

CLEAN AIR LONDON
AIR QUALITY DIRECTIVE 2008/50/EC AND PLANNING
OPINION of ROBERT McCracken QC

Introduction:

1. I am asked to advise on the approach which planning authorities should take to the Air Quality Directive 2000/50/EC and the extent to which they should take into account in their decision making present or future breaches thereof, and in particular:
 - (a) whether it is lawful to grant consent for a development which would result in a breach of limit values in the immediate area
 - (b) whether it would be lawful to grant consent for a development which would worsen air quality in an area which is already in breach of limit values
 - (c) whether, in an area where limit values are not exceeded, a lawful grant of consent which worsened air quality would be restricted to circumstances where the development was in accordance with the principle of sustainable development and project related mitigation was included in the scheme.

Synopsis:

2. Because of the admitted, serious, and ongoing breaches by the UK of the limit values of the Air Quality Directive 2008/50/EC planning authorities have a duty in their decision making to seek to achieve compliance with the Directive's limit values.
3. Where a development would cause a breach in the locality¹ of the development they must refuse permission.

¹ subject to paragraphs 49 & 50 below

4. Where a development would in the locality² either make significantly worse an existing breach or significantly delay the achievement of compliance with limit values it must be refused.
5. Where limit values are not exceeded in the locality³ planning authorities must try to prevent developments from worsening air quality and to achieve best air quality, only permitting the former if the development can be justified by the principle of sustainable development as understood in a European Union (not English) sense. Project related mitigation included in the scheme may be material to this assessment. Any action which significantly increases risk to the health of the present generation, especially the poor who are often those most directly affected by poor air quality, would not be compatible with the concept, as health is plainly a need for every generation.

Analysis:

Some General Principles of European Union law :

6. The following general principles apply to public law and the interpretation of domestic law deriving from EU environmental law. Thus they apply to those operating the planning system.
7. The EU constitution provides for a high level of protection and enhancement of the environment and the application of the preventative, precautionary and polluter pays principles (Art 3(3) Treaty on European Union 'TEU' and Art 191 Treaty on the Functioning of the European Union 'TFEU', ex Art 174 EC). The protection and improvement of public health is one of its objectives (Art 6 (1) TFEU)
8. The Court of Justice at Luxembourg regards these principles as critical to the interpretation and application of EU legislation (see eg Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2005] Env LR 14 at [44] ('Waddenzee').
9. A purposive approach is taken to EU legislation (C567/10 Inter Environnement Brussel v Region de Bruxelles [2012] Env LR 30). Exceptions are to be interpreted restrictively. (C-287/98 Luxembourg v Linster [2000] ECR I 6917)
10. Directives impose obligations on member states to achieve particular results (TFEU 288). How member states go about that is for them. But they must achieve the required results.

² see footnote 1.

³ see footnote 1

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (my emphasis)

11. An important, but sometimes neglected obligation, deriving from the last part of TEU 4 (3) is that to refrain from action which would prejudice fulfilment of EU law obligations (see Case C-126/96 Inter Environnement Wallonie v Regione Wallonie [1996] Env LR 625)

'....The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'

12. Article 4 (3) TEU (ex Art 10 EC) and Article 288 TFEU (ex Art 249 EC) have the following effects in combination. National legislation must so far as possible be interpreted so as to be consistent with EU law and its obligations: Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 at [13]. Insofar as domestic legislation cannot be so interpreted it must be disapplied: Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR. 629 at [24].

13. All emanations of the state, such as the courts, and local and national planning authorities (for example PINS Inspectors), have a duty to use their powers to secure the implementation of EU law Case C-103/88 Costanzo [1989] ECR 1839. Domestic courts must enforce the obligations on members states deriving from directives: Case C-72/95 Kraaijeveld v Netherlands [1997] Env LR 265 at [55-61]; Case C-435/97 World Wildlife Fund (WWF) v Autonome Provinz Bozen [1999] ECR I-5613 at [68] – [71]. Lord Toulson and Lord Reed observed in Lumsdon[2015] UKSC 41 at [31]

'...as is sometimes said, the national judge is also a European judge'.

14. Directives, if unconditional and precise, are enforceable by individuals against emanations of the state, such as planning authorities, when they have not been fully and properly transposed into domestic law (R v Durham CC ex p Huddleston [2000] 1 WLR 1484 and C-201/02 Delena Wells v SSE [2004] ECR 1723).

