

Air quality and planning law

The planning process should be used to protect and improve local air quality and ensure developments are appropriately and sensitively designed to mitigate negative impacts on air quality¹.



This paper examines the obligations and powers of planners in respect of air quality, focusing on London. London has been selected for its particularly serious air quality problems, and for the clear way in which it demonstrates the relevance of different levels of policy. The paper begins with a discussion of the context of air quality in London, followed by an outline of the regulatory framework for air quality. It then examines the legal planning framework within which planners act. Air quality is fundamentally a consideration which must be taken into account in decisions. By means of this relatively limited legal obligation, the planning process can have a direct and positive influence over air quality.

The context

Campaign groups claim that by April 2013 London had already experienced eight smog episodes since the beginning of the year², with levels of some pollutants on average twice that of World Health Organisation Guidelines³. Over 85% of the worst areas in the country for nitrogen dioxide and particulate pollution are in London⁴. In 2010 a study found that an estimated 4,267 deaths in London were in part impacted by long-term exposure to fine particulate emissions⁵. The average loss of life expectancy from birth as a result of air pollution is approximately nine months for every resident in London, around 50% higher than the national average⁶. London clearly needs strong and focused action if air pollution is to be successfully tackled.

The regulation of air quality

At the European level, the Air Quality Directive 2008 sets both limit values and target values⁷. Limit values provide obligatory maximum limits for the concentrations of specified air pollutants with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole. These are to be attained within a given period and not to be exceeded once attained, but are in certain circumstances subject to a margin of tolerance⁸. Target values are to be met where any measures taken to attain these values would not entail disproportionate cost⁹.

The Air Quality Directive requires the Government to prepare an air quality plan, demonstrating how the terms of the Directive will be met within the timeframes specified¹⁰. The UK, along with other Member States, was granted time extensions on its obligations to 1 January 2015 in certain air quality assessment zones, under Article 22 of the Directive¹¹. The government has admitted that air quality standards will be breached in at least 16 areas until 2020, and that pollution levels in London will not fall to the legal limits until 2025¹².

The Air Quality Directive was implemented by the Air Quality Standards Regulations 2010 (SI 2010/1001). The 2010 Regulations empower the Secretary of State to require local authorities to monitor and improve air quality in line with the national Air Quality Strategy¹³, produced by the government under the Environment Act 1995¹⁴. The strategy sets out the UK's air quality standards and objectives for improving ambient air quality in the UK. Local authorities are required to put in place an Air Quality Management Area (AQMA) if air quality falls short in their area¹⁵. Thirty-one London Boroughs currently have AQMAs in place¹⁶.

The Environmental Audit Committee noted in 2010 that “the UK is failing to meet a range of domestic and European targets.”¹⁷ Relying on evidence provided by the Government, the follow up report found that “forty out of the UK's forty three assessment zones are failing to meet EU targets and poor air quality is now found to be shortening the lives of up to 200,000 people by an average of 2 years.”^{18, 19} ClientEarth recently challenged the Government in the Supreme Court, for failing to meet legal limits for air quality. The Supreme Court has referred legal questions on the interpretation of the Air Quality Directive to the Court of Justice of the European Union²⁰. Member States - through a different process from the one set in motion by ClientEarth - can be subject to financial penalties for failure to comply with EU law; Part 2 of the Localism Act 2011 created powers for Ministers to pass on penalties to local authorities who caused or contributed to the infringement²¹.

The Planning Framework

Section 70(1) of the Town and Country Planning Act 1990 (TCPA 1990) empowers a local planning authority to grant planning permission with or without conditions, or to refuse it. In dealing with an application, the authority is required under section 70(2) to have regard to:

- a) the provisions of the development plan, so far as material to the application;
- b) any local finance considerations, so far as material to the application; and
- c) any other material considerations.

In many cases, air quality will be a material consideration in the planning process²². This means that local planning authorities are under a legal duty to take air quality into account in determining planning applications, and a failure to do so could lead to a planning decision being judicially reviewed and potentially quashed. Local authorities must at least consider, in relevant cases, any adverse effects which a proposed development may have on local air quality, and whether existing air quality levels may have adverse effects on

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the proposed development. It remains for the decision maker to decide the weight to be given to each material consideration in the context of each application.

Other material considerations include the provisions of the development plan, national policy, and indeed the demands of the regulatory framework set out above. The provisions of the development plan have a special status. The Planning and Compulsory Purchase Act 2004, section 38(6) states that “if regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise²³.” Air quality issues may in appropriate circumstances be material considerations that “indicate otherwise.” For any area in Greater London, the development plan includes²⁴ the London Plan 2011, which is the overall strategic plan for London²⁵.

The development plan in London, in accordance with which decisions must be made (subject to material considerations that indicate otherwise), emphasises the importance of air quality. The London Plan provides that the Mayor will, and boroughs should, implement the Mayor’s Air Quality Strategy²⁶ and achieve reductions in pollutant emissions and public exposure to pollution. The planning process should aim to promote sustainable design and construction of new developments, and air quality needs to be taken into account along with other material considerations at the planning stage. Formal air quality assessments are undertaken where appropriate, particularly in designated Air Quality Management Areas²⁷. The London Air Quality Strategy emphasises the importance of air quality. New developments should be “air quality neutral or better”, making better use of the planning system to ensure no new development has a negative impact on air quality in London²⁸.

