

The Rt Hon Mark Harper MP
Secretary of State for Transport
Great Minster House
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By email to: pocorrespondence@dft.gov.uk

10 April 2024

Dear Secretary of State

TR010055: M3 Junction 9 Improvement

I am writing to you regarding National Highways' response dated 15 March 2024 to your consultation letter of 8 March 2024, and in particular their assessment of the implications of section 245 of the Levelling-Up and Regeneration Act 2023.

Campaign for National Parks obtained a legal opinion on the impact that this important new statutory requirement would have for decision-making on the A66 Northern Trans-Pennine project (TR010062) and submitted that as part of our representations on that particular project. We are gravely concerned that the conclusions in that legal opinion were misrepresented by National Highways in further responses on the A66 project and that they are now insisting that this significant legislative amendment does not require them to do anything differently with regard to their decision-making on the M3 Junction 9 project.

The legal advice we received from [REDACTED] at Landmark Chambers (a copy of which is attached to this letter) makes it absolutely clear that National Highways must now take a much more pro-active and thorough approach to demonstrating how their plans for M3 Junction 9 address the new requirement to "seek to further" the statutory purposes of the South Downs National Park.

The advice states that "relevant authorities should ensure, with evidence, that their decisions do all they reasonably can to further the statutory purposes, including going beyond merely mitigating harm.... if there is an obvious alternative approach that better furthers the statutory purposes and the relevant authority cannot evidence (1) why it cannot reasonably adopt that approach or (2) that its chosen approach also seeks to further the statutory purposes, the decision will be open to legal challenge."

The interpretation in our legal opinion is in accordance with Natural England's interpretation of this new duty as set out in the evidence they submitted to the examination for the A66 Trans-Pennine project (dated 19 January 2024): "the duty to 'seek to further' is an active duty, not a passive one. Any relevant authority must take all reasonable steps to explore how the statutory purposes of the protected landscape... can be furthered....The proposed measures to further the statutory purposes of a protected landscape, should explore what is

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possible in addition to avoiding and mitigating the effects of the development..." (emphasis in original)

It is, therefore, absolutely clear that National Highways must now provide the evidence to demonstrate that it has taken all reasonable steps to seek to further the purposes of the South Downs National Park as part of developing proposals for M3 Junction 9, including showing how it has considered alternative approaches which might better further the purposes, and why these alternatives were rejected. In the absence of such evidence, it is impossible for you to demonstrate that your decision on this scheme complies with this new duty since it also applies to the Secretary of State when making relevant decisions.

Yours sincerely

Ruth Bradshaw
Policy and Research Manager
Campaign for National Parks

Attachment: re. s245 LURA 2023 (Opinion 29.1.24). pdf

O P I N I O N

Introduction

1. I am instructed by the Campaign for National Parks to advise in relation to the duties imposed on relevant authorities by s.245 of the Levelling-up and Regeneration Act 2023 (“LURA 2023”) which relate to National Parks, areas of outstanding natural beauty/ national landscapes (“AONBs”) and the Norfolk and Suffolk Broads.
2. In summary, my views are as follows:
 - a) Section 245 creates a series of important, pro-active duties which require relevant authorities (which include all public bodies, statutory undertakers and government departments) to “seek to further” the statutory purposes of National Parks, AONBs and the Broads. The duties are in force now, and must be complied with as part of any decision or course of action that has implications for these protected areas.
 - b) The duties are comparable in nature to the public sector equality duty in s.149 of the Equality Act 2010, for which the courts have provided a great deal of useful guidance. However, in my view, these new duties are clearly more prescriptive than the s.149 duty.
 - c) Considering the wording of the new duties, and drawing in particular on the long-established case law relating to the public sector equality duty, I suggest some broad principles below which, if applied by relevant authorities as part

of their decision-making, may assist with ensuring compliance with these new duties.

Section 245 LURA 2023

3. Section 245 of LURA 2023 is entitled “Protected landscapes.” It amends the National Parks and Access to the Countryside Act 1949, the Environment Act 1995, the Countryside and Rights of Way Act 2000 and the Norfolk and Suffolk Broads Act 1988.

4. In particular, s.245 makes the following amendments (collectively: “the duties”):

a) Section 85 of the Countryside and Rights of Way Act 2000 is amended as follows (emphasis added):

“(A1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.

(A2) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a devolved Welsh authority must have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.”

b) Section 11A of the National Parks and Access to the Countryside Act 1949 is amended as follows (emphasis added):

“(1A) In exercising or performing any functions in relation to, or so as to affect, land in any National Park in England, a relevant authority other than a devolved Welsh authority must seek to further the purposes specified in section 5(1)¹ and if it

¹ Section 5: (1) The provisions of this Part of this Act shall have effect for the purpose— (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

(2) The said areas are those extensive tracts of country in England as to which it appears to Natural England that by reason of— (a) their natural beauty, and (b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population, it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.

appears that there is a conflict between those purposes, must attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.

