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Leith by James Carson

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Focus

Legal Aid Reform and Environmental (In)justice

The Scottish Government published its 'Legal Aid Reform Discussion Paper'[1] on 27 February 2025. This identifies the need to provide a more modern and responsive system and sets out some immediate reform actions and longer term programme of reform priorities, but promises nothing in relation to environmental cases.

Difficulties with obtaining legal aid have been identified as one of the barriers to securing environmental justice and as a contributing factor to Scotland being in breach of the obligation under the Aarhus Convention to provide access to effective remedies that is not prohibitively expensive. In particular, the availability of legal aid is restricted by the limitation to supporting cases taken by individuals, excluding actions raised by non-governmental organisations ('NGOs') and others, as is often the case in environmental matters that affect communities rather than just individuals. Such issues were extensively aired before the Equalities, Human Rights and Civil Justice Committee at the Scottish Parliament in November 2024.[2]

The importance of legal aid was recognised by the Scottish Government in its 'Report into the Effectiveness of Governance Arrangements',[3] published in June 2023 (see, for instance, (2023) 218 SPEL 75). There it was said that: 'The Scottish Government has committed to working towards Scottish Legal Aid reform which will consider extending legal aid availability to "legal persons", such as NGOs, and also facilitate more targeted provision of legal aid services by area of law and/or by geographical location.' The final 'Statement on the Effectiveness of Environmental Governance Arrangements'[4] published on 19 November 2024 (see, for example, (2025) 227 SPEL 4), records the many views expressed on the availability of legal aid but does not repeat that commitment.

Now the 'Legal Aid Reform Discussion Paper' has been published but again says nothing on these issues and makes no mention of environmental cases or the Aarhus Convention. This suggests that there will be no immediate action to address the limited availability of legal aid which will therefore continue to be an obstacle to securing environmental justice.

C T Reid
University of Dundee

(This journal has been commenting on the negative impact of limited access to legal aid in environmental (including land-use planning) matters for over 40 years. In his comments following the decision in McColl v Strathclyde Regional Council *1983 SLT 616, Frank Lyall (at (1984)11 SPLP 3) referred to the risk that good legal points will not be litigated if legal aid is not forthcoming and '[i]f so, the law itself may be altered by practice in default of someone able to challenge what is done, and certainly individual right will be subverted'. Good work is done by, for instance, the Good Law Project, the Free Legal Services Unit at the Faculty of Advocates and the Environmental Rights Centre for Scotland among others to help communities hold to account government, local authorities and regulatory bodies, but the fact remains that too many decisions and actions that may be legally flawed escape challenge simply because of the costs and risks of pursuing matters in the courts – Editor.)*

1 https://www.gov.scot/publications/legal-aid-reform-discussion-paper/
2 https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/EHRCJ-10-12-2024?meeting=16160
3 https://www.gov.scot/publications/report-effectiveness-environmental-governance-arrangements/documents/
4 https://www.gov.scot/publications/statement-effectiveness-environmental-governance-arrangements/documents/

The Natural Environment (Scotland) Bill and Investing in nature

The Natural Environment (Scotland) Bill ('the Bill') and related documents were introduced in the Scottish Parliament on 19 February 2025.[1]

The Bill aims to help restore nature and protect biodiversity in Scotland. It has been said that the Bill proposes actions to tackle the twin crises of climate change and nature loss with measures to protect biodiversity and to reduce harmful carbon emissions. There is no reference to Scotland's National Planning Framework, the current version of which was adopted in February 2023, in the Bill or its related documents.

The proposed legislation is a key part of the Scottish Government's Strategic Framework for Biodiversity and complements the Scottish Biodiversity Strategy and related delivery plans.

The Bill includes provisions about:

— imposing a duty on Scottish Ministers to set, and meet, legally binding targets for nature restoration;
— creating a power to allow for future amendments to Environmental Impact Assessment legislation and the 1994 Habitats Regulations, to ensure that they remain fit for purpose over time and to flexibly adapt to future requirements, while ensuring that the legislative frameworks continue to effectively underpin environmental protection and assessment processes in Scotland; and
— modernising the aims of National Parks and powers of National Park Authorities, and includes a provision imposing a duty to facilitate National Park Plan implementation.

The Scottish Parliament's Rural Affairs and Islands Committee has issued a call for views about the Bill. Views should be submitted by no later than 9 May 2025.

On 26 February 2026 the Scottish Government published 'Investing in Nature: A Plan to Support Investment in Biodiversity and Climate Adaptation in Scotland'.[2] This is an action plan which aims to support the creation of a nature finance system that enables funding and finance to flow into high-integrity biodiversity outcomes, and supports Scotland's Strategic Biodiversity Framework.

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That biodiversity investment plan ('BIP') does refer to Scotland's National Planning Framework. The BIP is said to be a first step in laying the groundwork for increased investment in biodiversity and it includes a commitment to monitor the actions set out in the BIP.

John Watchman
Watchman & Co

[1] https://www.parliament.scot/bills-and-laws/bills/s6/natural-environment-scotland-bill
[2] https://www.gov.scot/publications/investing-nature-plan-support-investment-biodiversity-climate-adaptation-scotland/

Healthier Lives Across Generations: A blueprint for intergenerational living

Following a two-day national symposium at Harvard University, Generations United has published a blueprint for intergenerational living which is aimed at a broad audience including policymakers, housing financiers, affordable housing developers and advocates, researchers, healthcare and social care organisations as well as elected members and philanthropists.[1]

The focus is on 'intentional' intergenerational living rather than 'multi' generational living which includes co-housing, multigenerational communities as well as speciality older adults with student housing. It highlights that people from low and moderate incomes have been historically left out of affordable and accessible living options and seeks to promote the creation of safe and sustainable housing options that improve health and wellbeing and provide an opportunity to address increasing loneliness and social isolation within communities.

The aim of the blueprint seeks to promote intergenerational living that:

- provides adequately for safety, health and basic necessities of life;
- promotes programmes, policies and practices that increase cooperation, interaction, interdependence and understanding between people of different generation; and
- enables all ages to share their talents and resources, and to support each other in relationships that benefit both individuals and their community.

With limited existing research and practice the blueprint identifies four key strategies with recommended action steps to increase availability of intergenerational living as a viable housing option. These can be summarised as follows.

Key strategies

Strategy 1 is to create an evidence base providing concrete, quantitative research which then can help promote investment. Research on intergenerational living is identified in relation to several areas including physical and mental health; effects on education and social wellbeing (in particular young people); how it can reduce social isolation, market research to understand demand as well as hesitation, impact on healthcare, childcare and eldercare. Another area of research focus is recommended in relation to the impact on reducing adverse environmental impacts with a focus on urban sprawl and related issues such as loss of habitat, greenhouse gas emissions, air and water quality as well as neighbourhood stability.

Strategy 2 focuses on communication and the need to create a 'compelling narrative' which engages with the private sector and builds awareness of intergenerational living. Varying methods of communication are identified and recommended from community focus groups, public awareness campaigns and the use of social media and video documentaries, all seeking to be inclusive of age, culture and socio-economic status and seeking to reach across different groups. Through developing common language and terminology as well as creating a 'lookbook' with design images the aim is to more clearly define what intergenerational living is and aid understanding. One of the key recommendations is integrating this communication into policy discussions at various levels of government, for instance, affordable housing delivery, economic security etc.

Strategy 3 then leads on the policy and funding mechanisms required for taking intergenerational living forward. As the blueprint is based on the existing systems in the United States it goes on to discuss and identify opportunities with some of the existing federal and state government funding streams and allocations such as Low-Income Housing Tax Credits and the opportunity to expand these to other low-income and moderate-income families. Some of the key recommendations also include the need for public funding to support common spaces which are an essential element in building communities as well as the need to promote local zonal planning which encourages the development of affordable multifamily housing options and the removal of policy barriers. There is recognition that public funding can help ensure long-term affordability to this type of housing but also the need for partnership with the private sector in particular both for-profit and non-profit housing developers.

The final strategy focuses on the practice and design elements of intergen--rational living. It identifies the key role that design plays in creation and placement of elements such as common areas which can help to promote healthy activities and encourage contact with nature for the residents. With careful programming to promote interaction and ensuring staff share the community mission this can promote a living environment which is flexible and responsive to the residents. In order to achieve this, it is recommended that resources are provided for housing developers and stakeholders including design tools to create culturally responsive design features. Further, training is promoted that would ensure support to adapt to the needs of residents. One of the recommendations also includes the need to create opportunities for urban planning and social work education to be aligned to be able to promote the develop and design of intergenerational housing to create a holistic approach to delivery.

Call to action

The final section of the report seeks a 'Call to Action' identifying what is needed at the various levels of government to see support and delivery of intergenerational housing. This includes zoning to allow this type of development through to funding mechanisms both governmental and philanthropic that are needed to ensure successful delivery of intergenerational living as a viable housing option within communities.

Julie Robertson
University of Dundee

[1] https://www.gu.org/resources/blueprint-for-intergenerational-living/

Tackling loneliness through the built environment.

In November 2024 the Centre for Social Justice ('CSJ') in November 2024 published its third instalment of a four-part series, presenting an evidence base and suggestions for government actions that can foster connectedness and community throughout the UK.[1]

The report, 'Lonely Nation: How to tackle loneliness through the built environment' makes 10 principal recommendations. It suggests that to fulfil the Westminster Government's objective of building 1.5m new homes and combating loneliness, it is imperative to consider beauty, design codes, access to green spaces, neighbourhood planning, and community-led housing as strategies to rejuvenate the most underprivileged areas. Land-use planners, architects, and others engaged in the development of the built environment must markedly enhance their endeavours to support and build public trust.

Evidence contained within the report indicates that around 60 per cent of adults surveyed acknowledge experiencing loneliness intermittently. In addition, 22 per cent said they experience a degree of loneliness that leads to a sense of disconnection from both individuals and their surrounding environment. This is exacerbated by communities experiencing a sense of powerlessness towards their local areas and the people therein. The CSJ study revealed that 62 per cent of individuals felt a lack of agency concerning changes in their local communities.

It is suggested that while government's aim to build more housing is economically motivated, it must recognise that the physical environment is crucial to the social fabric and affects the sense of community and belonging, and necessity for social connectivity.

A summary of some of the report's recommendations, which mainly are applicable to England, are:

— emphasising beauty and sustainable development in England's National Planning Policy Framework;
— requiring local planning authorities to utilise local design codes for development on brownfield land and to promote the automation of planning approvals;
— the Ministry of Housing, Communities and Local Government should facilitate community groups in bidding for assets via the Community Ownership Fund;
— the Department for Culture, Media and Sport should implement a redesigned loneliness strategy that expands upon 'A Connected Society', published six years ago; and
— the Ministry of Housing, Communities and Local Government should replace the Community Right to Bid with two new Community Right to Buy powers based on the existing legislation in Scotland.[2]

The relationship between places and wellbeing, including that of loneliness, has been considered in Scotland. Work has been underway for several years through the Improvement Service's 'Shaping Places for Wellbeing' programme.[3] The introduction of Local Place Plans via the Planning (Scotland) Act 2019 also reinforces some of the CSJ recommendations that seek to support communities feeling empowered and engaged within their local area.

Kirsty Macari
University of Dundee

1 https://www.centreforsocialjustice.org.uk/wp-content/uploads/2024/11/CSJ-Lonely_Nation_3.pdf
2 Scotland's provisions can be accessed at: https://www.gov.scot/publications/community-rights-to-buy-overview/
3 https://www.improvementservice.org.uk/products-and-services/planning-and-place-based-approaches/shaping-places-for-wellbeing

Glasgow City Council Affordable Housing Policy

Unlike many other planning authorities in Scotland, Glasgow City Council ('GCC') has not operated a planning policy which requires a proportion of housing units within a development granted planning permission to be provided in the form of affordable housing.

