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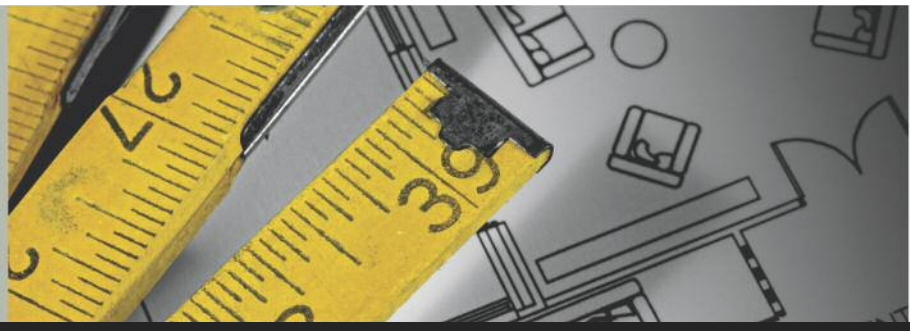
MAY 2014 *Planning, Environment & Property Law Newsletter*



**Welcome to the April edition of this newsletter. In this month's edition, Stephen Tromans QC looks at how biodiversity offsetting can work in practice, and Richard Harwood OBE QC discusses the new power to enter into heritage agreements under s26A Planning (Listed Buildings and Conservation Areas) Act 1990. Duncan Sinclair explores environmental issues arising from the proposed energy market review announced on 27 March 2014, and two summaries of recent cases involving members of Chambers provide some helpful guidance to interpreting and applying the heritage and green belt policies of the NPPF. We hope you enjoy it.**

*Philippa Jackson*

## Biodiversity offsetting in action

*Stephen Tromans QC*

Biodiversity offsetting is the practice of providing compensation for ecological resources which are lost or damaged by development, by creating or improving equivalent or better habitat on another site. Government policy supports this approach, and readers may recall a furore last year when it was suggested that this could be a charter for the destruction of irreplaceable habitat such as ancient woodland. Pilot projects have been run in various areas, and the results are currently being assessed. A good practical example of how offsetting can work is provided by a recent planning appeal in respect of a housing development in the village of Thaxted, Essex. Uttlesford District Council had refused permission on the basis that the development would be contrary to para. 118 of the NPPF, in that it would result in the loss of unimproved grassland, which had the potential to improve to lowland meadow status. The appellants were however able to convince the local planning authority that proposed offsetting would avoid the development causing significant harm to biodiversity, so that the authority dropped its objections at the inquiry.

Evidence emerged that the site had been subject to arable usage in the 1970s, which would have seriously affected its quality as grassland. Without active intervention and management, the grassland interest of the site would decline, and it certainly would not improve to lowland meadow status. An offsetting site was found at a farm within the district, where suitable management could improve the quality of the grassland resource to lowland meadow status. The appellants' case was supported by expert evidence on ecology and on land management and also by assessment undertaken objectively by the Environment Bank as to the number of "conservation credits" needed to compensate for the loss of the appeal site and the number that would be provided by the offsetting site. This quantitative approach is important in providing objectivity and assurance as to the adequacy of compensation.

The appellants and local planning authority agreed before the inquiry a suite of documents to ensure delivery of the offsetting site and its improvement and monitoring over a 25 year period. These included a section 106 agreement with the owners of the appeal site, a section 106 with the owner of the offsetting site, a management agreement between the appeal site and offsetting site owners, and a 25-year management plan for the offsetting site. The offsetting arrangements were in addition to onsite mitigation for bats, reptiles and other wildlife features. The planning authority agreed that these measures, taken together, meant that the proposal was in accordance with para. 118 of the NPPF and did not give rise to significant harm.

*Stephen Tromans QC acted for the appellants, instructed by Barr Ellison LLP, who drafted the section 106 documentation. Expert evidence on planning and land management was provided by Bidwells LLP, Cambridge (Guy Kaddish and Roland Bull) and on ecology and biodiversity by Prof. Max Wade of RPS.*

## Case Notes

**Cemeteries and the Green Belt**

***Timmins v Gedling Borough Council***
[2014] EWHC 654 (Admin)

James Strachan QC recently appeared in an interesting application for judicial review of the planning permission granted for a crematorium and cemetery in the Green Belt in Gedling. The Council's planning committee had been advised that the crematorium was inappropriate development, but that the cemetery alone was not.