”

- c) Section 17A of The Norfolk and Suffolk Broads Act 1988 is amended as follows (emphasis added):

“In exercising or performing any functions in relation to, or so as to affect, land in the Broads, a relevant authority must seek to further the purposes of—

(a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads;

(b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and

(c) protecting the interests of navigation.”

5. In all three cases, the amended provision provides that the Secretary of State may by regulations make provision about how a relevant authority is to comply with the duties (including provision about things that the authority may, must or must not do to comply with the duties).

Interpretation of section 245

The Explanatory Notes

6. Section 245 was inserted by the House of Lords as the Bill made its way through Parliament. The Government’s Explanatory Notes on the Lords Amendments to the Bill for this Act provide that (emphasis added) *“The clause strengthens the duty on certain public authorities when carrying out functions in relation to these landscapes to seek to further the statutory purposes and confers a power to make provision as to how they should do this.”* The duties are therefore clearly intended

...

(3) The said areas, as for the time being designated by order made by Natural England and submitted to and confirmed by the Minister, shall be as known as, and are hereinafter referred to as, National Parks.

to impose new and more onerous requirements with respect to the statutory purposes than existed before.

General principles of interpretation

7. The primary indication of legislative intention is the legislative text, read in context and having regard to its purpose: *Bennion, Bailey and Norbury on Statutory Interpretation*, 11.1. The text is the starting point, and the centre of the interpreter's attention from then on.

“Seek to further” and comparable duties

8. The words “seek” and “further” are common and do not appear in the leading legal dictionaries as terms with specific legal meaning.² The Oxford English Dictionary defines “further” as “*to help forward, assist (usually things; less frequently persons); to promote, favour (an action or movement).*”
9. The precise term “seek to further” has not appeared on the statute book before, other than in the Scottish statutory instrument the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/162, regulation 4 of which provides that an authority in Scotland must publish reasons if its equality outcomes do not “seek to further” the needs mentioned in s.149 of the Equality Act 2010 (the public sector equality duty). There is no useful reported case law on the regulation 4 duty.
10. Notwithstanding the fact that the precise wording “seek to further” does not appear elsewhere in statute, the following similar duties seem to me to be broadly comparable and helpful to consider:

² Jowitt’s Dictionary of English Law; Stroud’s Judicial Dictionary of Words and Phrases; Osborn’s Concise Law Dictionary. “Furtherance” was discussed in *R. v Tearse* (Rawling) [1945] K.B. 1, but that discussion has limited relevance here (it was a case about whether acts done before an illegal strike amounted to the criminal offence of committing acts in furtherance of that strike).

- a) Section 6 of the Environment (Wales) Act 2016 provides that a public authority in Wales must, “in the exercise of its functions”, “seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales.”
 - b) Section 149 of the Equality Act 2010 provides that a public authority, “in the exercise of its functions”, must have due regard to the need to “advance” equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. That includes having regard to the need to “take steps to meet the needs of persons who share a relevant protected characteristic” and “encourage persons who share a relevant protected characteristic to participate in public life” (emphasis added).
 - c) Schedule B1 of the Insolvency Act 1986 provides that the administrator of an insolvent company “must perform his or her functions with the objectives of” rescuing the company, achieving results for creditors or realising property.
 - d) The Civil Procedure Rules provide that the courts must “seek to” give effect to the overriding objective when exercising their powers or interpreting rules (CPR 1.2); and that parties are required to help the court to “further” the overriding objective (CPR 1.3).
11. As with the new duties in s.245, these are all positive duties which must be furthered by the subject of the duty in the exercise of their functions.

Relevant case law

12. I turn now to relevant case law concerning these comparable duties. Unfortunately, there is no useful reported case law concerning section 6 of the Environment (Wales) Act 2016. While there is case law on the CPR duties regarding the overriding objective, much of it is too high level to be helpful. However, there is case law relating to the Equality Act 2010 and, to a lesser extent,

the Insolvency Act 1986. I consider that this case law provides useful guidance to help understand how the new duties imposed by s.245 should be applied.

