Overcoming obstacles to planning major infrastructure projects

Received: 11th June, 2020

Duncan Field
Partner, Town Legal LLP, UK

Duncan Field is a partner at the specialist planning law firm Town Legal LLP. He advises on major infrastructure projects and regeneration schemes around the UK. His experience includes advising on airport expansion projects, deep sea container terminals and logistics facilities, offshore wind farms, the post-Games transformation of the London Olympic Stadium and various mixed use developments in Central London, including the redevelopment of the Old War Office and the regeneration of the Olympia Exhibition Centre.

Town Legal LLP, 10 Throgmorton Street, London EC2N 2DL
Tel: +44 (0)203 893 0370; E-mail: duncan.field@townlegal.com

Abstract The planning system has an important role to play in delivering major infrastructure projects. The obstacles which a promoter of a project must overcome are inherent in any consenting system which is rooted in democratic participation and political accountability. To understand the nature of those obstacles and how they might be addressed requires an appreciation of the process that a project must navigate to secure consent and the influences on the decision maker at each stage of that process. This paper suggests that the prospects for the success of a major infrastructure project and the speed of decision are best served by focusing time and resource on four key areas: the need and justification for the project; policy support for the project; technical assessment; and external and internal communication. The paper explores the considerations which a promoter should address in each of these key areas and identifies three priorities for government in the way the infrastructure planning system is operated.

Keywords: *infrastructure, planning, promoter, need, policy, assessment, communication*

BUREAUCRATIC BINDWEED?

During the daily coronavirus press conference from Downing Street on 14th May, 2020, the Rt Hon Grant Shapps MP, Secretary of State for Transport gave an indication of the consequences of social distancing for public transport capacity as the UK began to make tentative steps towards restarting the economy. He went on to explain that the time during lockdown had been used to fix and upgrade road and rail infrastructure and he finished by announcing additional government spending on future infrastructure.

Against the background of the accelerated delivery of infrastructure and systemic changes in response to the COVID-19 crisis, the Secretary of State went on to question the speed with which infrastructure is delivered in the UK:

> 'If building a new hospital takes 2 weeks, why should building a new road still take as long as 20 years? If GP surgeries can quickly move online, why are most rail passengers still travelling on cardboard tickets? We must exploit our newfound capacity to respond at pace and apply it to rapidly improving our infrastructure. And we must examine why it is that bureaucratic bindweed makes British infrastructure some of the costliest and slowest in Europe to build. Because whilst many will continue to work from home even after this immediate

> crisis … both the long-term transport trend and the pressing need to level-up communities across the country, dictate that infrastructure will be even more important in stimulating our recovery and supporting new jobs.'[1]

Did the Secretary of State have the planning system in mind when he was referring to 'bureaucratic bindweed'?

In truth there are many obstacles to infrastructure projects which exist outside of the planning system and which are responsible for failed or delayed delivery. They include:

- Decisions relating to government financing and investment;
- Failing to attract enough private capital and finance;
- An uncertain climate for financial performance and return;
- Short-term or overly rigid strategies and policy frameworks, which fail to respond to long-term need and fail to accommodate the variability of long-term forecasting;
- The lack of understanding of the benefits of infrastructure among the general public;
- Party politics.

These 'macro' issues are beyond the scope of this paper, but it is important to appreciate that the merits of major infrastructure projects and how well they progress through the planning system are inextricably linked with them. The planning system does not exist in isolation. This is particularly the case at a time such as this, when the country faces unprecedented global challenges in terms of the economy, technological change and not least, the climate crisis.

Of course, the planning system has an important role to play and (if indeed this was his intention) the Secretary of State would not be the first to single it out as a source of bureaucracy and a brake on development, economic growth and productivity. Nevertheless, it is worth reminding ourselves that we live in a post-Eddington/post-Barker world[2] where recommendations to improve the planning system for infrastructure projects have in fact been implemented.[3] We now have two systems for infrastructure planning: development consent under the Planning Act 2008 for Nationally Significant Infrastructure Projects (NSIPs)[4] where they meet certain size thresholds, and planning permission under the Town and Country Planning Act 1990 (TCPA) for everything else.[5]

Are the systems the cause of the bureaucratic bindweed or, rather, is it the way those systems are funded, operated and used? I would venture to suggest that the key obstacles that remain in planning for major infrastructure projects are inherent in any consenting system which is rooted in the principles of democratic participation and political accountability. This paper explores those obstacles and what in practice may be done to overcome them.