The two key issues were:

a) Whether all development in the green belt was prima facie inappropriate unless it fell within the exceptions set out in paragraphs 89 and 90 of the NPPF; and
b) Whether the planning officers had misdirected the committee as to the meaning of "openness" by eliding the concepts of "openness" and "visual impact".

As to the first issue, the NPPF considers any development in the green belt to be inappropriate unless justified by reference to very special circumstances or if the development falls within the circumstances set out in paragraphs 89 and 90 (see Fordent Holdings [2013] EWHC 2844). Mr Justice Green held that the Defendant erred in its interpretation of paragraph 89 (at [23]):

> "It is apparent that it construed paragraph 89 as treating cemeteries as "appropriate" (provided they met the limited test contained therein). However, paragraph 89 is not concerned with cemeteries per se but with the construction of "new buildings" which provide appropriate facilities for cemeteries. The two are clearly different. Thus, for example, paragraph 89 might address toilet facilities, or a cafeteria or a car park which serves a cemetery. But it is not concerned with the cemetery itself. The structure of paragraph 89 makes this clear. It creates a prima facie rule namely that the construction of new buildings is inappropriate. It then states that there are certain "Exceptions to this". Amongst the exceptions are the "...provision of appropriate facilities for...cemeteries...". In my judgment the Defendant erred in treating the exception as applying to the cemetery as opposed to a new building which provided facilities to serve the cemetery.

This error was considered to be material, with the proper course being to quash the Decision and remit it to be re-taken (see [56]).

Mr Justice Green then considered the lack of specific definition as to openness and held that "any construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities" (at [74]). Further, whilst openness and visual impact were different concepts there was, in Mr Justice Green's view, no reason why "in logic that [visual impact] cannot properly be taken into account" in assessing very special circumstances. Nevertheless, "since measures to reduce or mitigate visual impact are, as their name suggests, mitigating measures, they can only bear a modest weight in the scales" (at [77]). In summary, therefore, Mr Justice Green held (at [78]) that:

> "First, there is a clear conceptual distinction between openness and visual impact. Secondly, it is therefore is wrong in principle to arrive at a specific conclusion as to openness by reference to visual impact. Thirdly, when considering however whether a development in the Green Belt which adversely impacts upon openness can be justified by very special circumstances it is not wrong to take account of the visual impact of a development as one, inter alia, of the considerations that form part of the overall weighing exercise…"

## Market investigation reference in the energy sector – environental issues

*Duncan Sinclair*

Since the announcement on 27th March 2014 and consequent extensive press coverage it will not be news to readers that Ofgem is consulting on a market investigation reference ('MIR') to the Competition and Markets Authority (the 'CMA', being the successor to the Competition Commission ("CC") in this regard) as it has greater powers to deal with any adverse effects on competition observed in the energy market.

There is every expectation that a reference will now be made. That it may have an extensive impact on the energy sector in a number of ways is clear. What

is less obvious but nonetheless important is whether there may be an impact on environmental regulation and if so, how this is likely to be approached. To answer this, it is helpful to turn to the process of an MIR first.

**The MIR process in outline**

For anyone familiar with competition law and specifically the UK regime, the following will not add much. But the audience of this newsletter is broad, and not everyone is expert in this field - indeed, given the small number of MIRs actually made and undertaken by the CC (the powers passing now to the CMA), actual experience of the regime resides in relatively few hands.

So, for those not familiar with the MIR powers, here are a few comments on the context and the process:

1. First, an MIR made by Ofgem was virtually inconceivable until recently. MIRs have almost universally been made by the OFT: the sectoral regulators with such powers concurrent to the OFT's (effectively all the main 'economic' regulators – Ofgem, Ofcom, Ofwat, the ORR et al) have been loathe to use them (the limited exception is the somewhat peripheral issue of the 'rolling stock leasing' market referred by the ORR in 2007 and the reference as regards BAA's ownership of airports referred by the CAA). Typically, economic regulators have wanted to keep the markets they regulate away from the kind of detailed scrutiny by another independent competition authority that an MIR entails. Not least, there is the potential for (implicit or other) criticism of what it has itself done (or failed to do).

