Butterworths Planning Law Service

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LEGISLATION

Nationally Significant Infrastructure Projects – Procedure

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) (Amendment) Regulations 2014 (SI 2014/2381) come into force on 1 October 2014. They make a small change to the application process for nationally significant infrastructure projects by removing the minimum scale requirement for application plans dealing with offshore matters.

Permitted Development Rights – Fees Increase – Prior Approval

The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) (No 2) Regulations 2014 (SI 2014/2026) came into force on 31 July 2014.

They increase the fee payable to the LPA in respect of the prior approval process for two new categories of permitted development rights as introduced in April 2014 by the Town and Country Planning (General Permitted Development) (Amendment and Consequential Provisions) (England) Order 2014 (SI 2014/2026). The permitted development rights in question are those in classes IA and MB that allow a change of use to residential use.

CASES OF INTEREST

A council was entitled to block vehicular access to a property by erecting barriers under the Highways Act 1980

***A4 Metal Recycling v Secretary of State for Communities and Local Government and West Berkshire District Council* (*2014*) *EWHC 2425* (*Admin*)**

In this case the claimant challenged the refusal by an inspector of a retrospective planning permission for the continued use of land for metal recycling and car breaking, the erection of a facilities building and the resurfacing of a bridleway leading to the site. The site is located within AONB. A CLUED had been issued in June 2005 which specified car-breaking and listed other lawful uses, including storing up to 90 vehicles awaiting breaking, the storage and sale of parts removed from vehicles at the site and the storage of substances removed from such vehicles. The 2005 CLUED specifically excluded a number of uses including the crushing of vehicles. In 2012 planning permission was refused for the 'continuation of metal recycling' and in 2012 an application for a CLUED seeking to add 'crushing of vehicles following dismantling and de-pollution to the lawful uses' identified in the 2005 CLUED was also refused.

The claimant challenged the refusal on four grounds including as regards the fallback position. The court dismissed all four grounds.

The court rejected the claimant's argument that the inspector was wrong to take the 2005 CLUED as defining the present lawful uses and that he should have recognised that the use for crushing of metal and general recycling had continued for more than ten years and was thereby a use that had become lawful.

The court held that the application before the inspector was not an application under s 191 of the TCPA 1990 and that the claimant was not entitled to treat it as though it were. The inspector was not entitled to ignore the recent refusal of a CLUED. Further, the lawfulness of the uses claimed by the claimant could not be regarded as beyond doubt and while they were in doubt, the inspector was entitled to make his assessment of whether to accept the claimant's position or to rely on the single CLUED that had been granted.

The court held that the inspector was not primarily being asked to assess what existing uses were lawful; he was being asked to hear an appeal against the refusal of planning permission for those uses. The claimant had made an application for planning permission and the inspector needed to decide whether it should be granted. If an application for permission is made, that is not a claim that the present uses are lawful. Such a claim is not made by an application for planning permission but either by an application for a CLUED or by waiting and if necessary defending an enforcement notice. To

compel the inspector to treat the current uses as lawful, in the absence of enforcement action, the claimant needed to obtain a CLUED specifying them.

The Court of Appeal provides clarification of the meaning of 'likely' in the EIA Directive

An Taisce* (*The National Trust for Ireland*), *R* (*on the application of*) *v Secretary of State for Energy and Climate Change [2014] EWCA Civ 1111

An Taisce challenged the grant of a development consent order under the Planning Act 2008 for the proposed Hinkley Point C nuclear power station in Somerset on the grounds that the Government should have consulted the Irish Government on the trans-boundary effects of the project under Article 7 of the EIA Directive but failed to do so.

The two grounds of challenge were that (i) the Secretary of State for Energy and Climate Change had misdirected himself as to the meaning of 'likely' within Article 7 by 'scoping out' severe nuclear accidents on the basis that they were very unlikely and (ii) that he had erred in relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents.

The Court dismissed the challenge but An Taisce has sought leave to appeal to the Supreme Court on its contention that the likelihood of trans-boundary effects requires consultation.

