here is a clear requirement, backed with financial sanctions, imposed upon planning authorities to consider the SSSI status of the area and take advice on the implications of the application for its special features.

There is a host of designations: National Parks, Areas of Outstanding Natural Beauty, Local Nature Reserves, Special Protection Areas (“SPAs”), Special Areas of Conservation (“SACs”), and so on. The first three of course are provided for in the National Parks and Access to the Countryside Act 1949 and those designations are largely amenity-focused rather than being purely aimed at conservation. SPAs and SACs derive from EU environmental law and have a specific wildlife conservation agenda. Typically, statute requires planning authorities to “have regard to” these designations and the underlying conservation objectives. Since 1995, where development affects a National Park, statute has provided that the planning authority must have regard to the purposes for which National Parks are managed.⁴⁸ Likewise, s.85(1) of the Countryside and Rights of Way Act 2000 provides that:

“In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.”

Similarly, the Conservation of Habitats and Species Regulations 2010 state that:

⁴⁸ National Parks and Access to the Countryside Act 1949 s.11A(2); *R. (on the application of Council for National Parks Ltd) v Pembrokeshire Coast National Park Authority* [2005] EWCA Civ 888; [2006] J.P.L. 415 at [22]–[23] per Maurice Kay L.J. See further discussion below.

“a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.”⁴⁹

In its latest White Paper, the government proposed creating an additional “local green space” designation. With a clear nod to spatial planning, it stated:

“Past environmental action in England has often taken place on too small a scale to achieve overall success and has overlooked crucial links, such as between wildlife sites and the wider countryside, or between rural and urban areas. Policies and practices have too often been conceived and implemented in isolation from each other. Both the NEA [National Ecosystem Assessment] and *Making Space for Nature* identify the need for a more coherent approach, working at a larger scale to reflect natural boundaries, joining up across the landscape and encouraging collaboration between sectors ... We need a more strategic and integrated approach to planning for nature within and across local areas, one that guides development to the best locations, encourages greener design and enables development to enhance natural networks for the benefit of people and the environment as part of sustainable development. We will retain protection and improvement of the natural environment as core objectives for local planning and development management. The planning system will continue to facilitate coherent and resilient ecological networks in association with local partners and reflect the value of natural systems. We want the planning system to contribute to our objective of no net loss of biodiversity; to encourage local authorities to promote multi-functional development so that we get the most from land; and to protect our best and most versatile agricultural land.”⁵⁰

It expressed an ambition to create “Nature Improvement Areas” which could be recognised in Local Plans, and to create a framework allowing for “offsetting” of harm to biodiversity with restoration or creation of habitats.⁵¹ This approach is now reflected in the NPPF, which provides for Local Plans to designate small areas of “demonstrably special” land as “Local Green Space” with equivalent protection to the Green Belt, such that development will only be allowed to proceed in “very special circumstances”.⁵²

Biodiversity duty

Since 2006, Parliament has required that every public authority must “in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity”, such purpose being defined as including the creation, restoration or enhancement of a habitat or population.⁵³

Landfill: an extreme case

A particularly extreme example of the legislature dictating the considerations that the planning authority must consider is to be found in the Environmental Permitting Regulations.⁵⁴ Not only must the planning authority have regard to the objectives and requirements of the Landfill Directive, but it must in all cases have regard to the following:

- “(a) the distances from the boundary of the site to residential and recreation areas, waterways, water bodies and other agricultural or urban sites;
- (b) the existence of groundwater, coastal water or nature protection zones in the area;

⁴⁹ Conservation of Habitats and Species Regulations 2010 (SI 2010/490) reg.9(5).

⁵⁰ *White Paper* pp.15, 21–2.

⁵¹ *White Paper* pp.21–2.

⁵² NPPF paras 76–78.

⁵³ Natural Environment and Rural Communities Act 2006 s.40(1) and (3).

⁵⁴ Waste (England and Wales) Regulations 2011 (SI 2011/988) regs 16–18 and 20(1).

- (c) the geological and hydrogeological conditions in the area;
 - (d) the risk of flooding, subsidence, landslides or avalanches on the site;
 - (e) the protection of the nature or cultural patrimony in the area.
- [...]
- emissions of odours and dust,
 - wind-blown materials,
 - noise and traffic,
 - birds, vermin and insects,
 - formation and aerosols,
 - fires.⁵⁵

Financial incentives

The last main way in which material considerations have been expanded is with regard to financial incentives. Over the last few years, the Coalition Government has moved away from targets and towards financial incentives and penalties as a means of prompting local authorities to implement national priorities. Having started with the “new homes bonus”, this approach is being applied to environmental ends with the government’s policy to enable local authorities to retain business rates levied on renewables.⁵⁶ Parliament has legislated to make clear that financial considerations, defined as financial assistance from Ministers of the Crown and income from Community Infrastructure Levy, are mandatory material considerations for the purpose of determining applications under s.70 of the Town and Country Planning Act.⁵⁷

It may be that the impact of development on local finances should always have been a material consideration even in the absence of the legislative change. In July, the Supreme Court delivered judgment in the case of the *Health and Safety Executive v Wolverhampton CC*.⁵⁸ That case concerned not the granting of permission, but the revocation or modification of a permission which probably ought not to have been granted for four blocks of student accommodation close to a liquefied petroleum gas facility. The HSE had asked the Council to revoke permission to build some of the flats, and the Council had refused to do this on the basis that it would not be expedient to spend tax monies buying out the developer, but would be more cost-effective to regulate or buy out the gas facility. The HSE contended that the Council should have had regard only to planning merits when deciding whether to revoke the permission. If it was in principle unacceptable for people to be permitted to live next to this facility, they argued that the authority had to buy out the developer at whatever cost to the public purse. The Supreme Court Justices unanimously held that in general terms “a public authority, when deciding whether to exercise a discretionary power to achieve a public objective, is entitled to take into account the cost to the public of so doing”.⁵⁹ Lord Carnwath said:

“‘Material’ in ordinary language is the same as ‘relevant’. Where the exercise of the power, in the manner envisaged by the statute, will have both planning and financial consequences, there is no obvious reason to treat either as irrelevant.”⁶⁰

The HSE’s argument was based on the widely accepted principle that planning permissions should not simply be sold to the highest bidder. Lord Carnwath considered that the statutory context of s.70 applications was different to revocations under s.97 of the Act:

⁵⁵ Council Directive 1999/31 on the landfill of waste [1999] OJ L182/1 paras 1.1 and 5 of Annex I, applied by reg.20(1) of the Waste (England and Wales) Regulations 2011 (SI 2011/988).

⁵⁶ DCLG, *Business Rates Retention Scheme: Renewable Energy Projects—a Statement of Intent* (May 2012).

⁵⁷ Localism Act 2011 s.143(2) substituting s.70(2) of the Town and Country Planning Act 1990.

⁵⁸ *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34.

⁵⁹ *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34 at [24]–[25] per Lord Carnwath.

⁶⁰ *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34 at [26].

“Under section 70 the planning authority has a duty to act, and it has a limited choice. It must either grant or refuse permission. Its decision must be governed by considerations material to that limited choice. Further, the decision normally has no direct cost consequences for the authority (unless exceptionally it has a direct financial interest in the development, when other constraints come into play). Under section 97, by contrast, the authority has no obligation to do anything ... if it does decide to act, it must bear the financial consequences, in the form of compensation. No doubt under section 70, planning permission cannot be ‘bought or sold’. But section 97 creates a specific statutory power to buy back a permission...Cost, or value for money, is naturally relevant ... To speak of the ‘self-interest’ of the authority in this context is unhelpful. A public authority has no self-interest distinct from that of the public which it serves.”

Lord Carnwath’s comments are clearly capable of applying to decisions on whether to grant permissions in the first place, where there *are* “direct cost consequences for the authority” in taking a particular course of action.

In addition to prescribing that regard must be had to fiscal consequences of development, the Government seems to have gone further and to be advocating voluntary “Community Benefit Payments” by those promoting renewable energy schemes. Important impetus for endorsing these has been given by the mandatory target for use of renewable energy which is set by European Union law.⁶¹ The Department for Energy and Climate Change has stated as follows:

“Alongside the planning system for onshore wind Government is working to create a new relationship between renewable energy projects and the communities that host them, as we believe communities should be rewarded for the contribution they are making to wider society, and local authorities supported in making decisions on local energy projects ...

To encourage investment and growth in local renewable energy projects, the Government has committed to ensuring business rates for renewable projects are retained in full by local authorities so they can be used to directly benefit the local area ... The Government also welcomes the Community Engagement Protocol announced by renewableUK ... The protocol specifies a £1,000 minimum payment per year per megawatt of installed wind power during the lifetime of the wind farm. At present most benefits are cash payments but communities can also benefit through job creation, training and energy efficiency measures.”⁶²

Unlike a statutory planning obligation, which has to be justified as being necessary and proportionate to mitigate a negative externality of the development, these community benefit payments are positive inducements negotiated between communities and developers. In Scotland, the devolved executive has endorsed and formalised these deals with its policy of introducing a public register of benefits accepted, in order that communities “know what the ‘going rate’ for community benefits is”.⁶³

It is difficult to argue that these schemes are anything other than a bargain and sale, and that they are inconsistent with the principle respected in the *Wolverhampton* case that planning permissions are not to be bought.⁶⁴ The purpose of this principle would seem to be to ensure that all developers and objectors are treated equally and developers with deeper pockets are not able to be treated more favourably in terms of the standards to be applied to their schemes. The Department for Energy and Climate Change is careful to say that these schemes run “alongside” the planning system.

⁶¹ Directive 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77 and 2003/30 [2009] OJ L140/16 arts 1 and 3 and Pt A of Annex I.

⁶² DECC, “Community Support” at http://www.decc.gov.uk/en/content/cms/meeting_energy/wind/onshore/community/community.aspx [Accessed September, 2012]. cf. Centre for Sustainable Energy, *Delivering community benefits from wind energy development: A Toolkit* (Renewables Advisory Board, July 2009); RenewableUK, *A Community Commitment: The Benefits of Onshore Wind* (February 2011).

⁶³ Press release of Energy Minister Fergus Ewing, “Community Benefits from Renewables” (Scottish Government, December 2, 2011) at <http://www.scotland.gov.uk/News/Releases/2011/12/01135633> [Accessed September, 2012].

⁶⁴ See Caryl Walter, “Incentives-based planning policy—a clash of rationales” (2012) J.P.L. 6, 647–657.

However, in the light of the general reasoning in the *Wolverhampton* case, it is now unclear whether they can be a factor that local planning authorities can lawfully take into account. PPS22 stated that “economic benefits of all proposals for renewable energy projects...are material considerations that should be given significant weight”.⁶⁵ That must be right, and it is difficult to distinguish economic and fiscal impacts arising from a profit-generating development. There is evidence from overseas that financial incentives encourage communities to embrace large-scale projects. There is also a strong argument that in general terms communities through their elected representatives ought to lawfully be able to decide that the financial advantages of permitting a proposal outweigh other considerations, regardless of whether all other specific planning harms have been mitigated. It therefore seems to me that these sorts of financial incentives are likely to be judged to be material, at any rate where they relate to the capture of the “planning gain” from the permitted development in question and are not derived from the proceeds of profits earned elsewhere.

In order to address concerns about fairness and to maximise public benefit, it may be that sites should be allocated and parameters set for acceptability of developments at the plan-making stage, with permissions then auctioned off to developers and/or operators to ensure that there is a level playing-field. The owners could then be bought out by the successful concessionaire. In that way, perhaps lessons could be learned from extractive industries where such practices have long been common.

Although, in practice, it appears that the decision-making process will increasingly be guided by financial considerations, in legal terms it remains the case that planning authorities have discretion as to how much weight to give to these. And, of course, while sometimes financial incentives favour conservation of the environment, very often they will favour its degradation. If the legislature considers particular outcomes to be important, then it is not sufficient merely to leave these matters to the decision-maker. It must intervene to a greater or lesser extent, to tilt the balance in favour of that outcome. This has been done in relation to three matters in particular: built heritage, waste management and national parks.

Dictating weight as well as materiality: presumptions

Built Heritage

For more than a generation, strict statutory protections have been in place around buildings thought to be of historic significance. Those protections⁶⁶ were consolidated by the Planning (Listed Buildings and Conservation Areas) Act 1990. Section 72 states:

“In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned [including the Town and Country Planning Act 1990] ... special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.”

Likewise, s.66(1) provides as follows:

“In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”

⁶⁵ ODPM, *Planning Policy Statement 22: Renewable Energy* (August 2006) para.1(iv).

⁶⁶ Previously in s.1(8) of the Town and Country Amenities Act 1974 and s.56(3) of the Town and Country Planning Act 1971.

The courts have since 1991 recognised that the “special regard” and “special attention” provisions mean that Parliament intended the decision-maker to do more than merely have regard to the statutory designation. In *South Lakeland DC v Secretary of State for the Environment*, the House of Lords considered that:

“planning decisions in respect of development proposed to be carried out in a conservation area *must give a high priority to the objective* of preserving or enhancing the character or appearance of the area. *If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission*, though, no doubt in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest.”(Emphasis added)⁶⁷

In *R. (on the application of Garner) v Elmbridge BC*, involving the setting of Hampton Court Palace, Ouseley J. accepted that the same approach applied to the Listed Buildings provision:

“Section 66 does not permit a local planning authority to treat the desirability of preserving the setting of a listed building as a mere material consideration to which it can simply attach what weight it sees fit in its judgment. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate.”⁶⁸

Waste management

The influence of EU waste management law has gone beyond requiring consideration of various matters.

The Waste Framework Directive⁶⁹ was passed in 1991 when the European Union was still known as the “European Community”. Article 5(2) of the Framework Directive provided that Member States had to dispose of waste using “the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health”. Under art.7, they had to draw up “waste management plans” and take “measures necessary to prevent movements of waste, which are not in accordance with their waste management plans”. These had to indicate that there was a hierarchy for dealing with waste reduction the best solution, followed by re-use and recycling, and then various methods of disposal, with landfill being the least desirable method of disposal.

The United Kingdom implemented this Directive by publishing a national waste management strategy, *Waste Strategy 2000*. The Waste Management Licensing Regulations 1994⁷⁰ had provided that “competent authorities”, which included both planning authorities and permitting authorities, had to carry out their functions “implementing, so far as material, any plan made under the plan-making provisions”.

In addition to the general Framework Directive, the EC also issued a Directive specifically to regulate landfill sites, which we considered earlier.⁷¹ Article 8 of the Landfill Directive provided:

“Member States shall take measures in order that:

- (a) the competent authority [namely the Environment Agency] does not issue a landfill permit unless it is satisfied that:
 - (i) without prejudice to Article 3(4) and (5), the landfill project complies with all the relevant requirements of this Directive ...

⁶⁷ *South Lakeland DC v Secretary of State for the Environment* [1992] 2 A.C. 141 at 146 per Lord Bridge.

⁶⁸ *R. (on the application of Garner) v Elmbridge BC* [2011] EWHC 86 (Admin); [2011] P.T.S.R. D25 at [8], upheld on appeal [2011] EWCA 891.

⁶⁹ Directive 75/442 on waste [1975] OJ L194/39, as amended.

⁷⁰ Waste Management Licensing Regulations 1994 (SI 1994/1056) reg.19, Sch.4 paras 2(1), 3 and 4.

⁷¹ Landfill Directive 1999/31 on the landfill of waste [1999] OJ L182/1.