GCC's approach to affordable housing was the subject of discussion at its recent Economy, Housing, Transport and Regeneration City Policy Committee on 11 March 2025. That committee was provided with an update on the application of Scotland's Fourth National Planning Framework ('NPF4') Policy 16 Quality Homes following the May 2024 *Mossend* decision,[1] and the progress on developing local policy for Glasgow through the City Development Plan.

NPF4 Policy 16 states that a minimum of 25 per cent of the total number of homes on new housing developments must be set aside for affordable housing. This is caveated by the following:

> 'unless the LDP sets out locations or circumstances where:
> i. a higher contribution is justified by evidence of need, or
> ii. a lower contribution is justified, for example, by evidence of impact on viability, where proposals are small in scale, or to incentivise particular types of homes that are needed to diversify the supply, such as self-build or wheelchair accessible homes.'
> The contribution is to be provided in accordance with local policy or guidance.' [emphasis added].

GCC has so far resisted applying the 25 per cent affordable housing requirement of NPF4 on the basis that Glasgow provides more than 25 per cent affordable housing across the city as a whole. GCC relies on the emphasised wording of NPF4 Policy 16 which, in its view, makes clear that it is for the Local Development Plan to identify the need based on evidence and to develop local policy to set out the requirements to meet that need, considering key factors. Such key factors for Glasgow in particular are stated to include viability, abnormal ground conditions/contamination and associated development costs.

The report notes the commitment to the development of an affordable housing policy for Glasgow in the Council Strategic Plan 2022 to 2027 and its Local Housing Strategy 2023 to 2028. GCC has committed to procuring consultants to provide an evidence base for Glasgow's affordable housing policy and to make recommendations about how a contribution policy could operate.

Of note, it was stated in the update that GCC is considering an Affordable Housing Contributions Policy to utilise commuted sums to fund affordable housing off-site.

Until a new affordable housing policy is adopted, it would seem that GCC will continue its current position of not requiring affordable housing as part of planning permissions for housing

development, notwithstanding what is stated in NPF4. Standing the historic high levels of affordable housing in Glasgow, it may be the case that the policy which is adopted by GCC might seek a level of affordable housing contribution which is less than the 25 per cent in NPF4. There also appears to be a possibility that GCC's affordable housing policy may include a larger role for financial contributions than in other affordable housing policies. Should such a contributions policy be adopted, we could see continued divergence between the policies of GCC and the rest of Scotland in relation to affordable housing.

Gordon Clark
DLA Piper

1 *Miller Homes Ltd v The Scottish Ministers* [2024] CSIH 11 (XA41/23). See, for instance, (2024) 223 SPEL 59.

Reports by the Standards Commissions

An annual report for 2023/24 by Scotland's Ethical Standards Commissioner ('ESC') has been published.[1] The ESC's role includes investigation of complaints about the conduct of Members of the Scottish Parliament ('MSPs'), local authority councillors and board members of public bodies. If the ESC considers that there has been a breach of the relevant Code of Conduct, the ESC will report in the case of MSPs, to the Scottish Parliament and in the case of councillors and members of public bodies, to the Standards Commission for Scotland ('SCS'). The ESC's role also includes investigating complaints about lobbyists who have failed to register or provide certain information to the Scottish Parliament and, where there has been a contravention, to report to the Scottish Parliament.

The ESC report notes that the vast majority of complaint allegations continue to relate to disrespectful behaviour against council officers, members of the public and other councillors. Such allegations have been on the rise for the last five financial years, with this one being the highest yet, with about 55 per cent of cases being related to disrespectful, discourteous or bullying and harassing conduct. Around a quarter of these relate to conduct online using social media.

An annual report for 2023/24 by the SCS has been published.[2] As noted above, complaints about breaches of local authority and devolved public bodies Codes of Conduct are investigated by the ESC and reported to the SCS. The SCS reviews ESC investigation reports and determines whether to direct the ESC to carry out further investigations, take no action or hold a hearing. After a hearing by a panel of the SCS, the SCS decides whether a councillor or member of a devolved public body has contravened the Councillors' or the Members' Code of Conduct and, if so, the sanction to be applied for the breach of the relevant Code of Conduct.

The SCS report summarises decisions on case reports, hearings, sanction, appeals and time scales for the process. It also usefully provides, at its Appendix A, summaries of cases in which no further investigation or a hearing was considered appropriate (a number of these involved complaints about planning matters) and about the, 15, hearing decisions issued in 2023/24.

For instance, in the case (ref LA/S/3571) Councillor Danny Gibson, a member of Stirling Council, was found to have subjected council officers to unacceptable behaviour, questioned their capability publicly, and made unwarranted accusations about their integrity. It was also found that his conduct disrupted effective working relations, threatened the council's reputation, and opened it up to the risk of legal challenges.

Other 2023/24 SCS decisions have been reported in this journal. See, for instance, (2024) 224 SPEL 92 and 93 and (2024) 225 SPEL 117.

John Watchman
Watchman & Co

1 https://www.ethicalstandards.org.uk/publication/annual-report-and-accounts-2023-24
2 https://www.standardscommissionscotland.org.uk/corporate-info/annual-reports

Electricity Act 1989, s 36 and deemed planning permission: standard onshore wind consent conditions

On 25 February 2025 the Scottish Government published its model standard onshore wind consent conditions for any approval by it under s 36 of the Electricity Act 1989 ('the 1989 Act') and deemed planning permission under s 57 of the Town and Country Planning (Scotland) Act 1997.[1]

The guidance states that the model conditions have been developed to ensure consistency in approach in decisions and in turn producing certainty to the development industry on the type and style of conditions to be applied but also to facilitate more efficient discharge of conditions by the Scottish Ministers and the relevant planning authority, in consultation with the relevant consultees. It also states that while this suite of standard conditions has been produced, it is recognised that conditions should be revised or adapted where appropriate to suit the particular circumstances of a case, and additional conditions may be required where appropriate.

The 2025 model conditions presumably supersede the 2015 s 36 model conditions published by Heads of Planning Scotland ('HoPS').[2]

Readers may recollect that the October 2024 edition of the NPF4 Delivery Programme refers to the Scottish Government working with HoPS to roll out standard templates for planning (s 75) obligations and to replace Circular 4/1998 Addendum: Model Planning Conditions by the publication of a standard working template for common planning permission conditions (see, for example, (2024) 226 SPEL 131 and 140). At the time of writing those templates have not been published.

John Watchman
Watchman & Co

1 https://www.gov.scot/publications/standard-onshore-wind-conditions-section-36-consent-and-deemed-planning-permission-form-and-guidance/
2 https://hopscotland.org.uk/wp-content/uploads/2014/08/hops-models-conditions-for-applications-under-section-36-of-the-electricity-act-1989-revised-14-12-151.pdf

Electricity Act 1989, s 37: Priority Applications for Transmission Infrastructure guidance

On 25 February 2025 the Scottish Government published its guidance about the procedure for 'priority applications' (see below) for consent to install overhead

line transmission infrastructure under s 37 of the Electricity Act 1989 ('the 1989 Act').[1]

The guidance has been written in consultation with the two principal applicants for consent to install overhead lines in Scotland at a voltage of 132kV or more. The definition of 'priority applications' has been agreed between those applicants and the Scottish Government.

'Priority Applications' refer only to applications which are a priority within the group of applications made by the transmission companies SPT and SSEN Transmission under s 37 of the 1989 Act. A definition of these and the rationale for according these applications priority status is set out under each definition:

> 'Strategic Transmission Infrastructure - Strategic Transmission infrastructure projects increasing system capacity or security of supply.'
> Rationale: these projects facilitate large-scale power transfer at a strategic scale supporting the delivery of net zero ambitions and ensuring energy security.
> 'Generation connections - Projects connecting generation where the connection would be for multiple generation sites; or for single generation sites where 1989 Act s 36 consent or planning permission for the generating station has been granted.'
> Rationale: these projects will help to secure connections for low carbon generation to meet net zero ambitions (focusing on maximising generation connections with greater certainty on delivery).

The guidance addresses matters including:

- pre-application engagement including community engagement and discussion with the Scottish Government's Energy Consents Unit;
- Environmental Impact Assessment ('EIA') Screening and EIA Scoping;
- submission and processing of the application; and
- the public inquiry process.

John Watchman
Watchman & Co

1 https://www.gov.scot/publications/priority-applications-transmission-infrastructure-guidance-section-37-electricity-act-1989/

Unauthorised EIA development

The June 2024 edition of this journal includes a note about the Scottish Government's unauthorised EIA development consultation (see (2024) 223 SPEL 50). In February 2025 the Scottish Government published an analysis of consultation responses.[1] The Scottish Government has noted the support for its consultation proposals and, at the time of writing, is reviewing suggested changes to the wording of the consultation draft regulations.

John Watchman
Watchman & Co

1 https://www.gov.scot/publications/time-limits-enforcement-action-unauthorised-environmental-impact-assessment-development-summary-responses-consultation/

Community Wealth Building Bill

Scotland's Fourth National Planning Framework ('NPF4') was adopted in February 2023. NPF4 defines 'Community wealth building' as 'A people-centred approach to local economic development, which redirects wealth back into the local economy, and places control and benefits into the hands of local people' and NPF4 Policy 25 Community wealth building supports development proposals which:

- contribute to local or regional community wealth building strategies and are consistent with local economic priorities; or
- are linked to community ownership and management of land.

Further, a policy outcome of NPF4 Policy 16 Quality Homes is more community wealth building.

The Community Wealth Building (Scotland) Bill ('the Bill') and related documents were introduced in the Scottish Parliament on 20 March 2025. Community wealth building ('CWB') focuses on ensuring that economic wealth is generated, circulated and retained in local communities. The Bill seeks to ensure consistent implementation of the CWB model across Scotland.

Proposals in the Bill include requiring local authorities, acting with certain public bodies within the local authority area, to produce CWB action plans setting out the measures to be taken within the local authority area in relation to CWB and to implement those plans so far as reasonably practicable. Those proposals also place a duty on the Scottish Ministers to produce guidance in relation to both the production of action plans and the inclusion of CWB measures in strategic planning by public bodies.

John Watchman
Watchman & Co

Scotland's land-use planning capacity

Readers may recollect that in March 2024 partnership working by the Scottish Government and the Royal Town Planning Institute led to the launch of a 'Digital Skills Portal' (see, for example, (2024) 223 SPEL 53).

On 17 March 2025 the Scottish Government launched its 'National Planning Skills Commitment Plan' ('the Plan') described as a new programme to attract more people into Scotland's land-use planning profession and to build the skills of Scotland's land-use planners.[1]

It is said that the Plan is supported by more than 100 leaders across almost 60 organisations in the built and natural environment professions. It is also said that the Plan will provide training and skills development through monthly themed webinars, hands-on learning and recruitment support. The Plan will cover different themes at different times, with the first focus being on housing.

Further details about the Plan can be accessed via the 'Our Place' website.[2] The Plan's current programme includes, for instance, planning law briefings by Planning Aid Scotland.

It is not clear whether launching the Plan is, at least in part, due to reports about issues at the University of Dundee. If so, it is questionable whether launching the Plan and other actions taken to date is an adequate response to the Scottish Government's recognition of the need for more land-use planners in Scotland.

The need for a pipeline of planners and their retention in Scotland, is underlined by, for instance, the RTPI Scotland December 2023 research briefing 'Resourcing the Planning Service' including 'Planning Staff Age Profiles' with about 40 per cent of staff aged over 49 years of age, 10 per cent aged under 30 years of age and 25 per cent in each of the categories 30-39 and 40-49 years of age.

The University of Dundee is the only university in Scotland which offers RTPI accredited undergraduate land-use planning degrees. Reports, including the Scottish Parliament Official Report of the 19 March 2025 meeting of the Education, Children and Young People Committee, are not likely to encourage undergraduate student enrolment at that university. Further, the recent publicity about issues at the University of Dundee may also have an adverse impact on the uptake of postgraduate land-use planning studies.

The recent announcement of emergency funding from the Scottish Funding Council may only underline why there may be concerns for those considering enrolling in land-use planning courses at the University of Dundee.

