

# ***GREEN INFRASTRUCTURE: A STATUTORY CONTEXT?***

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12 November 2008*

- DLA Piper UK LLP
- My work
- Focus of today: Is there a statutory context for Green Infrastructure?

- There's a lot of talk about GI and some relevant policy
- But no direct statutory underpinning, though some existing legislation is relevant
- Focus of today: what law is there to promote GI?
- You need to promote what is there!
- But some clearer duties would be helpful. Anyone taking up the baton?
- And what about National Policy Statements under the Planning Bill.....?

# What is green infrastructure?

- *"A network of multi-functional green space, both new and existing, both rural and urban, which supports the natural and ecological processes as is integral to the health and quality of life of sustainable communities" (PPS 12)*
- *"GI should be designed and managed as a multi-functional resource capable of providing:*
  - *the landscape*
  - *ecological services and*
  - *quality of life benefits**that are required by the communities it serves and needed to underpin sustainability" (Ecotowns, TCPA, 2008)*

Examples of key GI assets (source = NE and others):

- Urban and county parks
- Commons and village greens
- Local Nature Reserves
- SSSIs
- Woodlands/trees
- Allotments
- Historic Landscapes
- Waterways, waterbodies and wetlands
- Public rights of way
- Green corridors

- Potentially a vast array of legislation dealing with those GI assets
- Eg W&CA 1981, Commons Act 2006, Smallholdings and Allotments Act 1908
- Some of the legislation protects *what is there*, rather than requiring *creation of GI assets*
- But is there any legislation *specifically on GI*?
- Leads to 2 specific questions:
  - any legislation requiring GI in *planning policies*?
  - any legislation requiring GI to be considered when making *planning decisions*?
- I will deal with each separately

- No specific statutory requirement for a GI policy either at regional or local level
  - There is legislation requiring national, regional and local policy makers to consider relevant considerations going some way towards GI ie:
    - Reg 3(4) Conservation Regulations 1994
    - Art 10 Habitats Directive
    - s40 NERC (public body biodiversity duty)
    - Appropriate assessment under Habitats Directive/Cons Regs
- BUT these focus on the "ecological services" aspects of GI

- Reg 3(4) Conservation Regulations 1994:
- *"every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions"*
- So national, regional and local policy makers must "have regard" to Art 10 Habitats Directive
- You should point this out!

# Reg 3(4) Conservation Regulations 1994 and Article 10 Habitats Directive

- Article 10 HD:

"Member States *shall endeavour*, where they consider it necessary, *in their land use planning and development policies*, and in particular with a view to improving the ecological coherence of the Natura 2000 network, *to encourage the management of features of the landscape* which are of major importance for wild flora and fauna

Such features are those which, by virtue of their linear and continuous structure ..or their function as stepping stones ...are essential for the migration, dispersal and genetic exchange of wild species"

- Limitations = "endeavour"; "where they consider it necessary"; "have regard to"

## s40 NERC:

- "Every public authority [includes ministers, other public bodies, LPA] must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity
- Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat"

Limitations: "have regard to"

- Art 6(4) Habitats Directive: requirement to do an AA of a plan (eg RSS or DPD) if the plan is likely to have a significant effect on a European site, either alone or in combination with other plans or projects
- Mitigation may need to be provided so as to allow the plan maker to conclude, following the AA, that there will be no adverse effect on the integrity of the European site
- Such mitigation (eg creation of green spaces) may go towards provision of GI
- egs are in the Thames Basin Heath area - but controversial!

What *policy assistance* is there to drive GI in plans?:

## GI required in Regional Spatial Strategies?

- No specific requirement for GI policies in RSSs
- But the RSS:
  - must comply with its statutory objective (s39 P&CPA 1990) to contribute to the achievement of sustainable development
  - should provide a broad strategy for the region...taking into account..... priorities for the environment, such as countryside and biodiversity protection; and .....infrastructure (PPS 11)
  - should incorporate biodiversity objectives...and include policies to conserve and enhance biodiversity at the regional and sub regional levels (PPS 9)

## GI required in Local Development Documents?

- There *is* a specific requirement for GI! The only one:
  - The Core Strategy should be supported by evidence of what physical, social and **green infrastructure** is needed to enable the amount of development proposed for the area, taking account of its type and distribution. The evidence should cover who will provide the infrastructure and when it will be provided (PPS 12)
- LDDs must be in general conformity with RSS (s24(1)(a) P&CPA 2004)
- In devising its [Core] strategy, the LPA should be consistent with national policy and in general conformity with the RSS (PPS 12)

- Networks of natural habitats:
  - Local authorities should aim to maintain networks by avoiding or repairing the fragmentation and isolation of natural habitats through policies in plans. Such networks should be protected from development, and, where possible, strengthened by or integrated within it (PPS 9, para 12)

- What result?
- GI in RSSs? Many draft Regional Spatial Strategies contain policies requiring LPAs to incorporate GI into their own policies and plans (I am told!)
  - eg East of England Plan Policy Env 1
- GI in Core strategies? emerging....(I am told!)

- No specific statutory requirement for GI to be taken into account in planning decisions
- There is legislation that requires decision makers to consider relevant considerations going some way towards GI ie:
  - Presumption in favour of development plan s38(6) P&CPA 1990
  - National policy = material consideration eg PPS 9 (Biodiversity, esp para 12); PPG 17 (Planning for open space, sport and recreation)
  - Reg 3(4) Conservation Regulations 1994 plus Art 3(3) Habitats Directive = KEY!

- Article 3(3) HD:

"Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining and where appropriate developing features of the landscape which are of major importance for wild flora and fauna as referred to in Art 10"; [NB *No ref to plans/policies*]

- Regulation 37 Conservation Regulations 1994 = also key!
- s 40 NERC (public body biodiversity duty)
- Appropriate assessment of a "project"

What about Reg 37(1) Conservation Regs 1994:

"For the purposes of [the T&CPA 1990 mentioned below], policies in respect of the conservation of the natural beauty and amenity of the land shall be taken to include policies encouraging the management of features of the landscape which are of major importance for wild flora and fauna.....

Such features are those which, by virtue of their linear and continuous structure .....

- Reg 37(2): "The enactments referred to in paragraph (1) are section 12(3A) (unitary development plans), section 31(3) (structure plans) and section 36(3) (local plans) Town and Country Planning Act 1990"

Three problems arise with Reg 37!

- 1. Is there adequate transposition?: Does not cover Art 3 HD, only potentially Art 10
- 2. What does it actually mean?: when you read a policy about conservation you can read into that policy other policies encouraging the management of features of the landscape of major importance for wild flora and fauna? But not entirely clear!
- 3. Reg 37 is out of date as it refers to sections of the T&CPA 1990 which have now been repealed by P&CPA 1990, so strictly it does not apply to the present system!

"Buglife" court case re s40 in the context of a planning decision:

- Court considered the tension between (i) duties of an urban development corporation to bring land back into effective use; and (ii) duties under s40 and PPS 9 and said:
  - a "benevolent construction" should be given to planning decisions
  - the "primary" statutory duty to bring the development site back into use "prevailed"
- But an appeal is about to be heard

- No direct statutory underpinning for GI in relation to plans or planning decisions
- Only one direct policy statement re GI relating to Core strategies (in PPS 12)
- There is indirect legislative underpinning for ecological considerations of GI - you need to push those!
- Policies are emerging
- But the legal basis could be strengthened



EVERYTHING MATTERS

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