INFLUENCES AND PROCESS

An important context for any analysis of the obstacles that a project faces is the tapestry of influences and process through which the project must navigate.

What influences the decision maker? Typically, in making the case for the project, the promoter must address:

- The policy framework;
- The political backdrop;
- People — the local community and other stakeholders.

The importance of the policy framework is clear. In the plan-led system under the TCPA, planning applications must be determined in accordance with

the development plan unless material considerations indicate otherwise.[6] Under the NSIP system, where a national policy statement (NPS) has effect in relation to the category of infrastructure to which the project belongs, the Secretary of State must have regard to the NPS[7] and subject to certain exceptions (including where the adverse impact of the proposed development would outweigh its benefits), decide the application in accordance with the NPS;[8] in addition, representations in respect of an NSIP should not question the merits of a relevant NPS.[9] Policy support in a development plan or NPS therefore adds considerably to the prospects for success and will weigh heavily in the mind of the decision maker.

Politics also has an extremely importance influence on prospects for success when promoting a major infrastructure project; this is the case at both local and national levels.

Under the TCPA and the NSIP systems, decision makers are politically accountable; local authority members and the relevant Secretaries of State (forming part of government) are elected and, generally, will stand for election again after a decision on a project is made. The political difficulty presented by a major infrastructure project is that:

> 'Economic infrastructure has diffuse benefits and concentrated costs, creating small groups of highly vocal "losers" who are likely to oppose projects.'[10]

In other words, while some benefits of a major infrastructure project are local, most are spread regionally or even nationally; by contrast, the adverse impacts of a project are almost always concentrated locally and politicians naturally find it harder to make decisions which have clearly identifiable 'losers'.

It is essential that in making their case, promoters of major infrastructure projects have this in mind; support from political leaders is key and to win that support the merits of a project must speak to their political priorities. Those priorities often include jobs, skills and training at a local level and connectivity, security, trade and economic growth at a national level.

Importantly, political leaders and decision makers listen to people — the local community and other stakeholders such as statutory consultees and non-governmental organisations — and their reaction to a project will dictate the level of objection and support that the project receives and typically the time and difficulty involved in securing consent. A promoter of a major infrastructure project must address this.

As the saying goes, 'you can never please all of the people all of the time', but provision of information, real engagement and effective consultation will minimise opposition (both the propensity for objection and the likelihood of legal challenges) and secure some level of support.

In truth, the NSIP system, with its emphasis on pre-application consultation, exhibits best practice; engagement with communities and other stakeholders (including statutory consultees) must be meaningful and the output of that process must be taken into account by the promoter.[11] This is also best practice in the TCPA system but in general there is no statutory requirement for pre-application consultation,[12] with the consequence that the adequacy of pre-application consultation is rarely examined rigorously by the decision maker and there is an inconsistency of standard across projects.

Knowing the key influences on the decision-making process and the potential obstacles that they present is one thing, but knowing what to do to overcome them and when is also important.

The first step is to understand the procedure that needs be followed in the

consenting process. Broadly speaking, both the TCPA and NSIP systems comprise three key stages (pre-application, application and consent) and several steps within each stage (see Figure 1).

Two of these steps should be uppermost in any promoter's mind: first, the examination (by the local planning authority, a planning inspector under the TCPA system or independent examiner(s) under the NSIP system); and second, the decision. The approach taken at each of the other steps of the process should be dictated by whether the project will stand up to scrutiny under examination and whether a favourable decision on the right terms (and without a successful legal challenge) will be more likely. In practice this means focusing on four key areas:

- Justification;
- Policy support;
- Assessment;
- Communication.

Justification

The justification for a project rests on the promoter's business case and the market-driven or strategic needs that the project is seeking to meet. In practice this underpins everything else.