- (b) the landfill project is in line with the relevant waste management plan or plans referred to in Article 7 of ... [the Waste Framework Directive].”

In the case of *Commune de Braine-le-Chateau and Michel Tillieut v Region Wallonee*, the European Court of Justice held that the waste management plan could not be the only factor determining the siting of waste disposal facilities, since Member States had to take on board any comments received during the environmental impact assessment (“EIA”) procedure and their own rules on land use planning.⁷²

In *R. (on the application of Blewett v Derbyshire CC*⁷³ the Court of Appeal was called upon to answer the question whether under the Waste Framework Directive and the Landfill Directive a local authority was required to refuse planning permission for proposed landfill operations unless it was satisfied that they were the “best practicable environmental option” (“BPEO”) within the meaning of the Directives. The Council had granted permission for a landfill site which was likely to be surplus to requirements, but was thought desirable as it would enable the site to be regenerated once it had been filled up with rubbish.

The Court of Appeal held that the Directive’s requirement for the project to be “in line with” the waste management plan meant that the planning authority had to do more than merely have regard to the plan. It had to accord it “substantial” weight and to treat it as “important”, although it ruled that “the tilt ... may ... be reversed by other and more powerful considerations”.⁷⁴

Accordingly, one potential tool that Parliament might use is to impose a *presumption* that a development with adverse effects on certain environmental factors should not be allowed to proceed, in the absence of strong countervailing advantages.

National Parks: A priority rule

In relation to sizeable tracts of the country, Parliament has recently gone further than imposing a presumption.

National Parks now cover 9.3 per cent of the land area of England, 19.9 per cent of the land area of Wales, and 7.2 per cent of the land area of Scotland,⁷⁵ and the National Park Authorities are planning authorities for the area within the Parks.⁷⁶ Under the National Parks and Access to the Countryside Act 1949, the parks were set up for the twin purposes of “preserving and enhancing the natural beauty of the areas specified ... and for the purpose of promoting their enjoyment by the public”.⁷⁷ These purposes might conflict as well as reinforce each other. One of the criteria for designation has been “the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population”.⁷⁸ British National Parks have always contained sizeable resident populations and extensive agricultural use, and been managed with public enjoyment as an aim. They do not conform to the international definition of “national park”, which is reserved for wilderness areas under state ownership and control. Until 1995, the park authorities actually had fewer powers than ordinary local planning authorities, and certainly as a matter of law there were no additional restrictions on development in National Parks arising merely because of such designation.⁷⁹ Many of the problems of environmental degradation experienced in areas of natural beauty were caused by poor management of the land, damaging

⁷² *Commune de Braine-le-Chateau and Michel Tillieut v Region Wallonee* (C-53/02 and C-217/02) at [30].

⁷³ *R. (on the application of Blewett) v Derbyshire CC* [2004] EWCA Civ 1508, [2005] Env L.R. 15.

⁷⁴ *R. (on the application of Blewett) v Derbyshire CC* [2004] EWCA Civ 1508 at [91].

⁷⁵ UK Association of National Park Authorities, “National Park Facts and Figures” at <http://www.nationalparks.gov.uk/learningabout/whatisanationalpark/factsandfigures.htm> [Accessed September, 2012].

⁷⁶ Town and Country Planning Act 1990 s.4A(2).

⁷⁷ National Parks and Access to the Countryside Act 1949 s.5(1) as originally enacted.

⁷⁸ National Parks and Access to the Countryside Act 1949 s.5(2)(b) as originally enacted.

⁷⁹ See Christine Willmore, “What’s in a name? The role of ‘National Park’ designation” [2002] J.P.L. 1325 at 1327–1330.

agricultural practices and irresponsible tourism, which the Town and Country Planning system could not tackle in any event.⁸⁰

The National Parks Policy Review Committee in 1974 suggested what became known as the “Sandford Principle”, that where a scenario presents a conflict between the objectives of public enjoyment and preservation of beauty, “priority must be given to conservation of natural beauty”.⁸¹ Since 1976,⁸² this principle has formed the basis of development control policy in National Parks. However, since 1995 this principle has been reflected in legislation. The Environment Act of that year amended the 1949 Act so that the objectives of Park management set out in s.5(1) read as follows:

- “(a) ... conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified ... and
- (b) ... promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.”

It then added a new s.11A. This was entitled, “Duty of certain bodies and persons to have regard to the purposes for which National Parks are designated”. Subsection (1) stated that:

“A National Park authority, in pursuing in relation to the National Park the purposes specified in subsection (1) of section five of this Act, shall seek to foster the economic and social well-being of local communities within the National Park.”

This duty would seem to be subordinate to the two purposes (a) and (b) rather than a freestanding duty to promote economic development of the area.

Subsection (2) of s.11A states as follows:

“In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority [including all ministers and public bodies] shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.”

Although the title of the new section suggested that its new duties were limited to having regard to the purposes in s.5(1), which would have been relevant to the exercise of powers under the 1949 Act even without this being reiterated in a new section, in fact it went much further. There was a new duty to foster the wellbeing of the inhabitants of the Parks, and also a duty to “attach greater weight” to the purpose of conserving and enhancing the “beauty, wildlife and cultural heritage”.

The s.11A, subs.(2) duty is weakly drafted in a number of respects. First, it treats as a single purpose the conservation of beauty, wildlife and cultural heritage, when in some circumstances conserving one of these attributes would result in detriment to others. Should that happen, it provides no steer as to the appropriate order of priorities. Secondly, it only applies if it “appears” to the authority that there is a conflict. It is to be supposed the authority has discretion to judge whether there is a conflict, and that this judgment will only be subject to challenge if it is one that no reasonable authority would have come to. Thirdly, it is not entirely clear that “shall attach greater weight” means the same as “shall give priority to”, not least when *other* considerations might weigh in on the side of development. Nevertheless, we have here a statute which goes beyond listing mandatory considerations or introducing presumptions, and attempts to dictate the relative weight to attach to environmental factors as against other factors.

⁸⁰ See in relation to the Norfolk and Suffolk Broads, Martin Shaw, “The Broads Act 1988: a framework for environmental planning and management” [1989] J.P.L. 241 at 241–241, 246.

⁸¹ *Report of the National Park Policies Review Committee* (London: HMSO, 1974).

⁸² Department of the Environment *Report of the National Parks Policies Review Committee*, Circular 4/76.

Prospect and problem

In areas outside national parks, economic development cannot be restricted to recreation, tourism and preservation or enhancement of the beauty of the landscape. However, we can envisage the possibility of a structured statutory test of more general application, whereby permission shall be permitted if it is in accordance with the development plan and material considerations do not indicate otherwise, *unless* specified serious adverse impacts on the environment were thought likely to occur.

The NPPF arguably does something similar in its policy on biodiversity at para.118. The first and fifth bullet points of this state as follows:

“When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:

- if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused; [...]
- planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including ancient woodland and the loss of aged or veteran trees found outside ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss”

The first bullet point is something more than a presumption or tilting of the scales in a balancing exercise: it is a prescriptive set of tests for the decision-maker to apply in reaching his decision. Will significant harm result from the development? If so, can it be avoided by developing an alternative site? If not, can it be adequately mitigated? If not, can it be adequately compensated for? This is only a policy rather than a legal requirement. It only says that local planning authorities “should aim to” apply its principles, and it is curiously silent about national planning authorities. At each stage, the decision-maker must make value-judgments required about what counts as “significant” harm and “adequate” mitigation. Unless the principles are all cumulative protections, the inclusion of the fifth-bullet-point rather suggests that the scope for deciding what is “significant” is intended to be extremely broad; after all “irreplaceable” habitats cannot by definition be compensated for. Yet this sort of structured test with some thoughtful definition of “significance”, could provide a predictable and reliable means of ensuring that development is environmentally sustainable.

The main difficulty lies in measuring environmental impacts, and in defining what makes them “sustainable”. It is to these thorny questions that we now must turn.

Measurement of impacts: EIA

Gathering information

For more than two decades, environmental legislation has introduced procedural rules into the planning system in order to enable the identification of impacts on the built, social or natural environment.

For a very long time, planning authorities have been required to consult public authorities whose knowledge and expertise might enable them to spot concerns with particular schemes. Consultation requirements in England and Wales are now found in Pt 3 of the Development Management Procedure Orders.⁸³ Thus, development affecting playing fields must be consulted on with the Sports Council, development involving land on which there is a theatre must be consulted on with the Theatres Trust,

⁸³ Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) Pt 3 and Sch.5; Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (2012/801) Pt 3 and Sch.4.

development within 250m of former landfill sites must be notified to the Environment Agency, and so on. The statutory consultees are placed under a duty to respond, and this procedure clearly has the potential to pick up issues that non-expert planning decision-makers might not themselves have identified.

However, while these statutory consultation procedures are good for identifying issues for investigation, they will not of themselves always enable consultees to give sensible advice because the extent of many environmental impacts can only be predicted after detailed study. If consultees make a “holding objection” to the effect that they cannot give favourable recommendations without further investigative work, and the planning authority is minded to give decisive weight to such concerns, then developers will be obliged to conduct assessment work. The extent of assessment is, with this traditional model of information-gathering, very much dependent upon the particular biases of the decision-maker.

A more standardised process of Environmental Impact Assessment was introduced by EEC Directive in 1985.⁸⁴ It was said to apply to “those public and private projects likely to have a significant effect on the environment”.⁸⁵ The preamble said:

“the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.”⁸⁶

The language was pre-Brundtland, but the general rationale for the legislation was to enable decision-makers to consider the sort of factors that subsequently came under the portmanteau of “sustainable development”. Member States were required to:

“ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.”⁸⁷

The Directive’s organising premise was that there were certain types of project which would always have significant effects, and that other categories might or might not do so. Accordingly, there were two annexes to the Directive: one listing types of development for which assessment was mandatory, and one listing types of development which national authorities could require assessment for either on the basis of their own criteria or after case-by-case evaluation.⁸⁸ Where an assessment was required to be carried out, certain minimum information had to be provided, and an assessment made of the “direct and indirect effects of the project on the following factors: human beings, fauna and flora, soil, water, air, climate and the landscape, ... material assets and the cultural heritage”. Both positive and negative impacts had to be described, as well as cumulative and indirect effects.⁸⁹

A good illustration of the scope of the Directive is the case of *Abraham v Region Wallonne*.⁹⁰ An agreement was entered into by the Walloon local authority, the company running Liège airport and air freight firms to build a new control tower, widen the runway, equip it with landing lights and extend its use so as to fly larger aircraft for longer hours. A claim was brought by neighbours affected by noise. Annex I of the EIA Directive referred only to the construction of airports with runways of more than 2,100m in length, which was longer than the one at Liège. Annex II did, however, refer to the construction

⁸⁴ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

⁸⁵ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 art.1.

⁸⁶ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 fifteenth recital.

⁸⁷ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 art.2(1).

⁸⁸ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 twelfth and thirteenth recitals and art.4.

⁸⁹ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 art.3, art.5, annex 3.

⁹⁰ *Abraham v Region Wallonne* (C-2/07) [2008] E.C.R. I-1197.

or modification of airfields. The questions were whether the development agreement could be a project or consent, and whether the scheme might fall within Annex II.

The Luxembourg court held that such development agreements were not “projects” themselves but might be “development consent” for the underlying project. It held⁹¹ that the test for this was as follows:

“a decision of the competent authority or authorities granting the developer the right to proceed with construction works or other installations or schemes or to intervene in the natural surroundings and landscape.”

The court went on:⁹²

“... where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment ... Thus, where one of those stages involves a principal decision and the other involves an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure ...

Finally, the national court should be reminded that the objective of the legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of art.2(1) of Directive 85/337.”

It was held⁹³ that a broad approach should be taken to interpreting the Annexes, to protect the environment:

“The Court has frequently pointed out ... that the scope of Directive 85/337 is wide and its purpose very broad... It would be contrary to the very objective of Directive 85/337 to exclude works to improve or extend the infrastructure of an existing airport from the scope of Annex II on the ground that Annex I covers the ‘construction of airports’ and not ‘airports’ as such.

... It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.

Moreover, the list laid down in Art.3 of Directive 85/337 of the factors to be taken into account, such as the effect of the project on human beings, fauna and flora, soil, water, air or the cultural heritage, shows, in itself, that the environmental impact whose assessment Directive 85/337 is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out.

The Court has thus held, in relation to a project to double an existing railway track, that a project of that kind can have a significant effect on the environment within the meaning of Directive 85/337, since it is likely to produce, inter alia, significant noise effects (*Case C-227/01 Commission v Spain* [2004] ECR I-8253, [49]). In that case, the significant noise effects were brought about not by the works involved in doubling the railway track but by the foreseeable increase in rail traffic permitted

⁹¹ *Abraham v Region Wallonne* (C-2/07) [2008] E.C.R. I-1197 at [25].

⁹² *Abraham v Region Wallonne* (C-2/07) [2008] E.C.R. I-1197 at [26]–[27].

⁹³ *Abraham v Region Wallonne* (C-2/07) [2008] E.C.R. I-1197 at [32]–[33].

precisely by the works involved in doubling the track. The same must apply to a project, such as the one in dispute in the main proceedings, which seeks to enable an increase in the activity of an airport and, consequently, in the intensity of air traffic.”⁹⁴

It will be recalled that in this country, authorities and the industry were caught out because originally there was no procedure in place for requiring environmental assessment before reserved matters were approved pursuant to an existing outline permission.⁹⁵

Effects beyond the narrowly informative

The 1985 Directive required public consultation on the environmental assessment, and it appears from the preamble to the Directive that the original purpose in doing so was that “information supplied by the developer ... may be supplemented ... by the people who may be concerned by the project in question”. The focus was very much on ensuring that more informed decisions were made.

However, the Directive was subsequently amended to bring it into line with the Aarhus Convention and the emphasis of the consultation process has shifted away from the gathering of information and towards ensuring that the opinions and concerns of the public in relation to the information presented by the developer are addressed and seen to be addressed:

“thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.”⁹⁶

In *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)*,⁹⁷ Lord Hoffmann was asked to look at a number of different documents:

“I do not accept that this paper chase can be treated as the equivalent of an environmental statement ... The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation ... of the relevant environmental information and the summary in non-technical language. It is true that article 6.3 gives member states a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows member states to treat a disparate collection of documents ... traceable only by a person with a good deal of energy and persistence as satisfying the requirement ...”

It was made clear that environmental reports should be drafted so that they can be understood as stand-alone documents, although there is no express requirement for this in the wording of the Directive itself, so that the relevant findings of other work are summarised or referred to and members of the public do not have to embark upon a “paper-chase”.

In *R. (on the application of Mellor) v Secretary of State for Communities and Local Government*,⁹⁸ the European Court of Justice (“ECJ”) subsequently emphasised the importance of public accessibility of the procedures. That case involved a challenge by a third party to the Secretary of State’s failure to give reasons for his “screening” decision not to require an EIA for a particular project. The EIA Directive did not require the giving of reasons for decisions about the need for an EIA. The United Kingdom’s implementing regulations required that reasons be given for a determination that EIA was required, but not for a decision that no such assessment was required. The ECJ held that Member States had to make

⁹⁴ *Abraham v Region Wallonne* (C-2/07) [2008] E.C.R. I-1197 at [43]–[45].

⁹⁵ *R. (on the application of Barker) v Bromley LBC* [2006] UKHL 52; [2007] 1 A.C. 470.

⁹⁶ Recital (16) in the preamble to the codified Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1.

