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Relevance of Heathrow Court of Appeal Decision for Section 1 North Essex Authorities Local Plan

1. Executive summary

The Heathrow Court of Appeal ruling of 27 February 2020 has significant implications across the national planning sphere. Indeed a series of related challenges are already emerging (HS2 by Chris Packham, government fossil fuel dependency by George Monbiot, and RIS2 by the Transport Action Network) plus we now know there is a related delay to government's National Infrastructure Strategy.

It gives rise to a high likelihood that the North Essex Authorities Section 1 Plan (if found sound by the Inspector) would be successfully challenged in the courts on similar grounds, around failure to consider climate change appropriately. Specifically:

- **National policy, in the form of the Paris Agreement, has not been considered, contrary to the Planning & Compulsory Purchase Act 2004**
- **International objectives on environmental protection, in the form of the Paris Agreement, have not been considered, contrary to the SEA Directive**
- **In addition, regardless of the Paris Agreement, the Climate Change Act 2008 was not considered in its unamended form at the time of the plan making, contrary to NPPF 2012 requirements.**

More specifically, there have been no references to the Paris Agreement, nor to the Climate Change Act 2008 in the Section 1 evidence base (including in the list of legislation and guidance taken into account). Furthermore, there has been only a cursory attempt to carry out the required analysis of current emissions, no meaningful predictions of future emissions under the plan and their relationship to emissions targets, and no examination of how to mitigate any increased emissions.

In the context of this lack of consideration of key legislation, policies and objectives, we contend that it cannot be possible for an inspector to determine that the plan is lawful.

2. Paris Agreement & Climate Change Act 2008

The Paris Agreement, ratified by the UK in 2016, enshrines a firm commitment to restricting the increase in the global average temperature to *"well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels"* as well as an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21st century.

The Climate Change Act 2008 established a legally binding target to reduce the UK's greenhouse gas emissions by at least 80% in 2050 from 1990 levels. To drive progress and set the UK on a pathway towards this target, the Act introduced a system of carbon budgets including a target that the annual equivalent of the carbon budget for the period including 2020 is at least 34% lower than 1990. In 2019, the 80% was amended in the legislation to 100% in line with the Paris Agreement.

3. Heathrow ruling

In this recent ruling, the High Court agreed with Friends of the Earth, ruling that the Airports National Policy Statement designation was unlawful.

In summary, the court ruled that **there was a legal obligation for the Secretary of State to take Government policy as well as international environmental protection objectives, in this case the Paris Agreement, into account when arriving at his decision.** There was no requirement to comply with it, only **to take into account his own policy commitments and explain how he has done so.**

Friends of the Earth argued that the Secretary of State acted in breach of section 10(3)[1] of the Planning Act 2008, *"because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10."* And, *"If he had asked himself that question, and insofar as he did, the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account."*

The judges accepted those submissions in essence.

Paragraph 5 (8) in the 2008 Planning Act was key: *"The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."* The judges found that these words do require the Secretary of State to *"take that policy into account and explain how it has been taken into account. None of that was ever done in the present case."*[2]

The judges were of the view that Government's commitment to the Paris Agreement was part of "Government policy" following on from ratification in 2016 and references by Ministers parliament, also in 2016.

[1] 10(3)For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of— (a)mitigating, and adapting to, climate change; (b)achieving good design.
[2] Paragraph 226 https://www.judiciary.uk/wp-content/uploads/2020/02/Heathrow-judgment-on-planning-issues-27-February-2020.pdf

The judges separately accepted (para 242-247) that the SEA Directive (Annex I (e)) requires plans to set out environmental objectives at international level and how these have been taken into account. The key points of the Paris agreement are clearly environmental objectives at international level (and have been since 2016) and therefore the conclusion was the same as for the previously expressed point, that the failure to consider the Paris Agreement was unlawful, but in this case under the SEA Directive rather than the Planning Act 2008.

When handing down judgment, Lindblom LJ stated that the government had said that it would not appeal against the Court of Appeal's finding in this regard and the related Declaration.

4. Climate change law and guidance in the context of Local Plans

i. **The Planning & Compulsory Purchase Act 2004 (The Act, 2004).** The relevant act with regards to the Local Plan is the Act, 2004. The Planning Act 2008 deals only with infrastructure.

   a. The question is therefore whether there is the same obligation to take into account climate change government policy in the preparation of a Local Plan as in the planning of an infrastructure project.

   b. The Act, 2004, contains the following paragraphs:
   "19(1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change."