A robust need case will be required to explain and justify the design and scale of the project, any requirements for land acquisition and the necessity of any adverse environmental effects that may be identified. The need case will only be as good as the deliverability of

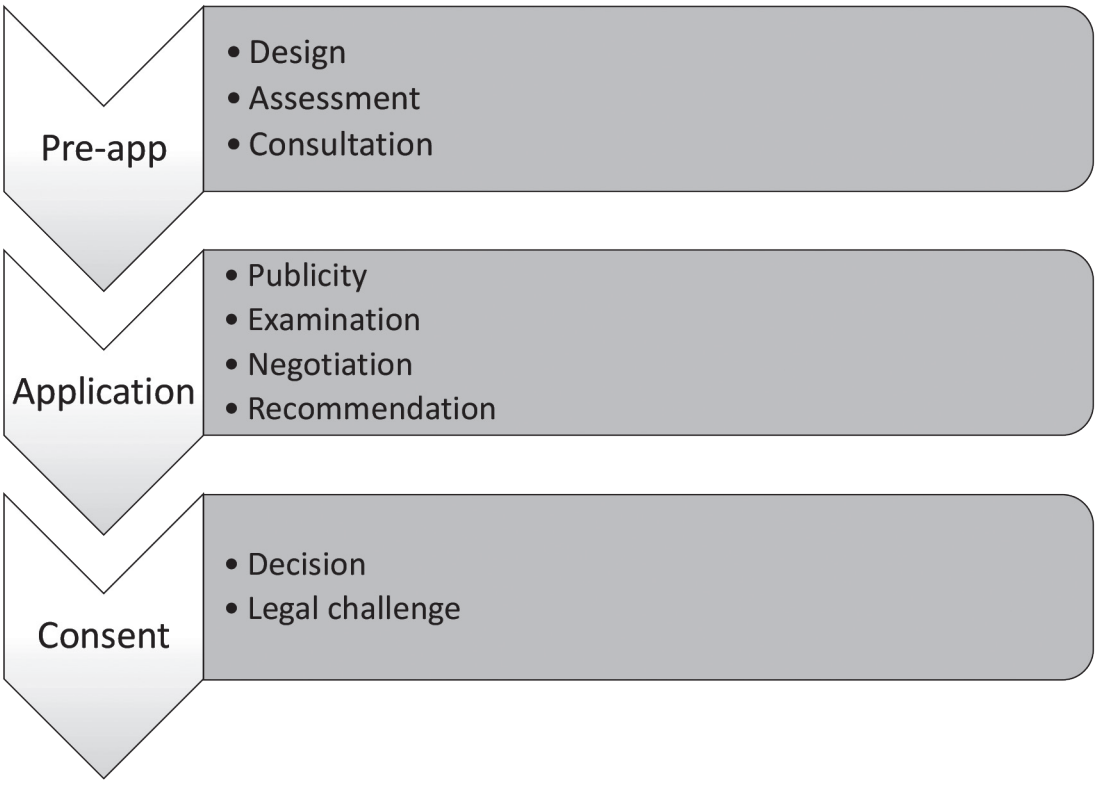

Figure 1: The key stages of the consenting process

Source: Author

the project, however; if consented, there must be a degree of confidence that the project will be constructed and meet the identified need.

Likewise, the public benefits of a project must be clearly ascertainable and presented in a robust way. These will support a compelling public interest case for the project in order to justify compulsory land acquisition and to weigh against the adverse impacts of the project. Typically for most infrastructure projects, these benefits will be socio-economic, but they may also stem from the fulfilment of a policy imperative, eg a target generating capacity from renewable energy sources.

A promoter must assume that any justification for the project will be examined and criticised. Unless the justification is thoroughly tested before it is advanced, this risks creating obstacles for the project. In particular:

- It is important to be realistic in terms of the need that will be met and how. The scope and deliverability of the project must be capable of being evidenced;
- A promoter would be well advised to plan for several contingencies and avoid reliance on one forecasted outcome that may be capable of being unpicked or doubted; this is particularly the case where need is based on long-term forecasting which is inherently uncertain and more vulnerable to changes in assumptions. A better approach in such circumstances is to anticipate and assess a range of outcomes, not a single most likely outcome;
- It is important always to understand the consequences of the need case for the parameters of the project; those parameters will feed into the assessment work and if they are pushed too hard, they could result in unacceptable outcomes, refusal of consent and thus unmet need.

Policy support

As discussed, the policy framework has a significant influence on the prospects for success of a project under the TCPA system[13] and the NSIP system.[14]

An honest assessment of the project against that framework is critical to its merits. Policy support for the project will be a significant advantage in the consenting process; the detail in National Policy Statements for NSIPs also helps to direct promoters to the key issues that need to be considered and assessed in any examination of the project.