⁹⁷ *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603 HL at [617].

⁹⁸ *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* (C-75/08) [2010] P.T.S.R. 880.

a determination as to whether an EIA was needed, and that third parties had to be able to satisfy themselves that this had been done properly, in order to decide whether they had grounds to apply for a judicial review of the decision.⁹⁹ The court held that although it was not a requirement of the Directive that the decision notice itself give reasons, these must be provided at the request of an interested party.¹⁰⁰

Under the influence of the Aarhus Convention, the latest version of the Directive requires developers to state the main alternatives to their proposals that they have studied, and explain the reasons for their choice taking into account the environmental effect.¹⁰¹ This enables the reasoning for the choices to be publicly examined.

Effect and limitations of the EIA Directive

The effectiveness of the EIA Directive, whether as an aid to decision-making, or as a means of ensuring that environmental issues are aired, is subject to certain constraints.

Most importantly, there is a very wide discretion as to what projects are assessed. In the first place, the Member States are not required to individually examine every project on a case-by-case basis to determine whether it might have a significant effect on the environment, and can choose what thresholds are applied to Annex II development. The Court of Appeal has recently held in the *Loader* case that planning authorities are not required to assess all projects “in every case where an environmental objection which might influence the decision on planning consent is raised”.¹⁰² The most recent codification of the EIA Directive says this:

“Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.”¹⁰³

Secondly, what is a “significant” impact of developments within the thresholds is left undefined by the Community legislature, and it is up to the Member States to decide. Within the United Kingdom, it is left to the particular planning authority which is considering the application to decide what is or is not likely to be a significant effect.¹⁰⁴ To some degree, it is common sense that a given effect in one place may be less significant than the same effect in another. For instance, a development of ten houses in the middle of the countryside on the habitat of a shy species of foraging animal may have an altogether more deleterious effect than the same development sited on previously developed land in the midst of a major city. To that extent, it makes sense for assessment of significance to be a purely local matter relying upon the exercise of judgment. On the other hand, the identification of potential effects may not be possible until assessment work is done, and so environmental impacts may be missed. It also means that developers do not have a level playing field and there is a lack of certainty as to how much assessment work will be required in any particular case. At European level we see this starkly. The Commission has reported great variation in the numbers of projects subjected to assessment between 2002 and 2006: just 25–30 were carried out annually in Austria, compared with 1,600 or so in Sweden, 5,000 in France and 3,000 in Greece. By

⁹⁹ *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* (C-75/08) [2010] P.T.S.R. 880 at [51], [57]–[59].

¹⁰⁰ *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* (C-75/08) [2010] P.T.S.R. 880 at 61.

¹⁰¹ Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1 art.5(3)(d); cf. Aarhus Convention art.6(6)(e).

¹⁰² *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [32]–[33].

¹⁰³ Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1 preamble, recital (10).

¹⁰⁴ See *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [28]–[30] per Pill L.J. and the authorities therein cited.

comparison, there were between 597 and 700 EIAs carried out annually in the United Kingdom during the same period, putting us among the least strict Member States.¹⁰⁵

To reduce this uncertainty at least in part, the Directive has been implemented in the United Kingdom so as to provide an advance “screening” procedure to check whether proposals require assessment, and a “scoping” procedure for checking how much assessment work needs to be carried out. The procedures allow for appeals by developers to the Secretary of State, which at least in theory ought to provide some consistency.¹⁰⁶ The latest 2011 set of regulations also allowed members of the public for the first time to request a screening direction from the Secretary of State, and made clear that the Secretary of State was entitled to examine developments below the published thresholds.¹⁰⁷ The current scoping procedures can however be criticised because they are optional and where they are not done at an early stage, there may subsequently be demands for further information. Both screening and scoping procedures suffer for lack of public consultation at the crucial initial stages of determining the scope of any environmental study, which reduces the legitimacy accorded to the process and deprives decision-makers of an opportunity to learn of concerns that it might not itself have considered.

An important general limitation in the United Kingdom development control system is that the definition of “development” requiring planning permission excludes agricultural use of land. In *Birch*¹⁰⁸ it was accepted by the Court of Appeal that the spreading of compost could be ignored as an environmental effect of a development if it would not amount to “development” requiring consent by way of planning permission.

Another limitation is that unlike the Strategic Environmental Assessment (SEA) Directive for the assessment of governmental plans and programmes,¹⁰⁹ the EIA Directive does not require developers of individual projects to consider reasonable alternatives, and in particular it does not require them to study whether alternative designs could have a less harmful environmental impact. Government guidance is that Design and Access Statements¹¹⁰ are supposed to be a tool for improving the sustainability and inclusiveness of the design, and should “demonstrate how climate change mitigation ... and adaptation measures ... have been considered in the design of the proposal”.¹¹¹ Nevertheless, there remains no general legislative requirement to actively demonstrate that reasonable and less environmentally harmful alternatives to the chosen design have been considered.

The SEA Directive is emerging as an important influence on plan-making. It required the suspension of the Coalition Government’s revocation of Regional Spatial Strategies as—extraordinarily—no detailed assessment had been made of the impacts that this would have on development outcomes or whether alternative approaches would have better outcomes.¹¹² While in theory development plans have always been required to be “sound” before they are adopted, the procedural duty to consider reasonable alternatives is useful in encouraging a culture in which robust evidence forms the basis for policy decisions. Notably, in recent years, the courts have found that there was no apparent justification for why it was proposed in the Forest Heath Core Strategy to locate 1,200 homes on a specific site as an urban extension to Newmarket,¹¹³ while in *Heard v Broadland DC, South Norfolk DC and Norwich CC* the court upheld a challenge to the selection of the north-east of Norwich as a “growth triangle” because it had not been assessed against alternatives. In the *Heard* case Ouseley J. emphasised that the Directive requires a reasoned evaluative process which explains what, if any, alternatives are thought to be reasonable and why; and

¹⁰⁵ Commission, *Study concerning the report on the application and effectiveness of the EIA Directive* (June 2009) pp.69–72.

¹⁰⁶ Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) regs 4–6, 13–15.

¹⁰⁷ Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) reg.4 paras (8)(b) and (9).

¹⁰⁸ *R. (on the application of Birch) v Barnsley MBC* [2010] EWCA Civ 1180; [2011] Env. L.R. 15 at [22].

¹⁰⁹ Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30 art.5(1).

¹¹⁰ As required by art.8 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184).

¹¹¹ Department for Communities and Local Government, *Guidance on information requirements and validation* (March 2010) paras 102–3, 105.

¹¹² *R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin) at [54]–[66] per Sales J.

¹¹³ *Save Historic Newmarket v Forest Heath DC* [2011] EWHC 606 (Admin).

which examines all reasonable alternatives equally to see whether those options which start as preferred ones ought to remain so.¹¹⁴

Practical impacts of the EIA procedures

The actual impact of EIA procedures on decisions is unclear. Case studies require a great deal of research, including interviewing the participants in the decision-making process and reading through all the submitted materials. Accordingly, there have been relatively few academic studies of EIA in action, and very few have been done within the last few years. They are not, on the whole, encouraging.

Early studies suggested that there was a culture of “minimum compliance” initially, and reviews of inquiry decisions in 1996 found that inspectors attributed little weight to the contents of environmental statements (“ESs”) and in 53 per cent of the sample of cases examined (about half of all the EIA public inquiry cases at the time) the ES was not even mentioned. As late as the early 1990s, the Secretary of State was ignoring his own circulars and most environmental statements failed to meet the minimum requirements of the regulations.¹¹⁵

In the mid-1990s, there appears to have been a change in attitudes. Wood and Jones’s study of 40 EIA cases revealed that while only 72 per cent of planning officers thought the ESs to have been adequate, 63 per cent of them found the ES “very” or “reasonably” useful in reaching their recommendations, 61 per cent claimed to give them “moderate” or “substantial” weight, and they thought that in about 20–30 per cent of cases they had been “very” or “reasonably” influential in affecting the final decision.¹¹⁶

A 2002 review of 14 post-1997 decision letters found that inspectors were mentioning the ES in most cases, and in two cases the inadequacy of the ES was cited as a reason for dismissing an appeal. However, there was found not to be “any convincing evidence that the ES has played a significant part in the decision-making process”. In the majority of cases, the determining issues were policy-based, and where they were impact-based appeals were rejected despite ESs which stated that there was no significant adverse effect. The consensus among practitioners surveyed as part of the same 2002 research was that in the light of judicial review challenges there was more attention paid to ensuring that the correct EIA procedures were followed, but that it was the policy context and general emphasis on environmental and sustainability issues rather than EIA which had influenced planning decisions.¹¹⁷

An evaluation of four waste-disposal case studies decided in 1994, 1996, 1997 and 2002 against the Aarhus Convention’s requirement for “early” and “effective” public participation in decision-making found that not all those affected by the developments were informed of the application, that there was insufficient pre-application consultation of the locals, that those who were informed were not given advance information about the decision-making process and opportunities for participation. The statutory minimum time period for public consultation on the ES was considered to be too short for consideration of complex issues, while a lack of technical knowledge impeded understanding of the issues. It was suggested that scoping should be made mandatory, with integral public participation at that stage.¹¹⁸

Snell and Cowell studied the scoping process as practised in 2004. They found that only about 50 per cent of planning authorities surveyed thought determining the significance of environmental impacts to be important in scoping. They found a lack of expertise among planning officers, a lack of specific advice and guidance, and strong criticism by both planning officers and environmental consultants of statutory

¹¹⁴ *Heard v Broadland DC* [2012] EWHC 344 (Admin) at [66]–[72].

¹¹⁵ See Joe Weston, “From Poole to Fulham: A Changing Culture in UK Environmental Impact Assessment Decision-Making?” (2002) *Journal of Environmental Planning and Management* 45:3, 425–43, 432–434.

¹¹⁶ Christopher Wood and Carys Jones, “The Effect of Environmental Assessment on UK Local Planning Authority Decisions” (July 1997) *Urban Studies* 34, 1237–1257 at 1242–3, 1246–7, 1250.

¹¹⁷ Joe Weston, “From Poole to Fulham: A Changing Culture in UK Environmental Impact Assessment Decision-Making?” (2002) *Journal of Environmental Planning and Management* 45:3, 425–43, 436–439.

¹¹⁸ Nicola Hartley and Christopher Wood, “Public participation in environmental impact assessment—implementing the Aarhus Convention” (2005) *Environmental Impact Assessment Review* 25:4, 319–340 at 322, table 1 323, 330–335, 339.

consultees, who were castigated for “minimal input, the provision of bland, noncommittal responses, and ... delayed and poorly coordinated feedback”.¹¹⁹ Rather than engaging with the Directive on its own terms and examining potential environmental effects of each development, developers submitted information based upon “what might ultimately best expedite consent”, while local planning authorities were animated by “a pervading fear of legal challenge” adopted a standardised, “checklist” approach and tended to “scope in” information for those reasons. Scoping was viewed not as part of an iterative process of project design, but as a hoop to jump through.¹²⁰

Bond, Cobb and Cashmore looked at three case studies for a paper written in 2006. They found that what they termed “developmental outcomes” were not particularly notable. The quality of the assessment reports was found to be very poor, with “rigorous scientific approaches... infrequently employed”.¹²¹ They highlighted a failure to consider alternatives as part of the design process: “some alternatives were entirely unrealistic, while in other cases, the comparative assessments were documented justifications of decisions that had already been made”. At best, the contribution of the assessment work was to “modest “fine-tuning” rather than influencing the selection of strategic alternatives”. Planning officers had insufficient time to read through the material that was submitted. Councillors’ primary concern was public opinion. Developers saw the process as “an advocacy tool in a political process of conciliation” which was “linked more to the appeasement of influential stakeholders by creating a perception of due diligence and through provision for impact mitigation”.¹²² Participatory procedures were subverted in one case where the developers set up and funded a community association to “create a veneer of democratic respectability” and stifled genuine debate.¹²³ Thus, the authors saw what in effect was a cynical genuflection to the aims of the procedure while all parties actually engaged in “double-think”. Ironically, given the apparently Machiavellian motivations of developers and decision-makers, the authors found that at least some of the environmental non-governmental organisations taking part in consultations started to trust the process more.¹²⁴ The authors considered that the only observable positive impacts of the EIA procedures were likely to be the release of environmental data into the public domain, and what they called “social learning” — the organisation of working groups of developers, objectors and professionals to co-ordinate their participation in the system.¹²⁵

A comparative study of Italy and the United Kingdom published this year found that while our EIA procedures and practice compare favourably with Italian ones, our methodology of environmental assessment still leaves a lot to be desired. More work needed to be done in monitoring results of development, integrating and updating baseline data and verifying the effectiveness of mitigation measures. Ineffective scoping and “non-existent follow-up” were highlighted, and ESs were criticised as being “voluminous, disorganised and over-technical” but also “insufficiently interdisciplinary”. There was insufficient public participation in analysing and designing alternatives, sustainability indicators and thresholds were not defined and used as yardsticks, and the impact of refuse and recycling of waste resulting from development was often overlooked.¹²⁶

¹¹⁹ Tim Snell and Richard Cowell, “Scoping in environmental impact assessment: Balancing precaution and efficiency?” (2006) *Environmental Impact Assessment Review* 26, 359–376, 365, 368–9.

¹²⁰ Tim Snell and Richard Cowell, “Scoping in environmental impact assessment: Balancing precaution and efficiency?” (2006) *Environmental Impact Assessment Review* 26, 359–376, 370–371, 373–4.

¹²¹ Matthew Cashmore, Alan Bond and Dick Cobb, “The Contribution of Environmental Assessment to Sustainable Development: Toward a Richer Empirical Understanding” (2007) *Environmental Management* 40, 516–530, 520–521.

¹²² Tim Snell and Richard Cowell, “Scoping in environmental impact assessment: Balancing precaution and efficiency?” (2006) *Environmental Impact Assessment Review* 26, 359–376, 526–527.

¹²³ Tim Snell and Richard Cowell, “Scoping in environmental impact assessment: Balancing precaution and efficiency?” [2006] *Environmental Impact Assessment Review* 26, 359–376, 523–4.

¹²⁴ Tim Snell and Richard Cowell, “Scoping in environmental impact assessment: Balancing precaution and efficiency?” [2006] *Environmental Impact Assessment Review* 26, 359–376, 524–525.

¹²⁵ Tim Snell and Richard Cowell, “Scoping in environmental impact assessment: Balancing precaution and efficiency?” [2006] *Environmental Impact Assessment Review* 26, 359–376, 520–522, 524.

¹²⁶ Adrian Bassi, Robert Howard, Davide Geneletti and Simone Ferrari, “UK and Italian EIA Systems: A comparative study on management practice and performance in the construction industry” [2012] *Environmental Impact Assessment Review* 34, 1–11, 7, 10, 3.

What all these studies show is that it is all very well to have detailed procedural rules, but unless the values underlying the rules are instilled in participants in the process, they will be ineffective. Once again here, we see that it is changes in policy and cultural shifts which seem to have altered the outcomes rather than legislative measures.

A drawback consistently identified by those who have studied the implementation of EIA in the United Kingdom is a failure to properly condition follow-up monitoring and re-assessment in order to improve the accuracy of assessments and improve their methodologies. This has also been found to be a common concern across the Member States in a review of the literature by the Commission in June 2009.¹²⁷ At EU-level, concern about the variation in approaches to screening, variable quality of reports, and the inadequacy of participation have been other themes.¹²⁸

The most significant overall weakness is the fact that only about 0.1 per cent of all United Kingdom planning decisions require EIA,¹²⁹ although it is possible that environmental impacts are being designed out in order to avoid having to go through the EIA procedure. This is because it is difficult to adopt a scientific approach to “sustainable development” without attempting to systematically estimate and quantify the effects of a development. That tends to suggest that more projects ought to be assessed in the United Kingdom.

