LEGAL PLANNING

Brexit, planning and the environment: key questions

The noise of Brexit is in danger of drowning out its immediate practical implications for the planning system, writes Simon Ricketts.

Secretary of state Michael Gove committed in the Department for Environment, Food and Rural Affairs’ 25 Year Environment Plan (published on 21 January 2018) to consulting “fairly in 2018” on “establishing a new world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the European Union.”

The European Union (Withdrawal) Act 2018 was enacted on 24 June 2018. Due to amendments introduced in the House of Lords, section 16 commits parliament to secure that, once we leave the EU and we no longer have the monitoring and enforcement functions currently being carried out by the European Commission and the European Court of Justice, “environmental principles” are maintained (see below) and a new independent body is created to enforce those principles.

Section 16 provides that the draft Environmental Principles and Governance Bill to secure all of this must be published by 26 December 2018. It is not easy.

Key challenges

What approach will be taken, for example, to air quality and air pollution standards? Will the opportunity be taken to adopt an approach that sidesteps in any way the country’s current breaches of the Air Quality Standards Directive? How can we avoid risk that new rules in relation to habitats conservation have led to headaches for scheme promoters and local authorities alike (see www.epicurian.co.uk/legal/new-rulings-on-habitats-negligence-assessments)? But inevitably any moves away from this approach will be seen as a weakening of current environmental protections.

Further complications arise given that England and the devolved administrations of Scotland, Wales and Northern Ireland will not necessarily take a common approach – and the intergovernmental government in Northern Ireland also creates its own specific problem.

Defra’s proposals

In England, Defra started a consultation process on 20 May 2018, which closed on 2 August 2018. The consultation paper set out, in paragraph 2.4, the following basic position:

“Where environmental principles are contained in specific pieces of EU legislation, these will be maintained as part of our domestic legal framework through the retention of EU law under the EU (Withdrawal) Bill. Any question as to the interpretation of retained EU law will be determined by UK courts in accordance with relevant precedents.”

The consultation paper refers to the relevance of the body to the operation of the planning system. In summary, the body would have no role in individual planning policy decisions. The focus of the new body would be therefore on ensuring the correct application of relevant environmental law within the planning system.

It adds that, in relation to wider planning policy, the body could have two roles. First, it could be a key consultee, when certain planning policy is being considered, for example when the National Planning Policy Framework (NPPF) is updated. Secondly, it could provide advice on the implementation of the environmental aspects of existing planning policy and suggest future potential changes. It says: “The government would not be bound to agree to such suggestions, but should consider them alongside wider policy aims.”

What’s the problem?

I have some questions:

1. How detailed will the environmental principles be? Will the principles contain targets in the manner of Defra’s 25 Year Environment Plan or just a generic summary of the principles currently underlying EU environmental legislation – and, if so, how useful will they be?

2. To what extent will the principles overlap with those in, for instance, the NPPF? Will they be irrelevant to decision making in relation to applications, appeals and planning?

3. Will Parliament ratify the principles to a statutory policy statement? What and when will be the consultation process? What parliamentary voting process will be required? And what will be the mechanism for subsequent amendments?

4. Surely it is for the courts to ensure “the correct application of relevant environmental law within the planning system.”

Non-legally binding views from this new authority (beyond views already formally expressed by ministers or government bodies such as the Environment Agency (EA), Natural England or Historic England) may just add confusion.

How can a body be created which does not overlap with existing bodies such as the EA, has a “baked in” constitutional status, and is not susceptible to lobbying and repeated judicial review?

While the proposed body is not intended to be embodied in individual planning decisions, what safeguards will there be as to its potential influence on planning outcomes in other ways, for instance through expressing views on types of development?

To what extent will there be coordination and consistency between England and the devolved nations?

What about the gap between the workings of the European Commission and CIEU’s jurisdiction and the establishment of new regimes within England, Wales, Scotland and Northern Ireland?

30 December 2018 is only the deadline for the draft Bill. How long before the Bill itself is introduced, enacted and brought into force, with this new body operational? If we have a “cliff edge” and a transition period, time will be tight but there may not be a gap. If there is a “no deal”, there will be a period before the promised structure is in place. Indeed there will be no environmental principles in place, nor an independent body to ensure compliance.

When will we have answers?

The Commons Environmental Audit Committee has been conducting an inquiry seeking answers to a number of questions along these lines. I had hoped to conclude the inquiry by August but we still await its report. I hope its conclusions will be available before Defra publishes its draft Bill, although I suspect we have to go back before an actual set of principles start to emerge, alongside clearer ideas as to the nature of the authority that is to be holding sway on all of this.

In the meantime, of course, existing legislation will need to be expunged, via statutory instruments, of any references to EU law, to be replaced by references to new domestic legislation. This is not likely to be a simple process. EU legislation frozen at time of leaving is to be treated as current EU legislation and must be brought into domestic law. But will not be the substantive effect of it likely to be fait accompli? Instead, watch out for the draft Bill and surrounding amendments – and let’s be alert for any unintended implications for our town and country planning system.