Francis Taylor Building

FTB Annual Infrastructure Seminar

24 April 2023

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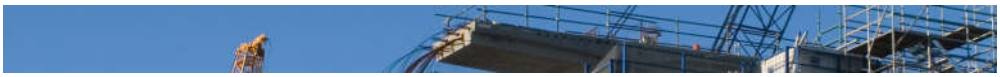

Solar update

Michael Humphries KC

Merrow Golden

SOLAR FARMS: SOME RECENT DEVELOPMENTS

Michael Humphries KC
Merrow Golden

Francis Taylor Building

INTRODUCTION

- NSIP thresholds
- Need
- Alternatives
- Green Belt
- Landscape
- Heritage
- Agricultural land
- Decommissioning
- Conclusions

NSIP THRESHOLDS

- PA 2008, s.15(1) - The construction or extension of a generating station is within section 14(1)(a) only if the generating station is or (when constructed or extended) is expected to have a capacity (in England) of more than 50MW
- When is a second generating station an 'extension'?
  - Look out for R (oao Durham and Hartlepool) v DLUHC and Lightsourcebp

NEED

- The draft revised NPS EN-3 (2023)
  - paras 3.10.1/2
- The weight to be attached to need
  - Cleve Hill DCO – SS DL paras 4.6/8
  - Little Crow DCO – SS DL para 4.32 and 6.4
- Are there exceptions?
  - What about when there are alternatives

Draft revised NPS EN-3 (2023)

- 3.10.1 The government has committed to sustained growth in solar capacity to ensure that we are on a pathway that allows us to meet net zero emissions. As such solar is a key part of the government's strategy for low-cost decarbonisation of the energy sector.
- 3.10.2 Solar also has an important role in delivering the government's goals for greater energy independence and the British Energy Security Strategy states that government expects a five-fold increase in solar deployment by 2035 (up to 70GW).

Little Crow DCO – SS DL para 6.4

- The ExA considered that moderate weight should be given to the proposed Development's electricity generation. The Secretary of State disagrees with the ExA's suggested weighting and considers that it is appropriate to accord substantial positive weight to the project due to the contribution it will make towards the decarbonisation of the UK's energy production.

NEED

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  - paras 3.10.1/2
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  - Cleve Hill DCO – SS DL paras 4.6/8
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- Are there exceptions?
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ALTERNATIVES

- The approach to alternatives
  - draft revised Energy NPS(2023) EN-1 paras 4.2.21/22
- Rebutting an alternatives argument
  - Minchins Lane – Insp DL paras 55/57
  - Fern Brook – Insp DL paras 90/91
  - Rawfield Lane – Insp DL para 36

Draft Revise NPS EN-1 paras 4.2.21/22

- Given the level and urgency of need for new energy infrastructure, the Secretary of State should, subject to any relevant legal requirements (e.g. under the Habitats Regulations) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives:
  - the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner
  - only alternatives that can meet the objectives of the proposed development need to be considered.
- The Secretary of State should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security, climate change, and other environmental benefits) in the same timescale as the proposed development.

Minchins Lane (Feb 2023)

- 55. Concerns were raised regarding a lack of detail demonstrating that alternative sites, including the use of previously developed land, was considered by the appellant. …

  …
- 57. Since 2015, Parliament has declared a climate emergency and the Climate Change Act 2008 (2050 Target Amendment) Order 2019 requires the achievement of net zero by 2050. I was not directed to any legal or policy requirements which set out a sequential approach to considering alternative sites with developments such as the appeal proposal.

Fern Brook (Feb 2023)

- 90. … the number of sites which could reasonably accommodate this type of development in flood zones, conservation areas or Green Belts (all of which were regarded by the authority to be potentially feasible) must be seriously limited due to the various additional constraints in such areas.
- 91. Overall, whilst the Assessment might be criticised on a number of grounds, it would have to massively underestimate the position before it could be demonstrated that there are sufficient sites in the area. From the evidence that is an untenable position. In addition the Council did not put forward any alternative site which might be more appropriate than the appeal site, and more importantly the LP does not identify sites or even broad areas of search for this type of development.

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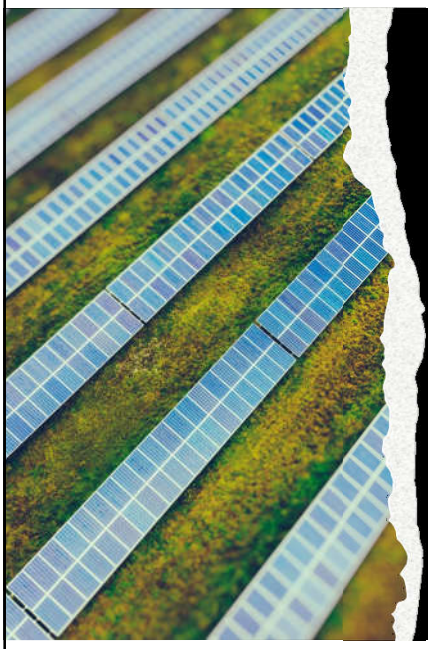


GREEN BELT

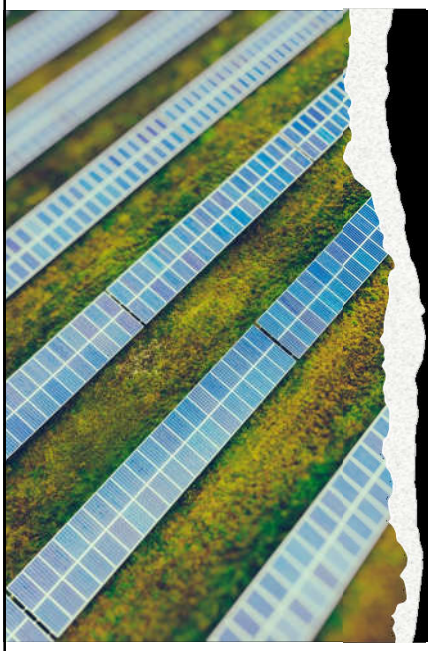
- **NPPF**
  - Paras 147-151
- **Inappropriate development?**
  - Rawfield Lane – Insp DL para 3
  - Park Farm – Insp DL para 6
- **Very special circumstances and solar**
  - NB. NPPF para 151
  - Rawfield Lane – Insp DL para 44
  - Hanningfield – Insp DL paras 90/92
  - Park Farm – Insp DL paras 29/30

Rawfield Lane (Dec 2022)

- 43. The proposal would be inappropriate development in the Green Belt and would be significantly harmful to its openness, contrary to the Framework. The proposal would also fail to safeguard the countryside from encroachment contrary to one of the aims of the Green Belt. In accordance with the Framework, together I give these harms substantial weight. There would also be minor harm to the character and appearance of the area to which I give minor weight.
- 44. However, in this instance I have found that the development would deliver very substantial benefits, contributing to Net Zero targets and facilitating the role out of increasing use of renewable energy resources in the country. Therefore, I find that the other considerations in this case clearly outweigh the harm that I have identified. Looking at the case as a whole, I consider that very special circumstances exist which justify the development.

