

## Air quality: change is coming

---



David Wood

30/06/2020

---



With lockdown leading to dramatic reductions in air pollution across some of the UK's major urban areas – including falls of nearly 50% in dangerous emissions on some of London's busiest roads – attention is turning to how best to translate these temporary improvements in air quality into a permanent feature of life in the new normal.

Air quality is a familiar battleground to those involved in the planning system. Planning objections and legal challenges based on air quality grounds have proliferated in recent years. It culminated in the widely publicised Court of Appeal ruling in February 2020 – *R (on the application of Plan B Earth) v Secretary of State for Transport and linked cases* [\[2020\] EWCA Civ 214](#); [\[2020\] EGLR 16](#) – that the UK's Airports National Policy Statement was unlawful because it did not consider the impact of the Heathrow expansion on the UK's climate change obligations. The Heathrow decision – while not groundbreaking in its conclusions – joins an increasing body of case law with air quality and climate concerns at its heart.

Within that context, planning authorities and developers alike need to be attuned to the implications for air quality of plan-making, decisions on planning applications and the design, construction and operation of developments. But although the refusal notices, appeal decisions and burgeoning case law all highlight the constraints imposed by air quality considerations, it shouldn't be forgotten that planning and development proposals present a number of opportunities to improve air quality and tackle the problem head-on.

### The legal and policy framework

The UK has legally binding obligations under the Air Quality Directive 2008 to improve air quality. Put simply, the secretary of state must make sure that levels of specified damaging pollutants do not exceed defined limit values. This obligation is here to stay and won't go away simply because of Brexit.

Where pollutant levels are below the limit values, the secretary of state has to ensure that they are kept that way and must endeavour to maintain the best ambient air quality compatible with sustainable development. If the levels are exceeded, the secretary of state must prepare and implement an air quality plan to achieve the defined limit value.

The local air quality management regime requires local authorities to review and assess air quality in their areas regularly. If national objectives are not met, or are at risk of not being met, the relevant local authority must declare an air quality management area (AQMA) and prepare an air quality action plan.

These legislative requirements are reflected in planning policy. The National Planning Policy Framework requires planning policy and decision making to contribute to and enhance the natural and local environment by preventing development from contributing to or being adversely affected by unacceptable levels of air pollution.

Accordingly, planning policies and decisions should sustain and contribute towards compliance with the relevant limit values or national objectives for pollutants, taking into account the presence of any AQMAs and clean air zones, as well as the cumulative impacts from individual sites in local areas. Mitigation, though, is not enough, and opportunities should be taken to improve air quality through traffic and travel management as well as green infrastructure provision and enhancement. Planning decisions must ensure that any new development in AQMAs and clean-air zones is consistent with the local air quality action plan.

## **A roadblock on development**

With such a multifaceted legal and policy position, preparing planning policy and taking decisions can be fraught with complexity.

Take, for example, the case of Epping Forest District Council. The authority's forward planning and decision-making powers have ground to a halt because of the potential adverse impact of any new development within its area on the Epping Forest Special Area of Conservation (SAC).

The site has a special designation because its flora and fauna have significant ecological importance. The SAC – which extends to more than 1,600ha – is sensitive to air pollutants and so Natural England, the government's nature conservation adviser, considers the site to have an unfavourable conservation status in respect of air pollution.

The implications of this for the council's emerging local plan and its decision-making powers are acute. Since 2018, the council's position is that it is unable to process applications which would give rise to any increase in vehicle movements on roads within 200m of the SAC because of the potential impact on air quality. At one stage in summer 2019, more than 70 schemes in the council's area with resolutions to grant were subject to the embargo.

The moratorium on determining planning applications is not the only problem, though – the impasse has left the council unable to progress its emerging local plan. The plan, submitted in autumn 2018 for examination in public, is not expected to be adopted until later this year. The council says it is "exploring every avenue in an attempt to resolve this issue as soon as possible". In the meantime, however, the planning and delivery of much needed homes is on hold.