2. The above is not surprising given the nature of the MIR regime (which has received relatively minor tweaks only in passing from the Competition Commission to the CMA): an MIR is a lengthy (now 18 months, extendable to 2 years) investigation, potentially followed by a remedies phase which may also be lengthy and include incredibly 'intrusive' powers.

3. While one may well assume the 'big six' are most obviously going to be under scrutiny, an MIR does not, in terms, focus on particular parties. Any member of the sector/any party having an effect on the market may be considered or required to give information. And government regulation may come under scrutiny including (and importantly for present purposes) regulation promulgated by DECC relating to environmental regulation.

4. The ultimate decision makers in an MIR will be independent and highly qualified (and experienced) people, supported by experienced and well qualified staff. This 'robustness' has always been a strength of the MIR process. If they believe that environmental measures (from ECO to Feed in Tariffs and the Renewables Obligation) are distorting competition, they will say so – and may either make direct amendments to the operation of the market to remedy this, or (perhaps more likely) suggest amendments to the various schemes. Ultimately, indeed, this may include not only secondary legislation promulgated by DECC, but potentially even certain aspects of Ofgem's duties under primary legislation.

**Some points of conflict between environmental measures and competition**

It is too early in the day to make predictions as to outcome. However, it has been regularly recognised by industry experts (including economists and lawyers) that the core 'competition' duty of Ofgem has been 'watered down' over time, by imposing sometimes competing duties in relation to the environment. At its most basic level the conflict may be expressed as follows: while a properly functioning market will lead to an optimal allocation of resources (for instance, the 'generation mix' that would meet the needs of the market at the lowest cost), interventions aimed at ensuring a higher level of renewables (or, indeed, meeting specific CO2 targets) 'distorts' this, ultimately giving benefits to low carbon technologies at a cost to consumers of gas and electricity. These 'interventions' have been hard wired into both the duties placed on Ofgem, and through secondary legislation in respect of schemes (such as ECO, FITs and ROCs).

The above characterisation of the problem is not however the whole picture: economic theory recognises that markets (and hence, pure competition) do not naturally factor in external costs (such as pollution or other environmental costs). So, schemes which accurately and efficiently address this issue of 'externalities' may have a sound economic basis.

### A preliminary view

The real territory for dispute in this area is not likely to be as simple as the binary question about whether environmental costs should be factored into the regulation of energy markets or not: the answer here is that this is a legitimate aim of government policy and legislation (and indeed economic theory regarding the pricing of external costs). Rather, the focus will be on whether there are elements of the current schemes which operate to the detriment of competition (have an 'adverse effect on competition' in the language of the MIR process) and/or which could be structured in a manner less likely to distort competition.

And it is here that one can spot real issues, both with current schemes and future pricing mechanisms (such as Contracts for Difference). To take an obvious current example: smaller energy suppliers (those with under 250,000 customers) are exempted from a range of environmental measures (and therefore costs); for instance the ECO scheme. The aim is to reduce barriers to entry, and thereby to encourage competition – and this has been effective, with 10 new 'small' suppliers entering the market in the past 4 years. However, it is also a barrier to growth: a supplier that is close to the limit will face a massive additional cost once taking on customer number 250,001, as the benefit of the exemption is then lost. And that additional cost may make it impossible to compete with the larger companies (who, some argue, benefit from owning their own generation – i.e. they are 'vertically integrated'). Hence the observed strategy of some, but not all, small suppliers to stay small.

One might expect the CMA to find that this situation is well intentioned, but flawed in design: there are other ways of reducing barriers to entry that don't have the obvious consequences of the route taken (at the very least, even a 'tweak' so that the benefit of exemption phases out as a company grows would be far less of a barrier to growth, in particular if combined with other measures such as increasing electricity wholesale availability other than by vertical integration).

So, to make a prediction at this very early stage: the CMA will be unlikely to be able to (or want to) avoid the interaction of environmental measures (and targets) with issues of competition in the relevant markets. There is also some obvious 'low hanging fruit' for change. At a minimum, therefore, one might expect changes to some of the environmental schemes. However, there is a distinct possibility that the CMA goes further: this already complex field (energy regulation) has been beset with both a multiplicity of environmental schemes (aside from licence obligations, there are over five currently in place aimed at reducing carbon emissions or reducing demand), and regular changes to the schemes. Some of these (notably the CESP scheme and the Green Deal) have been/are perceived as failures. It is a rather obvious question to ask whether a properly constructed CfD scheme, with a single and simplified 'demand side' scheme (along the lines of ECO) might not lead to less regulatory burden (so facilitating entry/expansion and encouraging competition) and longer term certainty (again facilitating competition, as investment can be made on a predictable footing).