Further, the recent, 11 March 2025, publication of the Westminster Planning and Infrastructure Bill, and debates about it, might make those minded to pursue a career in land-use planning more attracted to pursuing their education south of the border. Moreover, the number, and amount, of bursaries available for those studying south of the border may put Scotland at a competitive disadvantage.

Finally, despite policy approaches about community wealth building, and the recent introduction of the Community Wealth Building Bill in the Scottish Parliament, which is mentioned above, there still appears to be no Scottish Government movement towards increasing public sector land-use planning capacity by, for instance, advocating that planning authorities seek appropriate public sector assistance.

John Watchman
Watchman & Co

[1] https://www.gov.scot/news/national-planning-skills-commitment-plan/
[1] https://www.ourplace.scot/resource/training-and-recruitment-opportunities

2024/25 DPEA caseload and its impacts

In 2024/25 the Scottish Government's Planning and Environmental Appeals Division ('DPEA') received an unprecedented number of new cases. These are primarily planning permission; enforcement notice and certificate of lawfulness appeals about short-term letting ('STL') use.

There are only two STL statutory control areas (Edinburgh and the Badenoch & Strathspey Ward within the Highland Council's administrative area). The vast majority of STL appeals relate to properties in Edinburgh and Glasgow.

Typically, the number of cases received annually by DPEA in recent years is around 600. In 2024/25 DPEA received 1,298 cases with around 43 per cent of those cases relating to STL appeals.

The following figures illustrate the extent of the unprecedent increase in the number of lawful use and development appeals received by DPEA:

- 15 lawfulness appeals in 2021/22;
- 17 lawfulness appeals in 2022/23;
- 54 lawfulness appeals in 2023/24; and
- 426 lawfulness appeals in 2024/25.

DPEA recognises that this unprecedented increase in DPEA's caseload will also have had an impact on planning authorities, given the significance of their role in responding to appeals, and for the smooth running of the appeal process for all others involved (including appellants and those who have made representations) in any appeal process.

There are other major challenges facing DPEA over the course of the next few years – in addition to that of STLs, DPEA has, for instance, to undertake the 'Gate Check' of planning authorities' Local Development Plan Evidence Reports.

A very significant increase in volumes of renewable energy projects, transmission lines and associated land use rights, which are dealt with under the Electricity Act 1989 ('the 1989 Act'), are also expected to be submitted to DPEA for examination in 2025/26. Further, as noted later in this edition, the March 2025 Westminster Planning and Infrastructure Bill propose significant changes to the Scottish procedures under the 1989 Act for obtaining s 36 consents (which includes onshore generating stations over 50 MW for generating stations) and s 37 consents for overhead lines.

DPEA has taken several steps to minimise any adverse impact on its own performance because of this unprecedented increase in its caseload and to the service that it delivers. For instance, it is seeking to appoint new DPEA reporters. The 20 March 2025 deadline to respond to the recent invitation by the Scottish Government for applications to fill seven full-time DPEA reporters has passed. It is anticipated that the successful applicants will take up their posts in summer 2025.

John Watchman
Watchman & Co

Circular

Planning Circular 3/2024: The Town and Country Planning (Fees for Applications) (Scotland) Amendment Regulations 2024

Scottish Government Circulars 1/2004, 2/2013 and 2/2022, which offered guidance about planning application fees and charges, are said to be replaced by the above circular.[1]

This circular, published by the Scottish Government on 12 December 2024 (the day the above regulations came into force), sets out guidance about the Town and Country Planning (Fees for Applications) (Scotland) Regulations 2022 (SSI 2022 No 190) as amended by the Town and Country Planning (Fees for Applications) (Scotland) Amendment Regulations 2024 (see, for instance, (2024) 226 SPEL 142) as amended by the Town and Country Planning (Fees for Applications) (Scotland) Amendment (Amendment) Regulations 2024 (SSI 2024 No 369).

This circular describes matters such as Annual Inflation Linked Increases, several circumstances in which a reduced fee is payable, discretionary charges and fees and refund of fees and their adjustment.

John Watchman
Watchman & Co

[1] https://www.gov.scot/publications/planning-circular-3-2024-town-country-planning-fees-applications-scotland-amendment-regulations-2024/

Planning and Infrastructure Bill

The Planning and Infrastructure Bill ('the Bill'), which was introduced in the House of Commons on 11 March 2025, forms a key part of the UK Government's objective of improving the land-use planning system to support the delivery of housing and infrastructure. It gives effect to the UK Government's proposals about streamlining the consenting process for any nationally significant infrastructure project ('NSIP') in England and Wales in terms of the Planning Act 2008 ('the 2008 Act').[1] The reforms to the 2008 Act regime in relation to NSIPs include:

- a requirement for nationally policy statements to be reviewed every five years;
- a power to make a direction disapplying the requirement for a development consent order for NSIPs - this will give more flexibility over the appropriate consenting regime for larger infrastructure developments;
- streamlining of pre-application consultation requirements and procedures for acceptance of applications to give more certainty on consultation requirements and avoid rejection of applications on overly legalistic grounds; and
- limiting availability of judicial review in relation to applications which are considered to be 'totally without merit'.

Although many of the provisions in the Bill are only applicable to England and Wales, the proposed ss 14 to 20 would make significant changes to the Scottish procedures under the Electricity Act 1989 ('the 1989 Act') for obtaining s 36 consents (which includes onshore generating stations over 50 MW for generating stations) and s 37 consents for overhead lines. The reforms largely follow what was flagged in a consultation at the end of 2024 (see, for instance, (2024) 226 SPEL 125) and were triggered by delays in obtaining energy consents for large-scale energy projects in Scotland.[2] Inefficient and outdated procedures in the 1989 Act were identified as a cause of delay.

The proposed reforms are framework in nature. Schedule 8 to the 1989 Act would be amended to allow the Secretary of State or Scottish Ministers to make regulations about the following matters in relation to applications for consent under s 36 or s 37:

- steps to be taken before making an application;
- the information to be included in an application;
- an acceptance stage, during which Scottish Ministers would assess compliance with procedural requirements to decide whether to accept the application;
- payment of fees; and
- requests by Scottish Ministers for additional information to aid their decision whether or not to accept an application or grant consent.

The 2024 consultation suggested that lack of statutory consultation or prescribed standards for the content of applications under the 1989 Act were contributing to delay through unnecessarily protected objections and consequent modifications to applications. The intent is therefore to front-load the process so that applications are adjusted to address the results of statutory consultation at the pre-application stage. The proposal to introduce a new 'acceptance stage' is influenced by the NSIP process under the 2008 Act. However, the procedural requirements for NSIPs are far more onerous than for applications under the 1989 Act. It is not clear that an additional formal stage of this nature is necessary in Scotland.

Concerns were expressed about the practicality of a proposal in the 2024 consultation to limit amendments to applications and this amendment has not been taken forward.

A key change which is proposed is the removal of an automatic public inquiry where there is an objection by the relevant planning authority to an s 36 or an s 37 application. This would be replaced by a procedure more analogous to the rest of the Scottish land-use planning system where a Scottish Government Planning and Environmental Appeals reporter will be appointed and decide on the procedure for considering objections.

Provision is included in the Bill for regulations to impose time limits for various stages of the procedure, including actions on the part of the applicant, consultees and reporters as well as a potential time limit for Scottish Ministers to decide an application. Again, this appears to be influenced by the NSIP regime where there are strict time limits for the various parts of the process.

Express provision is to be included in a proposed, new, s 37A of the 1989 Act to allow the beneficiary of an s 37 consent to apply for it to be varied (in a similar way to how an s 36 consent can currently be varied under s 36C of the 1989 Act). New powers are also included to allow Scottish Ministers themselves to vary an s 36 or an s 37 consent due to a change of circumstances or technological changes and where the beneficiary of the consent agrees. These powers are far more limited than was proposed in the 2024 consultation which included suggested powers to change or revoke consents without consent. Provision is also included for Scottish Ministers to correct errors in decision documents.

Section 36D of the 1989 Act is to be amended to provide a unified procedure for challenging decisions in relation to an s 36 and an s 37 consent so that all need to be made by means of statutory challenge to the Court of Session within six weeks of the decision being published.

In addition to the reform to the Scottish consenting processes, various other changes are made to the 1989 Act which apply throughout England, Wales and Scotland. This includes power under s 22 for the Secretary of State to make regulations to create a financial benefit scheme for people living near new transmission infrastructure.

The proposed changes to the Scottish consenting procedures under the 1989 Act are likely to be welcome, particularly as they have been adjusted to remove what were perhaps the more controversial aspects of the 2024 consultation. However, as the reforms are framework in nature, the precise nature of the new system will not be entirely clear until the relevant regulations are made.

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[1] https://www.gov.uk/government/publications/planning-reform-working-paper-streamlining-infrastructure-planning/planning-reform-working-paper-streamlining-infrastructure-planning

[2] https://www.gov.uk/government/consultations/electricity-infrastructure-consenting-in-scotland

Masterplan Consent Areas

The February 2025 edition of this journal noted (at (2025) 227 SPEL 8) the coming into effect of Masterplan Consent Area ('MCA') regulations and the publication of Scottish Government guidance about MCAs.[1] That guidance is a must-read for anyone interested in MCAs. It contains practical comments in addition to information on the statutory provisions which came into operation on 5 December 2024.

Background

MCAs are a new upfront consenting mechanism for development proposals, removing the need for planning permission applications. The consultation paper described MCAs as like simplified planning zones but refreshed and rebranded with expanded powers – for example, EIA development can be included.

MCA schemes can streamline consenting, by giving several types of consent, including planning permission, roads construction consent, listed building consent, and conservation area consent.

The certainty provided by the advance consenting can make a location more attractive to developers, funders and operators, because it removes consent risk and delay(s).

MCA procedures

The power to promote an MCA scheme lies with the planning authority.

The procedures for preparing an MCA scheme are intended to replicate existing consent procedures. Streamlining of procedures only comes after the scheme is in place.

There is no third-party right of appeal against an MCA scheme. Unlike Compulsory Purchase Orders and other statutory orders, there is no requirement for confirmation by the Scottish Ministers if there are objections to the scheme, although the Scottish Ministers do have call-in powers (at the time of writing the position is that a notification direction and circular will be issued soon).

MCA costs

Scottish Government impact assessments acknowledge the costs of an individual scheme may range from £15,000 to £200,000 but note the potential for partnership with the development sector.[2] The impact assessment mentions that the Hillington Park SPZ has attracted over £25m of investment since its creation.

The statutory provisions allow planning authorities to introduce charges to recoup their costs in preparing or altering an MCA scheme and to charge for applications for the approval, consent or agreement required by a condition specified in an MCA scheme.

MCA scheme

The statutory powers are very flexible. The guidance indicates that there are no exclusions on the forms of development that can be consented (apart from electricity generation projects above 50MW which require consent under s 36 of the Electricity Act 1989).

Locational restrictions are also limited – only some designations of international and national importance cannot be included in a scheme.

Potential uses mentioned in the guidance include:

— large-scale infrastructure projects (including associated housing needs);
— national developments;
— Green Freeports;
— green data centres;
— development required to support ScotWind offshore wind projects; and
— housing, including rural homes, custom and self-build.

Masterplan

The intention is for MCAs to shape development, with use of a masterplan and by including conditions, limitations and exceptions which may cover aspects such as development parameters, design and environmental matters.

Development parameters arise from the 'Rochdale envelope' approach, which provides design flexibility.

The guidance states that the scheme cannot grant planning permission in principle ('PPiP'), but provides no indication whether that restriction is contained in the statutory provisions. The Rochdale envelope is often deployed in the context of PPiP applications – indeed, it derives from the July 2000 court decision (*R v Rochdale Metropolitan Borough Council, ex parte Milne* [2000] EWHC 650 (Admin)) about a permission for a business park, which was described, at para 20 of the judgment, as 'an outline application together with certain Reserved Matters'.[3]

MCAs are described in the guidance as front-loading consideration of design, infrastructure and environmental matters at an earlier stage in the planning process. The intention therefore appears to be granting consent for more than the principle of the development, but perhaps with less detail/prescription than a detailed planning permission.