15. The courts have a duty to nullify the unlawful consequences of a breach of EU law: Case C-6/90 Francovich v. Italy [1991] ECR I-5357 at [36]. Case C 201/02 Wells v SSE [2004] ECR I723
16. Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.
17. The importance of the principle that courts should ensure the effectiveness of EU law was illustrated in Case 253/00 Antonio Munoz v Frumar [2003] Ch 328 at [28] and [30-31]. The Court of Justice held that individuals should be able to bring civil actions in respect of breaches of an EU regulations governing description of grapes. The method of implementing the regulation in the UK had been by way of domestic regulations backed by criminal sanctions. Where the domestic regulators had failed to enforce the regulation the individual had to be able to bring a civil action.
18. This suggests that where a Directive has been transposed into domestic law but the implementation is nonetheless failing to achieve the result required by the Directive courts and other emanations of the state should use their powers to remedy the default.
19. The Court of Justice has specifically observed in C 404/ 13 R (Client Earth v SSEFRA) in relation to the Air Quality Directive 2008/50/EC

[52] As regards Article 4 TEU, it should be recalled that according to settled case-law, under the principle of sincere cooperation laid down in paragraph 3 of that article, **it is for the Member States to ensure judicial protection of an individual's rights under EU law.**

[55] '... That consideration [of the possibility of enforcement by individuals] **applies particularly in respect of a directive whose objective is to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.** (my emphasis)

20. The above approach has been consistently taken by the Court of Justice (see for example Case C 237/07 Janecek)

Some General Principles of English Planning Law

21. A statutory obligation of planning authorities in making planning decisions is that they should take account of the development plan and any other 'material considerations' (s70 Town and Country Planning Act 1990). They must decide in accordance with the development plan unless other material considerations indicate otherwise (s 38 (6))

Planning and Compulsory Purchase Act 2004) . The courts have given a very wide interpretation to the phrase 'material considerations'. As Mr Justice Cooke said in Stringer v MHLG [1970] 1 WLR 1281:

'any consideration which relates to the use and development of land is capable of being a planning consideration'

The House of Lords endorsed a broad approach in Great Portland Estates v Westminster City Council [1985] AC 661

22. The potential of a development to cause ill effects off site such as traffic congestion is accepted to be a material, and is in fact a commonplace, consideration in planning decisions
23. Both the ultimate national planning authority, the Secretary of State whose policies direct PINS, and the courts, attach importance to the principles of specialisation and deference whereby planning decision makers leave decisions about pollution control to the Environment Agency and other specialists.
24. The Court of Appeal in Gateshead MBC v SSE (1996) 71 P & CR 350 held that the potential of a development to cause pollution was a material consideration but that a planning authority could defer to specialist pollution controllers (such as the EA under EPR). It was entitled to assume that they would do their job properly. Lord Justice Glidewell, with whom Lords Justice Hoffman and Hobhouse agreed, observed:

'..... the extent to which discharges from a proposed plant will necessarily, or probably, pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission.....

Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a **stringent regime** under the EPA [Environmental Protection Act 1990]. for preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, 'The Secretary of State cannot leave the question of pollution to the E.P.A' (my emphasis).

However it might be appropriate to refuse permission if it was inevitable that the only proper pollution control decision was to refuse a permit under the relevant pollution control regime.

'.....If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by H.M.I.P. to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission.....'

25. The Court of Appeal recently affirmed this approach in Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government [2012] EWCA Civ 379 where Lord Justice Carnwath, with whom Lords Justice Moore Bick and Arden agreed, observed:

[The Appellants submitted that] the inspector was not saying that the emissions were irrelevant to the planning decision, but was simply following the well-established principle, approved by this court in Gateshead MBC v Secretary of State (1971) 71 P. & C.R. 350 (citing the then current policy guidance, which is reflected in similar guidance today) that:

"It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies... Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters".

.....[The Inspector] observed correctly that the *control* of such emissions *in this case* was one for the Secretary of State, **he was entitled** to be guided on this issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as Gateshead'(my emphasis in bold)

26. It is important to distinguish between the absence of an obligation to refuse permission for pollution emission reasons and the absence of a power to decide so to do. Thus the Court of Appeal simply held in Cornwall St Dennis that the SSE was entitled to defer to the specialist decision makers. It does not follow that he would have been acting unlawfully if he had in fact decided to come to his own view on the potential pollution problems.