It is equally as important to identify areas of non-compliance and uncertainty in policy in order to address these weaknesses expressly and position the project in the best possible way, strengthening the case for granting consent. A project may lack policy cover or specific policy provision; for example, under the NSIP system there is currently no express provision in the Energy National Policy Statements[15] for tidal lagoons or large-scale solar plants. Alternatively, the age of policy may mean that there is insufficient or out-of-date provision on key material considerations such as climate change.[16]

Assessment

The assessment of the effects of a project is the principal area of focus for examination (by the local planning authority, TCPA inspector or NSIP examiner) and the focus for consultation and publicity in the consenting process. All assessment work therefore comes under significant scrutiny in the consenting process and it must be accurate, robust and comprehensive enough to withstand this.

In addition, most assessment work has its own legal framework — for example:

- Environmental Impact Assessment;[17]
- Habitats Regulations Assessment;[18]
- Equalities Impact Assessment.[19]

In such cases, the purpose and content of the assessment work and the procedure to be followed are prescribed by legislative provisions. Failure to comply with those provisions is a common area for legal challenge to infrastructure project consents. Consequently, an important aspect of risk management for any major infrastructure project is the commissioning of an audit of assessment work by experienced lawyers; this audit helps to apprehend and either remove or manage potential pitfalls before they become apparent in the course of examination or subsequently (after the decision) in court proceedings.

Communication

A well-thought-through communication strategy is vital to the success of a major infrastructure project. This should cover three core areas:

- *Statutory and non-statutory consultation*: The consultation undertaken by a promoter must be well designed in terms of its reach, timing and content. This ensures compliance with legal requirements and adherence to best practice; there should be meaningful engagement with the local community and other consultees when proposals are at a formative stage and capable of being influenced by consultation responses;
- *External communication*: Aside from formal consultation, the promoter must ensure that throughout the consenting process the case for the project is communicated in the best possible way to all audiences. This includes the local community, the public at large, local politicians, national politicians, statutory consultees and other stakeholders with special interests and local and national media. Messaging will need to be adapted accordingly, with different levels of technical content and an understanding of the real interests and motivations of each audience;
- *Internal communication*: Major infrastructure projects are often co-ordinated by a large promoter team, which is typically supported by a vast team of specialist consultants and advisers. Clear and effective communication within this group of people is vital to ensure a thorough understanding of the project, as well as the accuracy and consistency of information. In addition — although this is often overlooked — each member of the team has the potential to interact with external audiences, particularly public authorities and statutory consultees; with that comes considerable risk that information is passed over which is either incomplete or otherwise unhelpful or even confidential and (in the hands of a public body) becomes disclosable to the general public.[20] A promoter would be well advised to adopt a set of 'dos' and 'don'ts' in the form of an information-handling protocol which all members of this group follow; this should encourage the careful handling of information and reduce the risk of unintended disclosure.

IN THE HANDS OF PROMOTERS

Drawing this together, to maximise the prospects for success and to overcome the obstacles presented by the influences on decision makers and the procedural steps that must be followed in the consenting process, the promoter of a major infrastructure project should focus on the areas outlined in Figure 2.

Nevertheless, the obstacles in the way of planning for major infrastructure projects and the means by which they can be overcome do not rest entirely in the hands of promoters. Some obstacles require government action.

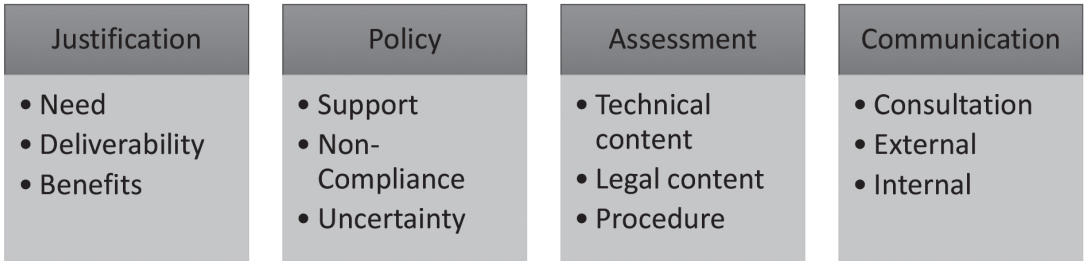

Figure 2: Areas of focus for promoting a major infrastructure project

Source: Author

What can government do?

Periodically there are debates about the fitness for purpose of our planning system(s) and the need for reform, but with the relatively recent (and successful) introduction of the Planning Act 2008, there is unlikely to be either the justification or the legislative time for structural change to the way in which we consent major infrastructure projects. Furthermore, in practice the political focus for planning reform is currently on housing delivery.