Hanningfield (Feb 2023)

- 93. Accordingly, the public benefits of the proposal are of sufficient magnitude to outweigh the substantial harm found to the Green Belt and all other harm identified above. These benefits identified attract very substantial weight in favour of the scheme. In this context, the harm to the Green Belt would be clearly outweighed by the other considerations identified and therefore the very special circumstances necessary to justify the development exist. Accordingly, the proposal would satisfy the local and national Green Belt policies I have already outlined.



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LANDSCAPE

- **Contrasting approaches**
  - Hall Farm – Insp DL paras 19/20
  - Halloughton – Insp DL para 18
  - Parsonage Road – Insp DL para 60
- **Landscape policy hierarchy**
  - NPPF para 174
  - Valued landscape?
  - LI "TGN 02-21 Assessing landscape value outside national designations" (2021)
- **The importance of good design**
  - Halloughton – Insp DL para 32

Hall Farm (Dec 2022)

- 19. The proposed development would occupy a large part of the sloping fields on the west side of Alfreton. Many of the panels would be mounted to face the sun on slopes descending in the opposite northerly direction. This would accentuate the appearance of the rear of the panels which would present as a starkly industrial mass of metal ascending the hill. (…)
- The panels would extend the area of industrial development into an area close to the town that is currently open countryside. (…)

Halloughton (18 Feb 2022)

- 18. Apart from the proposed permanent electricity substation, the solar panels and associated infrastructure, would, for the wont of a better phrase, sit lightly on the affected fields, with no material change to topography. (…)

Parsonage Road (Aug 2022)

- 60. It is unavoidable, and recognised in policy, that large-scale solar farms may result in some landscape and visual impact harm. However, national policy and guidance promotes a positive approach indicating that development can be approved where the harm is outweighed by the benefits. In this case, with the topography, existing hedgerow screening and further planting for mitigation, I have found the adverse effect on landscape character and visual impact would be limited and highly localised, and with time reduced by the maturing planting and ongoing management of the boundaries; I accord this moderate weight against the proposal. Once decommissioned, I consider that there would be landscape benefits.

Fern Brook (13 Feb 2022)

Industrial vs rural?

- 33. There was an argument put forward by the appellant that the proposed solar farm would be inherently rural in nature. But although many solar farms are now located in rural settings, I do not consider that they are so common that they have come to be regarded as a form of development which is inherently rural. But nor do I accept the Council's assertion that they are industrial in visual terms, as they have little in common with industrial development and are becoming gradually accepted in rural areas.

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HERITAGE

- Setting of heritage assets
  - NPPF chapter 16 (reflect statutory duties)
  - HE guidance "The setting of Heritage Assets"
- Reversibility
  - Minchins Lane – Insp DL paras 50, 83
  - Halloughton – Insp DL para 77

Minchens Lane (13 Feb 2023)

- 50. The Pound is not prominent in the landscape given topography and mature vegetation, and its setting is mostly confined to the immediately surrounding fields. The appeal site lies beyond this in the hinterland of the conservation area and contributes little to its significance. Inter-visibility between the proposal and the asset would be limited as would views across the asset towards the development and vice-versa. Furthermore, mitigation planting would reduce the impact of the proposal over time and the effect of the proposed development would be fully reversed on decommissioning. As such the proposal would have a very minor adverse effect on the significance of this designated heritage asset.

Minchens Lane (13 Feb 2023)

- 83. Turning to heritage, the proposal would result in less than substantial harm to the significance of several designated heritage assets. The harm would be very minor and would be reversed once the solar farm is decommissioned. …
- 84. In my judgement, the public benefits of this proposal which would contribute towards achieving net zero as part of a decisive shift away from fossil fuels, assist with increasing solar capacity in the UK from 14GW to 70GW by 2035, assist with achieving the Council's Climate Emergency Action Plan (2021), reduce carbon dioxide emissions by around 9,381 tonnes annually and provide a biodiversity net gain of 100%, are very significant and outweigh the less than substantial harm to the affected designated heritage assets, giving great weight to the conservation of each of them. The Council confirmed that in its view there was no conflict with LP Policy EM11 which seeks to conserve the Borough's heritage assets, given the outweighing benefits20 and from my assessment I have no reason to disagree.

HERITAGE

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AGRICULTURAL LAND

- 'Best and most versatile' (BMV) land
  - New draft revised NPS EN-3 para 3.10.14/136/141
  - NPPF para 174(b)
- Detailed agricultural land classification (ALC) surveys
  - Parsonage Rd – Insp DL para 34
- Harm to agricultural land
  - Minchins Lane – Insp DL para 27
- Need and alternatives
  - Parsonage Rd – Insp DL para 38

Draft revised NPS EN-3 para 3.10.14/136/141

- 3.10.14 … Where the proposed use of any agricultural land has been shown to be necessary, poorer quality land should be preferred to higher quality land (avoiding the use of "Best and Most Versatile" agricultural land where possible).
- 3.10.136 The Secretary of State should take into account the economic and other benefits of the best and most versatile agricultural land. The Secretary of State should ensure that the applicant has put forward appropriate mitigation measures to minimise impacts on soils or soil resources.
- 3.10.141 The time limited nature of the solar farm, where a time limit is sought as a condition of consent, is likely to be an important consideration for the Secretary of State.

Parsonage Rd (Aug 2022)

- 38. This would not represent a total loss of agricultural land. The mounting for the PV panels would allow for restoration to full agricultural use, subject to appropriate soil management, and during operation, there are well document options for alternative agricultural use to take place alongside the operation of the site; such use can be secured through conditions. Nonetheless, the use of some BMV does not sit comfortably with guidance, although this does not preclude such development, and I acknowledge that the use will be temporary and must be considered against the benefits of the scheme. The weight arising against the proposal is a function of the availability of alternatives and the implications for provision of agricultural land in the area and as such would need to be fully justified.

AGRICULTURAL LAND

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DECOMMISSIONING

- Planning condition or s.106 obligation
  - Parsonage Rd – Insp DL paras 72-75
- Decommissioning method statements
  - Minchins Lane – Insp DL para 89
- Decommissioning Bonds required
  - Experience – only rarely

Parsonage Rd (Aug 2022)

- 73. I can understand the concerns but there is no guidance that requires either a bond or completion of a legal agreement regarding restoration. While I note that UDC suggest that another solar farm scheme in the district is approved subject only to agreement on such a s106 undertaking, I have very limited information on the reasoning behind this, which is by no means a typical approach to such installations at this time.
- 74. In fact, the nPPG, states that planning conditions can be used to ensure that the installations are removed when no longer in use and the land restored to its previous use. …

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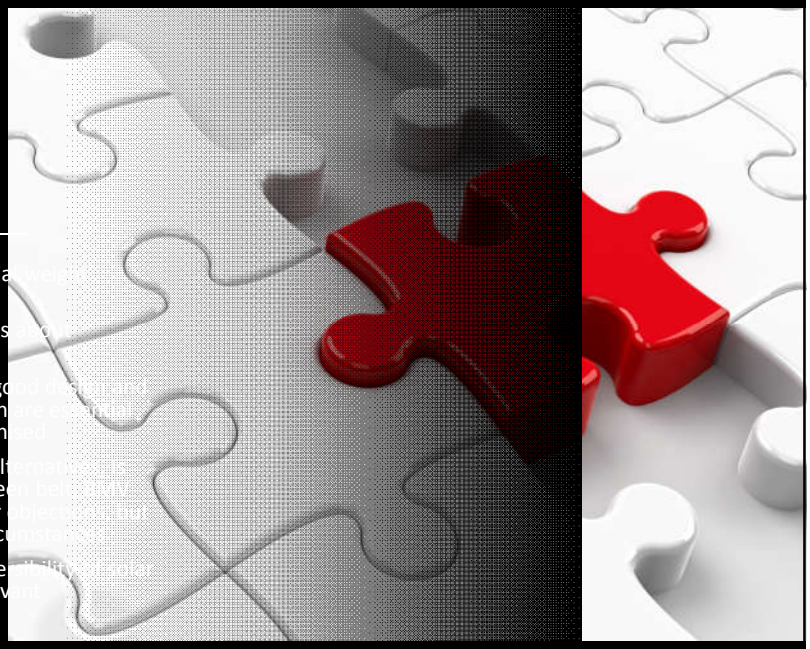
CONCLUSIONS