A study of costs and benefits of the EIA Directive for the Commission in 2007 reviewed the literature and found that no efforts had been made to quantify the benefits of EIA, but that practitioners across the Member States broadly did not think the costs unreasonable or disproportionate and generally felt the regulation brought a net benefit.¹³⁰ Overall, the costs of assessing a project seem to range from 0.1 per cent of large projects to 1 per cent of small projects,¹³¹ which would not be excessive if the procedures *did* lead to improved design and siting of development. It may be that, as the Commission has suggested¹³², a way to reduce costs and bureaucracy with regard to individual projects is to thoroughly identify parameters for sustainability at the development planning stage, which would then obviate the need for individual assessment of developments within those parameters unless new information came to light.

The difficulties in assigning value to ecological degradation and the need for limits

An important trend in environmental law has been to expand the number of factors that local authorities should consider, a trend that has been reinforced by the courts’ willingness to permit financial considerations to be taken into account. As has been mentioned, a second important trend has been the development of requirements to provide information about developments. In utilising the information that has been gathered, whether by formal EIA or the usual determination procedure, decision-makers need to have regard to the extent to which the impact on the environment will be tolerable.

The data derived from the statutory consultations and any environmental statement must then feed into an assessment of a development’s “sustainability” in order to judge whether or not it is acceptable. It is the yardstick by which one is to make this judgment that we must next consider. The whole concept of “sustainability” has come under attack from many quarters for reasons of both principle and of practice. One line of attack is that the concept of preserving the world *for future generations* is entirely

¹²⁷ Commission, *Study concerning the report on the application and effectiveness of the EIA Directive* (June 2009) p.32–33, 107–108, 189–190; *Report on the application and effectiveness of the EIA Directive* COM (2009) 378 final (July 23, 2009) pp.5–6.

¹²⁸ Commission, *Study concerning the report on the application and effectiveness of the EIA Directive* (June 2009)p.34 and *Report on the application and effectiveness of the EIA Directive* COM(2009) 378 final (July 23, 2009) pp.5–6.

¹²⁹ Joe Weston, “From Poole to Fulham: A Changing Culture in UK Environmental Impact Assessment Decision-Making?” [2002] *Journal of Environmental Planning and Management* 45:3, 441.

¹³⁰ Institute for Environmental Studies, Vrije Universiteit, Amsterdam, *Costs and Benefits of the EIA Directive: Final report for DG Environment* (May 2007) pp.7–22.

¹³¹ Commission, *Study concerning the report on the application and effectiveness of the EIA Directive* (June 2009), p.34. Spain is an outlier with costs approximately 2.5% of the investment value “with wide variations”: Institute for Environmental Studies, *Costs and Benefits*, p.8.

¹³² Commission, *Study concerning the report on the application and effectiveness of the EIA Directive* (June 2009) p.187.

anthropocentric, when we ought to be preserving the environment for its own sake. Can it be right to shoot an elephant for fun just because this does not cause human beings harm, ask Bebhinn Donnelly and Patrick Bishop?¹³³ However, even if we accept its anthropocentric premise, it proves to be very difficult to define wellbeing, or to properly measure how far this would be jeopardised by any particular action.

A liberal system of laws based on respect for personal autonomy ought perhaps to respect individuals' subjective assessments of wellbeing. Subjective wellbeing statistics are now being collected by the Office for National Statistics.¹³⁴ On the other hand, concerns that not everyone conceives wellbeing in the same terms, and indeed that treating everyone's conception of "living well" as being equally valid is unethical mean that the OECD collects statistics on "life satisfaction" but combines them with other objective measurements in its "Better Life Index".¹³⁵

What counts as a positive or negative social impact is itself particularly contested, for instance between those who value equality of outcomes over equality of opportunities and those on the other side of the debate. Tolerance of inequality may itself depend on other factors apart from the cultural or ideological, such as overall levels of wealth, health and living conditions. Customs and preferences vary both within and between societies, spatially and over time. 66 per cent of Latvians lived in flats in 2009, compared to less than 15 per cent of Britons. 61 per cent of Romanians lived in detached houses, compared to about 25 per cent of Britons.¹³⁶ It would be difficult either to predict that each nation's preferences would remain the same over multiple generations, or to argue that one form of housing development is inherently less conducive to overall human wellbeing than another. Conversely, future generations are likely to value things very differently to current ones and it is difficult to account for this in assigning present day values to social patterns and benefits. The social value of natural assets such as attractive landscapes will be affected by numerous factors including the proportion of the population living in urban areas, the accessibility of those landscapes for recreation, and the popularity of alternative recreational pursuits available.

Assuming that one can arrive at a consensus at what is socially "sustainable", the economic aspect to "sustainable development" is actually relatively easy to pin down, as one can simply measure overall wealth. It is of course difficult to forecast the speed of economic growth as this depends in part on technological and social change, and how social or institutional factors affect innovation and the spread of wealth is not easy to calculate. But economists have over a century of experience in developing analytical approaches to achieve this, and significant numbers of them have spent more than two decades seeking to apply economic science to environmental processes. Here, an approach has been adopted of drawing up "natural balance sheets", trying to put a value on individual "ecosystem services" such as the provision of clean air, food and water, soil stabilisation, flood protection, and the maintenance of a habitable and attractive environment generally. This approach treats natural resources as a "natural capital" stock, to be added to the sum of human, social and built. Indicative national "inclusive wealth" accounts have now been drawn up.¹³⁷ The British government has in its Natural Environment White Paper declared as follows:

"Too many of the benefits we derive from nature are not properly valued. The value of natural capital is not fully captured in the prices customers pay, in the operations of our markets or in the accounts of government or business. When nature is undervalued, bad choices can be made.

¹³³ Bebhinn Donnelly and Patrick Bishop, "Natural law and ecocentrism" [2007] *Journal of Environmental Law* 19(1), 89–101 at p.95, fn 20 and *passim*.

¹³⁴ See ONS, *Analysis of experimental subjective wellbeing data from the Annual Population Survey*, April to September 2011 at http://www.ons.gov.uk/ons/dcp171776_257882.pdf [Accessed September 28, 2012].

¹³⁵ OECD, *How's life? Measuring Wellbeing* (2011) pp.266–267; OECD, "Life Satisfaction" at <http://www.oecdbetterlifeindex.org/topics/life-satisfaction/> [Accessed September 28, 2012].

¹³⁶ Anna Rybkowska, Micha Schneider, "Housing Conditions in Europe in 2009" [2011] *Eurostat Statistics in Focus Issue 4* p.10 Figure 7 and accompanying text.

¹³⁷ UNU-IHD and UNEP, *Inclusive Wealth Report 2012: Measuring Progress Toward Sustainability* (CUP, July 2012).

We will put natural capital at the centre of economic thinking and at the heart of the way the way we measure economic progress nationally. We will include natural capital within the UK Environmental Accounts. We will establish an independent Natural Capital Committee to advise the Government on the state of natural capital in England.¹³⁸

There are difficulties with this; many ecosystem services are difficult to disentangle from each other, and since there is no functioning market for these services it is hard to price them. It is difficult to arrive at an aesthetic or spiritual value for a component of an ecosystem, and separate that from its functional value. Even if end-services could be valued, there is insufficient scientific data on the inter-relationship of the myriad variables within ecosystems to be able to price each individually.¹³⁹ Alterations to one variable may have disproportionate impact on other factors. For instance, some species are dispensable in ecosystems while others are “keystone” species whose absence causes a collapse of the whole system. Changes to a variable (such as levels of rainfall on land or dissolved nutrients in water) beyond a particular threshold can accordingly result in a dramatic shift from one sort of stable ecological community to another. The values at which the tipping-point lies cannot easily be predicted by observing the existing ecosystem.¹⁴⁰ There are also universally recognised drawbacks to accounting approaches even if sufficient data was available. National capital accounts presuppose that the various forms of capital are mutually substitutable, when in fact (at least with the present state of technology) machines cannot repopulate ecosystems or compensate for the loss of ecosystem services.¹⁴¹ Secondly, and related to the first issue, some ecosystem services are absolutely essential to life and their loss would be catastrophic, such that in fact their value is infinite. In reality therefore, changes to ecosystems may not be reversible. Accordingly, “resilience” of ecosystems and “reversibility” of changes have become key concepts in ensuring that future generations are not permanently deprived of resources.¹⁴²

Since there is such uncertainty about the present-day value of ecosystem components, their future economic and social value, future rates of economic growth and technological advances, and the existence of undetected “tipping points”, it is imperative to adopt a cautious approach to ecosystem degradation and to set limits to ecological damage at a tolerable level of risk.¹⁴³ Despite the United Kingdom having subscribed to the Rio Declaration, the “precautionary principle” has not been enacted as a principle of domestic law binding upon public authorities, and cannot be relied upon unless incorporated into government policy or in interpreting transposed EU Directives.¹⁴⁴ This is something that could easily be remedied by creating a statutory requirement to take a precautionary approach where risks are judged to be significant.

There are, however, a few legislative limits on development which take a precautionary approach. In this regard, I shall touch on the Habitats Directive which is the most notable attempt to impose limits.

The Habitats and Birds Directives: existing (near-) absolute limits in environmental law

The Birds Directive¹⁴⁵ applies to “all species of naturally-occurring birds in the wild state”, and requires Member States to “take the requisite measures to maintain the population of the species . . . at a level which

¹³⁸ HM Government, *The Natural Choice: securing the value of nature* (TSO, June 2011) p.4.

¹³⁹ Parliamentary Office of Science and Technology, *Natural Capital Accounting*, POSTNOTE 376 (May 2011).

¹⁴⁰ Parliamentary Office of Science and Technology, *Living with Environmental Limits*, POSTNOTE 370 (January 2011) pp.2–3.

¹⁴¹ See David Pearce and Giles Atkinson, “The concept of sustainable development: an evaluation of its usefulness ten years after Brundtland”, Centre for Social and Economic Research on the Global Environment Working Paper PA 98–02 pp.5–6, where they give the ozone layer as an example. This drawback is acknowledged by the authors of the Inclusive Wealth Report.

¹⁴² See Sustainable Development Commission, *Know your environmental limits*, p.17.

¹⁴³ Parliamentary Office of Science and Technology, *Living with Environmental Limits*, POSTNOTE 370 (January 2011).

¹⁴⁴ *R. v Leicestershire CC Ex p. Blackfordby and Boothorpe Action Group Ltd* [2001] Env. L.R. 2 at [65].

¹⁴⁵ Directive 79/409 on the conservation of wild birds [1979] OJ L103/1 as amended and codified now in Directive 2009/147 on the conservation of wild birds [2009] OJ L20/7.

corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level”.¹⁴⁶

The Habitats Directive sets up a very strict system of protection for protected species listed in Annex IV to the Directive, and also for areas designated as Special Protection Areas for birds (“SPAs”) or Special Areas of Conservation (“SACs”).¹⁴⁷ The Directive states that its objective is “ensuring biodiversity”. Although Member States are required to “take account of economic, social and cultural requirements”, they must take implementing measures “designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest”.¹⁴⁸ Articles 12 and 13 require them to “take the requisite measures to establish a system of strict protection” for species listed in Annex IV, prohibiting activities such as deliberate capture, killing, destruction, disturbance, collecting or uprooting of the animals and plants concerned. The European Court of Justice has held that this strict system must go beyond mere prohibitions, but must be effective to avoid these deleterious activities taking place.¹⁴⁹

In relation to the SACs, art.6(2) requires that Member States take:

“appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.”

Article 6(3) applies to:

“[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects.”

These must “be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives”. Furthermore, “in the light of the conclusions of the assessment... the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned”. Accordingly, a project or plan must be subject to assessment if there is “a probability or a risk that that plan or project will have a significant effect on the site concerned”. The court has ruled that:

“[i]n the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect.”¹⁵⁰

Domestic courts have followed the European jurisprudence in holding that decision-makers must be able to “conclude for certain” that there would be no adverse impact on the integrity of the site — that is, “it must be shown beyond doubt that the development would not have any adverse effect upon the SPA”.¹⁵¹

The European Court has held that the regulatory measures or rules operated by the Member State must “systematically guarantee in all cases that the activities in question will not cause disturbances likely significantly to affect those conservation objectives”.¹⁵² There is a procedure for derogations but only “in the absence of alternative solutions”, where the “plan or project must nevertheless be carried out for

¹⁴⁶ Directive 79/409 on the conservation of wild birds [1979] OJ L103/1 as amended and codified now in Directive 2009/147 on the conservation of wild birds [2009] OJ L20/7 arts 1 and 2.

¹⁴⁷ Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 arts 3(1), 6, 7, 12 and 13.

¹⁴⁸ Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 art.2.

¹⁴⁹ *Commission v France* (C-383/09) at [20], *Commission v Greece* (C-518/04) at [35]–[39] and *Commission v Ireland* (C-183/05) [2007] E.C.R. I-137 at [30] and [34].

¹⁵⁰ *Commission v Ireland* (C-418/04) at [226] to [227].

¹⁵¹ *R. (on the application of Peters) v Secretary of State for Communities and Local Government and Surrey Heath District Council* [2009] EWHC 1125 (Admin) at [24] and [43] per Collins J.

¹⁵² *Commission v France* (C-241/08) at [36].

imperative reasons of overriding public interest”, and the Member State takes “all compensatory measures necessary to ensure that the overall coherence” of the network of protected sites “is protected”.¹⁵³

In relation to birds, this August saw the introduction of a new reg.9A of the Conservation of Habitats and Species Regulations 2012¹⁵⁴ which states, “a competent authority in exercising any function ... must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds”. This arguably prevents them from approving any building whatsoever on land used as habitat for wild birds—even land not within an SPA or SAC—unless it would be positively unreasonable not to approve it.

The Directives have sent ripples through the planning system, causing a great deal of alarm to certain developers and generating a concern that they have been “gold-plated” so as to absolutely protect the various species concerned, giving an over-strict and over-cautious interpretation to what might be a “significant” effect or an impact adverse to the overall integrity of a protected site.¹⁵⁵ This view gained sufficient traction to trigger a governmental review at the start of this year into how the Directives had been implemented. Conversely, the English and Welsh courts have on the whole been reluctant to interpret the Directives strictly. The oft-repeated refrain is that “the provisions... are intended to be an aid to effective environmental decision-making, not a legal obstacle course”.¹⁵⁶ The government’s review has concluded that the Directives are generally working well, with Natural England only objecting to about 0.5 per cent of the 26,500 consultations it receives annually on Habitats grounds.¹⁵⁷ Interestingly, the review found that protected sites in Britain make up 6 per cent of our land area and 7 per cent of our inshore waters, which sounds impressive and yet is a much lower proportion than one finds in the rest of Europe, where they range from 9 per cent to 35 per cent with an average cover of 17.5 per cent.¹⁵⁸ This does not suggest that the United Kingdom is “gold-plating” the Directives; rather it seems to be valuing its habitats as rather less worthy of special protection than all 26 other Member States. Whether they actually are less ecologically valuable is beyond the expertise of this writer. But it does seem inevitable that where habitats and species are particularly valuable, rare and threatened, then protecting them does have to give a very high priority if “sustainability” is to have any meaning at all.