Notwithstanding this, even if one accepts that the systems which we now have for infrastructure planning perform sufficiently well and are not in need of reform, government has a critical role to play in the way those systems operate — specifically in terms of the national policy framework and the funding of the systems. Promoters and industry groups must collectively lobby government to play its full part.

In truth, each infrastructure sector has its own wish-list from government, particularly in terms of revising and refreshing policy and incentives to create a more certain, up-to-date framework for investment. In my view, however, at present there are at least three urgent issues for government attention under both the NSIP and TCPA systems. Failure to address these will cause increasingly difficult obstacles for the promotion of infrastructure projects.

Funding

A key issue is how the funding of both infrastructure projects and the infrastructure planning system may be affected by the economic costs and uncertainty associated with the COVID-19 pandemic.

The Office for Budget Responsibility (OBR) has estimated that the impact of the pandemic will be to take public sector net borrowing to approximately £298bn for 2020–1[21] (from an expected level of approximately £55bn); it has also been widely recognised that the UK economy is likely to be in recession by Q3 2020.

There are several implications:

- On 11th March, 2020 the Chancellor of the Exchequer announced £640bn of gross capital investment for roads, railways, communications, schools, hospitals and power networks across the UK by 2024–5.[22] Given the inevitable gap between government spending plans and revenue, will this announcement need to be revisited?;
- How will this deficit be addressed? Almost certainly the government will rely on cuts to public sector funding, but the question is to what degree and how will this affect the infrastructure planning system, from decision makers to public sector stakeholders?;
- The current uncertainty is likely to dampen private sector investment in UK infrastructure. The cost of

deploying capital may be higher for some investors as a result of the effect of the pandemic on financing costs and exchange rates; in addition, some sectors affected by a drop in demand due to lockdown and social distancing (eg the transport sector) may be less attractive.

The government will need to reiterate its commitment to expenditure on infrastructure, ensure that the infrastructure planning system is adequately funded and, more than ever, maintain a stable and attractive policy environment for private investment.

Demand

Long-term planning and investment will be extremely challenging in those sectors affected most acutely by the drop in demand during the COVID-19 pandemic such as roads, ports, rail and airports. This will raise questions about the long-term forecast of demand upon which government policy and individual business cases are based. The same issues may affect other infrastructure sectors as well, although most probably to a lesser extent.

Unless government moves quickly to reinforce the validity of long-term forecasts and associated policy, the promoters of infrastructure projects may well find themselves having to defend the forecast need for their projects and the associated socio-economic benefits against arguments that the pandemic has reset demand and altered societal behaviour and expectations, eg in relation to air quality and health.

Climate

In the words of Greta Thunberg, 'Change is coming, whether you like it or not'. Despite the understandable focus of government on the response to the COVID-19 pandemic and economic recovery, 2019 was the year when the 'climate emergency'[23] rose to the top of the political agenda in the UK and this is unlikely to change.

This has far broader implications than for infrastructure planning alone, but, in that context, the need for government to develop a strategy for achieving net zero[24] emissions by 2050 and to reflect that in infrastructure planning policy is urgent and pressing. Failure to do so will see decision makers having to grapple with climate change impact as a key material consideration in the determination of applications, without a sufficient understanding of the consequences of their decisions for the UK-wide strategy and the UK's part in the global action to tackle climate change. This is already proving to be a focus for objection and litigation;[25] it will create considerable uncertainty and risk for promoters of many types of infrastructure project.

CONCLUSION

Reforms to the planning system for major infrastructure projects in the relatively recent past have been successful. There remain obstacles to infrastructure planning in both the TCPA and NSIP systems, but, in my view, many of these are inherent in any consenting system which is rooted in democracy and political accountability and in practice, much can be done to manage or overcome those obstacles by focusing time and resources on project need/justification, policy support, assessment and communication.

Even in the absence of further reforms, the government has an important role to play in the way in which the planning systems are funded and operated. Critically, in the short term, it must ensure adequate funding for decision makers and other public sector participants, it must review and confirm national need for

infrastructure following the COVID-19 pandemic, and it must urgently set out a clear strategy for achieving net zero emissions by 2050 and the implications of this for infrastructure planning.