- Establishing that 'substantia
attaches to need is key
- Prepare to meet arguments
alternatives
- Appropriate micro-siting, g
well thought out mitigation
and will be carefully scrutin
- Need, and an absence of al
capable of outweighing gre
agricultural land and other
this will depend on the circ
- The temporary nature/reve
developments may be relev



List of cases (1)

- Cleve Hill Solar Park DCO (EN010085) (28 May 2020)
- Little Crow Solar Park DCO (EN010101) (5 April 2022)
- Land at Park Farm, Gillingham ("Fern Brook") (APP/D1265/W/22/3300299) (13 Feb 2023)
- Minchens Lane, Bramley (APP/H1705/W/22/3304561) (13 Feb 2023)
- Rawfield Lane, Fairburn (APP/N2739/W/22/3300623) (1 Dec 2022)
- Land east & west of A130 and north & south of Canon Barns Road, East Hanningfield (APP/W1525/W/22/3300222) (6 Feb 2023)

List of cases (2)

- Park Farm, Dunton Road ("Park Farm")(APP/V1505/W/22/3301454) (5 April 2023)
- Land north west of Hall Farm, Church Street ("Hall Farm") (APP/M1005/W/22/3299953) (5 Dec 2022)
- Land north of Halloughton, Southwell (APP/B3030/W/21/3279533)
- Land east of Parsonage Road and south of Hall Road, Stansted ("Parsonage Road") (S62A/22/0000004) (24 Aug 2022)

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Alternatives and *Aquind*

Alexander Booth KC

Hugh Flanagan

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TCPA 1990

The (some) Caselaw

- *Trusthouse Forte* (1987) 53 P&CR 293
- *Jones v North Warwickshire* [2001] PLCR 31
- *Mount Cook* [2004] 2 P&CR 22
- *Langley Park School* [2010] 1 P&CR 10
- *Derbyshire Dales v SSCLG* [2010] 1 P&CR 19

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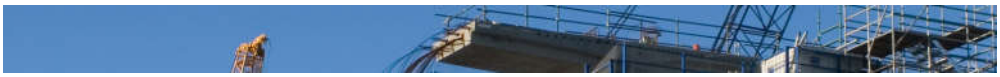

Nationally Significant Infrastructure

Statutes & Statutory Instruments

- Planning Act 2008
- Infrastructure Planning (Environmental Impact Assessment) Regulations 2017
  - *Regulation 14*
- Conservation of Species and Habitats Regulations 2017
  - *Regulations 63 & 64*

National Policy Statements

- *Illustrative Example: EN1*
  - Section 5.7 – Flood Risk and the Sequential Test
  - Section 5.9 – Landscape & Visual: development within nationally designated landscapes
- *Illustrative Example: EN6*
  - Paragraph 2.4.3 – no alternatives beyond those listed
- Illustrative *Example: NNNPS*
  - Paragraph 4.27 – Testing of alternative options not necessary as already carried out

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2008 Act

More Caselaw….

- *Blue Green Economy* [2015] EWCA Civ 876
- *Stonehenge World Heritage Site* [2021] EWHC 2161
- *Suffolk Substation* [2022] EWHC 3177

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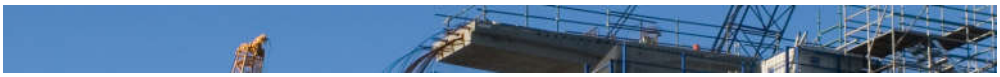

The 'Takeaway'

A tentative list. Some principles…..

1. Statutory requirements regarding alternatives must be observed
2. The 2008 Act imposes no free-standing duty to consider alternatives
3. Policy may direct contexts where alternatives should be considered, and also the nature of assessment to be undertaken
4. NPS may constrain basis on which alternatives can be explored at Examination
5. Policy which engages to exclude consideration of alternatives to be approached with caution
6. Outside of statutory/policy requirements:
   - Exceptional circumstances
   - Where obviously material
   - Fact sensitive judgement

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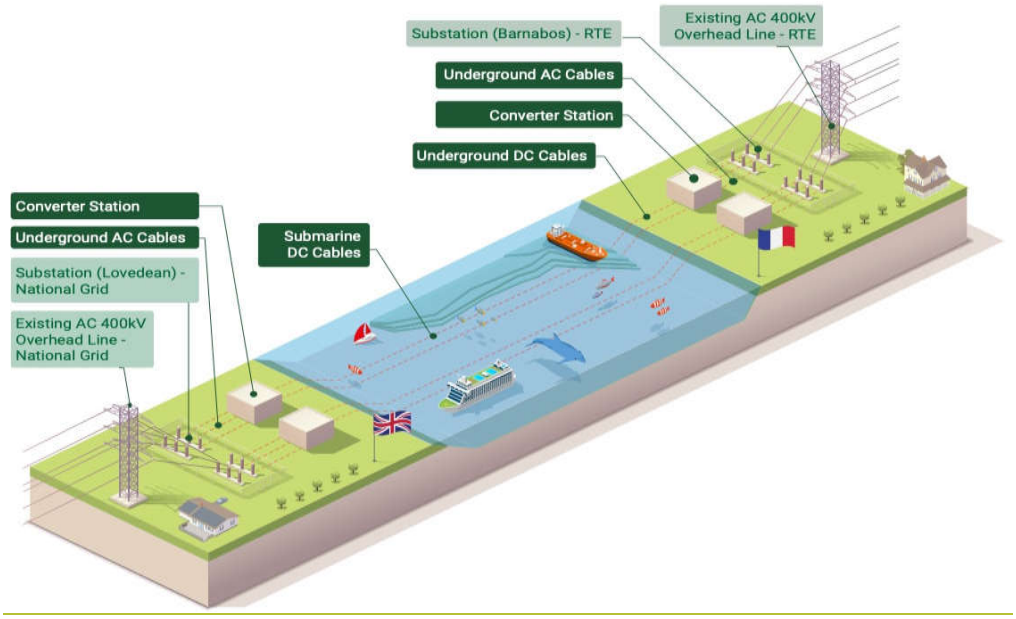
R (Aquind Ltd) v SSBEIS [2023] EWHC 98



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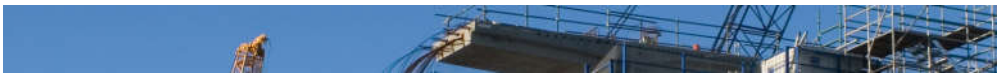

The project

1. 2000MW subsea and underground bi-directional electric power transmission link.
2. Between the south coast of England and Normandy in France.
3. Capacity to transmit up to 16,000,000MWh of electricity per annum ≈ 5% and 3% of total consumption of the UK and France respectively.