The challenge is to do this while providing predictability and conditions for economic success. The Implementation Review has proposed useful measures to improve the transparency, predictability and speed of the application of the Directives. A “problem solving unit” has been set up in Whitehall, the Major Infrastructure and Environment Unit (“MIEU”), to give early advice on the requirements of the Directives to developers of high-priority major projects, and to work on solutions that enable the infrastructure to be delivered without detriment to protected areas and species. The government has committed to publishing by next spring a new, simplified “overarching guidance manual” that promises to avoid over-precautionary approaches while remaining compliant with the Directives. Defra are currently consulting on draft guidance relating to art.6(4) on alternative solutions, derogation criteria and compensatory measures. There has been a commitment to implement the Penfold Review recommendations, which include requiring a deadline of 13 weeks for derogation licensing decisions, introducing standard “class licences” for routine operations, enabling developers to claim costs of planning appeals where statutory consultees have acted unreasonably, and setting up “account managers” and “relationship managers” with the 25 largest developers with whom the statutory nature consultees interact. There have

¹⁵³ Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 art.6(4).

¹⁵⁴ Conservation of Habitats and Species Regulations 2012 (SI 2012/1927).

¹⁵⁵ See *R. (on the application of Peters) v Secretary of State for Communities and Local Government and Surrey Heath DC* [2009] EWHC 1125 (Admin) at [51].

¹⁵⁶ *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16 at [72] per Sullivan J; *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [38].

¹⁵⁷ HM Government, *Report of the Habitats and Wild Birds Directives Implementation Review* (March 2012), paras 27–28.

¹⁵⁸ HM Government, *Report of the Habitats and Wild Birds Directives Implementation Review* (March 2012) para.22.

also been commitments to review and more clearly publicise the conservation objectives of protected sites, to review the effectiveness of existing mitigation measures and to encourage the sharing of environmental data.¹⁵⁹

The Habitats Directives are the paradigm example of the “precautionary principle” constraining development. As I have argued, it must be right in principle that particularly vulnerable and important ecosystems are subject to this approach. In the longer term, as data becomes more comprehensive and reliable, it will be possible to get a clearer idea of what sorts of development can be permitted near a protected site or species. However, in the near term these streamlining measures themselves are not going to be enough to reconcile the competing demands of conservation and development. Ultimately, if the level of protection of these protected areas is not to be watered down then development needs to be channelled into locations that are clearly more appropriate. That is an argument in favour of a more rational strategic plan-led planning system.

The Sustainable Development Commission has recommended a more strategic approach based on setting environmental limits. In a 2011 report, it has suggested extending genuine spatial planning to include the extension of land use planning to agricultural land to protect soils and habitats and absolute limits on development to reduce habitat loss/fragmentation and enhance multifunctionality of land.¹⁶⁰ In order to do this, as was recognised in the Natural Environment White Paper, it will be necessary to build up a larger and more coherent ecological network with well-policed boundaries while encouraging development elsewhere.

Interaction with other regimes

What we have then as a result of environmental law is *first*, a wider range of mandatory considerations and policies running the whole gamut of environmental policy; *secondly* much greater *structure* imposed on authorities, with greater opportunity for public participation and the provision of more information; *and thirdly*, we have a set of statutory limits in relation to habitats and species. *Fourthly*, though, we have a whole new set of other separate controls under dedicated environmental legislation.

That begs the question of how planning authorities deal with the existence of other systems of control. Possibilities are (1) to ignore the existence of the other system and come to one’s own decision on the merits; (2) come to one’s own decision but having regard to the other system’s policies and principles, and affording other regulators some greater or lesser degree of deference; (3) have regard to the other system and try to second-guess what the regulator would do but grant permission if the scheme were thought likely to be approved by the regulator; or (4) have regard to the other system but that it will be adequate and refuse to duplicate its functions.

PPS23 appeared to indicate that option (4) was the correct approach. Its annexes contained information about the Pollution Prevention and Control regime, the contaminated land regime, air and water quality policies, and statutory nuisance. It stated at paras 10 and 11:

“The planning and pollution control systems are separate but complementary. Pollution control is concerned with preventing pollution through the use of measures to prohibit or limit the release of substances to the environment from different sources to the lowest practicable level. It also ensures that ambient air and water quality meet standards that guard against impacts to the environment and human health. The planning system controls the development and use of land in the public interest. It plays an important role in determining the location of development which may give rise to pollution ... and in ensuring that other developments are, as far as possible, not affected by major existing, or potential sources of pollution. The planning system should focus on whether the development itself

¹⁵⁹ HM Government, *Report of the Habitats and Wild Birds Directives Implementation Review* (March 2012) pp.16–37, 45–6.

¹⁶⁰ Sustainable Development Commission, *Know your environmental limits* (March 2011) pp.16–18, 25.

is an acceptable use of the land, and the impact of those uses, rather than the control of processes or emissions themselves. Planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced. They should act to complement but not seek to duplicate it.

Close co-ordination between planning authorities, transport authorities and pollution control regulators is essential to meet the common objective that where development takes place, it is sustainable.”

Paragraph 15 then continued:

“This requires close co-operation with the Environment Agency and/or the pollution control authority, and other relevant bodies such as English Nature, Drainage Boards, and water and sewerage undertakers, to ensure that in the case of potentially polluting developments:

- The relevant pollution control authority is satisfied that potential releases can be adequately regulated under the pollution control framework; and
- The effects of existing sources of pollution in and around the site are not such that the cumulative effects of pollution when the proposed development is added would make that development unacceptable.”

This envisaged other regulators being asked whether they had powers to deal with any potential impacts from the proposal, and if the answer was “yes”, to consider only whether the cumulative impacts would be unacceptable. Annex 1A to PPS23 stated that:

“It should not be necessary to use planning conditions to control the pollution aspects of a development that are subject to prior approval by a pollution control authority.”

Other matters outside the scope of such a permit, such as hours of operation, the construction process and landscaping, could it said be made subject to conditions.¹⁶¹

The NPPF now states:¹⁶²

“To prevent unacceptable risks from pollution and land instability, planning policies and decisions should ensure that new development is appropriate for its location. The effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution, should be taken into account
...

... In doing so, local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.”

This, of course, assumes that there is a neat separation between the planning systems and other regimes. In some scenarios the two genuinely can be complementary.

¹⁶¹ Office of the Deputy Prime Minister, *Planning Policy Statement 23: Planning and Pollution Control* (2004) Annex 1A paras 1.47–1.48.

¹⁶² NPPF (DCLG, March 2012) paras 120 and 122.

The case law on other regimes as considerations

In *R. (on the application of Cox Skips Ltd) v First Secretary of State*,¹⁶³ the claimants had obtained permission to erect a building which they used to recycle and reprocess waste. They had planning permission allowing use “for the purposes of a waste transfer station for materials arising from construction, building, demolition, gardening and landscape industries excluding special wastes and liquid wastes”, as well as “use... to accommodate stable waste, along with a skip to temporarily store asbestos sheeting and guttering classified as special waste”. Condition 2 of that planning permission stipulated:

“The site shall be used only for the purposes of a waste transfer and recycling facility in accordance with the terms of this permission ... and for no other purposes.”

The claimants had obtained a waste management licence allowing them to handle food waste and bonded asbestos. They applied permission removing the restrictions imposed by Condition 2 to enable any waste to be handled at the facility subject to it being licensed by the Environment Agency. The planning inspector decided as follows:

“The two areas of legislation should complement each other, both over the degree of control and the matters which give rise to concern. In broad terms, planning controls are more relevant or appropriate in the wider area away from the site; the Environment Agency, through the waste management licence, is not able to give protection to broader environmental interests in the surrounding area ... it is both appropriate and necessary that the detailed and specific concerns addressed by the waste management licence are augmented by appropriate planning controls.

... There is the possibility that new types of waste could require novel handling methods which would have their own different range of environmental impacts. I accept that these may be no more harmful than the present range of operations or may even have less impact. Nevertheless, different waste streams may require different methods of handling, either in the types of vehicles used to transport the waste, the machinery used to handle it on site, and the containers used for storage prior to removal from the site. It may be that the installed plant already on site could successfully deal with new types of waste, but this may not be always so.

Although the waste management licence accepts a capacity of 260,000 tonnes per year, it was agreed at the inquiry that the installed capacity is about 130,000 tonnes, and that it is currently processing some 64,000 tonnes. That is, within the limitation of the current waste management licence there is scope for considerable growth in the amount of waste handled at this site, with a commensurate growth in traffic and potential implications for other issues of planning concern.

In my view it is appropriate for the planning authority to retain control over the types of waste handled here because of the associated implications of noise, movement or other off-site impacts not adequately controlled by the waste management licence ... That is, I do not accept that the waste management licence alone offers a rigorous or wide enough regime to safeguard the amenities of the local residents or the environmental impacts associated with the site operations over the wider area. Future expansion should be open to examination for, amongst other matters, the likely traffic impact. Therefore, I do not consider that removing all planning controls over the waste types to be handled would be appropriate.”¹⁶⁴

In the *Cox Skips* scenario, there was no conflict or duplication between the planning control objectives and the waste licensing regime; the planning regime looked at broader and different impacts other than pollution hazard such as traffic generation, so it was proper to retain both sets of controls.

¹⁶³ *R. (on the application of Cox Skips Ltd) v First Secretary of State* [2006] EWHC 2626 (Admin).

¹⁶⁴ *R. (on the application of Cox Skips Ltd) v First Secretary of State* [2006] EWHC 2626 (Admin) at [16].

The second sort of scenario where planning control and other systems of control are complementary can be where planning conditions are used to “fill in the gaps” of other regimes. A good example of this is the field of noise pollution. Although there are specific regulations relating to noise such as those setting absolute limits for workplaces,¹⁶⁵ very often neighbours’ amenity would otherwise be protected only by the law of nuisance. What is a nuisance is subjective, and private nuisance is extremely costly to prove at trial. The regulation of maximum noise levels by way of planning condition can help to pre-empt such nuisances arising.

However, there are categories of case where planning authorities have to deal with the same issue as other regulatory regimes, for the same reason. In such overlapping areas, there is no easy way to avoid covering the same ground if the authorities give independent consideration to a matter. The legal principles that apply are now very well established.

In the case of *Gateshead MBC v Secretary of State for the Environment*,¹⁶⁶ the Northumbrian Water Group had applied for permission to build a clinical waste incinerator in a semi-rural location. The planning inspector noted that the emissions would include cadmium and dioxins and would blow over a rural area, and that the documents submitted by the applicants envisaged that such emissions could exceed limits that were safe for health. He considered there to be insufficient certainty about the level of emissions and he recommended refusal of the application. However, the Secretary of State granted permission because while he acknowledged that he could not predict what level of emissions the Inspectorate of Pollution would authorise, he was confident that the controls under the Environmental Protection Act (“EPA”) were adequate to avoid any risk to health from that site. The deputy judge in the High Court, Jeremy Sullivan QC (as he then was), ruled that health risks were a material consideration and the Secretary of State could not simply ignore them and hive off all environmental considerations to the EPA regime. However:

“just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA for preventing or mitigating that impact and for rendering any emissions harmless. It is too simplistic to say ‘the Secretary of State cannot leave the question of pollution to the EPA’.”¹⁶⁷

He continued:

“Where two statutory controls overlap, it is not helpful, in my view, to try to define where one control ends and another begins in terms of some abstract principle. If one does so, there is a very real danger that one loses sight of the obligation to consider each case on its individual merits. At one extreme there will be cases where the evidence at the planning stage demonstrates that potential pollution problems have been substantially overcome, so that any reasonable person will accept that the remaining details can sensibly be left to the EPA authorisation process. At the other extreme, there may be cases where the evidence of environmental problems is so damning at the planning stage that any reasonable person would refuse planning permission, saying, in effect, there is no point in trying to resolve these very grave problems through the EPA process. Between those two extremes there will be a whole spectrum of cases disclosing pollution problems of different types and differing degree of complexity and gravity. Reasonable people might well differ as to whether the proper course in a particular case would be to refuse planning permission, or whether it would be to grant planning permission on the basis that one could be satisfied that the problems could and would be resolved by the EPA process. But that decision is for the Secretary of State to take as a matter of planning judgment, subject, of course, to challenge on normal *Wednesbury* principles.”

¹⁶⁵ Control of Noise at Work Regulations 2005 (SI 2005/1643).

¹⁶⁶ *Gateshead MBC v Secretary of State for the Environment* [1994] Env. L.R. 11 (High Court); *Gateshead MBC v Secretary of State for the Environment* [1995] Env. L.R. 37 CA.

¹⁶⁷ *Gateshead MBC v Secretary of State for the Environment* [1994] Env. L.R. 11 at 23.

The Court of Appeal upheld that approach. It held:

“[T]his was not a case in which it was apparent that a refusal of authorisation will, or will probably be, the only proper decision for HMIP to make. The Secretary of State was therefore justified in concluding that the areas of concern which led to the Inspector ... recommending refusal were matters which could properly be decided by HMIP, and that their powers were adequate to deal with those concerns.”

This left it to the decision-maker to decide what weight to give to the existence of the safeguards afforded by the other regimes, in the same way that ordinarily it is entirely a matter for the decision-maker what weight to give to any material consideration.

What this jurisprudence means in practice is that it is very much down to the decision-maker as to whether to leave matters to other regulators. In some cases there genuinely is duplication in the sense that not only the subject-matter but also the purpose for the inquiry is the same. This is the case in relation to alcohol and entertainments licensing and the planning system. Planning control is required to change the use of land to a form of establishment requiring a licence, or to erect licensed premises. The licensing authorities’ objectives are the prevention of crime and disorder, public safety, the prevention of public nuisance, and the protection of children from harm.¹⁶⁸ Insofar as these are affected by the use of the land, as opposed say to the identity or conduct of the management, impacts affecting these objectives are plainly also material planning considerations.

In 2002, in the case of *Lethem v Secretary of State for Transport, Local Government and the Regions*¹⁶⁹ an application was made to change the use of retail premises to operate what was euphemistically called a “cafe-bar” but was in fact intended to be operated like a public house. The planning inspector considered that premises primarily serving alcohol would be likely to result in an increase in crime and disorder. He refused the application, stating:

“I accept that the Licensing Authority would have some input into the nature of the use, through conditions that could be applied to the licence and the periodic consideration of whether the licence should be renewed. The letter to the appellant from West Mercia Constabulary, dated 13th February 2001, suggests, amongst other things, no promotional drink offers, drink prices in line with nearby outlets, no applications for Special Hours Certificates, CCTV coverage, and the use of ‘door supervisors’ after 1930 hours. Conditions of this nature, along with others dealing with table covers, the hours when food should be available and so on, may go some way towards defining the character of the use. However, I do not accept that it would be correct to grant planning permission for the proposal as presented and effectively hand over responsibility for defining the use and managing its effects to another regime. To my mind the proposal and its future operation must be satisfactorily secured in planning terms, before it passes to the Licensing Authority for any further control necessary.”

The Deputy High Court Judge George Bartlett QC upheld that decision, saying:

“The essential point ... is that a consideration that, in the absence of some other statutory control, would be a material consideration under section 70 is not rendered immaterial by the existence of that other statutory control.”¹⁷⁰

¹⁶⁸ Licensing Act 2003 s.4(2).

¹⁶⁹ *Lethem v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1549 (Admin).

¹⁷⁰ *Lethem v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1549 (Admin).