Notes and References

1. A transcript can be found at Gov.uk (May 2020), 'Transport Secretary's statement on coronavirus (COVID-19): 14 May 2020', available at https://www.gov.uk/government/speeches/transport-secretarys-statement-on-coronavirus-covid-19-14-may-2020 (accessed 8th July, 2020).
2. Publication of 'The Barker Review of Land Use Planning – Final Report – Recommendations' (Kate Barker, December 2006) commissioned by HM Treasury and Office of the Deputy Prime Minister (as it then was) and publication of 'The Eddington Transport Study' (Sir Rod Eddington, December 2006) commissioned by HM Treasury and Department for Transport.
3. For example the policy and decision making system for Nationally Significant Infrastructure Projects under the Planning Act 2008 and the first National Infrastructure Strategy which is expected to be published by the government later this year as part of its response to the National Infrastructure Commission's National Infrastructure Assessment (July 2018), available at https://www.nic.org.uk/wp-content/uploads/CCS001_CCS0618917350-001_NIC-NIA_Accessible.pdf (accessed 8th July, 2020).
4. Defined by Section 14 ff. Planning Act 2008.
5. Under section 35 Planning Act 2008, however, the Secretary of State may give a direction for a project to be treated as development for which development consent is required even though it does not meet or exceed the size thresholds.
6. Section 38(6) Planning and Compulsory Purchase Act 2004.
7. Section 104(2) Planning Act 2008.
8. Section 104 (3) Planning Act 2008.
9. Section 102(4) Planning Act 2008.
10. 'What's wrong with infrastructure decision making? Conclusions from six UK case studies' (2017), Institute for Government, para. 5, p. 3, available at https://www.instituteforgovernment.org.uk/sites/default/files/publications/Infrastructure%20report%20%28final%29r.pdf (accessed 8th July, 2020).
11. See Sections 42 (Duty to consult), 47 (Duty to consult local community), 48 (Duty to publicise) and 49 (Duty to take account of responses to consultation and publicity), Planning Act 2008.
12. Except for onshore windfarm developments — Section 61W Town and Country Planning Act as applied to onshore windfarms by Part 2 of The Town and Country Planning (Development Management Procedure) (England) Order 2015.
13. Section 38(6) Planning and Compulsory Purchase Act 2004.
14. Section 104 Planning Act 2008.
15. In particular, the Overarching National Policy Statement for Energy (EN-1) (2011) and National Policy Statement for Renewable Energy Infrastructure (EN-3) (2011).
16. An issue that arose in the unsuccessful judicial review of the Secretary of State's decision to make a development consent order for the re-powering of Drax Power Station where the Overarching National Policy Statement for Energy (EN-1) provides that CO2 emissions from a proposed energy NSIP do not provide a reason for refusing a development consent application. See *ClientEarth v Secretary of State for Business Energy and Industrial Strategy* [2020] EWHC 1303 (Admin).
17. Principally regulated by The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/572) and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571).
18. The Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) and The Conservation of Offshore Marine Habitats and Species Regulations 2017 (SI 2017/1013).
19. Referable to the public sector equality duty in section 149 of the Equality Act 2010.
20. As a result of the application of the Freedom of Information Act 2000 or the Environmental Information Regulations 2004 (SI 2004/3391).
21. See King, B. (July, 2020), 'Coronavirus: How much will it cost the UK', BBC, available at https://www.bbc.co.uk/news/business-52663523 and OBR (2020), 'Coronavirus analysis', available at http://obr.uk/coronavirus-analysis/ (both accessed 8th July, 2020).
22. Budget 2020 documents can be found at Gov.UK, see https://www.gov.uk/government/publications/budget-2020-documents (accessed 8th July, 2020).
23. Approximately 67 per cent of local authorities in the UK had declared a 'climate emergency' by the end of 2019; the UK Parliament also declared a climate emergency on 1st May, 2019 and on 27th June, 2019 a new Net Zero target was introduced to the Climate Change Act 2008 (requiring the net carbon account for the UK to be 100 per cent lower relative to the 1990 baseline) through The Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056).
24. The objective that the net carbon account for the UK should be 100 per cent lower relative to the 1990 baseline, as set out in Section 1(1) Climate Change Act 2008, as amended.
25. See for example: *HJ Banks & Company Ltd v Secretary of State for Housing Communities and Local Government* [2018] EWHC 3141 (Admin) (open cast coal mine); *ClientEarth v Secretary of State for Business Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) (Drax power station — see above); *Plan B Earth v Secretary of State For Transport* [2020] EWCA Civ 214 (Airports National Policy Statement and Heathrow Runway 3).