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Chronology

1. Application November 2019
2. Examination September 2020 – March 2021 (ExA finds need "strongly outweighs" identified disbenefits)
3. SoS Decision Letter refusing consent 20 January 2022
4. January 2023: judgment of Lieven J allowing claim and quashing decision refusing development consent
5. 3 March 2023: SoS request for information as part of redetermination process

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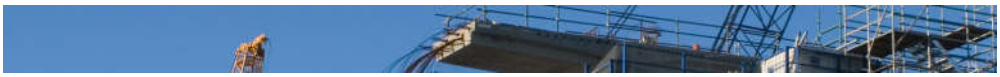

Basis of refusal

DL7.3: *"In addition to these impacts identified by the ExA, the Secretary of State considers that the Applicant's* ***failure to adequately assess the feasibility of Mannington Substation as an alternative connection point****, means that the planning balance weighs against the Order being made, given the proposed development's obvious impacts on the City of Portsmouth and the possibility that a connection at Mannington Substation might have resulted in less adverse impacts."* (emphasis added)

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Grounds:

- 1a and 1b: error of fact / failing to take account of evidence as to feasibility of Mannington
- 2: failure to comply with s.104 PA 08 decision-making approach
- 3: failure to apply NPS EN-1 policies
- 4: failure to take reasonable steps to inform himself as to feasibility
- 5: procedural unfairness in decision-making process
- 6: failure to give adequate reasons

Outcome:

- Grounds 1b, 2, 3 and 4 made out.

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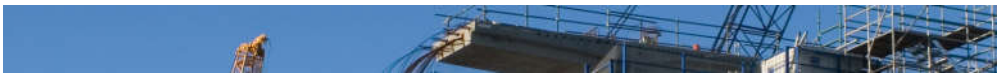

The importance of section 104:

- *"I consider that the SoS had to make clear whether he considered the proposal accorded with EN-1 or not, pursuant to s.104(3)"*
- *s.104 imposes a very clear structure on the decision-making process"*
- *"an NPS is not simply another policy document which is weighed in the balance"*
- *"The SoS simply went to s.104(7) and appears to have carried out an unconstrained planning balance. That is not what the statute requires him to do."*

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The importance of the NPS:

- *"Part 4 of EN-1 has a careful and highly structured approach to the assessment of projects."*
- *"the starting point is the presumption in favour of granting consent for energy NSIPs (4.1.2). The DL makes no reference to this presumption."*
- *"Part 4.4 of EN-1 sets out a very detailed policy approach to alternatives. … 4.4.3 sets out how the decision make should decide what weight to give to alternatives."*
- *"The policy requires a decision maker to engage with 4.4.3 if weight is going to be placed on potential alternatives. A promoter of development is entitled to rely on that exercise being undertaken."*

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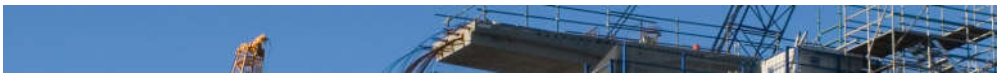

Takeaways

1. Decision-making to be undertaken in careful structure of the PA 2008 and any relevant NPS. Not a free for all.
2. Applications, including assessments of alternatives, should be tailored accordingly.
3. NPS policy on alternatives does not disapply the common law (Stonehenge) but nor does the common law avoid the need to apply (or give reasons from departing from) policy.
4. The presumption in favour matters.

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Aviation – recent judgments and developments

Mark Westmoreland Smith

Charles Streeten

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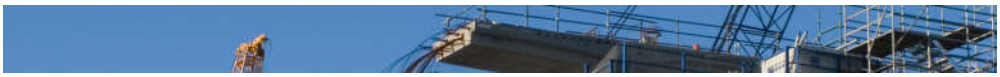

The Recent Jugments

- **Manston Airport DCO**
- ***R (GOESA Limited) v Eastleigh BC* [2022] EWHC 1221 (Admin)**
- ***R (BAANCC) v Secretary of State LUHC* [2023] EWHC 171 (Admin)**

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Manston Airport DCO

- DCO originally made on 9 July 2020, contrary to recommendation of ExA, which was to refuse.
- ExA provided very detailed analysis of need and concluded the levels of freight that the development could be expected to handle were "modest" and could be catered for with spare capacity at existing airports, including Heathrow and Stansted and that Manston offered "no obvious advantages" to the strong competition from those more central airports.
- SoS disagreed with the ExA's conclusion that existing airports could meet the need; concluded that there would be significant economic and social benefits, the benefits arising principally from the development of an asset in the particular location of Manston in North Kent; and identified policy support for the scheme. He did not grapple in any detail with the detailed quantitive analysis of need from ExA.
- Decision challenged by a local resident who had participated in the examination on the basis that: (i) SoS analysis of need was flawed, (ii) the decision was inadequately reasoned, (iii) SoS had acted procedurally unfairly, and (iv) SoS had failed to discharge his Net Zero duty under section 1 CCA 2008.
- 15 February 2022 SoS consents to judgment on the ground that the decision was inadequately reasoned. This was the first time a DCO had been quashed.

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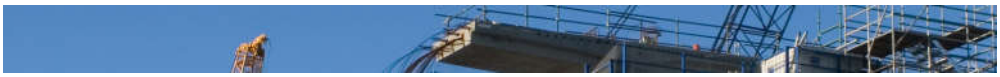

Re-determination

- Following further representations and consideration by an independent assessor, the decision was re-taken and the DCO made for a second time in August 2022.
- Far more detailed decision letter on need but still a focus on more qualitative aspects.
- The SoS found policy support for the principle of development. Granting consent would serve to implement Government aims on General Aviation activities which should be accorded substantial weight.
- On need, given dynamic changes taking place in the aviation sector as a result of COVID-19 pandemic and Brexit, the SoS held, contrary to ExA and IA conclusions, little weight could be placed on forecasts that rely on historic data and performance to determine Manston's future market share because of uncertainty the SoS places significant weight on the reopening and development of the site for aviation purposes, rather than losing the site and existing aviation infrastructure to other redevelopment.

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Re-determination

- Substantial weight given to the the fact that there is a private investor who has concluded that the traffic forecasted at the Development could be captured at a price that would make the Development viable, and is willing to invest in redeveloping the site on that basis.
- Contrary to the ExA and IA, the SoS found that the evidence provided by the Applicant, which was based on confidential discussions with industry stakeholders was sufficient to demonstrate that there is demand for the air freight capacity that the Development seeks to provide.
- SoS accepted there is potential for other existing airports to expand in future to increase capacity, but said no weight could be given to applications that had not yet come forward, because there is no certainly of delivery given that (i) the ANPS and MBU do not prejudge the planning decision and applications may not secure development consent; and (ii) the aviation sector in the UK operates in a competitive international market, and other airport operations may not make the commercial decision to invest in changes to infrastructure, it is therefore impossible to say whether indicative capacity in growth plans will result in actual future capacity.