While the planning authority in that case was entitled rely on other controls being effective, it was also entitled to be sceptical and to ascertain that they would work in the case before it to render the proposal acceptable in planning terms.

As we have seen, under the Conservation of Habitats and Species Regulations the United Kingdom is required to effectively avoid significant harm eventuating and to grant development consent only if there is no real risk of the harm happening. Disturbance of species without a licence from an appropriate authority is a criminal offence.¹⁷¹ However, there is no requirement to apply for permits for potentially disturbing activities, and the law is enforced primarily by criminal sanctions after the disturbance has taken place. It might be thought that where the Habitats Directive is engaged the planning authority should not grant permission unless it is sure either that no disturbance will take place, or that a licence will be obtained. The Supreme Court has though held that a planning authority is not *obliged* to do so and can grant permission even if unsure whether a licence would be granted if sought. Lord Brown considered that:

“... it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England’s own duty.”¹⁷²

Hence for the moment in this field too, matters are left to the decision-maker’s discretion.

In November 2006, in the case of *Hopkins Developments Ltd v First Secretary of State*,¹⁷³ Deputy Judge Bartlett applied the underlying rationale for the *Gateshead* judgment to a decision taking a dim view of the efficacy of an alternative control regime. The application concerned a proposal to build a plant to manufacture concrete. The concrete manufacturing process was regulated by the local authority pursuant to the Integrated Pollution Prevention and Control (“IPPC”) regime, and the Environmental Health Officer had expressed herself satisfied that the dust levels would be adequately controlled. However, the planning inspector disagreed and considered that unacceptable quantities of dust would be released into the air, affecting the amenities of nearby residential and industrial locations. It was argued in court that since the IPPC system was supposed to prevent significant pollution from arising, and since he was required to assume that it would be applied, it was unreasonable for the inspector to conclude that pollution would arise. The judge rejected that argument, stating:

“This is an argument that is superficially attractive. But it is dependent on the underlying assumption that, in relation to the likely impact of pollutants ... primacy must be accorded to the judgment of the regulator above that of the planning authority. I can see no basis for such an assumption ... It would effectively mean that, unless it was clear to the planning authority that the plant could never achieve a permit ... the potential impact of pollutants could never enter into its consideration of whether planning permission should be granted.”¹⁷⁴

What the courts are therefore saying is that it is my approach number (2) which should be adopted, rather than adopting approach (4). The planning authority must still satisfy itself that pollution impacts will be satisfactory, and it may do so by placing such faith in other authorities as it thinks appropriate.

Where a challenge is made to the adequacy of an alternative regulatory regime, the recent Cornish Waste Forum case indicates that as a matter of fairness the planning inspector is required to consider any arguments that are put to him. In that case, the application was for a waste incinerator and the Environment Agency had issued a draft permit for the stack emissions. It was held that it was incumbent on the inspector

¹⁷¹ Combined effect of regs 41(1)(a), 53(3) and 56 of the Conservation of Habitats and Species Regulations 2010 (SI 2010/490). In England, the licensing authority is either Natural England or the Secretary of State depending upon the reason for the licence. In Wales it is the Welsh Ministers or the Countryside Council for Wales.

¹⁷² *R. (on the application of Morge) v Hampshire CC* [2011] UKSC 2; [2011] 1 W.L.R. 268 at [29].

¹⁷³ *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin); [2007] Env. L.R. 14.

¹⁷⁴ *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin) at [15].

to consider the matters raised.¹⁷⁵ This must be correct in principle as the existence of additional or alternative controls is a material consideration, and the limitations of any control regime are relevant in determining what weight to give to its existence. This jurisprudence accordingly means that in some instances planning authorities will have to deal with quite complex and detailed evidence about the rules, processes and assumptions of other forms of regulatory control, in addition to evidence about the actual effects of the development.

The other aspect of environmental law that affects planning decisions is the extent to which it provides redress for harms that are not prevented by the conditions imposed on the planning permission, or by other prior approval processes. One strand of case law suggests that nuisance law and planning control are separate regimes, such that planning authorities need not accept that what has been judged to abate a nuisance is acceptable in planning terms,¹⁷⁶ and conversely a grant of planning permission cannot operate to turn something which would otherwise be a nuisance into a lawful activity.¹⁷⁷ On the other hand, there is a strand of case law suggesting that once a strategic planning permission is implemented, the development which it authorises may so change the character of the neighbourhood as to make it unreasonable to expect to be unmolested by the ordinary operation of that development according to its terms.¹⁷⁸ The basis of this approach was put bluntly by Jackson L.J.: “The planning authority had made a decision in the public interest and the consequences had to be accepted.”¹⁷⁹ If this is correct, then a planning permission in effect is taking away the neighbours’ civil right to peaceful enjoyment of their property without compensation. The European Court of Human Rights has ruled that:

“the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances.”¹⁸⁰

In those circumstances, it may be that especial attention needs to be given to the individuals likely to be worst affected and planning obligations imposed on the developer requiring him to compensate them.

The question of liability in nuisance has been solved for Nationally Significant Infrastructure Projects by the Planning Act 2008. This provides that a development consent order granted pursuant to that Act will afford a defence in nuisance actions¹⁸¹ unless it states to the contrary,¹⁸² but s.152(3) of the Act states that if there is such a defence to nuisance proceedings:

“[a] person by whom or on whose behalf any authorised works are carried out must pay compensation to any person whose land is injuriously affected by the carrying out of the works.”

The courts are slow to allow an administrative decision to extinguish private rights without compensation.¹⁸³ It is therefore to be expected, although the wording is narrow, that in line with the Human

¹⁷⁵ *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2011] EWHC 2761 (Admin) at [48]–[50], [59]. The decision was reversed by the Court of Appeal on the ground, inter alia, that the inspector had in fact dealt with and impliedly rejected the criticism made: *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 at [39]–[40] per Carnwath L.J. No doubt was cast on the argument that in principle it was incumbent on the inspector to address any criticisms made of the adequacy of the IPPC regime.

¹⁷⁶ *R. v Kennet DC Ex p. Somerfield Property Co Ltd* [1999] J.P.L. 361.

¹⁷⁷ These are cited in *Barr v Biffa Waste Services* [2012] EWCA Civ 312 at [77] per Carnwath L.J.

¹⁷⁸ See *Coventry (t/a RDC Promotions) v Lawrence* [2012] EWCA Civ 26 at [53]–[58], [65(iv)], [74]–[75] per Jackson L.J. This is discussed in *Barr v Biffa* [2012] EWCA Civ 312 at [78]–[85] per Carnwath L.J.

¹⁷⁹ *Coventry (t/a RDC Promotions) v Lawrence* [2012] EWCA Civ 26 at [58] per Jackson L.J.

¹⁸⁰ *Holy Monasteries v Greece (A/301-A)* (1995) 20 E.H.R.R. 1 at 71.

¹⁸¹ There is an interesting discussion of whether this will serve to defeat prosecutions under s.79 of the Environmental Protection Act for “statutory nuisances” which are “prejudicial to health” or otherwise distinct from what would be a nuisance at common law in Francis Moor, “Planning for nuisance? A review of the effects of the Planning Act 2008 on the statutory authority defence in the UK” [2011] *International Journal of Law in the Built Environment* 3(1), 65–82 at 78–80.

¹⁸² Planning Act 2008 ss.158(1) and (3).

¹⁸³ See *Blackburn v ARC Ltd* [1998] Env. L.R. 469 at 525.

Rights Convention this compensation provision will be construed broadly to allow compensation to be recovered for those who are affected not just by the building of the infrastructure but also by its operation.¹⁸⁴

Duplication and the costs of overlap

Planning control is about whether a specific proposed use of land is acceptable at a specific location in the public interest. It is a decision made “in the round”, and so the requirements of other regimes may be met on their own terms but the development may still be found unacceptable. For instance, it may be that an activity would use the best practicable means to control noise but would still harm amenity, or would be safe but would make a quiet neighbourhood unacceptably busy. Accordingly, often the criticism of supposed duplication of other prior consenting regimes is not justified because there is not a simple duplication as the questions are different even if some of the evidence is common to both processes.

Furthermore, planning law has a different and complementary function to reactive regulation by way of tort law claims and criminal charges. It vindicates the overall public interest rather than the rights of victims of pollution and uncontrolled safety risks, and it aims at avoiding problems and creatively designing better places rather than policing minimum standards, compensating victims or punishing the reckless.

It is also apparent that the planning authority is not in fact “duplicating” other regimes even where it covers the same ground and asks the same questions. Let us look for instance at the strongly overlapping instance of the drinking establishment mentioned above. If the planning authorities think it is likely to lead to unacceptable levels of disorder and refuse permission, then the developer will never get around to having to apply to the licensing authorities for a licence.¹⁸⁵ If the planning authorities grant a conditional planning consent then the licensing authority will not need to duplicate the conditions imposed when it draws up its own licence.

Dealing with a wide range of considerations at the stage of granting planning permission does tend to “front-load” costs and it works against those who merely want “in-principle” consent and have not worked up detailed plans, and those who would be refused permission because the planning authority thinks that the location is wrong for that sort of activity without having to condescend to specific details.

However, the system is supposed to determine the location of land in the public interest and planning authorities have to work on the assumption that proposals will actually be implemented. If an overall assessment of the “sustainability” of development is being made at the level of each decision, then it is vital that the decision-maker is fully informed so that he can feed all the social, economic and environmental impacts of the development into the overall balancing exercise. This was recognised by Adrian Penfold’s review of non-planning consents.¹⁸⁶ As Penfold concluded in his review, it is conceptually attractive for all issues relating to whether a development should go ahead to be settled at the time when planning permission is granted.¹⁸⁷ It would also be better for developers to have certainty that all issues will be considered “in the round” than the current system where the extent to which matters are left to other authorities is left to the decision-maker’s discretion. For those reasons, there are good reasons for predicting that the expansion of the planning system’s remit is only likely to continue.

Thus, the Penfold Review’s suggestions of increased pre-application consultation to identify what information is essential, of parallel applications for non-planning consents, of “front-loading” of environmental assessments and design work, and all “in principle” decisions being made at the planning application stage makes overall sense. Clearly, different regimes can be amalgamated to simplify procedures.

¹⁸⁴ Pace Bishop and Jenkins who take the opposite view without analysis of the Convention case law in “Planning and nuisance: revisiting the balance of public and private interests in land-use development” *Journal of Environmental Law* 23(2), 285–310 at 297.

¹⁸⁵ Usually these are of course the same local authority but the principle is not affected.

¹⁸⁶ See Adrian Penfold, “The relationship between Planning Permission and Non-Planning Consents—Unfinished Business?” [2010] 13 J.P.L. OP27 at OP27–OP29, OP39.

¹⁸⁷ Adrian Penfold, *Penfold Review of non-planning consents*, Final Report (Department for Business, Innovation and Skills: July 2010), URN 10/1027, pp.47–53, particularly p.48 and para.4.15 on p.52.

Already many environmental permits have been amalgamated and “standard” or “class” consents are being issued for straightforward cases, based on clear and predictable rules.¹⁸⁸ Clear development plans will go some way to indicating what development is likely to be acceptable in a particular location, so as to reduce the prospect of costs being wasted.

Although Penfold shied away in his Final Report from recommending a single unified planning consent, in future the dilemma of how to deal with other regimes may eventually be eliminated because the planning system will have taken over or integrated many of the other consents.

Impact on High Court Challenges

There is no doubt that the prospect of a successful judicial review influences the manner in which decision makers exercise their discretion. This was recognised in opening words of the first edition of the government publication *The Judge Over Your Shoulder*:

“You are sitting at your desk granting licences on behalf of your Minister. Your enabling statutory powers are in the widest possible terms: ‘The Secretary of State may grant licences on such conditions as he thinks fit’. With power like that you might think that there could be no possible ground for legal challenge in the courts whatever you do. But you would be wrong.”¹⁸⁹

This is not the place for a detailed examination of the impact of European law upon public law decision making. But EU law via its environmental law provisions has had an immense impact upon the ability of dissatisfied persons to challenge planning decisions in the courts and thereby has influenced the way in which such decisions are made.

The result is that a challenger who bases his challenge against a planning decision upon an breach of EU environmental law is in a better position in terms of English court procedure than if his challenge is based upon an entirely English ground of review. The following is a brief overview of the position.

Time limit for judicial review of planning decisions

CPR r.54.5 imposes a time limit for filing a claim form with the Administrative Court. The claim must be filed promptly and “in any event not later than three months after the grounds to make the claim first arose.”¹⁹⁰ This is the only avenue open to a person who wishes to challenge the legality of a planning permission granted by a local planning authority

The three months time limit would seem compatible with the requirements of EU law.¹⁹¹ However, the real issue is whether the requirement that proceedings be brought “promptly” (or without “undue delay” in the context of permission or remedy) can be said to satisfy the principle of legal certainty. The European Court of Justice (“ECJ”) has repeatedly stated that the effect of EU legislation must be clear and predictable

¹⁸⁸ See Elizabeth A. Kirk and Kirsty Blackstock, “Enhanced decision making: balancing public participation against “better regulation” in British environmental permitting regimes” [2011] *Journal of Environmental Law* 23(1), 97–116 on these changes and the impact on public participation.

¹⁸⁹ See http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf [Accessed September, 2012].

¹⁹⁰ If proceedings are issued outside the 3 month limit, the court has a power to extend the time limit as part of its general case management powers under r.3 (see r.31(2)), but in practice this is not done unless there are good reasons for doing so. Rule 54.5 needs to be considered alongside s.31(6) of the Supreme Court Act 1981, which provides that “where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—(a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”.

¹⁹¹ A fixed time-limit is less likely to be reasonable if a claimant’s delay in exercising the remedy is due in some way to the conduct of the national authorities (See *Edilizia Industriale Siderurgica Srl (EDIS) v Ministero delle Finanze* (C231/96) [1998] E.C.R. I-4951 at 48 and *Santex SpA v Unita Socio Sanitaria Locale No.42 di Pavia* (C-327/00) [2004] All E.R. (EC) 640; [2003] E.C.R. I-1877). The more mitigating the circumstances by which delay can be explained the more likely a refusal of permission or relief based on delay will be unlawful (See *Levez v TH Jennings (Harlow Pools) Ltd* (C-326/96) [1999] All E.R. (EC) 1; [1998] E.C.R. I-7835 at 20, 27–34).

for those who are subject to it.¹⁹² The concept of promptitude contains a degree of inherent uncertainty, a point I made a decade ago in Jones and Phillpot in “He Who Hesitates is Lost: Judicial Review of Planning Permissions”.¹⁹³ That article was considered by the House of Lords in *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)*,¹⁹⁴ leading Lord Steyn, with whom Lord Hope agreed, to doubt in obiter statements the compatibility of the promptitude rule with EU and ECHR law state in an obiter passage.¹⁹⁵

This dicta was considered subsequently by the lower courts.¹⁹⁶ In ,¹⁹⁷ the Court of Appeal seized upon the fact that in *LAM v United Kingdom*¹⁹⁸ the European Court of Human Rights (“ECtHR”) had held that the promptness requirement was not in breach of art.6(1) of the Convention and that *LAM* (41671/98) (July 5, 2001) had not been cited in *Burkett*.¹⁹⁹ The Court of Appeal refused permission to appeal a refusal of permission to apply for judicial review of an environmental challenge to a grant of planning permission brought just²⁰⁰ within the three month period. Keene L.J. giving the leading judgment relied upon *LAM* (41671/98) (July 5, 2001) pointing out that the ECtHR had held that legal certainty does not connote “absolute certainty”²⁰¹ and that this was especially applicable to a procedural rule in applications seeking judicial review where the degree of promptness required would vary from case to case. *Hardy* did not deal with the position under EU law. Indeed, one of the factors on which Keene L.J. not unreasonably based the decision was the use of a “promptness” test by the ECHR itself in connection with its own procedure. In essence this has remained the position of the English courts.²⁰² The compatibility of the promptness requirement and EU law has now been addressed by the CJEU. In *Uniplex (UK) Ltd v NHS Business Services Authority*²⁰³ the CJEU set out guidance on the limitation period established in the UK’s Public Contracts Regulations 2006 (the “Regulations”), implementing Directive 89/665 (the “Remedies Directive”). The time periods are (no doubt intentionally) identical to those proscribed for judicial review pursuant to CPR 54. The court held that the time for bringing proceedings should run from when the claimant knew, or ought to have known of the alleged breach (the date of knowledge) and not from the date on which the infringement occurred. The CJEU also held that the national court’s discretion under the Regulations to dismiss proceedings not brought “promptly”, even though within the 3 month time limit, breaches certainty and effectiveness and is not compatible with art.1(1) of the Remedies Directive.²⁰⁴

¹⁹² Opinion of A.G. Jacobs in *Konstantinidis v Stadt Altensteig-Standesamt* (C168/91) [1993] E.C.R. I-1191; *Kingdom of Denmark v Commission* (C-233/96) [1988] E.C.R. I-5759 at 38 (Community rules must enable those concerned to know precisely the extent of the obligations imposed on them); *Grandrand Freres* (169/80) [1981] E.C.R. 1931 at 1942; *Germany v Commission* (C-245/97) [2000] E.C.R. I-11261 at [72].