## ***Shirley* that's pragmatic**

Air quality-based moratoria on development should not, though, become the norm. To the relief of the development industry – as well as decision-makers – the Court of Appeal held in *R (on the application of Shirley and another) v Secretary of State for Housing, Communities and Local Government* [\[2019\] EWCA Civ 22](#); [\[2019\] PLSCS 19](#) that the secretary of state's duty in the Air Quality Directive to prepare and implement an air quality plan is just that. It does not go so far as requiring the secretary of state to ensure compliance with limit values.

The Court of Appeal's conclusion put to bed concerns which had filtered through the market that decision-makers would have to refuse permission in cases where a development would cause limit values to be breached, make significantly worse an existing breach or delay compliance with limit values. Sighs of relief all around, then, as air quality was found not to be “the new daylight and sunlight” – a dubious moniker applied to a ready-baked ground of refusal for schemes not favoured by decision-makers.

That said, the decision in *Shirley* doesn't mean that decision-makers can simply forget about compliance with limit values. Limit values are material considerations relevant to the determination of planning applications. Although breaches do not mandate a particular outcome (ie refusal, as the appellant had sought in the *Shirley* appeal), it is vital for the robustness of decisions that the purpose of the limit values and the importance of the requirements of the Air Quality Directive are set out in the planning authority's committee report and considered fully in coming to decisions.

## **Opportunity knocks**

Beyond its role in the courtroom, however, the planning process has much to offer in the way of improvements to air quality. Indeed, the contribution that development can make to improving air quality has been overlooked to date.

Public Health England found last year that the interventions with the highest potential to be effective in reducing harm from air pollution are those related to traffic, with driving restrictions producing the largest and most consistent reductions in air pollution levels. Working together with highway authorities, the development industry is at the forefront of such traffic-related preventative measures and schemes of mitigation.

Car-free developments are now commonplace, reducing traffic congestion and pollution and encouraging sustainable travel. The deliberate lack of parking spaces and planning obligations restricting parking permits can have a positive effect on emissions in a local area.

Similarly, the provision in developments of other preventative measures such as improved cycling infrastructure, cycle hire schemes and electric vehicle charging points is also proving effective. Simple green infrastructure solutions such as green walls and tree planting can be employed effectively alongside technologically advanced solutions including air filtration systems and low carbon heating solutions.

These initiatives help to make measurable improvements to air quality around developments. Encouragingly, much of the development industry is taking active proactive steps to build them into proposals and not simply begrudgingly accepting planning conditions and section 106 obligations.

## **A breath of fresh air**

Further opportunities to innovate are likely to present themselves as society emerges from lockdown, recognises some of the gains made to date, and reappraises how cities ought to work.

Will Norman, London's walking and cycling commissioner, has said that "things are going to change whether we like it or not". Already, large parts of the capital have been closed to motor traffic to accommodate safe walking and cycling and reduce capacity constraints on public transport as the lockdown is eased. Bristol is fast-tracking a scheme to turn part of its historic centre into a pedestrian and cycle zone.

Not every response to the disruption caused by Covid-19 has been quite so progressive. Greater Manchester has joined Leeds, Birmingham and Bath in delaying the implementation of its clean air zone in the wake of the pandemic, which may be an indication that the e-bike isn't expected to challenge the dominance of the private car just yet.

It remains to be seen whether cities, developers and government have the appetite to build on their good work to date and embrace a green recovery – or whether old habits are just too hard to shake.

*David Wood is a senior associate in the planning team at Hogan Lovells International LLP*

---

## Related Articles

[Guest v Guest and another](#)

[Where next for planning?](#)

[Social value in the era of Covid-19](#)

[The Agriculture Bill and Covid in the countryside](#)

[The business case for healthy buildings and places beyond Covid-19](#)

---



© 2020 Reed Business Information Ltd. All Rights Reserved. RELX and the RE symbol are trade marks of RELX Group plc, used under license.