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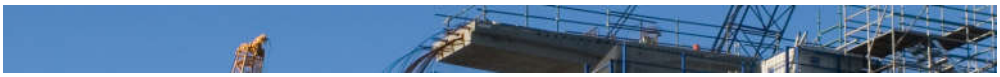

Re-determination

- The SoS held that Government's Transport Decarbonisation Plan and the Jet Zero Strategy will ensure the Government's decarbonisation targets for the sector and the legislated carbon budgets can be met without directly limiting aviation demand and for this reason did not accept the ExA view that carbon emissions are a matter to be attributed negative weight in the planning balance.
- SoS concluded that there was a clear case of need for the Development and that significant economic and socio-economic benefits would flow from the Development which should be given substantial weight in the planning balance.
- Overall, those benefits outweigh the negative impacts from noise, congestion and delays on the local road system and visual/ heritage impacts including on designated heritage assets.

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Current position

- 29 September 2022 - Claimant brings second challenge
- Permission refused on papers by Lane J
- 23 March 2023 permission granted by Lieven J on some grounds namely:

(1) It was procedurally unfair to rely on the developer's evidence of need without the underlying evidence;

(2) It was irrational to rely only on qualitative need and not to reach a conclusion on quantitative need having asked for representations on it;

(3) The SoS was wrongly advised that potential growth at other airports was immaterial; and

(4) The approach to Climate Change was unlawful in relying on The Transport Decarbonisation Plan and Jet Zero Strategy which did not account for Manston re-opening.

- Final hearing listed to be heard in July 2023

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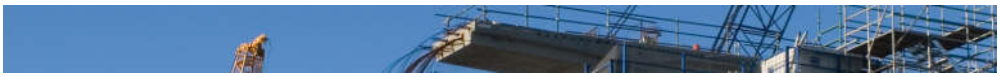

R (GOESA Limited) v Eastleigh BC [2022] EWHC 1221 (Admin)

- Challenge to grant of planning permission to develop Southampton airport, including 164m long runway extension.
- Objector wrote to the SoS asking him to call in under section 77 of the 1990 Act.
- Objector understood that LPA had agreed not to issue the permission before a decision on call in was made, but asked SoS to give a holding direction (which he did not).
- Objector also wrote to the LPA seeking an undertaking that it would not issue the permission in those circumstances, which it refused to give stating it was "in contact with the SoS about the determination" and had agreed to his "informal request to delay issuing the decision"

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Grounds

- Ground 1: Breach of legitimate expectation that LPA would not issue permission until SoS had decided whether or not to call-in.
- Ground 2: SoS had failed to assess the proposals impact on climate change, taking into account the cumulative effects of GHG in combination with those from other projects.
- Ground 3: SoS had misinterpreted NPPF 11(d).
- Ground 4: unlawfully took into account an immaterial consideration, namely that refusing planning permission would lead to the loss of the airport.

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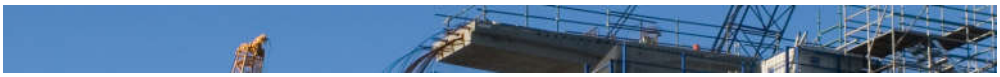

Ground 1 (paras 46 and 51-91)

- LPA had not made a clear, unequivocal representation that the decision notice would not be issued until the SoS had decided on whether to call in the application, irrespective of the length of time that might take.
- Where its response to the request for an undertaking had merely indicated that it had agreed to an informal request "to delay issuing the decision", without saying for how long or in what circumstances that delay would continue, there was no basis for the claimant to contend that the authority had given a promise as alleged, let alone a clear, unequivocal promise devoid of relevant qualification.

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Ground 2 (paras 121-123, 128)

- The EIA Regulations 2017 did not set criteria or thresholds by which to measure the "significance" of the GHG from a particular proposal, nor was there any guidance for assessing the acceptability of that contribution, whether expressed as a percentage of national budgets or targets or otherwise. Acceptability was therefore a matter for the judgment of the decision-maker
- As a matter of principle, there was nothing unlawful in a decision-maker using benchmarks that they considered to be appropriate, such as the statutory carbon budgets or national sectoral figures, to help arrive at a judgment on those issues.
- The LPA had been entitled to have regard to national aviation targets (which had allowed for a third runway at Heathrow and expansion elsewhere) and a "planning assumption" based on those targets as to the level of emissions from international aviation in 2050.
- As the EIA Regulations focused on assessing the significance of an environmental effect, not the acceptability of an effect identified by environmental information, the latter was a matter of judgment for the decision-maker not a hard-edged point of law and it was therefore permissible for a planning authority to look at the scale of the GHG emissions relative to a national target and to reach a judgment, which might inevitably be of a generalised nature.

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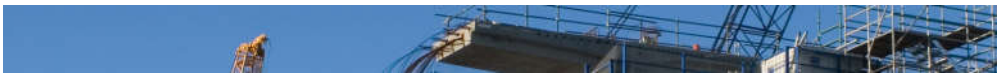

Ground 3 (paras 139-169)

- Paragraph 11(d) of the NPPF does not say how the "importance" of a planning policy should be assessed. This is a matter of judgment left to the expertise and good sense of the decision-maker.
- A decision-maker was entitled, although not legally obliged, to take into account how a particular policy applied to the particular proposed development when judging whether it was important for the purposes of paragraph 11(d).
- The paragraph 11(d) assessment involved a subjective judgment about what were the most important policies for deciding the application in questions. A decision-maker could therefore legitimately discount a policy as not being important for the purposes of paragraph 11(d) because, as a matter of their judgment, it would not be breached in the case before them and therefore would not be important for their determination of the application.
- There could be cases where a single policy would be determinative of an application and thus, by definition, would be the most important policy. In the present case, policy 115.E was critical to the outcome of the application so that, where the application did not meet one of the criteria set by that policy, it was wholly understandable that the officer's report should have effectively treated that criterion as the most important policy.
- There was no indication in the officer's report to suggest that he had failed to consider which policies were important for the purposes of paragraph 11(d), it being obvious that he had addressed the question in the specific context of the application before the local planning authority.

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Ground 4 (paras 170-198)

- The final ground was that the Council unlawfully took into account an immaterial consideration, namely that refusing planning permission would lead to the loss of the airport.
- Claimant submitted that a brief statement made during the debate of the full Council by each of 8 councillors who voted in favour of the proposal, showed that they made their decision "by reference to airport closure as an important consideration".
- Claimant submitted that that approach was based on no evidence and conflicted with statements made on behalf of SIAL and the clear advice given by planning officer to members.
- The court concluded that the claimant was referring to a small number of comments which came nowhere near establishing the "general tenor" of the 20-hour discussion by the full Council so as to show that there was a general view that the airport would close if the application was refused or that the councillors would have voted the other way had they disregarded the closure issue. Members had been advised appropriately on the issue by planning officers.

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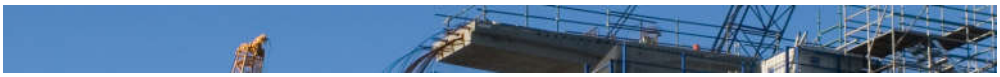

R (BAANCC) v Secretary of State LUHC [2023] EWHC 171 (Admin)

- Challenge to grant of planning permission for the expansion of Bristol Airport.
- Proposal was for expansion of capacity by approximately 20% to facilitate an additional 2 million passengers a year.
- Application for planning permission dismissed by North Somerset Council in February 2020.
- BAL appealed to Secretary of State under section 78 TCPA. Appeal considered by a panel of inspectors following an inquiry lasting 9 weeks.
- 2 February 2022 - Panel allow the appeal and grant planning permission.
- Decision challenged pursuant to section 288 TCPA by BAANCC.