¹⁹³ Jones and Phillpot, “He Who Hesitates is Lost: Judicial Review of Planning Permissions” [2000] J.P.L. 564 cited by Lord Steyn in *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23; [2002] 1 W.L.R. 1593 at [41], [44], [49] and [53] and by J. Sykes, *The Northern Jamaica Conservation Association and others. The Natural Resources Conservation Authority and The National Environment and Planning Agency* (May 6, 2006). The Supreme Court of Judicature Jamaica in Common Law, (Claim No.HCV 3022 of 2005).

¹⁹⁴ *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23; [2002] 1 W.L.R. 1593.

¹⁹⁵ *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23; [2002] 1 W.L.R. 1593 at [53]: “... there is at the very least doubt whether the obligation to apply ‘promptly’ is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). It is a matter for consideration whether the requirement of *promptitude*, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty.”

¹⁹⁶ In *R. (on the application of Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370, Sedley L.J. commented in respect of *Burkett*: “Its effect seems to be to open a new chapter on time bars in public law. ... It is clear from paragraphs 53 and 59–60 of the report of their Lordships’ decision that promptness within the three-month period is now an instrument to be handled with great circumspection.” See also *R. (on the application of Boulton) v Leeds School Organisation Committee* [2002] EWCA Civ 884 but cf. *R. (on the application of Young) v Oxford CC* [2003] J.P.L. 330 and *R. (on the application of Lynes) v West Berkshire DC* [2002] EWHC 1828; [2003] J.P.L. 1137.

¹⁹⁷ *Hardy v Pembrokehire CC (Permission to Appeal)* [2006] EWCA Civ 240.

¹⁹⁸ *LAM v United Kingdom* (41671/98) (July 5, 2001).

¹⁹⁹ *LAM v United Kingdom* (41671/98) (July 5, 2001) however post-dated Jones and Phillpot.

²⁰⁰ Although most of the decisions were made more than three months prior to the application for permission to seek judicial review, the court impliedly accepted that the question in respect of the last decision was whether the proceedings to challenge it had been brought promptly.

²⁰¹ *Sunday Times v United Kingdom* (A/30) [1979–1980] 2 E.H.R.R. 245 at 49.

²⁰² See *Finn-Kelsey v Milton Keynes BC* [2008] EWCA Civ 1067.

²⁰³ *Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08) [2010] P.T.S.R. 1377; [2010] 2 C.M.L.R. 47

²⁰⁴ Advocate General Kokott stated in her opinion that a limitation period the duration of which is placed at the discretion of the court is not predicably in its effects and fails to ensure effective transposition of a Directive’s requirements [para.69].

Consequently, the CJEU held that the English court's discretion must be exercised to extend the time limit for bringing proceedings in order to comply with EU law.

In *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Medway Council*,²⁰⁵ H.H. Judge Thornton QC (sitting as Deputy High Court Judge) in a challenge to an EIA planning permission accepted that, following *Uniplex* claimants seeking permission to apply for judicial review no longer have to satisfy an independent test of "promptitude" under CPR r.54.5 where their claim involves the enforcement of European Union Directives. The requirement in such cases is simply that claims be brought within three months of the relevant decision. The *Buglife* view has been reinforced by the judgment of Collins J. in *R. (on the application of U & Partners (East Anglia) Ltd) v Broads Authority*²⁰⁶ which has quashed the grant of planning permission for a flood defence wall for breaches of the environmental impact assessment ("EIA") Directive. Collins J. considered that the claim was not brought promptly, however he allowed the claim because of its strong merits and, importantly, because decisions of the CJEU have held that time limits "must be certain since otherwise the protection of rights derived from Community Law would not, it is said, be effective" (at [37]). The judge expressed the view that he did not agree with the CJEU judgments but felt bound by the CJEU judgments in *Uniplex* and *Commission v Ireland*.²⁰⁷ Both cases related to the EU Directive on public procurement. However the ratio of those cases was based upon the overarching principle of effectiveness and Collins J. held that limiting its application to public procurement situations "cannot be justified" (at [44]).

But in obiter dicta in *R. (on the application of Berky) v Newport CC*²⁰⁸ Carnwath and Moore-Bick LL.J.s' comments at [35] and [53] suggested that the *Uniplex* ruling it applied only to grounds based upon EU law.²⁰⁹ The existence of a two tier set of time limits for challenges to planning permissions by judicial review seems with respect absurd. Sir Richard Buxton's minority view in *Berky* that *Uniplex* disapplies time limits in respect of all grounds so long as there is an EU ground (at [68]–[70]) seems the more pragmatic. One, however, is reminded of the position immediately post *Factortame* in respect of injunctions against the Crown. *Factortame*²¹⁰ had held that where a domestic rule, in this case the prohibition of obtaining injunctive relief against the Crown inhibited the effectiveness of an EU law right it must be disapplied. What was the position where the claimant seeks injunctive relief against the Crown in order to give effect to a domestic law right? Could he obtain injunctive relief against the Crown? In *M v Home Office* Lord Woolf in a speech endorsed by the other members stated:²¹¹

"Since the decision in *Factortame* there has also been the important development that the European Court has determined the second reference against the Crown so that the unhappy situation now exists that while a citizen is entitled to obtain injunctive relief (including interim relief) against the Crown or an Officer of the Crown to protect his interests under Community Law he cannot do so in respect of his other interests which may be just as important."

Lord Woolf went on to hold that there was in fact jurisdiction to grant injunctive relief against the Crown in respect of purely domestic grounds.

²⁰⁵ *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Medway Council* [2011] EWHC 746 (Admin).

²⁰⁶ *R. (on the application of U & Partners (East Anglia) Ltd) v Broads Authority* [2011] EWHC 1824 (Admin)

²⁰⁷ *Commission v Ireland* (C-456/08) [2010] P.T.S.R. 1403.

²⁰⁸ *R. (on the application of Berky) v Newport CC* [2012] EWCA Civ 378

²⁰⁹ A view previously also expressed in *R. (on the application of Macrae) v Herefordshire DC* [2011] EWHC 2810 (Admin) by David Elvin QC (sitting as a deputy High Court Judge).

²¹⁰ *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603; [1990] 3 W.L.R. 818; [1991] 1 All E.R. 70.

²¹¹ *M v Home Office* [1994] 1 A.C. 377.

Costs in High Court Challenges to Planning Permissions

The general guidance on Protective Costs Applications (“PCOs”) is set out in *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry*²¹² applied in *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Medway Council*²¹³ setting various factors which were to be taken into account including whether the application raised a matter of wider general public importance and the relative means of the parties. But the impact of the Aarhus Convention has altered the test for PCO application, at least as far as it concerns any challenge to a planning permission relating to an EIA development.²¹⁴ In *R. (on the application of Garner) v Elmbridge BC*²¹⁵ the Court of Appeal addressed the application of Aarhus to the costs regime.

Article 10a of the EIA Directive (now art.11 of the 2011 EIA Directive) provides that:

“Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned ... having a sufficient interest ... have access to a review procedure before a court of law ... to challenge [decisions governed by the Directive which is] fair, equitable, timely and not prohibitively expensive.”²¹⁶

The Court of Appeal (Sullivan L.J., Lloyd and Richards L.J. agreeing) allowed the appeal against the refusal of the PCO and held that in cases where the EIA or IPPC Directives apply, the *Corner House* conditions must be modified so as to ensure compliance with the directives. As such, the “general public importance” and “public interest requiring resolution of those issues” conditions in *Corner House* do not arise to be considered since the directives are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases. The High Court was therefore not entitled to deny the appellant’s application on the basis that the matter did not satisfy the public interest tests in *Corner House*. The court then considered the requirement under the Directives that review procedures are “not prohibitively expensive”. The appellant in *Garner* was unwilling to undergo a means test in a public forum and there were only vague references to his means in evidence. The court expressed its reluctance to decide whether an objective or subjective test, or some combination of the two, ought to be applied in determining “prohibitive expense” as the issue was under consideration by the Aarhus Convention Compliance Committee, the European Commission, and was also likely to be subject to a pending Supreme Court appeal reference to the CJEU as indeed it was²¹⁷ as to whether the test was purely subjective or objective. The Court of Appeal held that a purely subjective approach based on the means of a particular claimant, as taken by Nichol J. in the High Court, was not consistent with the Directives. The court stated that as a matter of common sense most “ordinary” members of the public would be deterred from proceeding with the case by the potential cost liability (estimated to be at least £60,000 plus VAT). The court noted the reluctance of the appellant to undergo a public means test, stating that investigations into the means of individual claimants may also have a chilling effect on the willingness of ordinary members of the public to bring environmental challenges, contrary to the underlying purposes of the Directives. The court therefore held that Nichol J.’s approach to the “prohibitively expensive” issue was not consistent with the Directive, and a PCO was necessary in this case if the proceedings were not to be prohibitively expensive. The respondent planning authority in

²¹² *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

²¹³ *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Medway Council* [2008] EWCA Civ 1209.

²¹⁴ Even where as in *Garner* the grounds did not raise an allegation of breach of the EIA Directive.

²¹⁵ *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006. In *Commission v Republic of Ireland (C-427/07)* [2009] E.C.R. I-6277 the ECJ held at [93]–[94] that the Irish costs provisions which are broadly similar to those in England and Wales are not compatible with the EIA Directive. The ECJ accepted that in principle some costs recovery is acceptable. The ECJ did not go on to say what approach would be regarded as compatible with the need to prevent costs from making proceedings prohibitively expensive.

²¹⁶ Article 16 of the IPPC Directive is in similar terms.

²¹⁷ *R. (on the application of Edwards) v Environment Agency* [2010] UKSC 57. The hearing before the CJEU has only just taken place and judgment is awaited.

Garner had made an offer in open correspondence to agree to a PCO on the basis that it would limit its costs claim to £5,500 in exchange for a reciprocal cap on its liability of £35,000. The appellant rejected this and argued that there was no reason to impose additional limitations on the remuneration of claimants' lawyers, which would have the effect of penalising a successful claimant in costs or requiring his legal advisers to subsidise the litigation. While accepting that there may be potential long term difficulties if modest reciprocal caps were consistently imposed, the court stated that these were systemic issues which could not be resolved within the immediate appeal. It held that, on the facts available to it, the imposition of a reciprocal cap of £35,000 as proposed by the respondent was fair and proportionate, and not prohibitively expensive. The Court of Appeal granted a PCO of £5,000 with a reciprocal cap of £35,000.

The CJEU's judgment in *Edwards (C-260/11)* is presently awaited which should address the question as to whether costs are to be subjectively or objectively assessed and whether the principles can apply also at the costs assessment stage. The opinion of the Advocate General was delivered on October 19, 2012 and suggested that both objective and subjective factors should be taken into account but with an emphasis on wide access to justice and the public interest. The Government will probably await the outcome of that judgment before acting on the outcome of its consultation paper: *Cost Protection for Litigants in Environmental Judicial Review Claims Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention*.²¹⁸

Undertaking to give damages when seeking an interim injunction pending substantive judicial review of a planning permission

The EU principle of effective protection extends to the question of interim remedies. The CJEU has held that, as a matter of principle, interim relief should be available until the compatibility with EC law of an act is determined, if necessary to ensure the effectiveness of the judgment which may find a breach of EU law.²¹⁹ In private law litigation, of course, a claimant's ability to provide an undertaking in damages is an important factor going to the court's discretion in deciding whether or not an interim injunction should be granted against the defendant.²²⁰ In the ordinary case, so too it is an important factor in public law.²²¹

In *R. v Durham CC Ex p. Huddleston*,²²² the claimant was unable to give a cross-undertaking in damages in seeking an interim injunction to prevent further quarrying in accordance with the planning permission which was the subject of the challenge. Nonetheless, an interim injunction was granted because the case raised questions of wider public interest involving EU environmental law.²²³ A local resident relying, *inter alia*, upon *Huddleston* was able to obtain an interim injunction without giving an undertaking in damages prohibiting Hampshire CC from carrying out works to implement a planning permission granted to itself to construct part of a guided bus way system.²²⁴ The Aarhus Convention says that access to environmental justice should not be prohibitively expensive.²²⁵ The compatibility with the normal requirement of providing undertakings in damages for interim relief pending a challenge to a grant of planning permission is the

²¹⁸ Consultation Paper CP16/11.

²¹⁹ See *Unibet (London) Ltd v Justitiekanslern* (C-432/05) [2007] 2 C.M.L.R. 30 at [47].

²²⁰ See generally CPR Pt 25 and Practice Direction 25 which deal with interim remedies in general.

²²¹ In *R. v Secretary of State for the Environment Ex p. Rose Theatre Trust Co (No.2)* [1990] 1 Q.B. 504, Schiemann J. held the court should be extremely slow to grant an injunction without a cross-undertaking in damages. See also *R. v Inspectorate of Pollution Ex p. Greenpeace Ltd (No.1)* [1994] 1 W.L.R. 570 at 574.

²²² *R. v Durham CC Ex p. Huddleston* [2000] Env. L.R. D21.

²²³ One might compare the approach in *ex p Huddleston* with that of the Privy Council in *R. (on the application of Friends of the Earth Ltd) v Environment Agency* [2003] EWHC 3193 (Admin); [2004] Env. L.R. 31, which did not involve a question of EU law, the case being a decision of the Privy Council involving development in Belize.

²²⁴ *R. (on the application of Morge) v Hampshire CC* [2011] UKSC 2, order granted by Silber J. on September 9, 2009. CO/10056/2009.