There is a note of caution in the guidance, namely that development proposals which do not comply with the MCA scheme would require to apply for planning permission in the usual way. The planning authority needs to avoid the risk of the scheme being so prescriptive that future projects might be non-compliant and require planning permission applications, removing the benefit of the scheme, and potentially weakening the MCA's commercial attractiveness.

Development plan

MCAs can include land which is not allocated in the development plan. The guidance confirms that MCAs do not need to be provided for in the development plan and that MCA schemes can be progressed for developments that emerge outwith the plan cycle.

The development plan position is not to be ignored. The guidance states that decisions on MCA schemes should be made in accordance with the development plan, unless material considerations indicate otherwise. It is not clear from the statutory provisions if this is a legal requirement.

Roll-out

The Scottish Government's Chief Planner stated in a September 2024 letter that the Scottish Government 'will support early adopters of MCAs'.[4]

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1 https://www.gov.scot/publications/masterplan-consent-areas-guidance/
2 https://www.gov.scot/publications/masterplan-consent-areas-guidance-impact-assessments/
3 https://www.bailii.org/ew/cases/EWHC/Admin/2000/650.html
4 https://www.gov.scot/publications/planning-work-programme-update-chief-planner-and-ministerial-letter-september-2024/

In Court

Remedy for unlawful environmental assessment

Greenpeace Ltd v Secretary of State for Business Energy and Industrial Strategy [2025] CSOH 10

The Court of Session was asked to determine what was the appropriate remedy once it had been accepted that consents for offshore oil and gas developments had not been lawfully granted, following a UK Supreme Court decision clarifying the proper interpretation of the law on environmental assessments. The decision was that the consents should be quashed, but that, subject to important qualifications, the effect of this should be suspended to give time for a new decision on the applications to be reached following the correct procedure.

Background and issue

The consents for the development of the Rosebank and Jackdaw projects in the North Sea had each been given in line with the official approach at the time, which included an environmental impact assessment but one that looked only at the immediate impacts of the project and did not consider the effects of downstream emissions arising from using the oil and gas to be extracted. After the consents had been granted, the UK Supreme Court, in *R (Finch) v Surrey County Council* [2024] UKSC 20 (see (2024) 224 SPEL 90), held that the proper interpretation of the law required that the effect of downstream emissions should also be taken into account. Accordingly, it was accepted by all parties that the consents should be regarded as having been unlawfully awarded. Additional grounds of challenge to the consents were dismissed.

The question that arose was what remedy should be granted following the belated realisation that the consents were unlawful. As Lord Ericht put it: 'Should the decisions be reduced (quashed) and made again on a proper and lawful basis taking into account downstream emissions? Or should the court grant declarator rather than reduction, so that the decisions stand and the projects proceed despite the decisions being unlawful?'

Reasoning and decision

Lord Ericht noted that judicial review in Scotland is a less discretionary process than in England, but that the court does retain a discretion to refuse to award a remedy if circumstances require that conclusion. Various factors are relevant, including:

— that public authorities must act in accordance with the law;
— the practical effects of reducing a decision;
— the public interest in good administration, including the certainty and finality of decisions; and
— any prejudice to public and private interests.

In this particular case relevant considerations included:

— the strong public interest in authorities acting lawfully, especially when the error was a material one that might affect the outcome of the decision-making process;
— the interests of members of the public both in the effects of climate change and in being able to express views on the downstream emissions issue that should have been considered;
— the interests of the developers in the continuation of the projects, to which a lot of investment, planning and work had already been committed;
— the fact that the *Finch* decision, which changed the interpretation of the law, came after the consents were granted;
— the conduct of the petitioners, who in this case had acted promptly and were not responsible for the delay between raising the action and the conclusion of this case, which had been held back to allow for the outcome of the *Finch* case in the UK Supreme Court;
— the conduct of the respondents, who had started work on the projects in the knowledge that the consents were subject to legal challenge; and
— the time it would take before a properly reached decision could be made.

The normal remedy was for an unlawful decision to be reduced and here the private interests of the developers did not outweigh the public interests in the rule of law and climate change so as to justify departing from that position.

However, it was considered that it would be wrong and disproportionate for the reduction to take effect immediately, requiring all work to cease until the new decisions on consent could be reached. Given the complexity of the projects, the co-ordination required between many parties and the limited times at which work offshore could be undertaken, it was proper to give the developers options as to how far elements of the work should proceed, taking a commercial risk on the outcome of the reconsideration of their applications for consent.

Nevertheless, it was noted that the whole purpose of the environmental impact assessment process was to ensure that activities involving environmental consequences (including, it was now appreciated, downstream emissions) did not begin until these had been properly considered. Therefore, a condition of the suspension was that no oil or gas was to be extracted from the Rosebank or Jackdaw fields unless and until consent was granted.

A final question was over the legality of the work done during the considerable time between the consents being granted and this decision. Although this was said to be a difficult question in general terms, the answer lay in the wide equitable power of the courts over the remedy. This included a well-established practice of granting reduction but without any retrospective effect. The status of any works already completed would not be affected.

Comments

Apart from its high public profile within wider discussions on climate change and the future of the oil and gas industry, this case is important for its thorough consideration of how the courts in Scotland should consider the question of remedies in judicial review cases. It is made clear that there is a wide power in the court to decide the most equitable way forward. Unlawful decisions should be denied effect, but there are factors that can justify departing from that position, with further flexibility added by the potential to suspend the effect of quashing a decision (with or without

conditions) or to make an order with only prospective effect.

The explicit recognition of the wide discretion and the careful weighing of various factors here, reflecting public and private interests and conduct, enabled an outcome to be reached that matched the complexities of the situation here. This pragmatic approach is sensible. Any theoretical absolutism that argues that all unlawful decisions are void ab initio is already undermined by the rules on standing and time-limits that may allow flawed decisions to survive unscathed. Applying the law correctly is important, but should not be taken to extremes.

It is important, though, that the starting-point remains that unlawful decisions should be denied effect. If not, there is a danger that parties may seek to alter the picture, for example increasing the prejudice they will suffer by going ahead with a building scheme while the legality of its consent is being considered in the courts. In this case it was made clear that carrying on in such circumstances was a commercial risk that had been knowingly accepted and it is right that it is the developer, not those challenging a decision, who should bear the consequences if the consent is ultimately held to be flawed.

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Property Enquiry Certificate disclosure

Allison and Anr v Russel + Aitken (Falkirk + Alloa) Ltd [2025] SC FAL 4

This Sheriff Court decision reports on the outcome of a debate held following Russel + Aitken (Falkirk + Alloa) Ltd ('the defender') having lodged a preliminary plea to the relevance and specification of the pursuers' averments. The sheriff refused the defender's motion and appointed the case to a proof before answer.

Background

The pursuers sought damages against their former solicitors, the defender, for breach of contract and/or professional negligence. They had instructed the defender to act for them in the purchase of a house in Falkirk which was then located next to an undeveloped greenfield site. Missives were concluded with a settlement date of 21 December 2021. The missives incorporated clause 21 of the Scottish Standard Clauses, obliging the sellers to exhibit a property enquiry certificate ('PEC') and entitling the pursuers to resile without penalty if the PEC disclosed 'any matter which [was] materially prejudicial to the purchaser of the property'.

Shortly before settlement, the defender received a PEC from the seller's solicitors which disclosed that there was a housing proposal site to the west of the property. The defender did not send a copy of the PEC to the pursuers, nor did the defender inform them of the housing proposal disclosed in it. The transaction settled and the pursuers moved into the property.

The pursuers averred that they only became aware of the housing proposal in January 2022, when they learned that an appeal had been lodged against the refusal of planning permission. The appeal was successful, and by the time of the proceedings, several houses had been built on the land adjoining their property. The pursuers averred that had the defender made them aware of the terms of the PEC and/or the housing proposal they would not have proceeded with the purchase, as the greenfield location of the property was material to their decision to purchase it.

The pursuers also explained that they intended to sell the property and move elsewhere. They sought damages of £50,000 for:

- 'wasted expenditure' including the costs of sale, purchase, tax and removal;
- capital expenditure that they incurred on the property prior to learning of the housing proposal; and
- damages for inconvenience and stress said to arise from the disruption caused by the noise, dust and traffic occasioned by the building of the development and the inconvenience and stress which would be associated with their moving house again.

Preliminary plea

The defender lodged a preliminary plea to the relevance and specification of the pursuers' averments and the matter was appointed to a debate.

The primary basis for the defender's preliminary plea was that the pursuers only offered to prove that the defender was required to inform them that the PEC contained potentially material information but accepted that they had not communicated to the defender that the housing proposal was material. For this reason, the defender contended that the claim was irrelevant.

Further, it was argued that the pursuers' claims of loss were irrelevant and lacking in specification. The pursuers indicated an intention to sell the property but did not provide a timeline or any action taken toward that goal and they failed to provide information about the current value of the property, leaving uncertainty about whether they have suffered any loss. The claim for costs incurred in the purchase of the property were mischaracterised as being 'wasted expenditure'. In relation to the claim for stress and inconvenience, there was no explanation as to why the pursuers should be entitled to a further award beyond that made by the Scottish Legal Complaints Commission ('SLCC').

The pursuers moved the court to appoint the case to a proof before answer. As to the relevancy of the claim, the pursuers did not aver that the defender was under a duty to send the PEC to the pursuers. Whether what the PEC disclosed was materially prejudicial to the pursuers was a matter for them and they were under no obligation to anticipate in advance everything which it might contain and tell their solicitors of anything which might be materially prejudicial to them. Their position was that a reasonably competent solicitor was under a duty to inform the pursuers if the PEC contained something that might reasonably be materially prejudicial to them. That was what the pursuers offered to prove.

The pursuers argued that the matters raised in relation to the claims of loss were, in the main, matters for proof. In relation to the claim for stress and inconvenience, they contended that the sum awarded by the SLCC was insufficient to fully compensate them, although it fell to be deducted from any award that the court might make.

Decision

Sheriff Collins noted in his decision that it was common ground between the parties that the test in *Hunter v Hanley*

1955 SC 200 was applicable. The pursuers' claim that no solicitor of ordinary reasonable competence would have failed to make them aware of the housing proposal prior to settlement was not one which was irrelevant and necessarily bound to fail. The claim did not become so only because the pursuers did not previously tell their solicitors that such a housing proposal would be materially prejudicial to them.

The sheriff explained that whether such a claim succeeds is a matter of facts and circumstances as established by evidence, and therefore, a matter for proof. He noted that there may be cases where something disclosed by the PEC appears to be so minor that a reasonably competent solicitor would not be under an actionable duty to inform their client of it (he gave the example of an application for permission to replace the windows on a nearby listed building); but there may be cases where there could be no sensible dispute that the solicitor would be obliged to inform the client (noting an example of planning permission having been granted for developing an open cast mine next to the property to be purchased).

While it was a matter for proof, a failure to inform a purchaser of a house on a greenfield site that there was a proposal for a large housing development adjacent to the house would, he suggested, be likely to be indicative of a breach of contract and/or professional negligence on a solicitor's part, whether or not the purchasers had previously indicated that they would regard this as materially prejudicial to them. However, he did not require to decide that matter and it was enough to say that the claim was not bound to fail on the basis advanced by the defender.

In relation to the pursuers' claims of loss, the sheriff explained that the courts are entitled to take a broad approach to assessment of damages. The foundations of the pursuers' position were matters of fact. While obvious evidential issues were likely to arise (for example, as to why the pursuers had not moved nor apparently taken preparatory steps to do so since they became aware of the housing proposal in January 2022, and whether some of the items claimed as capital expenditure were indeed incurred prior to them learning of the housing proposal), these were matters which were matters for proof. If the pursuers' evidence on the foundational facts were to be accepted, it may also be accepted that they would incur costs which, but for the defender's actions, they would not have incurred.