The London Context:

27. Many important sources of the air pollution in London are diffuse sources such as motor vehicles and domestic space heating. They are not subject to specialist pollution control regimes. Thus the principles of specialisation and deference do not on first consideration seem to exonerate planning authorities from an EU obligation to use their powers to achieve the objectives of the Air Quality Directive 2008/50/EC.

28. Insofar as other sources of air pollution in London are subject to specialist regimes it is clear (see below) that such regimes are not in fact in relation to the requirements of the Air Quality Directive effective, still less 'stringent'.

29. Thus Gateshead abstinence by planning authorities from pollution judgements is inapplicable in places with such serious non compliance.

Transposition of Air Quality Limit Values into Domestic Law

30. The UK has a National Air Quality Strategy produced pursuant to the Environment Act 1995. It seeks to comply with Directive 2000/50/EC through the duty imposed on the Secretary of State under the Air Quality Limit Value Regulations 2003 (S.I.2003/2121).
31. The primary responsibility for compliance with the Directive falls therefore on the SoS. But he has failed so to do in respect of nitrogen dioxide ('NO₂') despite the passage of 12 years since the Regulations were issued.
32. The lamentable failure of the 2003 regulations to achieve the results required by the Directive are clear from the opening words of the judgement of [Lord Carnwath of Notting Hill JSC in R Client Earth v SSEFRA [2015] UKSC 28

'These proceedings arise out of the admitted and continuing failure by the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European law, under Directive 2008/50/EC. The legal and factual background is set out in the judgment of this court dated 1 May 2013 [2013] UKSC 25....'

The specific and limited questions referred to the Court of Justice were answered in its Judgement of November 2014 in Case 404/13. The Supreme court has now ordered the Government to produce a new air quality plan by the end of the year 2015. True it is that the Court of Justice in its judgement referred simply to the duty to produce a plan (see for example [50]). That was, however, in the context of a reference from the Supreme Court in a dispute which related to the extent of the duty to produce such plans.

Does the Directive Merely Require Air Quality Plans?

33. Is the production of an Air Quality Plans enough? In my opinion the answer must be in the negative.

First such plans must be capable of achieving compliance with the Directive or remedying non compliance

'as soon as possible'. (art 23)

Second they must capable of, and subject to, robust enforcement. No doubt many of the measures which would naturally be part of achieving the result required by the Directive would be measures such as regulations directly controlling potentially polluting activities

(such as rules affecting individuals and companies such as controls on type of vehicles, engines or boilers). Hence the Directive requires that national penalties for non compliance with implementing regulations must be

'effective, proportionate and dissuasive' (art 30)

This does not mean that less direct measures such as controls over the amount of, and conditions for, development cannot appropriately be included as part of the overall plan or sometimes be a necessary part of compliance with the Directive.

34. In view of the failure of the organ of state with responsibility in the UK under the transposing legislation to achieve the result required by the Directive other organs of state must use their powers to achieve it if their decision are capable of having a significant effect in relation thereto. Planning authorities may, in my opinion, be in that position in relation to many development proposals.
35. My view is supported by the approach of the Court of Justice to the water quality requirements of the Water Framework Directive which can be viewed in this respect as to some extent analogous. The Court in the Weser case C 461/13 Naturschutz Deutschland v Germany rejected the proposition that the Directive merely required the establishment of plans. It held that it might be necessary to refuse consent for projects It is worth noting in particular the Opinion of Jaaskinen AG at [78-80] and the Judgment of the Court at [32-33] and [42], [47]) and

[50] '..... unless a derogation is granted, any deterioration of the status of a body of water must be prevented, **irrespective of the longer term planning provided for by management plans and programmes of measures.** The obligation to prevent deterioration of the status of bodies of surface water remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has **or should have been adopted.** The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive.' (note also

This suggests that the absence of an adequate air quality plan, or inadequate implementation or enforcement of an adequate, may lead to a duty to refuse consent for projects on the basis of their effect on compliance with the Air Quality Directive.

Significance of the Air Quality Directive 2008/50/EC for the Planning System

36. EPUK and IAQM have asked the DEFRA what implications the Air Quality Directive has for the approach which planning authorities should take. No answer has yet been received. Does this mean that planning authorities can just ignore the problem?