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Grounds

- **Ground 1**: The Panel misinterpreted development Plan Policies CS1 and CS23 by saying they did not "directly address aviation emissions".
- **Ground 2**: The Panel erred in its interpretation of the Government's Policy document entitled "Beyond the Horizon - the Future of UK Aviation: Making Best Use of Existing Runways ("MBU").
- **Ground 3**: The Panel erred in its approach to NPPF 188, and in assuming the Secretary of State would comply with his legal obligations under the CCA 2008.
- **Ground 4**: The panel erred in discounting the impact of the expansion of Bristol airport on the local carbon budget for North Somerset Council.
- **Ground 5**: The Panel erred in concluding that the impact of non-CO2 emissions from aircraft could be excluded from the EIA for the development and should not weigh in the balance against the grant of planning permission.
- **Ground 6**: The Panel erred in determining that replacement habitat for horseshoe bats amounted to "mitigation" rather than "compensation".

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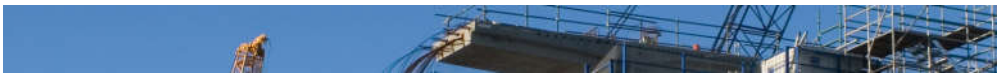

Ground 2: MBU (paras 114-119)

- The panel had considered in detail the carbon emissions from all sources, including from aviation.
- They did so by reference to whether the predicted aviation emissions from the proposal would have a material impact on the government's ability to meet its climate change targets and budgets. That was an appropriate approach as Holgate J held in R (Goesa Ltd) v Eastleigh BC [2022] EWHC 1221 (Admin).
- MBU has to be read as a whole. Paras. 1.12 and 1.13 said that "aviation carbon" "should be considered at a national level". It was in that important light that 1.29 fell to be read. The panel had not misinterpreted MBU.

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Ground 3: NPPF 188 (paras 138-152)

- The relationship between local and national decision-making in the area of air quality is significantly different from the position with regard to greenhouse gas emissions from aircraft. *Gladman Developments Ltd v Secretary of State for Communities and Local Government and others* [2019] EWCA Civ 1543 is not analogous.
- GHG emissions from aircraft are controlled at a national level through carbon nudges and the use of national and international trading schemes, pursuant to the CCA.
- In contrast, air quality issues have a significant and discrete local element (see NPPF 186).
- The application of the assumption in paragraph 188 of the NPPF in respect of emissions from aircraft would therefore not cut across any other requirements of the NPPF or other national planning policy. On the contrary, the consequence of accepting the claimant's submission in respect of paragraph 188 of the NPPF would not duplicate the system of controlling aircraft emissions, put in place by the CCA and would lead local planning decision- makers into an area of national policy, with which they are not directly concerned.

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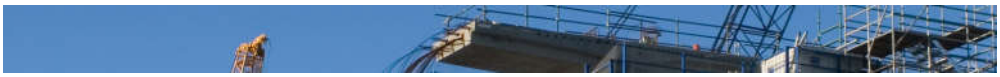

Ground 4: Local Carbon Budgets (paras. 165-175)

- The Panel had engaged with the claimant's approach that the increased emissions would consume the local carbon budget, but had given it no weight.
- Such an allegation falls into the second category of cases where an allegation is made that regard was not had to an obviously material consideration which the statute does not expressly require to be taken into account, the other category being where the decision maker does not avert to the consideration at all (see *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52). In a case like this, where the decision-maker turns their mind to a particular consideration, but decides to give the consideration no weight the question is whether the decision-maker acts rationally in doing so.
- It was not irrational to give the issue of local carbon budgets no weight. The local carbon budgets had no basis in law or policy. This was significant, given that planning decision-making was intensely concerned with taking decisions on the basis of policy within a statutory framework.

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Ground 5: Non CO2 Emissions (paras. 199-235)

- The BEIS multiplier of 1.9 upon which the Claimant sought to rely was published in a document entitled "Greenhouse Gas Conversion Factors for Company Reporting". There is very far from being any scientific consensus that it is a relevant tool in determining non-CO2 emissions from aviation, other than in the context of company reporting.
- The Climate Change Committee's attitude to non-CO2 emissions is of high relevance, given that the CCC is concerned with the discharge of the Secretary of State's obligations under the CCA. The Panel properly concluded that the relevance of aviation emissions to the Panel's decision was whether the implementation of BAL's proposals for expansion "would materially affect the ability of the United Kingdom to meet its carbon budgets and the target of net-zero GHG emissions by 2050."
- Given the CCC's view that non-CO2 effects should not be included within the net-zero target, it is difficult to see how the Panel could make use of the BEIS 1.9 multiplier in order to answer that central question. In any event, the issue for the court was whether the Panel was entitled, in the exercise of its planning judgment, to refuse to make use of the multiplier. Plainly, it was.
- The approach to the ES disclosed no "patent defect". Leaving non-CO2 aircraft emissions to be dealt with when the science enabled them to be brought into account for the purposes of the CCA was a decision that was open to those preparing the environmental statement, and one that the Panel were entitled to accept. For the panel to have attempted directly to address the non-CO2 effects of aircraft emissions would have been highly anomalous and it was not irrational for them to conclude that they would not do so.

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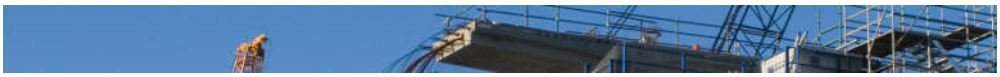

Case law and NPS update

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Infrastructure seminar: Case law update - EIA and HRA

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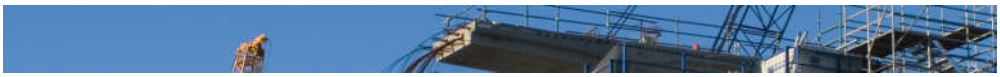

R (Ashchurch RPC) v Tewksbury BC [2023] EWCA Civ 101, Feb 2023

- planning application for a bridge, treated as a standalone project for EIA screening purposes
- project for EIA purposes can be more than just the application development – to avoid 'salami slicing'
- what constitutes the project is a fact-specific question for the planning judgment of the LPA
- list of potentially relevant criteria set out in *R (Wingfield) v Canterbury CC* (2019)

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Ashchurch

- LPA had not asked if the bridge formed an integral part of a wider project for EIA purposes – did not exercise planning judgment on this issue
- WS from screening author did not explain why he concluded the project was the bridge only, or what he had considered in reaching that view
- LPA did not adopt correct legal approach and did not ask itself the right question

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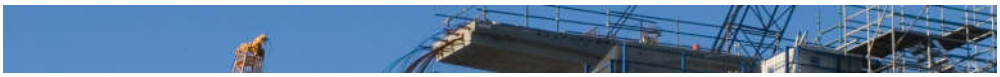

Ashchurch

- Development can be part of a wider project where the other development is still at an early stage
- can answer the question "is this part of a larger project" before the other development is defined
- difficulty of doing EIA of a wider development is irrelevant to question of whether the application development is part of a wider development – does not establish that it is not part of a wider dev