The policy supports a shift to public transport and walking and cycling through the planning of new developments. It recognises that developments such as new offices, retail and housing often place significant demands on London’s transport system or if located in areas of poor public transport connectivity can lead to increased car trips²⁹. The London Air Quality strategy outlines the need to ensure that the impacts of new developments on air quality are mitigated as far as possible and that development is both sustainable and viable³⁰. It states that high trip-generating developments should be located in areas of high current or planned public transport accessibility, connectivity and capacity and all developments should be planned in a way to increase the attractiveness and potential mode share of walking and cycling³¹. The plan also acknowledges that more can be done at the construction

stage, advocating the adoption of Best Practice Guidance for the demolition and construction phases of development, including clear advice for air pollution mitigation measures³².

The local planning authority must prepare a plan for their area to be known as a local development plan³³. This is the plan for the future development of the local area and is drawn up by the local planning authority in consultation with the community. It is also open to local authorities to develop Supplementary Planning Documents (SPDs) as part of a local development scheme, to provide further guidance on particular issues such as air quality. These SPDs are capable of being a material consideration but do not form part of the development plan³⁴. The Local Plan and SPDs must, when taken as a whole, set out the authority’s policies relating to the development and use of land in their area.

The national policy context was renewed in March 2012 by the National Planning Policy Framework (NPPF)³⁵. This sets out a framework vision of the Government’s planning policies for England which aims to be relevant, proportionate and necessary, and in doing so vastly reduces the number of policy documents on planning³⁶. The NPPF is a material consideration in both the preparation of development plans, and in making planning decisions³⁷. The NPPF reiterates some key principles the determination of planning applications: planning law requires applications for planning permission to be determined in accordance with the development plan, unless material considerations indicate otherwise³⁸; planning policies and decisions must reflect and where appropriate promote relevant EU obligations and statutory requirements³⁹. These would of course include the obligations contained in the Air Quality Directive 2008.

The NPPF sets out a presumption in favour of sustainable development. It contends that the purpose of the planning system is to contribute to the achievement of sustainable development. Sustainable development is said to have three dimensions: economic, social, and environmental; and is described as ‘a golden thread running through both plan-making and decision-taking’⁴⁰. The presumption in favour of (sustainable) development comes into effect where the local development plan is absent, silent or out of date on relevant policies⁴¹; we should note that the role of the NPPF during the drafting of the development plan documents should embed that presumption throughout the planning system. Although created prior to the introduction of the NPPF, the London Plan should not necessarily be considered ‘out of date’ in the terms of the NPPF. Due weight should be given to relevant policies in existing plans in accordance to their degree of consistency

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with the NPPF⁴².

Significantly, the NPPF provides that the planning system should contribute to and enhance the natural and local environment by, *inter alia*:

“preventing both new and existing development from contributing to or being put at unacceptable risk from, or being adversely affected by unacceptable levels of soil, air, water or noise pollution or land instability⁴³.”

Moreover, that:

“Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan⁴⁴.”

The approach of the NPPF to air quality issues allows for expansive considerations relating to air quality to fall within its scope. This gives local authorities significant influence over air quality impact where planning powers are properly utilised. In some cases, air quality issues within AQMAs may be so significant that planning permission is refused altogether. But it must be noted that even if the development would result in a deterioration of local air quality, these provisions do not prevent permission being granted.

For the sake of completeness, we should also note that air quality may enter the planning process through environmental impact assessment (EIA), if one is required for a particular development⁴⁵. Where an EIA is required, an applicant for planning permission must submit an “environmental statement” to the local planning authority. This sets out the likely impacts of the proposed development on the environment, including air quality if relevant. Where significant adverse effects are identified, the statement must also contain a description of the remedial measures which the developer proposes.

Conclusions

Planning decisions clearly have the potential to exercise a strong positive influence on air quality, and decision makers will often be required to take air quality into account. However, planning law does not dictate any particular decision, which is ultimately a matter of expert and political judgment, weighing all material considerations. The substantive requirements in the Air Quality Directive may weigh heavily against granting planning permission in any particular case. But the range of factors associated with air pollution will, other than in extreme

cases, make it difficult to claim that the grant of any single planning permission would lead to a breach of the legislative standards. Local authorities’ obligations in the planning process are therefore predominantly procedural.

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- ²⁸ Mayor of London, *Clearing the Air, The Mayor's Air Quality Strategy* (2010), para 4.2.1; www.london.gov.uk/sites/default/files/Air_Quality_Strategy_v3.pdf (note that this commitment is in a chapter entitled 'non-transport issues').
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- ³⁶ *Ibid*, para 1.
- ³⁷ *Ibid*, para 2, although the identification of material considerations is ultimately a matter for the courts.
- ³⁸ *Ibid*, para 196.
- ³⁹ *Ibid*, para 2.
- ⁴⁰ *Ibid*, para 14.
- ⁴¹ *Ibid*, para 14.
- ⁴² *Ibid*, Annex 1, Implementation, para 215.
- ⁴³ *Ibid*, para 109
- ⁴⁴ *Ibid*, para 124.
- ⁴⁵ EIA is required where a proposed development falls under Schedules 1 or 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

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