37. My view is that a lawful answer must be that planning authorities must seek in their decision making, insofar as it can have a significant effect, to prevent or reduce the extent of breaches of EU law including the Air Quality Directive. This approach appears to be supported by the National Planning Policy Framework ('NPPF') and the national Planning Practice Guidance ('PPG').

38. A core principle of the NPPF is that the planning system should

'contribute to conserving and enhancing the natural environment and reducing pollution'

39. The PPG 2015 (revision 6.03.14), a 'web based resource' states

'Whether or not air quality is relevant to a planning decision will depend on the proposed development and its location. **Concerns could arise** if the development is likely to generate air quality impact in an area where air quality is known to be poor. They could also arise **where the development is likely to adversely impact** upon the implementation of air quality strategies and action plans and/or, in particular, **lead to a breach of EU legislation (including that applicable to wildlife)**. The steps a local planning authority might take in considering air quality are set out here. When deciding whether air quality is relevant to a planning application, considerations could include whether the development would:

Significantly affect traffic in the immediate vicinity of the proposed development site or further afield.

Introduce new point sources of air pollution.

Expose people to existing sources of air pollutants.

Give rise to potentially unacceptable impact (such as dust) during construction for nearby sensitive locations.

Affect biodiversity. In particular, is it likely to result in deposition or concentration of pollutants that significantly affect a European-designated wildlife site, and is not directly connected with or necessary to the management of the site, or does it otherwise affect biodiversity, particularly designated wildlife sites.' (my emphasis)

The Limit Values of the Directive

40. The Directive has more than one type of quantitative standard. A key type is that which constitutes a 'limit value'. These impose obligations of result. Absent a specific exception or exemption member states must achieve the result. Excuses based on the difficulty of achievement are not admissible. Thus in the Case C-56/90 Commission v UK [1993] ECR I -4109 the Court of Justice rejected the UK's arguments that it was virtually impossible to comply with the mandatory quantitative standards of Bathing Waters Directive 76/160/EEC. The Court of Justice has observed in C- 404/13 R Client Earth v SSE in relation to London's air quality and the Air Quality Directive:

'30 However, it should be noted that while, as regards sulphur dioxide, PM10, lead and carbon monoxide, the first subparagraph of Article 13(1) of Directive 2008/50 provides that Member States are to 'ensure' that the limit values are not exceeded, the second subparagraph of Article 13(1) states that, as regards nitrogen dioxide and benzene, the limit values 'may not be exceeded' after the specified deadline, which amounts to an obligation to achieve a certain result.

34 As regards the question of whether certain circumstances may nevertheless justify a failure to comply with that obligation, it suffices to observe that Directive 2008/50 does not contain any exception to the obligation flowing from Article 22(1).'

[41] [the AQD Art 23] plan must set out appropriate measures so that the **period during which the limit values are exceeded can be kept as short as possible**' (my emphasis)

41. Such standards may be contrasted with others such as 'target value[s]' Art 2 (9) or 'national exposure reduction target[s]' Art 2 (22) which are to be achieved

'where possible' (Art 2 (9)) or 'where not entailing disproportionate costs' (Art 15 (1))

42. If a planning authority were to grant permission for a development which would cause emissions which would lead to a breach of the limit values in the area of the development that would be to take, rather than refrain from, a measure jeopardising the fulfilment of the UK's obligations under the Directive. It would in my view be unlawful unless the principle '*de minimis non curat lex*' applied.

The Relevant Areas for Compliance with Limit Values:

43. Article 13 (1) states that its limit values apply to member states

'throughout their zones'

This must in my view, as the European Commission opine in its letter in response to one of 14th October 2013, be interpreted to mean in every part of the zones rather than in all zones. This is the natural meaning of the quoted words. The purpose of these limit values is to protect human health (see for example Preamble Recitals 1 and 2 and the heading of Article 13). It would not be consistent with that purpose simply to average out levels of pollution within the zones. Very heavy, life threatening pollution could then be tolerated in particular unfortunate localities.