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R (Hardcastle) v Bucks Council [2022] EWHC 2905 (Admin), Nov 2022

- 2015 EIA screening reasons: "albeit crisp, they were adequate", in line with *Bateman*
- D claimed had been a later review of 2015 screening but provided no evidence of it
- Sir Ross Cranston said lack of evidence / disclosure "a troubling issue" & proceeded on assumption had been no consideration of whether the 2015 screening conclusion still held

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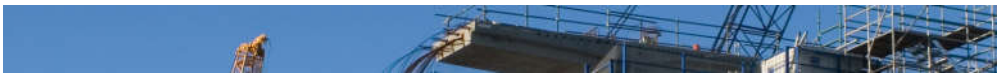

Hardcastle

- C argued unlawful failure to review screening due to changed circs and new info, including in light of deficient 2015 screening – 8 points cumulatively
- case law summarised in *Swire v Ashford* in 2021: lawful *if no reasonable planning officer* would have thought that the changes could make the development EIA development

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Hardcastle

- Judge briefly considered the 8 points and concluded: "a reasonable planning officer would not have thought these changes, such as they were, could change the outcome of the 2015 screening individually or cumulatively"

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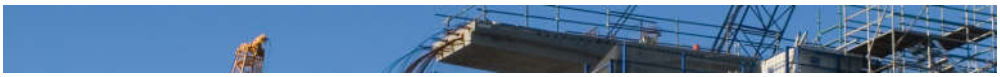

R (Substation Action Save East Suffolk) v SSBEIS [2022] EWHC 3177 (Admin), Dec 2022

- JR of 2 DCOs for offshore wind developments including on EIA ground re cumulative effects
- excluded from EIA effects of known proposals for extension of substation for other connections
- proposals for 3 other interconnectors which could connect to the substation, plus other wind farms
- at request of ExA, applicant provided info on likely env effects of extending for 2 interconnectors

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Substation Action Save East Suffolk

- that info not treated as further information, ie additional env info necessary to include in the ES
- C said was wrong, irrational & inadequate reasons
- Vanguard DCO quashed in *Pearce* where evaluation of cumulative impacts of a substation was deferred on basis that info was limited, without giving a properly reasoned conclusion as to whether an evaluation could be made

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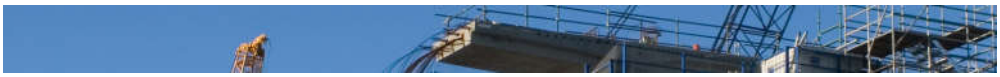

Substation Action Save East Suffolk

- case law: rational not to assess cumulative impacts, where later dev was inchoate, no proposals had been formulated, and there was not any, or any adequate, info available on which a cumulative assessment could have been based
- response to claim: proposals not yet existing or approved projects & insufficient reliable info *publicly available* to assess cumulative impacts

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Substation Action Save East Suffolk

- Lang J distinguished *Pearce*, finding no breach of EIA Regs and adequate reasons
- proposals not "existing and/or approved projects" of which cumulative assessment was required
- Lang J referred to what info Advice Note 17 is required for cumulative impacts assessment
  - design and location information; proposed programme; environmental assessments setting out baseline data and effects

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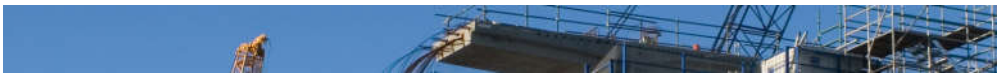

Substation Action Save East Suffolk

- Proposals at such an early stage that there was not sufficient reliable information to undertake a satisfactory cumulative assessment
- uncertainties about the proposals such that it was not possible to undertake a reliable assessment of cumulative effects
- info provided by applicant rightly regarded as env info, but not further info under EIA Regs, and was carefully taken into account

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HRA: R (Sahota) v Herefordshire Council [2022] EWCA Civ 1640, Dec 2022 Proposals at such an early stage that there was not sufficient reliable information to undertake a satisfactory cumulative assessment

- Challenge to advice that AA was not required
- CA admitted evidence of LPA's ecology officer to explain why he advised HRA was not required
- WS set out his contemporaneous "workings", to understand why he had advised AA was not required
- ex post facto evidence admissible to elucidate, add to or confirm contemporaneous reasons
- need for caution in admitting such evidence

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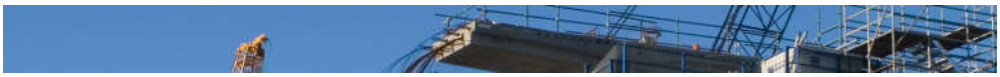

Sahota

- C argued AA required due to hydrological connection between farmland & SAC watercourse
- LPA's ecology officer's WS explained were no relevant effects from the development on the SAC, based on his expert experience – no impact pathway
- CA found no public law error in that explanation eg demonstrable error in reasoning or irrationality
- CA clear could only challenge on public law grounds

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Infrastructure seminar: NPS Update

Rebecca Clutten

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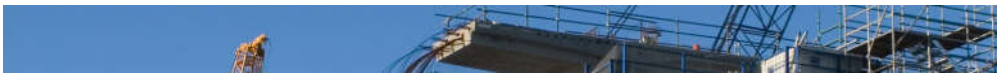

NPS Update

- **Key issues arising from latest consultation on Energy NPS Review**
- Government's topics for reconsultation
- Other notable changes to the NPSs
- Government's response to consultation
- To note – designation of the Water Resources Infrastructure NPS; review of the Ports NPS

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NPS Review – Timeline to date

- **2011** - current Energy NPSs designated
- **December 2020** – Energy White Paper and review of Energy NPSs announced
- **September 2021** – consultation on updated draft NPSs
- **October 2021** – Net Zero Strategy published
- **April 2022** - British Energy Security Strategy announced

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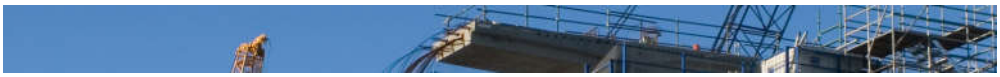

NPS Review – Timeline to date

- **February 2023** - *Nationally Significant Infrastructure: action plan for reforms to the planning process* published
- **March 2023** – Revised Energy NPSs issued for consultation
- **25 May 2023** – Consultation closes
- **Q2 2023** – Intended date for designation of revised NPSs

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Government's Reconsultation

- Main reconsultation limited to 'Key policy changes'
- Affecting EN-1, EN-3 and EN-5
- Key policy changes are/relate to:
  - 'Critical national priority' policy for offshore wind
  - Offshore Wind Environmental Improvement Package
  - Civil and military aviation and defence interests
  - Need for new electricity network infrastructure

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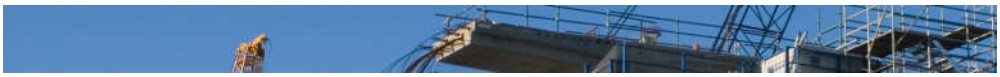

Government's Reconsultation

- **'Critical National Priority' policy**
  - Policy presumption intended to reflect criticality of offshore wind and associated on/offshore infrastructure and network reinforcements ('CNP Infrastructure')
  - EN-3 [3.8.7] ff – urgent need for this 'CNP infrastructure' will generally outweigh any other (non-HRA) residual impacts not capable of being mitigated
  - [3.8.15] – Interesting list of what this means in practice
  - Consultation focusses on definition/support for 50 by 2030