The sheriff refused the defender's motion for dismissal of the action, which failing deletion of some, or all, of the pursuers' averments of loss. The case was appointed to a proof before answer on all pleas.

Comments

While this decision reflects only the outcome of a debate, it raises a notable point about the responsibilities of solicitors to inform property-purchasing clients about the terms of a PEC, and the potential consequences of failing to make known an issue which might reasonably be considered to be materially prejudicial to the client.

The indication given by the sheriff of his view as to the circumstances which are likely to be indicative of a breach of contract and/or professional negligence by a solicitor serves as a cautionary tale to those advising clients in relation to property purchases.

A decision from the resultant proof has not been published at the time of writing.

Alison McNab

Failure to tackle illegal waste is a breach of human rights

Cannavacciuolo and Ors v Italy European Court of Human Rights (39742/14, 51567/14, 74208/14 et al) 30 January 2025

The failure of Italy to deal with the long-standing and widespread phenomenon of the illegal dumping and incineration of waste, including hazardous materials, amounts to a breach of the human rights of those whose health is affected by this. States are required to take effective measures to tackle such problems and protect the health of their citizens.

Background and decision

This case arose from the *Terra dei Fuochi* (Land of Fires) phenomenon around Naples where for many years there has been widespread illegal dumping and incineration of waste of many sorts, urban, industrial and hazardous, often at the hands of criminal organisations. This pollution has caused severe health problems and fatalities among local residents. Although there have been some official investigations and reports, regulatory interventions and criminal proceedings, severe pollution remains a major problem. Several individuals, including relatives of deceased local residents as well as local associations, argued that the failure to take effective action meant that their rights under the European Convention on Human Rights ('the Convention') were being unlawfully breached.

The European Court of Human Rights ('ECtHR') held that the serious risk to health had been known for many years and that the authorities were under a duty to assess the pollution, identifying the areas affected and the nature of the contamination, and then to take action to manage the risk, combating the illegal conduct giving rise to the problem. There was also a duty to provide information to allow residents to assess the risks they faced.

Although the Italian authorities had taken some steps, these fell short of the systematic, coordinated, and comprehensive response that was required and the authorities had not approached the problem with the diligence warranted by the seriousness of the situation. Italy was therefore in breach of its obligations under the Convention in relation to the right to life (art 2); in view of that conclusion, separate claims under the right to home and family life (art 8) were not considered. It was for Italy to decide

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how to ensure that this failing was corrected, but the court suggested that there was a need for a comprehensive strategy, with adequate resources and clear time frames, that brought together action at all levels of the state, including further action to identify the specific sites affected, carry out decontamination, and provide information to residents.

Comments

As the court noted, the circumstances here were different from previous cases where it had held that pollution from a specific site or incident could amount to breach of the right to life or to respect for family life or home. There are, though, parallels with the recent case holding that Switzerland's response to climate change was inadequate and amounted to a breach of human rights (see (2024) 223 SPEL 56). In both cases the state had recognised a serious problem affecting more than just a single location but the measures taken to deal with it were inadequate.

The state will always be allowed considerable leeway in how it approaches environmental problems and recourse to the ECtHR is slow and cumbersome, with procedural rules that can defeat some claimants (as occurred here and in the Swiss case). Moreover, the threshold for pollution cases being a threat to life, family life or home is high. Nevertheless, the potential to argue on human rights grounds shown by these cases does at least open a further dimension of argument for individuals and communities who are suffering from pervasive and severe environmental harm and are frustrated by the inadequacy of the state's response.

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Lawful amalgamation of flats

London Borough of Lambeth v Secretary of State for Levelling Up, Housing and Communities [2024] EWHC 1391 (Admin)

This case concerned the proposed amalgamation of two residential flats in the London Borough of Lambeth. The owner of the properties, Kathryn Van Rooyen, sought council approval to merge two adjacent flats by removing an internal wall. She aimed to create a single, four-bedroom flat from two two-bedroom flats, to enable her elderly parents to live with her. Van Rooyen had lived in one of the properties for many years and owned both. No external changes were proposed.

She made two applications to the council: one for a certificate of lawfulness of proposed development ('CLPD') and the other for (full) planning permission. Both were refused. One on the basis that the amalgamation would not be lawful development. The other because the proposed amalgamation would result in a net loss of housing, contrary to policy under the Lambeth Local Plan (adopted Sept 2021) and the London Plan (adopted March 2021).

Van Rooyen appealed the council's refusals to the Planning Inspectorate ('PINS'), the planning appeals body in England and Wales, equivalent to the Scottish Government's Planning and Environmental Appeals Division). She was successful, obtaining both a CLPD and planning permission. The council challenged these in court under s 288 of the Town and Country Planning Act 1990 ('the 1990 Act'), the equivalent of s 239 of the Town and Country Planning (Scotland) Act 1997 ('the 1997 Act'). The general principles of judicial review are applicable to challenges under planning legislation and the council advanced six grounds on which it alleged PINS had misdirected itself in law, acted irrationally and failed to have regard to relevant considerations.

Unlawful to grant both appeals

The council argued that there was an inherent contradiction in PINS granting both the CLPD appeal and the planning permission appeal. The CLPD was based on PINS' finding that the proposed works were not development for which planning permission was required under s 55(2)(a) of the 1990 Act. As such, granting the second appeal and giving planning permission for development was irrational and an error of law.

The court disagreed. It found that PINS was entitled to determine the planning permission appeal notwithstanding its decision on the CLPD appeal. This was because two separate applications were submitted to the council on a 'without prejudice' basis and a separate appeal for each application was lodged with PINS. This rationale raises interesting questions about whether the same outcome would be possible under the Scottish system, where approaches to the 'without prejudice' rule and duplicate planning applications are very different.

The 'without prejudice' rule concerns the extent to which legal privilege protects statements made during attempts to resolve disputes – essentially, can concessions given by one party during compromise negotiations be used against it by the other party if no compromise is struck? It is applied differently in England/Wales and Scotland, as usefully summarised in *Sovereign Dimensional Survey Ltd v Cooper* [2008] CSOH 85 (although the case was overturned on unrelated matters): 'The English approach is context based and the Scottish approach is content based. In England, protection is given to all privileged communications. In Scotland, even if something bears to be "without prejudice", the court will still look at it if it constitutes an admission of fact.' In the circumstances of a planning appeal, any 'without prejudice' statements would almost certainly be factual and so likely to fall within the scope of the Scottish courts' deliberations. It is possible the council's 'without prejudice' arguments might have had more success for proposals in Lanarkshire than in Lambeth.

However, there might not have been two planning applications to consider at all had they related to development in Scotland. Tactical submissions of concurrent applications for similar developments on the same site, known as 'twin-tracking', enable applicants to hedge their bets where there are multiple potential routes to obtaining approval. They are reasonably common for large projects in England/Wales but vanishingly rare in Scotland. This is likely due to practical rather than legal reasons given there are discretionary powers for planning authorities to decline to determine repeat or similar applications in both jurisdictions (under ss 70A and 70B of the 1990 Act and ss 39 and 39A of the 1997 Act, respectively - also see Annex E of Scottish Government Circular 3/2022: Development Management Procedures).

For example, differences in the scale

and cost of major developments could mean that paying two planning application fees is justifiable where twin-tracking reduces the risk of an expensive and lengthy appeal. The average costs of building a three-bedroom house in 2024 have been estimated to be £327,058 for projects in London and £271,140 in Scotland so a cost/benefit analysis could point towards more twin-tracking in England.

Another factor could be that the development community is much smaller in Scotland. There are fewer (34) planning authorities in Scotland than there are in London (35) alone. Across all of England and Wales, there are 337 planning authorities. The RTPI's State of the Profession Research Paper (November 2023) estimated around 19,600 planners worked in England and Wales and 1,600 in Scotland. This would very roughly equate to 58 planners working in each planning authority area (private and public sectors) in England and Wales, compared with 50 planners per authority area in Scotland. The likelihood of working with the same people repeatedly in Scotland could contribute to a less adversarial approach. There is also relatively less capacity generally within the Scottish land-use system to administer applications, making twin-tracking more, rather than less, likely to lead to processing delays.

Incorrect policy interpretation

Van Rooyen's proposals were assessed against the Lambeth Local Plan and the London Plan. The London Plan is the spatial development strategy for Greater London. Its relationship to the Lambeth Local Plan is analogous to that between National Planning Framework 4 ('NPF4') and local development plans in Scotland (that is the London Plan and NPF4 are part of the statutory development plan, inform decisions on planning applications and local plans are in general conformity with them).

The council argued that PINS incorrectly interpreted Lambeth Local Plan Policy H3, which did not support the loss of existing housing stock and restricted amalgamations of separate units. However, the court considered that the type of housing in question was subject to policies in the London Plan, which prevailed in these circumstances.

Policy H8 of the London Plan did not preclude amalgamations. It simply stated that any loss of existing housing should be compensated, with replacement housing of at least the same density and floorspace area. It was silent on the definition of 'density', so it was for PINS to determine if the compensatory housing was policy-compliant. PINS found that, despite the loss of a residential unit, there was no loss of density arising from Van Rooyen's proposals as the overall floorspace area and number of habitable rooms remained the same. Further, the London Plan included supplementary text which anticipated that amalgamations of existing properties could be used to provide accommodation for larger families.

As the number of amalgamations in the council's area was proportionately low, they did not have any sustained impact on overall housing provision. The loss of housing represented by Van Rooyen's proposals was not significant in context and they were not in conflict with other parts of the Lambeth Local Plan. For these reasons, the council's grounds of challenge were dismissed.

Assessing a material change of use

The council claimed that the Lambeth Local Plan was determinative of whether development proposals constituted a material change of use requiring planning permission (pursuant to s 55 of the 1990 Act). The court rejected this assertion. It noted, first, that s 55(2) of the 1990 Act states that the amalgamation of multiple dwellinghouses may or may not be a material change of use. Unlike the subdivision of a single dwellinghouse, which is expressly made a material change of use under s 55(3)(a) of the 1990 Act, there is no such deeming provision for amalgamations. Second, s 55 of the 1990 Act makes no mention of the development plan. Even if a development plan addressed the loss of an existing use, there may be broader material considerations to take in to account in deciding an application.

The court referred to *R (Royal Borough of Kensington and Chelsea) v Secretary of State for Communities and Local Government* [2016] EWHC 1785 (Admin) in which Holgate J reviewed case-law precedent on this matter (at para 7):

> '(1) A planning purpose is one which relates to the character of the use of land; (2) Whether there would be a material change in the use of land or buildings [...] depends upon whether there would be a change in the character of the use of land; (3) The extent to which an existing use fulfils a proper planning purpose is relevant in deciding whether a change from that use would amount to a material change of use [...] the need for a land use [...] is a planning purpose which relates to the character of the use of land; (4) Whether the loss of an existing use would have a significant planning consequence(s), even where there would be no amenity or environmental impact, is relevant to an assessment of whether a change from that use would represent a material change of use; (5) The issues in (2) and (4) above are issues of fact and degree for the decision maker and are only subject to challenge on public law grounds; (6) Whether or not a planning policy addresses a planning consequence of the loss of an existing use is relevant to, but not determinative of, an issue under (4) above.'

Although Van Rooyen's proposals would lead to the loss of a housing unit, PINS' judgment was that the planning consequence of the change was not material in the context of housing delivery more generally. Accordingly, the council's grounds of challenge were dismissed.

Reliance on other planning appeal decisions

Finally, the council claimed that PINS had failed to consider other planning appeal decisions which supported the council's interpretation of the Lambeth Local Plan. Dismissing this argument, the court reiterated the general legal rule that PINS was only obliged to consider previous appeal decisions which had been drawn to its attention. The court emphasised that PINS' function is to decide planning appeals on evidence provided to it, not to conduct extensive legal research. The council should have flagged relevant decisions to PINS, even if they were only decided once proceedings had commenced. Regardless, the appeals in question did

not consider if amalgamations were a material change of use and so would not have impacted the outcome here.