44. The Directive sets out methodologies for assessment of air pollution. These involve the designation by members states of zones. Zones are defined in Art 2 (16) as parts of territory delimited by members states for the purposes of air quality

'assessment and management'

The designation of zones for assessment and management purposes does not imply that the limit values only apply to the average air quality over such areas. That would be inconsistent with the purpose of protecting public health. Individuals human beings do not generally spend their lives spread evenly over air quality zones. A high quality of environmental and public health protection requires such standards to apply throughout the member states of the Union.

45. Any other approach would be inconsistent with the objectives of the Directive, construed in accordance with the fundamental principles of the Treaties.

46. Article 13 requires measurement in accordance with Annex III. Annex III(B)(1)(a) expressly directs that sampling points be placed both in representative locations and in areas where the highest concentrations occur to which the population is exposed for significant periods. This is directed towards ensuring that both the general and most serious risks to groups of people are actually noted. It does not state or imply that other locations which are not sampling points do not have to comply with the limit value.

47. Annex III(B)(1)(g) speaks of the need to locate sampling points on islands. Manifestly such sampling points are directed towards the specific populations of those islands rather than the effects on the zone as a whole.

48. Annex XI sets out the quantitative limit values. The limit values and footnotes explain how measurements are to be assessed in the locations chosen under Annex III. The assessment involves taking measurements over a period of time. It is expressly

acknowledged that some of the assessments require averaging over defined *periods of time*. This is the averaging *over time* of quantities at particular sampling points. It does not expressly state nor does it imply that compliance with the Directive is a matter of achieving a certain average air quality over different sampling points within a zone.

A Common Sense Limitation

49. Three types of location may not be chosen for sampling in respect of human health limit values. They are set out in Annex III(A)(2). They are

- (a) uninhabited areas to which the public have no access
- (b) under Article 2 (1) installations where health and safety at work provisions apply
- (c) road carriageways and central reservations not used by pedestrians.

Sampling there would not produce information relevant to the achievement of the objectives of the Directive. They might in the context of the purpose of the Directive either be falsely reassuring or disturbing.

50. A common sense interpretation of the Directive in accordance with its purpose suggests that in such locations the limit values do not apply. A common sense approach must also be taken to the other macroscale sampling location provisions. They make clear that *sampling* points must be useful as such. They must be representative. It does not follow that the limit values only apply to the identified sampling points.

Worsening of Air in an Area Already in Breach such as London:

51. Unless there are already measures in place which will lead to compliance with the Directive before the development is undertaken then any permission for new development which would significantly increase non compliance with a limit value would in my view be in breach of the obligation to refrain measures which jeopardize the attainment of the EU objectives.

52. The UK Government has admitted that the air quality in London is in breach of the Directive. It concedes that unless some unexpected change of circumstance occurs this will continue for a long time. The air in London, the West Yorkshire Urban Area and the West Midlands Urban Area zones will still be in breach after 2030 (see Supreme Court judgement in Client Earth v SSEFRA [2015] UKSC 28 at [20].)

53. This is no mere technical breach. A substantial number of premature deaths are estimated to be caused in London from poor air quality. Walton et al (KCL 2015) estimate that each year London suffers 5,879 additional deaths from NO₂, and 3,537 from PM 2.5. That is a total of 9,416 additional deaths each year.

54. In these circumstances there is no basis for planning authorities to assume that the SoS or other regulatory bodies can be left to deal with air pollution.

Example: Greenwich Cruiser Terminal Development

55. An example of a development proposal in respect of which the above considerations would apply is the proposal for a cruise liner terminal at Greenwich. Such a development would, I am instructed, be likely to lead to significant emissions of air pollutants and make worse existing breaches of NO₂ limit values in the surrounding area. The local planning authority would in my view have a duty to consider the effects of the development on both London wide and local air quality.

56. The probability is that the only decision on such a proposal which would be consistent with the obligations on all organs of state to take any appropriate measure to achieve compliance with the Directive would be simple refusal of permission.

57. It might be possible to permit the physical works and change of use subject to Grampian condition that no vessel could be accepted until air quality was, and would remain after operations began, compliant with the Directive. This would only be reasonable and compliant with the duty of restraint in TEU 4(3) if measures were in place which could confidently be expected to lead to compliance in a reasonable time scale in the future. (Such a time scale would not extend to 'after 2030'). That might well not be commercially attractive to the developer. But there is no 'commercial attractiveness' derogation provision in the Directive. Nor does a Grampian condition have, as a matter of domestic law, to lead to a commercially attractive outcome.