13. In *re Lehman Bros Europe Ltd (in administration) (No 9) and another* [2018] Bus. L.R. 439, Hildyard J considered the meaning of the administrator duties in the Insolvency Act 1986. His analysis was as follows (emphasis added):

“on a plain reading of paragraph 3(1) of Schedule B1, any such function must be performed with the objective of the administration's statutory purpose. That provision does not, as the Administrators at one point seemed to contend, permit an administrator to perform any of his functions so long as doing so does not conflict with the statutory purpose of the administration. If it had been Parliament's intention to so provide, it could easily have done so. Rather, the statute is clear that any performance of an administrator's function must be performed for, and only for, the administration's purpose.”

14. As to the Equality Act 2010, there is a wealth of case law on the s.149 public sector equality duty. *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 remains the leading case. In particular, I note the following established principles [25]:

- a) An important evidential element in the demonstration of the discharge of the s.149 duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.
- b) A public authority must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision.
- c) The s.149 duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument.

- d) The s.149 duty is non-delegable and continuing.
- e) General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

Natural England's advice

15. I have seen brief advice dated 19 January 2024 from Natural England which states as follows (emphasis in original):

- *the duty to 'seek to further' is an active duty, not a passive one. Any relevant authority must take all reasonable steps to explore how the statutory purposes of the protected landscape (A National Park, the Broads, or an AONB) can be furthered;*
- *The new duty underlines the importance of avoiding harm to the statutory purposes of protected landscapes but also to seek to further the conservation and enhancement of a protected landscape. That goes beyond mitigation and like for like measures and replacement. A relevant authority must be able to demonstrate with reasoned evidence what measures can be taken to further the statutory purpose.*
- *The proposed measures to further the statutory purposes of a protected landscape, should explore what is possible in addition to avoiding and mitigating the effects of the development, and should be appropriate, proportionate to the type and scale of the development and its implications for the area and effectively secured. **Natural England's view is that the proposed measures should align with and help to deliver the aims and objectives of the designated landscape's statutory management plan. The relevant protected landscape team/body should be consulted.***

Analysis

Interpretation of the duty: the words in their context

16. I turn first to the words used in their context:

- a) In all three cases, a relevant authority is defined by the respective section as any Minister of the Crown, “any public body,”³ any statutory undertaker, and any person holding public office.
- b) The duties apply to the exercise of “any functions in relation to, or so as to affect, land in” an area of outstanding natural beauty, national park or the Broads. This wording is very wide in scope.
- c) The relevant authority “must seek to further” the various stated purposes. “Seek” and “further” both imply demonstrable action in the form of assistance and promotion of those purposes. I agree with Natural England’s advice in that regard (and indeed I would endorse it more generally). As with the *Lehman Bros* case, it is not enough that a decision simply does not conflict with these purposes: it must seek to further it.
- d) This seems to me to be a more onerous duty than the public sector equality duty in s.149 of the Equality Act 2010, which only requires “due regard” to be given to the stated objectives. Here, by contrast, the relevant authority must go further than simply having “due regard” to the various purposes: it is required to actively further them. I note in particular that the previous wording in the three acts was “shall have regard to the purposes” rather than “must seek to further”. The amendment therefore evidences a deliberate intention to strengthen the previous duty: if “have regard to” was the same as “seek to further”, then there would be no need for the amendment.
- e) The Secretary of State may by regulations make provision about how a relevant authority is to comply with the duties (including provision about things that

³ I note that a “public body” is one, whether elected or created by statute, which functions and performs its duties for the benefit of the public, as opposed to private gain: *R. v Joy and Emmony* (1975) 60 Cr. App. R. 132. This would include publicly funded companies delivering services for the benefit of the public, and arm’s length bodies such as executive agencies: see <https://www.gov.uk/guidance/public-bodies-reform>.

the authority may, must or must not do to comply with the duties). It is clear that the scope of the duties is intended to be heavily guided by those regulations when they come into effect. However, I note that the duties apply now, i.e. before those regulations have been made. As things currently stand, it would be an error of law for a relevant authority to ignore the duties on the basis that regulations which may never be made have not yet been made.

Principles to help ensure compliance with the duties

17. In the absence of those regulations, it seems to me that the following principles, drawn from the wording of the statute and the comparable case law cited above, could usefully be applied by public bodies and government departments seeking to comply with the new duties:
 - a) The new duties are very broad in scope, applying to “any functions” in relation to, or so as to affect, land in the protected areas. Relevant authorities would do well to assume that if their decision touches in any way upon an AONB, National Park or the Broads, the relevant duty is engaged.
 - b) The duties are pro-active, and not merely an afterthought: the authority must “seek to further” the stated purposes in the exercise of their functions. That means that the duties should be pro-actively considered as part of any decision to which the duty applies. A failure to consider those duties, or a failure to understand their pro-active and mandatory nature, would be an error of law.
 - c) As with the (less onerous) public sector equality duty, an authority must factor in the relevant duty before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision.
 - d) Again, as with the public sector equality duty, it will be important for relevant authorities to record the steps taken by the decision maker in seeking to meet

the statutory requirements and demonstrate how the decision complies with the duty.