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Government's Reconsultation

- **Offshore wind Environmental Improvement Package ('OWEIP')**
  - Previously introduced in BESS
  - Intended to support streamlining of offshore wind consenting timeline, to support 50 by 2030, and protect marine environment notwithstanding more rapid deployment of offshore generating capacity
  - EN-3 [3.8.103] introduces 'Offshore Wind Environmental Standards' ('Nature Based Design Standards' in BESS)

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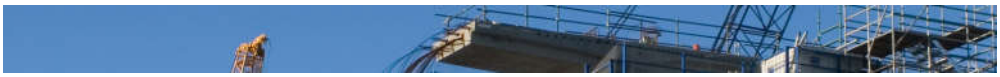

Government's Reconsultation

- **Offshore wind Environmental Standards**
  - EN-3 [3.8.103] doesn't actually say what the standards are – but will relate to *"design, construction, operation and decommissioning of offshore wind farms"* and be consulted on this year
  - Draft NPS requires applicants to demonstrate compliance with the final guidance ("and targets") or justify any departure
  - Also [3.8.282] ff – acknowledging likely need for compensatory measures and need to engage SNCBs early

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Government's Reconsultation

- **Civil and military aviation and defence interests**
  - Policy changes intended to address and manage relationship between energy developments and civil and military aviation and defence infrastructure
  - EN-1 [5.5] ff – ambition is for "collaboration and co-existence between aviation and energy industry stakeholders" to ensure "that neither is unduly compromised"
  - Particular additions relating to Comms, Navigation and Surveillance Infrastructure and meteorological systems

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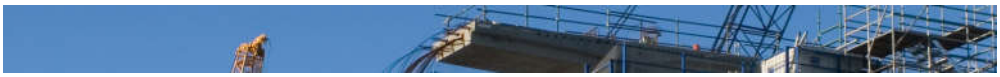

Government's Reconsultation

- **Need for new electricity networks infrastructure**
  - EN-5 [2.12.17] Actions BESS commitment - expressly states that infrastructure identified in the Holistic Network Design (HND) is infrastructure falling within the CNP definition; further detail given at [2.13]
  - EN-5 [2.8] Support network reinforcement - projects identified in the Centralised Strategic Network Planning process under the Electricity Transmission Network Planning Review (ETNPR) will have the benefit of the need case for network infrastructure in EN-1 [3.3]

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Government's Reconsultation

- **Need for new electricity networks infrastructure**
  - For projects not part of strategic network planning, EN-5 [2.13.5] encourages participation in OTNR 'Early Opportunities' workstream and the bringing forward of co-ordinated design work
  - Curious Q7 – relates to a matter not described in preceding text:

    - *"Draft EN-5 includes a strong starting presumption for OHL…outside nationally designated landscapes…Do you agree?"*

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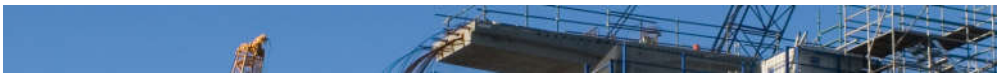

Other notable changes – EN-1

- [1.5.2] - "expectation" of NPS reviews every five years
- Changes in respect of gas generation/infrastructure
- Changes in respect of hydrogen infrastructure
- [4.1.8] - land can be acquired compulsorily for biodiversity net gain (though note BNG Consultation 'last resort')

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Other notable changes – EN-1

- **Air quality** - Projects near sensitive sites for AQ should only be proposed where no viable alternative is available (5.2.6);
  - AQ considerations will be given substantial weight where near sensitive site (5.2.15);
  - absent justification and mitigation for the location, consent should be refused (5.2.16)
- **GHG Emissions -** requirement for GHG Assessment within ES (5.3.4) and a GHG Reduction Strategy included and secured by DCO (5.3.7); several decision-making obligations (5.3.8 – 5.3.12)

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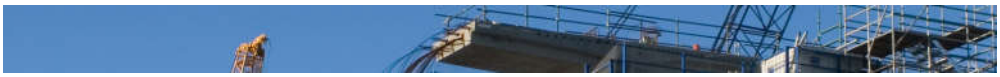

Other notable changes – EN-1

- **Biodiversity**
- [5.11.37] – confirmation that renewable energy may constitute VSC for development in the Green Belt
- [5.4.52] – need for SoS to assess impact on all Marine Protected Areas (network of HRA sites, SSSIs and MCZs)
- [5.4.32] – need for applicants to include measures to mitigate direct/indirect effects on ancient woodland, veteran trees, other irreplaceable habitats (applications also to assess impacts on trees/woodland generally)

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Other notable changes – EN-1

- **Landscape**
- [5.10] – policy protection from development for Heritage Coasts – *"unlikely to be appropriate unless compatible with the natural beauty and special character of the area"*

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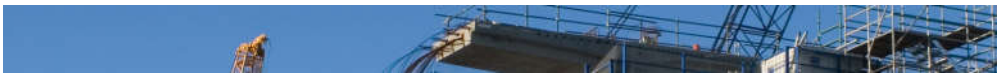

Other notable changes – EN-3

- [2.6.3] – NPS directed to apply to offshore transmissions projects benefitting from S.35 Directions, with interconnectors/MPIs specifically referenced
- [3.7] – Extensive policy relating to EfW applications and their determination
- [3.8.51] – Positive policy support for MPIs, including as a mechanism for direct export of energy; and emphasis on the need for future-proofing to enable future connections to MPIs or other windfarm [3.8.53]

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Other notable changes – EN-3

- [3.10] – Direct acknowledgement of the ambition for up to 70GW solar deployment to 2035, and co-location of the same with other uses e.g. agriculture
- [3.10.13] ff – Explanation that the land type should not be "predominating" factor in site selection and that development of ground-mounted solar on Grade 1, 3 and 3a is not prohibited, though "impacts are expected to be considered"

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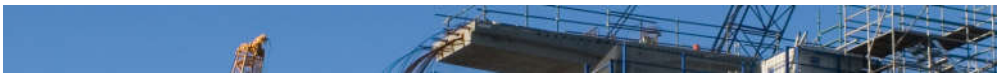

Other notable changes – EN-5

- [2.9.21] – In context of "strong starting presumption" that applicants should underground electricity network infrastructure in nationally designated landscapes, harm to visual amenity and natural beauty is also noted as a reason for undergrounding along with landscape harm
- [3.10.13] ff – Explanation that the land type should not be "predominating" factor in site selection and that development of ground-mounted solar on Grade 1, 3 and 3a is not prohibited, though "impacts are expected to be considered"

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Other notable changes – EN-4

- Absence of change notable – not extended to other non-natural gas networks e.g. hydrogen and CO2
- Reflects Government's consultation response that adequate policy support for hydrogen etc appears in EN-1

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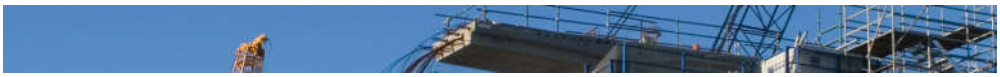

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FTB Annual Infrastructure Seminar

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