Lessons from Lambeth

This case is a cautionary tale about the importance of understanding how various tiers of planning policy interact, at a time when jurisprudence on NPF4 is in its infancy. This case shows that, where overarching policy such as the London Plan is ambiguous on a matter, specific provision must be made in local development plans where the policy objective is to control certain types of development more stringently.

This case also has implications on how to assess if changes of use are material against development plan policies, noting that the sections of the 1990 Act relevant to the Van Rooyen applications have identical wording to their 1997 Act counterparts.

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Private nuisance: wind turbine noise

Webster and Ors v Meenacloghspar (Wind) Ltd [2024] IEHC 136

The plaintiffs, two couples, lived close to two wind turbines. They raised an action in private nuisance, claiming that the noise and vibration generated by the wind turbines had interfered with the use and enjoyment of their homes, over a substantial period of time. They also complained of 'shadow flicker'.

The wind farm was built after conditional planning permission had been granted in 2004. That permission included certain conditions relating to the maximum noise levels which could be measured at the nearest inhabited house. The two turbines did not become operational until February 2017. The plaintiffs sought damages for nuisance and an injunction to prevent nuisance. The plaintiffs also claimed that the wind farm was operating otherwise than in compliance with its planning permission, and sought relief under s 160 of Ireland's Planning Development Act 2000.

The key feature of the plaintiffs' case was that they had found the amplitude modulation (that is the swishing and thumping sound) associated with the two turbines particularly intrusive.

The High Court of Ireland's decision was given by Judge Ms Justice Egan ('the judge'). Her judgment stated that to succeed in a case of nuisance, the plaintiff required to show with reference to the character of the locality an interference with the ordinary use, enjoyment, and comfort of their property. Such interference also required to be substantial, in the sense that it was pronounced or prolonged or repeated. The judge stressed that one required to take into account the timing, duration and impact of the occurrence complained about. The frequency of occurrence also required to be considered. Occasional temporary or fleeting events could not, in general, give rise to a nuisance. However, depending on the particular interference in issue, there may be no requirement that the nuisance is continuous and unremitting, 24 hours a day. The interference with the plaintiff's property required to be objectively unreasonable.

The judge stated that the case concerned the production of renewable energy, which clearly was of vital importance to society and everyone who lived in it. However, that factor did not carry decisive weight in determining whether a nuisance had been established.

The defendant's primary defence was that it was not open to the court to find that the threshold for nuisance impact should be set at a specific level, other than the noise limit set out in the planning permission. Since the wind turbine noise ('WTN') complied with that limit, a nuisance had not been established. The judge stated that before she considered that matter, she would require to consider planning guidance in relation to wind energy developments. It was also necessary to consider the land-use planning framework. The judge referred to two key pieces of guidance which pre-dated the planning permission, namely, 'The Assessment and Rating of Noise from Wind Farms' published by the Department of Trade and Industry in 1996 ('ETSU') and 'The Wind Farm Development Guidelines for Planning Authorities' issued by the Department of Local Government in 1996 ('WEDG 1996').

The judge stated that since its adoption, ETSU had been the primary framework by which planning conditions pertaining to wind farms were set in the UK. It was also the primary methodology by which planning compliance continued to be assessed, in both the UK and Ireland.

The judge stated that the noise limits set in the Ballyduff permission were generally in accordance with WEDG 1996.

As far as the current assessment framework applying to the grant of planning permission for wind farms, these were set out in the 'The Wind Energy Development Guidelines 2006', issued by the Department of the Environment, Heritage and Local Government in December 2006 ('WEDG 2006').

The judge stated that she was satisfied that the noise limits which were set in the Ballyduff permission, complied broadly with WEDG 1996, and also broadly with WEDG 2006. However, the judge stated that she was not satisfied, on a balance of probabilities, that the WTN on site, complied with the WEDG 1996.

The judge then addressed the relevance of planning permission. The grant of planning permission was of particular relevance to a nuisance claim, in two particular ways. First, the grant of planning permission could permit the very intrusion (for instance by noise) which was alleged by a plaintiff to constitute a nuisance. In the instant case, the question was the extent, if any, to which the planning permission (or the noise condition specified therein) could be relied on as a defence to a nuisance action. Second, nuisance also fell to be assessed by reference to the character of the particular locality. The grant of planning permission for the development impugned could authorise the use of the defendant's property for certain purposes, potentially changing the character of the locality. In the instant case, the question was whether the locality should be seen as including the defendant's wind farm at Ballyduff.

As far as the first was concerned, the defendant did not dispute that, as a matter of common law and statute, planning permission could not deprive a property owner of a right to object to what would otherwise be a nuisance. The grant of planning permission for a particular development did not mean that the development was lawful. A bar to the use imposed by land-use planning

law in the public interest had been removed. However, the defendant none the less argued that the court was 'bound' by the terms and conditions of the planning permission, in assessing what was objectively reasonable for the purposes of a nuisance claim. The defendant argued that the court was bound to accept and apply the noise limits in the planning permission, as a wholly reliable indicator of what the ordinary person would expect in terms of noise control. In short, the planning permission noise limits comprised evidence of a reasonable objective standard. There was precedent to support this argument. The defendant founded on *Smyth v Railway Procurement Agency and Anr* [2010] IEHC 291.

In *Smyth* the plaintiffs had claimed that a newly established light railway system, which was operated by the defendant ('RPA') had caused them a noise nuisance. They sought an order, directing the RPA to erect an appropriate acoustic barrier, together with damages for nuisance, negligence and breach of statutory duty. The plaintiffs claimed that the noise from the trams had an adverse impact on the amenity of their back gardens, which backed on to the tracks; that it was difficult to hold a normal conversation in the garden; that the noise from the trams was very intrusive in the kitchen, dining area and living areas of their house, and that the noise impact in the bedrooms at the rear of the house was such as to cause serious sleep disturbance.

The line had been established under the Transport (Dublin Light Rail) Act 1996 which enabled the Minister for Public Enterprise ('the Minister') by order, to authorise the construction and operation of the light rail. The statutory process required that the application to the Minister was accompanied by an Environmental Impact Statement ('EIS'), including detailed forecasting on noise emissions. The application was published, and any persons likely to be affected, had a statutory entitlement to make submissions to the Minister. The Minister was mandated to appoint an inspector to conduct a public inquiry and to submit a report of the resultant findings and recommendations. All affected landowners and occupiers, and other interested parties, were entitled to appear at the inquiry.

The inspector recommended the inclusion of detailed noise conditions in the Line B order, together with general conditions in relation to monitoring noise emissions. The Line B order was promulgated in September 1999.

The judge found that if the line had been operated strictly in accordance with the Line B order, then that would have been a complete answer to a claim in nuisance.

In the instant case, the judge stated that in *Smyth* the judge had based his reasoning on the defence of statutory authority. However, *Smyth* did not support the argument that compliance with specific noise limits in a planning permission was necessarily a complete answer to a claim in noise nuisance.

The judge stated that since the issue of statutory authority did not arise in the instant case, she was required to consider whether the noise from the wind turbines constituted a nuisance at common law. She observed that in *Smyth* the judge considered that the noise conditions in the EIS and the Line B order set an objective test as to what was reasonable. In short, the noise levels predicted in the EIS were a wholly reliable indicator as to what the ordinary person whose requirements were objectively reasonable, would expect, in terms of noise control. Therefore, since the operation of the line was within the noise levels predicted in the EIS (which were conditioned in the Line B Order) the noise in question did not constitute a nuisance. The defendant, in the instant case, claimed that the limits in the planning permission were a wholly reliable indicator of what was objectively reasonable, in terms of noise. However, the judge disagreed with this. In her opinion, the planning permission which had been granted to the defendant in the instant case, was not comparable to the statutory process in *Smyth* to establish a wholly reliable indicator of what was reasonable in terms of noise impacts. The judge stated that even if that were the case, that would not assist the defendant for two important reasons.

First, the planning permission regulated WTN decibel levels only. However, the ETSU methodology upon which both the Ballyduff planning permission and WEDG 2006 was based, could not establish a yardstick for the particular aspects of the WTN complained of by the plaintiffs, which included high-amplitude modulation ('AM') values and 'thump' AM.

Second, compliance with the noise limits in the Ballyduff planning permission was not, in any event, demonstrated. In short, the judge found that, as a matter of law, planning permission was not a reliable indicator of what was objectively reasonable at this locality in terms of WTN.

The defendant argued that while planning permission did not create an immunity from being sued in nuisance, on the authority of *Lawrence v Fen Tigers Ltd* [2014] 2 All ER 622, significant weight required to be attached to the views of the planning authority. In short, planning conditions were a wholly reliable indicator of what was reasonable in terms of noise impact. The judge agreed that in a nuisance action the court placed considerable weight on the terms of planning permission. However, she stated that the court was not bound to decide that the court was bound to accept the planning conditions as a wholly reliable indicator of what was reasonable in terms of noise impact. However, in the instant case the planning permission regulated only one aspect of the WTN, namely, the absolute decibel limit. The judge held that, in any case, the defendant had not complied with the relevant planning permission.

The judge then considered the character of the locality and the relevance of planning permission in terms of the law of nuisance. While the plaintiffs argued that the locality was simply a quiet rural location, that is one without the presence of wind turbines, the defendant argued that planning permission had defined the character of the locality as one with a wind farm. The judge stated that she was required to determine whether one should assess the character of the locality with, or without, the Ballyduff wind farm.

The judge stated that the Irish courts had tended to afford weight to the decisions of planning authorities in determining the character and nature of a locality. The judge stated that in the instant case the planning permission had authorised WTN of a particular decibel level. However, the plaintiffs did not

complain about the decibel levels from the wind turbine, but rather, its character. Further, in any event, it had not been demonstrated that the WTN was within the limits specified in the planning permission.

The judge found that the plaintiffs were not hypersensitive to noise and were reasonably tolerant individuals. The judge found that while low frequency noise was not the dominant characteristic of the WTN, there was a significant element of audible and lower frequency noise which manifested as 'thump'.

The judge found that the noise from the wind farms was an unreasonable interference with the plaintiffs' enjoyment of their property and therefore, constituted a nuisance.

The judge concluded by requiring the parties to attempt to resolve the differences between them by engaging in mediation.

Personal injury claim

The judge then addressed the issue whether damages for personal injuries could be brought in a nuisance claim. In the House of Lords case of *Hunter v Canary Wharf Ltd* [1997] AC 655 Lord Hoffman stated that an action in nuisance was based on the defendant causing an injury to land, not for causing personal discomfort. However, the judge added that such an approach did not represent the law of Ireland. The judge therefore considered whether the plaintiff could recover in respect of the psychiatric injury which he had sustained. The judge stated that in contrast to the law of negligence, the liability in a nuisance did not turn on foreseeability. However, in a nuisance action, while foreseeability of the risk of harm was irrelevant, in establishing liability, reasonable foreseeability of the type of injury sustained by the plaintiff was required to be proved by the plaintiff. Therefore, in the instant case, reasonable foreseeability of psychiatric injury was a precondition to the award of damages for such injury. The judge therefore refused to strike out the claim to damages for psychiatric injury. However, she stated that while, in the instant case, psychiatric injury was not reasonably foreseeable, imposing liability for such an injury would involve an extension of the existing law, and would ultimately be a matter for the Supreme Court of Ireland.

Comments

Webster raises several interesting issues. The first is whether mere compliance with relevant planning permission could be employed by the defendant as a defence in a nuisance action. The court answered that question in the negative. In short, planning permission could not be equated with statutory authority.