The Court of Appeal held that while the word 'likely' appears in both the EIA and Habitats Directives, the CJEU has not ruled on the meaning of 'likely to have significant effects on the environment' in the EIA Directive but had done so in the Habitats Directive in the *Waddenzee* case (*Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Bogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*) (*C-127/02*). However, there is a clear distinction between the EIA and Habitats Directives and to adopt the meaning of 'likelihood' (that a significant environmen*tal effect is* 'likely' if it cannot be excluded on the basis of objective evidence) *from the Waddenzee* case would have the effect of both (a) materially increasing the number of projects within Annex II of the EIA Directive which would have to be the subject of an EIA; and (b) increasing the number of 'likely' significant effects that would have to be included in all environmental statements, and consulted upon.

The Court held that that the differences between the scope, purpose and text of the two Directives was such that it would be unduly simplistic to say that, because one part of the text in both Directives is 'essentially similar', the meaning of that part of the text in the context of Article 6(3) of the Habitats Directive as determined by the Grand Chamber in Waddenzee can simply be carried over into the EIA Directive. Instead, the 'real risk' test (that 'likely' connotes real risk and not probability) adopted in the domestic cases such as *R* (*Morge*) *v Hampshire County Council [2010] EWCA Civ 608* and *R*

(*Bateman*) *v South Cambridgehire District Council [2011] EWCA Civ 157* incorporates the protective principle in the context of the EIA Directive.

Challenge to the High Speed 2 safeguarding directions fails

HS2 Action Alliance Ltd, R (on the application of) v Secretary of State for Transport [2014] EWHC 2759 (Admin)

On 6 August 2014 the High Court dismissed the latest challenge to the HS2 project brought by HS2 Action Alliance (HS2AA) and the London Borough of Hillingdon.

HS2AA and the Council challenged the decision of the Secretary of State for Transport to issue safeguarding directions protecting land required for phase 1 of HS2. The original safeguarding directions were issued in July 2013 but have been amended twice to reflect route adjustments.

The claimants argued, as they had done unsuccessfully in the Supreme Court earlier this year that the Government had acted unlawfully in issuing the directions because it should have, prior to doing so, undertaken a Strategic Environmental Assessment (SEA) of the proposed directions under the SEA Directive. The aim of the SEA Directive (and regulations made under it) is to ensure there is a high level assessment of the likely environmental effects of certain 'plans and programmes' which set out the framework for future development consent of projects listed in the EIA Directive.

The claimants argued that because of the failure by the Government to undertake a SEA of the safeguarding directions, the directions were unlawful and should be quashed.

The main consideration for the court was whether the safeguarding directions constituted a plan or programme which sets the framework for future development consent of the HS2 project itself or any other project. In dismissing the challenge, the court was guided by the earlier Supreme Court decision in which HSAA had sought to argue (unsuccessfully) that a SEA ought to have been undertaken of the Government's Command paper titled 'High Speed Rail' published in 2010. The Supreme Court had rejected the argument on the grounds that the Command Paper did not constrain Parliament's consideration of the environmental impacts of the HS2 project. Applying the same principles, the court held it was '… impossible to conclude that the safeguarding directions fall within the scope of "plans and programmes … which set the framework for future development consent of projects …" in article 3(2) of the SEA Directive'.

CONSULTATIONS

DCLG – Technical Consultation on Planning

This consultation paper was issued by DCLG in July. It invites comments on a number of proposals intended to further streamline the planning system.

The title of the consultation paper belies that the changes proposed, not least as regards permitted development rights, could have far reaching effects. The proposals concern the following:

- Neighbourhood plans and neighbourhood development orders
- A further expansion of permitted development rights
- Planning conditions
- Engagement with statutory consultees
- EIA
- Nationally significant infrastructure projects (NSIPs)

Neighbourhood plans and neighbourhood development orders

It is proposed to impose a statutory time limit of ten weeks within which an LPA must decide whether to designate a proposed neighbourhood area as applied for by a Parish Council or a prospective neighbourhood forum. The time limit would apply where the proposed area follows parish or electoral ward boundaries and it, or a part of it, is not the subject of another undetermined application.

The Government is concerned about the time being taken in some cases by LPAs in making such decisions – the average being 126 days, with decision times ranging from 45 to 400 days. LPAs will still be required to publicise area designation applications and invite representations for a minimum of six weeks. The consultation paper also mentions the possibility of further changes to time limits, including the prospect of automatic designation if the LPA fails to make a decision within a prescribed period of time.