- e) While there is no obvious requirement to expressly reference the new duties in every decision, they are not merely a box-ticking exercise, and they must be rigorously applied as part of any relevant decision.
- f) General regard to the benefit of protecting these landscapes is not the same as having specific regard to the statutory purposes, by way of conscious approach to the statutory criteria.
- g) Unlike the public sector equality duty, these duties are outcome-based: they do not simply require “due regard” to be had to them. If, having considered the implications of a decision, an authority reaches the view that the decision does not “seek to further” the applicable legislative purpose, it would be hard to argue that the decision would in fact be open to the relevant authority: because it would appear to be in breach of the applicable duty. In those circumstances, the decision would need to either be withdrawn or modified such that the relevant authority could confidently say that it did seek to further the relevant purpose.
- h) To be clear, however, this does not mean that the duty precludes decisions that are “net harmful” to an AONB, National Park of the Broads: if that were so, the duty would be to “further the purpose” rather than to “seek to further the purpose.” But what is required is positive evidence that the relevant authority has, in all the circumstances, sought to further the purpose: not merely through mitigation of harm but by taking all reasonable steps to further the purpose.
- i) As to whether a decision or course of action *in fact* seeks to further the relevant purpose, I consider that this is a question for the relevant authority in the first

instance, subject to challenge on *Wednesbury* principles. But a positive conclusion that the decision or course of action does seek to further that purpose is clearly required.

18. The above principles are of course subject to any guidance provided by the proposed regulations and/or the courts, which will no doubt be forthcoming. But it seems to me that, if a relevant authority applies these principles conscientiously, it will be less open to a judicial review challenge on the basis of an alleged breach of the new duties.

Questions a relevant authority should ask itself when considering whether it has complied with the duties

19. Applying these principles more practically, when making a decision that is within the scope of one or more of the new duties, it may assist a relevant authority to ask itself the following questions:
 - i. What are the required statutory purposes my decision must seek to further?
 - ii. Does my decision in fact pro-actively seek to further those purposes? If so-how does it do so? If not, how can my decision be modified so that I can confidently conclude that it does seek to further the relevant purposes?
 - iii. As a matter of best practice, have I recorded how I have concluded that my decision seeks to further the required purposes, which I can produce in the event of a subsequent legal challenge?

The duties in practice

20. The most obvious implications for the new duties relate to planning decisions. I do not think that as a matter of law the new duties require the refusal of planning

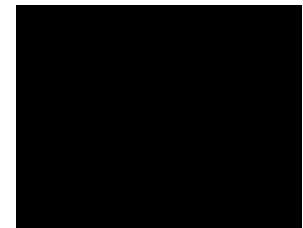
permission for any proposal that would have a net negative impact on the relevant protected spaces. In some circumstances, the duties might come into conflict e.g. where there is a proposal that benefits access to a National Park but harms an AONB: decision-making would be impossible if furtherance of both purposes was mandatory. But in any event, a duty which requires refusal in circumstances where there is net harm would be a duty to “further the purpose” rather than to “seek to further the purpose.”

21. Nevertheless, the clear intention of the amendment is to strengthen the previous duties to “have regard to” the purposes. This is also what the new wording clearly does. Planning decision-makers would be well-advised not treat the new duties as “business as usual” and to consider the pro-active duties now placed on them to seek to further the purposes of AONBs, National Parks and the Broads. I agree with Natural England that this means that relevant authorities should ensure, with evidence, that their decisions do all they reasonably can to further the statutory purposes, including going beyond merely mitigating harm. This could include, for example, delivering enhancements to the natural beauty of the area, or creating new opportunities for the understanding and enjoyment of the special qualities of national parks by the public (rather than merely maintaining or supporting existing opportunities). Moreover, if there is an obvious alternative approach that better furthers the statutory purposes and the relevant authority cannot evidence (1) why it cannot reasonably adopt that approach or (2) that its chosen approach also seeks to further the statutory purposes, the decision will be open to legal challenge.
22. It is important however to highlight that the principles I have suggested above extend beyond merely the planning sphere: all public bodies and government departments and all kinds of decisions are in scope. If a relevant authority makes a decision that engages the duties and it cannot demonstrate that it has done all

it reasonably can to further the statutory purposes as part of the decision, that decision will also be open to legal challenge.

Conclusion

23. I advise accordingly: a summary of my conclusions is set out in the introductory section to this opinion. Do not hesitate to contact me with any further queries.



ALEX SHATTOCK
Landmark Chambers

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