However, a more contentious issue was whether planning permission could change the character of the land. In short, the defendant argued that the grant of planning permission had changed the character of the land from land without wind turbines to land containing wind turbines. In the UK Supreme Court case of *Lawrence v Fen Tigers* [2014] AC 822 at 846 Lord Neuberger was of the view that while implementation of planning permission could give rise to a change of character of the locality, simply because the relevant work had the benefit of planning permission was no different from work that did not require planning permission. Further, the mere fact that the activity that is said to give rise to the nuisance had the benefit of planning permission, would normally be of no assistance to the defendant in a nuisance action. However, Lord Carnwath after stating that there should be a strong presumption against allowing private rights to be over-ridden by administrative decisions, without compensation, stated that in exceptional cases (that is in relation to large-scale developments) a planning permission could be the result of a considered policy decision by the competent authority which could not sensibly be ignored in assessing the character of the area, against which the acceptability of the defendant activity was to be judged. In *Webster*, given the fact that the defendant had not complied with the relevant planning permission, this issue was irrelevant.

As far as the personal injury claim was concerned, the law of nuisance has been regarded in the UK as protecting the occupier of land from unreasonable interference. In short, the right to successfully raise an action against the defender derives from the claimant's right to occupy that property. The law of nuisance does not protect a claimant against any form of bodily harm, such as mental illness from activities taking place outwith that land.

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No power to vary an abatement notice

R (oao Ball) v Hinckley & Bosworth Council [2024] EWCA Civ 433

The interested party 'Real Motorsport Ltd' ('RM') operated the Mallory Park Circuit ('the circuit'). It is a well-known sports venue and was used for motor racing since the 1950s. It was very close to the village of Kirby Mallory. There had been ongoing issues of noise nuisance.

The first abatement notice was served by the council in 1985, under Part III of the Control of Pollution Act 1974 (which was subsequently repealed). It was served on the company then running the circuit. However, that did not resolve matters. In 2014 the local government ombudsman reported several complaints, to the effect that Hinckley & Bosworth Council ('the council') had failed to take enforcement action for breach of the 1985 notice. As a result, the council served an abatement notice on 21 November 2014 which stated that noise from racing activities at the circuit had given rise to statutory nuisance, which the council was satisfied was likely to recur. RM was required to restrict the recurrence of the nuisance, and to cease operations at the circuit from 1 January 2015 'other than in accordance with the Schedule hereto attached'. The Schedule laid down a regime for the operation of the circuit, defining noisy days, non-noise event days, and quiet days. There was an annual limit set on the number of 'high noise' and 'medium noise' days, and also limits on the number of noisy days within any seven-day period. Clause 21 of the Schedule provided for possible variations to the restrictions in the Schedule.

Variations of the November 2014 abatement notice took place between 2015 and 2021. On 1 December 2021, Mr Ball sought five variations from the council. Three were granted. The variations were stated to be permanent, although subject to annual review,

undertaken by the council. Mr Ball challenged the validity of the variation of 31 March 2022 on the basis that its effect would be to increase the impact which noise from motor racing at the circuit would have on him, and other residents of the village. Permission was given to bring judicial review proceedings.

At first instance, the judge found that there was an implied power, on the part of a local authority, to vary an abatement notice. In reaching that conclusion, he relied heavily on the decision in *R v Bristol City Council, ex parte Everett* [1999] 1 WLR 92. The judge's heavy reliance on Everett was the subject of appeal in the instant case.

The appeal decision

In the Court of Appeal, Coulson LJ gave the judgment with which his fellow judges concurred.

He outlined the relevant statutory framework. Under s 79(1)(g) of the Environmental Protection Act 1990 ('the 1990 Act') 'noise emitted from premises so as to be prejudicial to health or a nuisance, ranks as a statutory nuisance'. Section 80(1) of the 1990 Act places a local authority under a duty to serve an abatement notice, if it is satisfied that a nuisance exists. The abatement notice must require the abatement of the statutory nuisance, or the prohibition or restriction of its occurrence or recurrence. The judge stated that the said ss 79 and 80 treated abatement notices as a 'one-off' event. That is why an abatement notice remained in force indefinitely. The sections were not couched in the language of continuing duty, and did not suggest that inspections, and subsequent notices, were to be regarded as part of an obligatory continuing dialogue, both before and after, service of the notice. There were two distinct stages. First the local authority had to decide if there was a statutory nuisance. If it did so decide, it was obliged to issue an abatement notice. There was no discretion. If there was an appeal, or a criminal prosecution, then it was at that second stage that the Magistrates Court was required to decide whether there was a best practical means defence ('BPM') under s 80(7) of the 1990 Act. That distinction between the powers of the local authority on the one hand, and those of the Magistrates Court on the other, was of crucial importance when considering the primary issue in the present appeal. Whether or not the nuisance had been, or could be, addressed using BPM was not a matter for the local authority. It fell outside its jurisdiction. It was solely a matter for the Magistrates Court.

Coulson LJ stated that whether or not the local authority had power to vary an abatement notice, was central to the appeal. He stated that there was no express power in the 1990 Act, or the relevant regulations, to allow a local authority to vary an abatement notice. The judge added that a local authority had no power to vary an abatement notice on its own, because any such power resided with the Magistrates Court. Any power granted to a local authority to vary an abatement notice would be inconsistent with, and contradictory to, the express power that could be exercised by the Magistrates Court. In short, a local authority had no express power to vary an abatement notice.

The judge also rejected the proposition that there was an implied power, on the part of a local authority, to vary an abatement notice.

Comments

Ball settles the point, as far as the law of England and Wales is concerned, that a local authority has no power to vary an abatement notice. While this Court of Appeal decision is not, of course, binding on the Scottish courts, it will be of persuasive authority. Indeed, decisions of the English courts as far as the law of statutory nuisance is concerned are invariably followed by the Scottish courts.

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Failed noise nuisance appeal by over-sensitive residents

Dennis and Anr v Head Start Nursery Ltd [2024] EWHC 1248 (Admin)

This was an appeal, by way of case stated, against the decision of the District Judge who had found the defendant not guilty of statutory nuisance because of noise.

Since the early 1990s the defendant's premises had been used as a nursery for children between the ages of three months and five years. The prosecutors were Dennis and Andrei, who were the landlord and tenant respectively, of property which was situated next door to the nursery. They contended that the noise coming from the nursery amounted to a statutory nuisance.

Under s 82 of the Environmental Protection Act 1990 ('EPA') a person aggrieved by a statutory nuisance can apply to a Magistrates Court for an abatement order. Under EPA s 79(1) noise emitted from premises so as to be prejudicial to health or a nuisance ranks as a statutory nuisance. In *National Coal Board v Neath Borough Council* [1976] 2 All ER 478 (which was a case brought under the Public Health Act 1936) it was held that a statutory nuisance within the meaning of that Act must either be a private or public nuisance, as understood by the common law.

Turner J stated that the central question which fell to be determined by the judge was, therefore, whether the noise from the nursery amounted to a private nuisance vis-à-vis vis the property, by the application of common law principles. Turner J stated that the law of private nuisance had recently been reviewed by the UK Supreme Court in *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1. In that case, Lord Leggatt stated that in order to rank as a nuisance, the interference with the claimant's property required to be substantial. The test was objective. What amounted to a material or substantial interference was not to be judged by what the claimant found annoying, but rather by the standards of an ordinary or average person, in the claimant's position. However, even where the defendant's activity substantially interfered with the ordinary use and enjoyment of the claimant's land, it would not give rise to liability, if the activity itself was no more than the ordinary use of the defendant's own land. Such a rule was underpinned by the principle of 'give and take, live and let live'. Turner J stated that the rule of 'give and take, live and let live' applied wherever a nuisance resulted from the ordinary use of land.

The judge referred to the House of Lords case of *Southwark London Borough*

Council v Tanner [2001] 1 AC 1.In that case adjoining flats had been built without adequate sound insulation, the result of which was that the tenants could hear literally everything their neighbours were doing. The noise from the neighbours' activities had thus caused a substantial interference with the ordinary use and enjoyment of the claimants' flats. However, the court held that this interference was not an actionable nuisance because the neighbours were doing no more than making normal use of their own flats.

Turner J stated that these authorities supported the view that in circumstances where the court took the view that the noise complained of in any case did not amount to a sufficiently high level of interference with the ordinary use of property, then there was no need to go on to consider the common and ordinary use criterion. The assessment of the nature of the locality was pertinent, not to the threshold level of interference but, rather to the 'ordinary use' assessment. The judge added that what was a common and ordinary use of land was to be judged, having regard to the character of the locality.

Turner J then addressed the two substantive questions which the court was required to answer.

In relation to the first question the judge had correctly set out the 'threshold test' as an objective test. That was to say, that what amounted to material or substantial interference, was not to be judged by what the claimant found annoying or inconvenient, but by the standards of an ordinary or average person in the claimant's position. The objective nature of the test reflected the fact that the interest protected by the private law of nuisance was the utility of land and not the bodily security and comfort of the particular individuals occupying it. The judge had properly applied that test in finding that the threshold had not been met. The consequence of this was that no further consideration was needed of any other matter in issue. There was, therefore, no need for the judge to consider the common and ordinary use of the defendants' premises.

In relation to the second question, Turner J stated that the issue was whether the judge was right to find that the prosecutors had created an artificially low acoustically sensitive ambience which was not usual or average. Turner J concluded that the prosecutors were oversensitive and that the noise in question would not have affected the average person.

Turner J concluded by rejecting the appeal.

Comments

Before an adverse state of affairs can be categorised as a nuisance it must be plus quam tolerabile (that is more than can reasonably be endured) in the eyes of the law: *Watt v Jamieson* 1954 SC 56 at 58 (per Lord Cooper). In this case the noise in question did not reach a level which would have annoyed a reasonable person. In short, the prosecutors were oversensitive and, therefore, fell foul of the rule that the courts are unwilling to assist the oversensitive: *Heath v Brighton Corporation* (1908) 24 TLR 414. The decision in this instance also illustrates the principle that in order to rank as a statutory nuisance, the impact of the adverse state of affairs on the occupier of the premises affected, requires to be like that which ranks as a common law nuisance: *Robb v Dundee City Council* 2002 SC 301 and *National Coal Board* (cited above).

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Obiter

An eco-warrior whose holistic retreat was described as an inspiration by the television presenter Kevin McCloud has been jailed after breaching planning rules and refusing to pay a fine – *The Times*.

Review

Taking English Planning Law Scholarship Seriously

Maria Lee and Carolyn Abbot (Eds)
(UCL Press) Hardback £45.00, Paperback £25.00 (also available to download free at www.uclpress.co.uk)

Do not be put off by the title of this book. It is extremely pertinent to Scottish readers, practitioners, academics and students. Of course, the focus is English land-use planning law and the related system around that law, but the overarching ideas, concerns and analysis are relevant in Scotland.

This is an edited collection of essay chapters grouped into broad themes. The authors were supported by the Society of Legal Scholars, Small Projects and Events Fund, for a post-coronavirus (Covid-19), in person workshop, to develop the research and this book. The original concept of the editors, Maria Lee and Carolyn Abbot, was to create a space to explore, explain and celebrate the role of land-use planning law. They recognised its importance, not only in land use, but increasingly in the climate and biodiversity challenges as well as social and economic inequalities. They had become aware that relevant law raises some of the most fundamental questions faced by society and yet it has been relatively neglected in academic discourse.

The book consists of five sections, including an introduction. The other sections are Part II: 'Place shaping, place framing'; Part III: 'Participation'; Part IV: 'Time and scale' and Part V: 'Planning at the intersections'. Lee provides the introduction both to the volume and the topic of taking land-use planning law scholarship seriously, pointing out the 'complexity and crucial detail of planning law'. This section also includes a brief outline of English land-use planning law, proving an instructional context for the book as a whole. For the Scottish reader, it may be interesting to compare and contrast the differences and similarities in the regimes. It is also an effective summary of current land-use planning law and policy south of the border.

The first substantive section recognises that 'planning is concerned with everything that makes a successful place in a physical and a social sense'. Chapter 3 is an analysis of the legal and political happenings of three London LGBT+ night time spaces. Steven Vaughan and Brad Jessup argue that their case studies illustrate the heteronormativity of the current land-use planning system. They explore what might become of this area of law if informed by queer legal theory. The three examples provide fascinating detail about processes and outcomes. The lens of queer legal theory ultimately concludes that land-use planning law should embrace opportunities to reflect lived history and heritage rather than the material embodiment of heritage in the decision-making processes.