²²⁵ See the Aarhus Committee Draft decision in the Port of Tyne complaint ACCC/C/2008/33 at http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf [Accessed September, 2012].

subject of a government consultation *Cross-undertakings in damages in environmental judicial review claims*.²²⁶

Intensity of review of planning decisions

To date the English courts²²⁷ have maintained a fairly robust if not always consistent approach to the intensity (or rather lack of) of review of the so-called merits of the planning decision.²²⁸ In maintaining the traditional *Wednesbury* unreasonable test as the appropriate test.²²⁹ In *Buglife*²³⁰ H.H. Judge Thornton QC in obiter dicta suggested that the *Wednesbury* approach to EIA challenges might not be correct. The EIA Directive was amended in 2005 by the Public Participation Directive to incorporate the requirements of the Aarhus Convention. Article 9(2) of the Public Participation Directive requires that parties with sufficient interest to challenge an environmental decision must have the right to challenge the “substantive legality” of that decision. This provision is directly effective by virtue of art.11 of the EIA Directive. In *Boxus v Region Wallaone*,²³¹ the court held that art.9 required in respect of non legislative projects the ability to challenge the “substantive or procedural legality” of such decisions ([51]). Later, it said that national rules should allow the ability to review the substance of the decision. It is of course not clear what is meant by “review” the “substance” of the decision. In one way that is what *Wednesbury* allows. However, the Aarhus Convention Compliance Committee at paras 125–127 in the Port of Tyne complaint decision doubted whether the general *Wednesbury* approach was compatible with art.9(2). Accordingly, it has been suggested by one commentator that:

“[T]here may be scope for arguing that the *Wednesbury* approach is too restrictive and that the courts should subject EIA decisions to a greater degree of scrutiny. The difficulty of this question may even merit a reference to the CJEU under Art 267 TFEU and it has the potential to have a significant impact on the nature of judicial review of EIA and similar environmental decisions.”²³²

Conclusion

What themes can we draw together from this review? First, under the influence of principles expressed in international environmental conventions, the preoccupations of the planning system have grown ever-wider, even as those same principles have to some extent curtailed the discretion of the planning authorities.

In particular, decision-making procedures have become more structured to require certain factors to be considered, and to allow for input from consultees and environmental assessment, while statutory directions have been given as to the weight to give to environmental factors in some cases. Decisions are taken in an increasingly more transparent manner with a requirement for reasons to be given. The public has an increasing ability to challenge those decisions in the courts. These reforms have been piecemeal and there is significant cause to doubt how far the overall environmental impact of the new legal requirements has been positive. Positive outcomes seem to depend more upon the inculcation of environmental values than on the precise content of the specific binding rules that are imposed from above. We can see this very

²²⁶ Consultation Paper CP17/10 at <http://www.parliament.uk/deposits/depositedpapers/2010/DEP2010-2072.pdf> [Accessed September, 2012].

²²⁷ cf. the judgment of the high court in Northern Ireland in *Sandale* [2010] N.I.Q.B. 43.

²²⁸ See for a critique of the failure of the English court to achieve a consistent approach to the application of the precautionary principle in EU environmental law see Denis Edwards, Judicial Review and the Precautionary Principle in Gregory Jones (ed), Ch.12 of *The Habitats Directive: A Developer's Obstacle Course?* (Hart, 2012).

²²⁹ See, e.g. *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env. L.R. 21, *R. (on the application of Blewett) v Derbyshire CC* [2004] EWCA Civ 1508 and most recently *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321 and *R. (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869.

²³⁰ *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Medway Council* [2011] EWHC 746 (Admin).

²³¹ *Boxus v Region Wallaone* (C-128/09) [2012] C.E.C. 414; [2012] Env. L.R. 14.

²³² David Elvin QC, *Is Europe Good for Planning?* PEBA Annual Conference 2012.

clearly in the greatly varying approach to conducting EIAs across all the EU Member States, which show up the different value judgments being made as to what effects are “significant”. An important function of environmental law has been to raise awareness of these values and prompt decision-makers to think about them.

The greatest influence of environmental law has been on the conceptualisation, formulation and content of policy and particularly the statutory development plan. We have seen that at the level of rhetoric or ideology the concept of “sustainable development” has become an organising principle of the whole system, but that there is a long way to go before that objective can be translated into concrete steps at the level of the individual decision, which is still largely discretionary and unstructured when it comes to putting that definition into meaningful practice. Perhaps a better method is to look at “ecological sustainability”—something we see reflected in the obligation of the Habitats Directive presumption against the grant of consent for development that adversely affect the conservation objectives of a European Protected Area.

“If this concept [sustainable development] is caught between political vagueness and legal ambition ‘international lawyers could be serious about detecting its normative core’. Clarity can only come from defining the essence of ‘sustainable’ with respect to its object. The essence is neither ‘economic sustainability’, nor ‘social sustainability’, nor ‘everything sustainable’, but ‘ecological sustainability’.”²³³

Meanwhile, the integration of various fields of policy has created an overlap in functions that has been abetted by the doctrine of “relevant considerations”. While this has not in fact expanded the number of relevant issues, the existence of other regimes makes for a more complex decision-making exercise where the sufficiency of the other regimes in regulating particular schemes is challenged.

The direction of travel, slow though it may be, is unmistakable: the implementation of an integrated and plan-led approach to planning decision-making with an emphasis on “sustainability” being reinforced by statutory constraints on the taking of decisions.

Where we go from here

We should not be cynical. It is too easy to suggest that “sustainable development” is a vacuous concept. I suggest that it is a simple and profoundly important one and its realisation is actually very important. Plainly, it is not conducive to the long-term health of the environment or the well-being of the population for the wealth of the country to be stagnant or falling. It is also clearly vitally important to do this in a manner that does not harm future generations. We do however need to look hard at how ecologically “sustainable development” can best be put into practice. To do this, we need firstly to understand the economic and environmental costs and benefits of our current planning laws, and then to arrive at a consensus as to the optimum trade-off between the two.

More research needed

Having been descriptive it is time to be prescriptive. First, I make a call for more research. On July 12, 2012, the Foreign Secretary William Hague made a statement to Parliament calling for an “audit” of the impact of the European Union on the United Kingdom. He said:

“Today, I have published a Command Paper that sets out in detail how we will deliver our undertaking in the coalition programme for government to ‘examine the balance of the EU’s existing competences’.

²³³ K. Bosselmann, *The Principle of Sustainability* (2008).

The review will be an audit of what the EU does and how it affects us in the United Kingdom. It will look at where competence lies, how the EU's competences, whether exclusive, shared or supporting, are used and what that means for our national interest ...

As the European Union continues to develop ... we need to be absolutely clear when it is most appropriate to take decisions at the national or local level—closer to the people affected—and in other cases when it is best to take action at the EU or global level.”

In this paper I have cast a look at how environmental laws have affected the planning system in this country, and an important component of those laws have been promulgated as a result of European Union action. One of my themes has been that in this field, European initiatives have been beneficial to the environment without undue cost, and so “more Europe” in this particular field may be a good thing. However, as should have become clear by the end of this discussion, there is still a lot that we do not know about how decision-making has been affected in practice. I therefore echo Mr Hague's call for serious study of how environmental objectives have been integrated into the planning system, with particular reference to the effectiveness of European Union-derived laws. The implementation review of the Habitats and Birds Directives was a good step in that direction but its results were quite superficial.

I would suggest that we need research into the following areas relating to European Union law. First, we need routine follow-up studies to be conducted into the environmental effects of plans and projects, and a comparison with what had been predicted by their EIA or SEA. This will enable assessment methodologies to be improved. Secondly, more research should be conducted by way of interviews and observation studies into the extent to which prompting decision-makers about matters such as the Habitats Directive or providing them with impact assessments actually impacts upon their decisions and in what ways. Thirdly, we should investigate whether and to what extent national planning systems need to be co-ordinated or harmonised under the aegis of the European Union in order to achieve conservation objectives outside the especially protected areas in a way that gives developers a level playing field across Europe.

In the realm of national law, it may be that a set of absolute “environmental limits” needs to be built into Local Plans, that particular tests and presumptions for decision-makers need to be brought in (such as on climate change mitigation and carbon emissions), or that more prescriptive “bright line rules” need to apply to certain sorts of habitat or ecosystem which are not European protected sites. Protection of soils and landscapes may need to be more tightly achieved by bringing agriculture and forestry under strategic planning control of local authorities. Again, more research is needed to ascertain what is required.

More co-ordination needed at a national level?

One of the themes of government policy has been that “spatial planning” is an essential tool for realising “sustainable development”. Precepts must be related to places if they are to have any effect. The government recites the following “core principles” in the NPPF with regard to local plan-making:

“planning should:

- be genuinely plan-led, empowering local people to shape their surroundings...setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency”
- not simply be about scrutiny, but instead be a creative exercise in finding ways to enhance and improve the places in which people live their lives;

- proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs ...
- contribute to conserving and enhancing the natural environment and reducing pollution. Allocations of land for development should prefer land of lesser environmental value ...²³⁴

What is true at the local level is equally true at national level, it seems to me. There, sectoralism and piecemeal development still reign. When someone proposes to build a high-speed railway, we hold an inquiry. When it is suggested that we construct a runway at a major airport, we hold an inquiry or consult on the future of air travel. We have planning going on with regard to water resources managed by individual water undertakers, which come forward piecemeal as plans and are not integrated into the planning system. We have separate biodiversity management plans operating to their own cycle. There are many thousands of pages of National Policy Statements with regard to Nationally Significant Infrastructure Projects but they of course only apply to the sort of large-scale development that is reserved to the Secretary of State, are on the whole not site-specific, and are produced apparently in isolation from each other by individual Whitehall departments. Systematic strategic planning for the overall location of housing, industry, and infrastructure, and the protection of natural systems taken as a whole, is simply not done. What is wholly and very conspicuously lacking in England is a national-level, long-term and location-specific master plan for the future sustainable development of the country, which could guide individual decisions.

So I here float what some might think a radical suggestion: is it time to consider imposing a statutory requirement on central government departments to collaborate to come up with an integrated strategic sustainable development plan, to be put to MPs, debated and voted upon?

In Wales, the planning system is already structured around the Wales Spatial Plan that provides a 20-year agenda for planning.²³⁵ The Planning etc. (Scotland) Act 2006 requires Scottish Ministers to prepare a national planning framework, and its second National Planning Framework also runs from 2009 to 2030, designating 14 developments of strategic importance to Scotland.²³⁶

Clearly, an integrated national development plan would be a radical departure from the Government's direction of travel. It might be said that history is against such a proposal. The concept of simply an integrated transport strategy was the subject of satire in the excellent *Yes Minister in Bed of Nails*²³⁷ and attempts to coordinate even transport have proved problematic.²³⁸

"Rt. Hon Jim Hacker MP: After all we do need a transport policy.

²³⁴ NPPF (DCLG, March 2012) para.17.

²³⁵ *Peoples, Places, Futures: The Wales Spatial Plan* (National Assembly for Wales, 2004) updated 2008.

²³⁶ *National Planning Framework for Scotland 2* was published on June 25, 2009.

²³⁷ *The Bed of Nails* is the 19th episode of the BBC comedy series *Yes Minister* and was first broadcast December 9, 1982 in which Hacker unwisely accepts the role of "Transport Supremo" with a view to developing and "Integrated Transport" policy for the UK.

²³⁸ A research paper published by Parliament in 2010 reflected on the question of how much policy is made by the minister and how much influence the civil service quoting from "A Bed of Nails". The episode is often credited as being the source of the term "integrated transport". A "Commission for Integrated Transport" was established in 1998 "to provide independent advice to Government on the implementation of integrated transport policy, to monitor developments across transport, environment, health and other sectors and to review progress towards meeting our objectives." This was abolished in the 2010 spending review. In 2008, the passenger transport authorities in a number of major UK conurbations were renamed integrated transport authorities. By 2010 the Department for Transport had an "Integrated Transport Economics and Appraisal" unit which included in its remit to develop a strategic National Transport Model for use by the Department in the assessment of a range of transport policy options. The Model uses data on how people travel according to their circumstances and where they live. It takes into account the choices available and the use people make of the different modes of transport—car, rail, bus, walk and cycle. New Labour's first transport white paper *A New Deal for Transport: Better for everyone* in 1997 resulted in the formation of Transport Direct which established a information system to "deliver an integrated and comprehensive information service for all travel modes and mode combinations and also to develop integrated information and ticket sales for journeys involving more than one mode of transport". The first aim was achieved in 2004, a comprehensive national ticketing system was not. The Integrated Transport Smartcard Organisation was established 2001 to develop and maintain the relevant data standards for electronic ticketing, some regional systems are in use and Oystercard does allow travel on mainline rail and London Underground in the London area. In 2010, the new Government announced that it would introduce a national smart card ticketing system to make multi-modal journeys easy and seamless by 2014. In 2012, Heathrow Airport is still not connected to the West Coast Main Line. A link from the airport to High Speed 2 was considered but was discounted for cost reasons.

Sir Humphrey Appleby: If by we you mean Britain that is perfectly true, but if by we you mean you and me and this department we need a transport policy like an aperture in the cranial cavity.”

There is potential for major tension between local democracy and local wishes and the national interest. There is a democratic argument that it would be wrong for one Parliament to commit its successor which might be of a different composition. There is also a legal argument that Parliament cannot bind itself and so the whole exercise is futile. But these arguments are not insuperable. Governments already commit to long-term schemes so long as they have cross-party consensus. EU membership, the nuclear deterrent, the Climate Change Act regime and the Olympics project are obvious ones. But they are substantial all the same. It is therefore all the more vital that there be a stock-take of “natural capital” and prospects for growth at a national level, to lay the groundwork for informed debate on the merits and demerits of more integrated spatial approach at a national level.

Once a stock-take is done, there may be a need for bold thinking. Some districts include much greater areas of land of high ecological value than others, and a rational planner might restrict built development more in those areas and less in districts that are of lesser ecological value. Self-evidently, the north and the west of England have higher rainfall and faster wind speeds. It would be rational to plan to make it easier to develop reservoirs and wind turbines in these areas, and to build the infrastructure to transport the power and water to centres of population. Much research suggests that developing Green Belt land is preferable to encouraging lower-density occupation of the countryside and its resultant costly transportation of commuters and their necessities of life further out to the country.²³⁹ Should and could the politically unthinkable be done and Green Belts be radically reshaped?

But there need not perhaps be such a great leap as all that. There are already strategic plans for all sorts of development produced by independent agencies and by governmental departments. There are already nationally protected SSSIs, national parks, enterprise zones, national policy statements and so on. A national plan-making process would, however, provide an important chance to engage in “joined up” governance tying existing sectoral policies together optimally in a sensible way. A national plan in respect of fundamentals which was debated in Parliament and achieved Parliamentary consensus (just as Local Plans are adopted by resolutions of local authorities) could offer important benefits. It would offer stability and certainty for investors, particularly in low-carbon energy and infrastructure projects. It could provide for statutory compensation or incentives for those affected by development that was to go ahead in the public interest. It would also give a direct role to elected representatives rather than just to the Executive in formulating the policy, and so could perhaps hope to achieve greater legitimacy than the current national policies.

In that way the trend fostered by developments in international and European Union environmental law towards a strategic and reasoned approach to sustainable development could be brought to its logical conclusion.

²³⁹ Kate Barker, *Barker Review of Land Use Planning*, Final Report (HMSO: December 2006), pp.8–10, 46–67. The Scottish Green Belt review identified similar concerns and considered that “green wedges” and “green fingers and corridors” as tried in Aberdeen could be better than encircling belts: Glen Bramley, *Review of Green Belt Policy in Scotland* (Scottish Executive Development Department, 2004), pp.38, 45, 48, 113–114, 116.