## Heritage partnership agreements

*Richard Harwood OBE QC*

From 6th April 2014 local planning authorities and the owners of listed buildings can enter into heritage partnership agreements by the new section 26A, Planning (Listed Buildings and Conservation Areas) Act 1990. Other parties to such a written agreement may be the Secretary of State, English Heritage, other local planning authorities, persons interested in, occupying or involved with managing the building and any other person with special knowledge of the building or listed buildings more generally.[1] English Heritage have published a Good Practice Advice Note Drawing up a Listed Building Heritage Partnership Agreement (LBHPA).

An agreement may grant listed building consent for specified works of alteration or extension of the listed building and make this subject to conditions.[2]

Heritage partnership agreements may also specify works which do not require consent, provide for works to be done and deal with public access and funding. They may:[3]

"(a) specify or describe works that would or would not, in the view of the parties to the agreement,

[1] Section 26A(2), Listed Buildings Act.
[2] Section 26A(3).
[3] Section 26A(6).

affect the character of the listed building as a building of special architectural or historic interest;

(b) make provision about the maintenance and preservation of the listed building;

(c) make provision about the carrying out of specified work, or the doing of any specified thing, in relation to the listed building;

(d) provide for public access to the listed building and the provision to the public of associated facilities, information or services;

(e) restrict access to, or use of, the listed building;

(f) prohibit the doing of any specified thing in relation to the listed building;

(g) provide for a relevant public authority to make payments of specified amounts and on specified terms –

(i) for, or towards, the costs of any works provided for under the agreement; or

(ii) in consideration of any restriction, prohibition or obligation accepted by any other party to the agreement."

A listed building consent granted by an agreement will enure for the benefit of the building and of all persons for the time being interested in it, but the other parts of an agreement do not affect third parties.[4] Consequently it becomes important to separate what is part of the consent and what is not.

Agreements which grant listed building consent are referred to in the regulations as listed building heritage partnership agreements and are subject to the Planning (Listed Buildings and Conservation Areas) (Heritage Partnership Agreements) Regulations 2014. Formal consultation is required before such an agreement is made. The proposed agreement must be publicised by a site notice, on the authority's website and by serving known owners.[5]

The documents available for public inspection must be 'extracts from the draft heritage partnership agreement which relate to the proposed works', the statement of reasons and all other plans and documents detailing the proposed works.[6] If the listed building (or part of it) is Grade I or II* listed or is owned by the local planning authority, English Heritage must be consulted on the proposed agreement.[7] A minimum 28 day consultation period is required.

The Secretary of State is able to call in proposed listed building heritage agreements.

The local planning authority has the power to make the agreement which may be in a modified form from that consulted upon.[8] The modifications would have to be agreed with the other parties to the agreement and must not be so substantial as to prejudice the interests of others or the public interest. The statutory duty to have special regard to the desirability of preserving the listed building, its setting or any features of special architectural or historic interest which it possesses applies to the grant of listed building consent in an agreement.

The Secretary of State may revoke a listed building heritage partnership agreement.

An ability to enforce an agreement will depend upon its terms. Any listed building consent element will be subject to the usual enforcement mechanisms under the Listed Buildings Act. An agreement may otherwise be contractually binding if consideration has passed between the parties and there is an intention to create legal relations or it is made by deed.

*This article is based on the Supplement to Historic Environment Law which is to be published by the Institute of Art and Law www.ial.uk.com on 31st May 2014. Copies of the Supplement may be ordered at the pre-publication price of £15 by emailing info@ial.uk.com*

[1] Section 26A(2), Listed Buildings Act.
[2] Section 26A(3).
[3] Section 26A(6).
[7] Regulation 4.
[8] Regulation 5(3).