Chapter 4, 'The highway: A right, a place or a resource?' examines low traffic neighbourhoods ('LTNs') pointing out that they provide an opportunity to consider whether the highway is a right of passage, a place belonging in some sense to local residents rather than to cars, or a resource to be allocated and governed. The author, Antonia Layard, argues that highways should be understood as a resource to be shared. She argues that in this way the focus can shift to how everyone can exercise rights of passage safely, encouraging mobility for all, while also respecting highways as places of diverse characteristics. The chapter contains an interesting explanation of the origins of LTNs (based on the Dutch concept of living streets) and how they have been implemented across England, including examples of how they have been highly contested, particularly by motorists. The conclusion links the discussion on highway law to planning law in terms of understanding 'development' as a resource to be allocated rather than the right of individual landowners.

In the fifth chapter, Margherita Pieraccini discusses marine spatial planning ('MSP') with an analysis of the English approach. This is relevant and transferable to Scotland, not least because both north and south of the border, the overarching policy is the UK Marine Policy Statement. She notes that like land-use planning, the stated aim of MSP is sustainable development. Pieraccini considers whether the ecosystem approach of MSP can provide a novel approach for planning for sustainability. The chapter explains that the ecosystem approach defined in international environmental law is underpinned by 'a relational ontology and by epistemic pluralism, helping to shift the conceptualisation of sustainable development beyond a balance/trade-off exercise'. She considers, however, that this is not visible in the way it has been conceptualised in the domestic marine planning context, derived from a detailed textual analysis and comparison of the east and south English marine plans. The chapter concludes that to date, marine planning in England is not capitalising on the opportunities of the ecosystem approach and there is a risk that it follows the same pro-growth agenda of land-use planning.

Part III contains two chapters dedicated to the wider topic of participation. In Chapter 6 Chiara Armeni argues for a shift in participation practice to recognise place experience. In particular, the contribution of place experience in decisions about climate change is considered as a key component in taking land-use planning law and participation seriously. The next chapter deals in detail with participation within planning inquiries. Planning inquiries in England, as in Scotland, are used to determine the most complex and controversial developments. Abbot considers the important contribution that legal experts can make when supporting local community groups. She argues that input and support from such legal experts as knowledge providers, skilled advocates and experienced practitioners can strengthen the impact and effectiveness of local community group participation. She concludes by expressing concern about proposals in the English system, to move away from the traditional discretionary land-use planning system to a zoning one. Abbot notes that if it ever does materialise, it will just shift the focus for participation to earlier in the planning process. Arguably in Scotland, we are further along this route in terms of the 'front loading' approach. Ultimately even if the focus of legal expertise does shift, she considers that 'it will be just as important, if not more so, if local communities are to have any influence

on where and when development takes place'.

Part IV addresses time and scale as the editors and individual authors recognise their importance to the understanding of land-use planning law in any jurisdiction, not just in England. In Chapter 8, Elen Stokes applies a future studies methodology to land-use planning law. A futurescapes framework is applied to three areas of planning resonant in England: onshore development of unconventional oil and gas exploration (fracking); the application of local development plans; and the Secretary of State's statutory powers to call-in planning applications and recover planning appeals. The author considers that too often the future is regarded as 'an incidental aspect of law' and points out the importance of understanding 'the many ways in which the law engages and, oftentimes, produces expectations, promises and fears about what will come'. Stokes argues that by ensuring futures is a focus of the decision-making, land-use planning law can draw the future into the present. Next, Lee makes a valuable contribution to the ongoing narrative about the shortage of housing and the barriers to this resulting from the land-use planning system. In a chapter entitled the 'Slippery scales in planning for housing' she acknowledges that housing is an extraordinary complex social and legal challenge. Recently in England, housing has been central to contests of the appropriate scale of planning: regional or local and fuelled the contested relationship between English local and central government. This chapter, therefore, interrogates scaling of planning for housing, through three categories: interests and impacts; law and policy; and actors. The author draws on the decision-making processes leading to the UK Supreme Court decision in *Dover District Council v CPRE* [2017] UKSC 79. The analysis provides a welcome route through the complexity of this issue of scale and to highlight the inadequacy of simple scalar descriptions or prescriptions.

The final section considers 'Planning at the intersections'. This recognises that planning exists within and across many other areas of law and other legal sub-disciplines. Three specific areas have been included. In Chapter 10, Edward Mitchell draws on contract law to inform land-use planning law scholarship. He focuses on the use of s 106 obligations (s 75 planning obligations in Scotland) to secure affordable housing. The case study scenario, albeit from Colchester, will be familiar to planners and planning lawyers in Scotland. It offers insights into the opportunism and the pursuit of control in town planning processes, showing how developers can create flexibility even amidst highly formal contractual behaviour. These insights will be of interest in Scotland as the issues, problems and potential solutions are almost identical. Chapter 11 considers judicial review, providing a brief overview of its intersections with land-use planning law. It then discusses in detail why administrative lawyers should take land-use planning law more seriously. It concludes with a more general appeal to scholars to embrace the vertical as well as the horizontal dimensions of judicial review. The author, Joanna Bell explains that 'Administrative law adjudication in practice involves the fusion of general grounds of review with legislative, policy and administrative particulars. Both the process and the results of this fusion would benefit form more scholarly engagement.'

In Chapter 12, Kim Bouwer and Rachel Gimson analyse Patrick McAuslan's assumed opposition between private land rights and public administrative regimes They argue that public and private aspects of property governance are more entangled and indeed complementary than he suggests. The authors challenge the notion of strictly private concepts of property in land, by arguing that courts also consider the promotion of social utility of land in their deliberations and decisions. They subsequently assess the role of compulsory purchase and compensation in planning and argue that these do not always advance the public interest.

The editors provide a final chapter of concluding thoughts noting that land-use planning law is 'fascinating, diverse and meaningful'. They offer insightful reflections and observations drawn from the shared endeavour of taking English land-use planning law seriously. A final conclusion is that land-use planning law 'offers a major conceptual and analytical resource ... grounded in rich sets of materials through which political and legal disagreement plays out'. A sentiment as true in Scotland as it is in England.

It should be noted that this work is free to download, but also available in conventional book form. It is well put together as a resource with clear executive summaries. The notes and references are at the end of the chapters, which this reviewer finds slightly annoying, but this is a small quibble in an excellent book. It is highly recommended as a resource on a particular topic or an extended read for land-use planning lawyers, academics, students and all those interested in land-use planning law generally.

The sections on reform of land-use planning law in England are now inevitably dated as the 2020 'Planning for the Future' White Paper, referred to in this book, has now been superseded largely for political reasons with some land-use planning law changes now being taken forward under the 'levelling up' processes. It is hoped that this work will have provided a foundation for further land-use planning law scholarship to contribute to both the academic and the practical implementation of reform. The obvious next question is when will we have the same treatment for land-use planning law in Scotland?

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Obiter

Scotland desperately needs the spirit of efficiency and innovation in every part of our economy – *The Scottish Daily Mail*.

The Scottish government has said it is willing to make 'radical' reforms to the public sector. ... Public Finance Minister Ivan McKee said the event would help drive a 'culture' shift, though the government has provided little detail on how it will be achieved. ... He said the government was still working to implement recommendations of the 2011 Christie Report [about the future delivery of public services] – *BBC News*.

The Scottish Government has announced plans to review the devolved nation's council tax system [which it promised to abolish in 2007] to make it 'fairer' – *LocalGov Daily Bulletin*.

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Prepared by John Watchman

Environmental Bullet Points

Plan for future of Grangemouth
A summary of the feasibility study 'Project Willow' has been published. The project seeks to secure a long-term industrial future for Grangemouth following the decision to decommission the oil refinery. The study has identified nine potential options for its future, towards low-carbon energy production including hydrothermal upgrading (breaking down hard to recycle plastics), chemical plastics recycling and anaerobic digestion of bioresources and digestate pyrolysis. This work is supported by investment, including £25m from the Scottish Government to establish a Grangemouth Just Transition Fund and £200m from the UK Government.

Offshore wind zonal pricing concerns
Industry body Scottish Renewables ('SR') has raised concerns with the Prime Minister and First Minister regarding 'zonal pricing' as proposed by the UK Government. If adopted, this would divide the UK into different pricing zones, leading to varying electricity costs to consumers across the UK. SR is urging that a Reformed National Market is instead introduced, providing a combination of measures to improve existing market arrangements.

New flood maps launched
The Scottish Environment Protection Agency has published new interactive surface water flood maps, which include small watercourses. This new level of detail will provide a more detailed and accurate picture to understand the flood risk in an area, and what the impacts could be when surface water flooding happens. The maps, which were developed with JBA Consulting, integrate up-to-date rainfall data and climate change projections to more accurately show areas likely to be affected by surface water during heavy rainfall.

Burning rubbish is UK's dirtiest form of power
The BBC has examined five years of data from across the UK, concluding that burning household waste in energy from waste plants produces the same amount of greenhouse gases per unit of energy as coal power, which is now completely phased out. Considered by the waste sector as a 'green' alternative to sending waste to landfill, the BBC has highlighted that the waste mix being sent to plants over the past few years contains higher volumes of plastic and less food waste due to the increased use of anaerobic digesters and food waste otherwise being composted.

Comhairle Nan Eilean Siar's non-recyclable waste into alternative fuel
In partnership with biotechnology company Advetec, Comhairle Nan Eilean Siar is diverting 100 per cent of non-recyclable waste from landfill by turning it into an alternative fuel in Uist and Barra in the Outer Hebrides. The local authority will process 1temtonnes of domestic and commercial waste into Solid Recovered Fuel ('SRF') daily at its waste transfer site in Benbecula. It uses Advetec's 'XO22' digester which acts as a mechanical biological treatment plant and accelerates the breakdown of organic matter using unique blends of bacteria. This is then further processed and turned into SRF which emits 95 per cent less carbon dioxide equivalent than fossil fuels.

Green heating requirements for new homes abandoned
The Scottish Government will not be putting forward the draft Heat in Buildings Bill in its current form. The legislation would have meant anyone buying a property (domestic or commercial) would have had to change from more a standard heating system, such as gas/oil fired boilers or LPG systems, to a green heating system, such as a heat pump, within a fixed period following completion of the sale. This decision has faced criticism particularly in light of the abandonment of the interim target of the 75 per cent reduction of emissions by 2030 and further delays to publication of the awaited energy strategy.

Passivhaus equivalent policy to become mandatory
Building Regulation amendments have been laid to enable the implementation of the Scottish equivalent to the Passivhaus standard. The aim is to improve energy efficiency and thermal performance of new builds. It will require a developer to submit an 'energy and environmental design statement' alongside a building warrant application and an 'energy and environmental construction statement' alongside a completion certificate. Developers will be required to set out how mandatory building standards for energy and environmental performance will be achieved.

World's first 'driverless' bus service ceases
An autonomous bus service which took passengers over the Forth Road Bridge ('the Bridge') terminated in February 2025 due to low passenger numbers. Since its launch in May 2023, the CAVForth 'driverless' bus service has been provided between the Ferrytoll Park and Ride near Inverkeithing and Edinburgh Park. The buses switched between autonomous and manual driving, with a computer driving them across the Bridge. However, the service always required two operators and in December 2023 it was being fully operated by a driver due to a system upgrade.

Europe's 'biggest battery farm' on coal mine site
Work has commenced to create a one-gigawatt battery storage facility at Coalburn in South Lanarkshire. This will consist of two large-scale battery farms, one of which is located at the site of a former opencast coal mine. Once completed, it is estimated that this will store enough electricity to power three million homes. It will be charged using excess power from wind farms with the electricity being discharged when demand is high or renewable generation is low. The batteries will operate for two hours at a time before being depleted. The first phase is due to be operational later this year, with construction on stage two to begin shortly.

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