58. It is also, at least in theory, possible that local site specific compensatory measures could be taken which would lead to a neutral net effect on air quality. Such measures would have to be ones which would not otherwise be undertaken or form part of any Air Quality Plan intended to achieve reduce air pollution to lawful levels.

The Davies Commission and Heathrow Expansion:

59. The Davies Commission into London Airport capacity makes some ambiguous remarks at [26-27] about the relevance of the Directive. There are two points to make.

60. First if the Davies Commission is suggesting that the only relevant requirement is that additional runway capacity should not delay in time average compliance throughout the London zone, then it has misdirected itself on the law. For example:

- (i) The limit values must be met throughout each zone (save in the specifically excepted circumstances).

.(ii) Air quality must not be made even less compliant in areas where it is already in breach'

61. Second: any suggestion that the additional capacity could be constructed but on the basis that it would not be brought into operation until air quality was, and would remain compliant, with the Directive would, in present circumstances, be inconsistent with the duty of restraint in the last part of TEU 4 (3). Unless a robust, realisable, and enforceable Air Quality plan is in place which can demonstrably ensure compliance after such additional capacity comes into operation then the duty of cooperation under TEU 4 (3) requires the UK to refrain from constructing such additional capacity. (see my [11] above)

Where Air Quality is Compliant

62. Article 12 provides that compliance with the limit values is not enough. Where there is such compliance then such values shall be maintained and the members states have a duty to

'...endeavour to preserve the best ambient air quality, compatible with sustainable development'

63. The aim is 'best ambient air quality'. This does not mean mere compliance with limit values. It means what it says. The standard is higher than that of non deterioration (compare the Water Framework Directive 2000/60/EC as discussed in the *Weser* case C 461/13 for example at [55] and [70].)

64. But the obligation is not one of result. It is to try.

65. Planning authorities must try to prevent deterioration and to improve in air quality and only permit the former if the development is in an EU sense sustainable development. Sustainable development, insofar as it must be understood as a qualification, is a limited qualification. The concept of sustainable development is, however, a protean one. It is therefore difficult to say with precision what compromises with best ambient air quality are justified by the implied qualification for sustainable development. The latter concept must be understood in an EU sense (not the English one). It broadly involves meeting the needs of the present, especially those of the world's poor, without preventing the meeting of the needs of future generations (see for example the Opinion of the Advocate General Jaaskinen in the *Weser* case C 461/13 at [6]) . Various formal definitions have been put forward but the most frequently quoted definition is from 'Our Common Future', also known as the Brundtland Report:

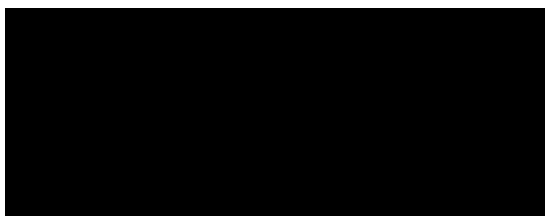
'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of **needs**, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of **limitations** imposed by the state of technology and social organization on the environment's ability to meet present and future needs'

Thus any action which significantly increases risk to the health of the present generation, especially the poor who are, I understand, often those most directly affected by poor air quality, would not be compatible with the concept, as health is plainly a need for every generation.

Conclusions:

66. Because of the admitted, serious, and ongoing breaches by the UK of the limit values of the Air Quality Directive 2008/50/EC planning authorities have a duty in their decision making to seek to achieve compliance with the Directive's limit values.
67. Where a development would cause a breach in the locality⁴ of the development they must refuse permission.
68. Where a development would in the locality⁵ either make significantly worse an existing breach or significantly delay the achievement of compliance with limit values it must be refused.
69. Where limit values are not exceeded in the locality⁶ planning authorities must try to prevent developments from worsening air quality and to achieve best air quality, only permitting the former if the development can be justified by the principle of sustainable development as understood in a European Union (not English) sense. Project related mitigation included in the scheme may be material to this assessment. Any action which significantly increases risk to the health of the present generation, especially the poor who are often those most directly affected by poor air quality, would not be compatible with the concept as health is plainly a need for every generation.



ROBERT McCracken QC

Francis Taylor Building



Long Vacation 2015

⁴ see footnote 1

⁵ see footnote 1

⁶ see footnote 1