# Case Notes

**Demolition and redevelopment in conservation areas**

***Holland v Secretary of State for Communities and Local Government***
[2014] EWHC 566 (Admin)

Justine Thornton recently acted for the Treasury Solicitor in an application under section 288(1)(b) of the Town and Country Planning Act 1990 and section 63 of the Planning (Listed Buildings & Conservation Areas) Act 1990.

The issue related to the proposed demolition of a single-storey house built in 1970 and the erection of a slightly larger single-storey dwelling within the site boundaries, permission for which had been refused on the grounds that demolition would be harmful to the character and appearance of the conservation area (contrary to policy D17 of the unitary development plan and guidance in the NPPF).

The inspector had previously allowed the appeal having concluded, at [21], that whilst the dwelling had "little group value and very limited individual significance", the Appeal site "contribute[d] positively to the overall character and appearance of the conservation area". This was in part due to its "extensive shrub and tree coverage" and in part due to the contribution the dwelling made to "the diverse range of housing". Notwithstanding that contribution, the inspector considered that any harm resulting from its demolition would be outweighed by the merits of the proposed development given that the proposed new dwelling would also positively contribute to the character and appearance of the conservation area. In doing so, it was clear that the inspector considered that it was the landscaped site, not the existing house itself, which primarily contributed positively to the conservation area's overall character and appearance. The contribution of the house itself was minimal.

It was held that the inspector had not erred in her interpretation or application of the policies/ development plan. She had identified the main issue as the effect on the character and appearance of the conservation area and correctly treated the conservation area as a designated heritage asset because the local authority had identified it as such.

The court noted (at [29]) that:

> "the Inspector correctly applied the relevant guidance in the NPPF to her findings. She assessed whether or not the demolition and new development would cause either substantial, or less than substantial, harm to the heritage asset – the Conservation Area – and concluded that it would not. She was entitled to reach such a conclusion under the provisions of section 72 of the PLBCAA 1990, as explained in South Lakeland District Council v Secretary of State [1992] 2 AC 141…"

As to the relevance of the proposed re-development, the court held (at [34]) that:

> "If policy D17 did prevent the decision-maker from considering the merits of the proposed re-development, it would be inconsistent with the NPPF, which enables the decision-maker to weigh the harm to the asset against the benefits of any proposal, on a sliding scale, depending upon the nature of the asset and the level of harm."

In this case, neither party suggested that policy D17 was inconsistent with the NPPF. As such, the inspector had correctly applied the relevant guidance in the NPPF by assessing whether or not the demolition and new development would cause either substantial, or less than substantial, harm to the heritage asset (the conservation area), and concluded that it would not.

The exercise of planning judgment and the weighing of the various issues were entirely matters for the decision-maker. There was "ample evidence upon which the inspector could justifiably have based her assessment of the existing house and its significance" (at [37]). As such, her findings were legitimate, the decision letter was "careful and conscientious" (at [42]) and the challenge "relied excessively on drafting criticisms and selective quotations" (at [46]).

**Stephen Tromans QC** is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear power stations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

**Richard Harwood OBE QC** specialises in planning, environmental, Parliamentary and public law. He appeared before Select Committees on the Channel Tunnel Rail Link Bill and Crossrail Bill and has drafted over 1500 amendments to Parliamentary Bills. Richard was awarded "Environmental/Planning Junior of the Year" at the Chambers Bar Awards 2011. He is the author of Historic Environment Law and Planning Enforcement. To view full CV click here.

**Duncan Sinclair** specialises in regulatory, EU/competition (including procurement) and public law (JR) issues. He is an Editor and one of the authors of the Butterworth's (loose-leaf) Competition Law Manual and has acted in some of the leading competition law and State Aid cases to date (including, in respect of State Aid, the London Underground PPP notification) as well as environmental issues in the energy sector (including the major Solar Panels JR last year, and work on issues including CERT, CESP, ECO and infrastructure projects including Windfarms and other forms of energy generation). To view full CV click here.

**Philippa Jackson** undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents, and challenges in the High Court. She has been listed for the past two years as one of the top planning juniors under 35 by Planning Magazine. Recent cases include *Stratford on Avon District Council v SSCLG & Ors* [2013] EWHC 2074 and *R (Church Commissioners for England) v Hampshire County Council & Anor* [2013] EWHC 1933. Recent inquiries include acting successfully for a Local Planning Authority in resisting a proposed supermarket in a conservation area (March 2014). To view full CV click here.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