   "39 (2) The person or body must exercise the function with the objective of contributing to the achievement of sustainable development. (3) For the purposes of subsection (2) the person or body must have regard to national policies and advice contained in guidance issued by— (a) the Secretary of State"

   c. **The language in 19(1A) is strong** – Local Plans must **secure** the mitigation of and adaption to climate change. 39(3) tells us that national policy must be taken into account – and we know from the Heathrow decision that **national policy at the time of this Local Plan being put together (i.e. in 2016-2017) was the Paris Agreement**.

ii. **The NPPF,** which sits below The Act, 2004 (i.e. legislation takes precedence), states, in Chapter 14, paragraphs 148 and 149 (including footnote 48) that planning for climate change should be in line with the objectives and provisions of the Climate Change Act 2008. NPPF 2012, under which, of course, the Section 1 plan is being examined, says the same thing[3].

   a. While as above we assert that legislation required the Paris Agreement (as a national policy and an international environmental protection objective) to be considered before its more ambitious targets had been enshrined in domestic law, **regardless of this point it is clear that the NPPF required the Climate Change Act**

[3]Paragraph 94, footnote 16

2008 (even if in its unamended form) to be considered in this Local Plan Section 1 at the time of preparation.

iii. **Planning Practice Guidance** (as of 2016) tells us that the Climate Change Act 2008 establishes a legally binding target to reduce the UK's greenhouse gas emissions by at least 80% in 2050 from 1990 levels and also that the Act introduced carbon emission targets for periods leading up to 2050. The updated PPG states that this target was strengthened in June 2019 through the Climate Change Act 2008 (2050 Target Amendment) Order 2019.

The PPG (as of 2016) also makes it clear that evaluation of future emissions should be robust, with a consideration of different emission sources, likely trends and taking into account requirements set in national legislation. The updated PPG is unchanged on these points.

iv. **The SEA Directive** in setting out what information is to be provided in an environmental report (such as a Sustainability Appraisal, which represents in this context a Strategic Environmental Assessment) includes (Annex I (e)):

a. *"the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation"*

b. The Paris Agreement emissions target is clearly an international environmental protection objective and had such status from 2016 onwards.

A helpful Law and Policy Briefing **'Planning for Climate Change'**[4], prepared by the **TCPA/RTPI/Client Earth** (prior to the Heathrow decision) comments on the sort of approach which plan makers would need to take in order to meet the requirement that *"plan policies must be 'designed to secure' the outcomes in question"* (2004 Act):

a. Show what carbon emissions are at present to provide a baseline to compare against;
b. Robustly evaluate future emissions, taking into account the emissions likely as a result of new housing and development commitments;
c. Adopt proactive strategies to mitigate carbon emissions

Such an approach is also entirely compatible with the requirements of the SEA Directive.

[4] https://www.rtpi.org.uk/media/3481013/CLPB_final.pdf

5. North Essex Section 1 Plan

With the above in mind, we believe that there is a high likelihood that the North Essex Authorities[5] (NEA) Section 1 Plan could be successfully challenged in the courts if found sound. It would be unlawful in not appropriately considering climate change, with a high likelihood that the Sustainability Appraisal would have produced different outcomes (and therefore different resulting decisions) if this had been done.

A. Review of evidence base

Subsequent to the Heathrow ruling, we believe that the **NEA have not taken into account the Paris Agreement OR the Climate Change Act 2008.** We believe it is clear the former should have been considered as national policy and an international environmental protection objective, but at a far more basic level, the Climate Change Act in its unamended form (i.e. its form at the time of Plan making) clearly should have been. It is obvious that neither were.

The table below provides evidence to support this assertion. It shows that the NEA have <u>not</u> taken into account either the Paris Agreement or the Climate Change Act 2008, in the Section 1 Plan or the evidence which supports it.

Authority	**NEA Legal Compliance Checklist**	**NEA Soundness Checklist**	**NEA Section 1 Sustainability Appraisal**
Braintree [Climate emergency declared July 2019]	**No reference to Climate Change Act 2008 or to Paris Agreement 2015** Refers to Section 19(1)A The Act 2004	**No reference to Climate Change Act 2008 or to Paris Agreement, or targets / phasing therein** Policy 74 Climate Change – requires the submission of a Sustainability Statement demonstrating how design accounts for the principles of climate change mitigation/adaptation. All further 8 references to climate relate to flooding.	**No reference to Climate Change Act 2008 or to Paris Agreement, or targets / phasing therein** <u>Jun 2016 SA</u> Place Services North Essex Authorities – Common Strategic Part 1 for Local Plans Sustainability Appraisal (SA) and Strategic Environmental Assessment (SEA) Environmental Report – Preferred Options: Non-Technical Summary Table 1: List of Plans and Programmes – no mention of Climate Change Act 2008 or Paris Agreement Full Report: Table 2: Key Documents – no mention of Climate Change Act 2008 or Paris Agreement
Colchester [Climate emergency declared July 2019]	**No reference to Climate Change Act 2008 or to Paris Agreement 2015** Refers to Section 19(1)A The Act 2004	**No reference to Climate Change Act 2008 or to Paris Agreement, or targets / phasing therein** Climate change mentioned, as follows, "Minimise vulnerability to climate change and manage the risk of flooding (99)" 10. Meeting the challenge of climate change, flooding and coastal change (paras 93-108). Adopt proactive trategies to mitigate and adapt to climate change taking full account of flood risk, coastal change and water	

[5] Braintree District Council, Colchester Borough Council and Tendring District Council

		supply and demand considerations (94)	under any sections.
Tendring [Climate emergency declared Aug 2019]	**No reference to Climate Change Act 2008 or to Paris Agreement 2015** Refers to Section 19(1)A The Act 2004	**No reference to Climate Change Act 2008 or to Paris Agreement 2015, or targets / phasing therein** 10. Meeting the challenge of climate change, flooding and coastal change (paras 93-108) Adopt proactive strategies to mitigate and adapt to climate change taking full account of flood risk, coastal change and water supply and demand considerations & some other mitigations. The Tendring Vision includes the requirement for "All new developments should account for, adapt to and mitigate against climate change." **[Note: no attempt to quantify or meaningfully address emissions arising from Local Plan]**	<u>July 2019 Additional SA</u> Land Use Consultants [builds from evidence / reference documentation base from Place Services work] **[Note: no attempt to quantify or meaningfully address emissions arising from Local Plan]**

Looking broadly across the Sustainability Appraisal(s), we observe:

i. There has been only a cursory examination of current carbon emissions;
ii. There has been no meaningful attempt to evaluate and quantify future emissions likely to arise due to the Section 1 plan and the relationship of those emissions to targets;
iii. There is (obviously given (i) and (ii)) no consideration of emissions mitigation strategies and their potential effect on emissions (and targets).

B. Preliminary and High Level Commentary on Practical Implications

The Heathrow ruling did not comment on whether the runway would be an appropriate strategy, rather just concluding that procedure had not been followed and this may have made a difference to the outcome of the process determining the strategy.

We note that in this case also we believe there is a significant likelihood that correct procedure would have led to a different outcome (i.e. spatial strategy selection). We comment briefly on this below.

Climate change touches many areas of the evidence base. To give just one specific example, SA7 and SA13 both share the issues that the selected sites need large scale sustainable transport interventions (e.g. RTS) to be considered sustainable development. Given that RTS for example will not be fully in place until 2051 and not expected to deliver modal share targets until 2070, the impact on CO2 and non-CO2 emissions (which are of course cumulative, not point-in-time) will be huge.

It is very possible that meaningful examination of emissions, targets and phasing of targets would have led to less isolated / smaller sites (including urban extensions) performing far better than the large GCs selected, given they might not require large-scale sustainable transport intervention (i.e. could deliver sustainable transport measures e.g. access to trains and existing buses on Day 1), might need less of a "leap of faith" on ability to internalise transport requirements (especially for urban extensions), and might distribute residual journeys more broadly such that traffic is mitigated and emissions do not rise disproportionately.

There is likely also to be a question around whether a large excess of potential supply on top of OAN – especially this additional supply being large sites producing a high number of concentrated vehicle journeys – can be compatible with emissions targets and indeed securing mitigation of climate change.

However, given the deficiencies of the evidence and analysis, all we can know at this point is there is a significant likelihood that the process has produced the wrong outcome. The authorities, quite simply, have no meaningful view of what the impact of their Section 1 plan on carbon emissions will be or how compatible the resulting emissions are with the Paris Agreement and/or Climate Change Act. This is clearly unlawful.

5. Further notes

Outdated local policies?

Finally, a linked but independent point is that there may now be a risk locally that Section 1 policies are outdated, given the Climate Emergency declared at each of the three NEA, summer 2019. The Climate Emergency will require a new type of planning strategy, and if appraised properly, garden communities – in their current form – may not (and are unlikely to) be part of that strategy.

There is a strong argument in a practical context that officers should have considered these climate change emergency declarations before submitting the revised evidence in August. Indeed we note the Inspector's comment on pursuing Option 2 as the NEA have done: *"It is also possible under Option 2 that other parts of the evidence base for both Section 1 and Section 2 might become out of date or overtaken by changes in national policy"* (IED011, para 154)

However, this point is independent of the other assertions herein.

Note regarding Section 2

The current examination is not looking at Section 2 of the Plan. However, we note that the three Section 2 Local Plans have given some attention to the Climate Change Act 2008, with each plan citing the 2008 Act. As a result, while we cannot comment clearly one way or the other, it is possible that Section 2 does not share the same deficiencies as Section 1.

We have asserted previously that Inspector's 'Option 1' as set out in the June 2008 letter (or the version which would be possible now: an adoption of a modified Local Plan without the GCs), is the best way forward for North Essex and this may still be feasible given the potential non-deficiency of Section 2.