Further, it is proposed to drop the requirement for a minimum of six weeks pre-application consultation. The necessity for a consultation statement to be submitted to the LPA would remain but a new requirement introduced to the effect that those with an interest in land proposed to allocated for development must have been consulted – as is the case already as regards neighbourhood development orders. That these requirements have been met would be a 'basic condition' in the TCPA 1990 that has to be met if the plan is to be acceptable.

Provision is also proposed to be made to ensure that proposed plans do not fall foul of the Environmental Assessment of Plans and Programmes Regulations 2004 (ie SEA). Accordingly, proposed neighbourhood plans will have to be screened and the relevant statutory consultation bodies consulted. A neighbourhood plan proposal when submitted to the LPA will have to be accompanied either by a statement of reasons as to why the plan is unlikely to have significant environmental effects (ie a negative screening opinion), an environmental report, or an explanation as to why the plan does not require screening or environmental assessment.

A further expansion of permitted development rights

Another raft of new PD rights is proposed with a view to further streamline the system and encourage development and growth. The proposals affect ten categories of development identified in the GDPO at present. Practitioners will be pleased to note that a consolidated version of the General Permitted Development Order (GPDO) is promised, the 1995 GPDO having been amended over 20 times.

Further changes to the Use Classes Order 1987 are also proposed to form a wider retail use class.

The proposals, in summary, are as follows:

- To permit a change of use to residential use (C3) from buildings in light industrial use (B1(c)) and from buildings in storage and distribution use (B8) provided that the B1(c) or B8 use, as the case may be, existed at the time of the 2014 Budget. Certain types of buildings (eg listed buildings) would be excluded from these rights and there would be a 'prior approval' process as regards certain elements, including (possibly) the impact of residential uses being introduced into an industrial/employment area.
- To permit a change of use to residential use (C3) from buildings in use (as at the 2014 Budget) as launderettes, amusement arcades, casinos and nightclubs, with rights to carry out associated works as reasonably necessary to carry out the conversion. There would be a prior approval process in respect of certain aspects and possibly a floor space limit. Some buildings (eg listed buildings) and areas (eg SSSIs) would be excluded.
- To adjust the PD rights introduced in 2013 allowing office buildings to be used for residential purposes. First, as foreshadowed at the time, the 30 May 2016 time limit for completing the development is proposed to be extended to 30 May 2019. The prior approval process is proposed to be altered in order to consider the effects of the loss of strategically important office accommodation.
- To make permanent changes to PD rights made in May 2013 as regards domestic house extensions (which set new size limits for such development).
- To require express planning permission to be obtained to change the use of a building to a betting shop (and possibly also a pay day loan shop) – in other words to no longer permit under the GPDO a change of use to such uses from the A3, A4 or A5 use classes.
- To revise and rename the A1 and A2 use classes to make them more relevant to current times involving transferring some current A2 uses (eg estate agents) to the new A1 class. Betting shops would remain in A2 and pay day loan shops would be similarly categorised.
- To permit a change of use from use classes A1 and A2 (and also some sui generis uses) to use class A3 (restaurants and cafes) subject to a

150 sq m size limit and also a prior approval process in the case of neighbour objection. The use being changed would have to have existed at the time of the 2013 Autumn Statement.

- To permit a change of use from use classes A1 and A2 (and some sui generis uses) to D2 uses (assembly and leisure) with no size limit but with a prior approval process. The use being changed would have to have existed at the time of the 2013 Autumn Statement.
- To introduce various PD rights for retailers to construct buildings within the curtilage of their premises, to install loading bay doors and to increase the size of mezzanine floors that can be installed under PD rights. These new rights would be subject to various conditions and limitations and are proposed in part as a response to the threat to high street shopping posed by internet shopping.
- To introduce new PD rights for the film and television industries in respect of filming on location. These rights would be subject to an area limitation and would endure for nine months in any rolling 27-month period.
- To introduce new PD rights to allow the installation of photovoltaic (solar PV) panels on non-domestic buildings, up to a 1MW capacity limit subject to a prior approval process and other limitations.
- To make permanent the increase in size limits for certain PD rights introduced on a temporary basis in May 2013 allowing business premises to be expanded.
- To introduce new PD rights for waste management facilities as regards the replacement of buildings, plant and machinery.
- To introduce new PD rights for sewerage undertakings, to bring them into line with certain PD rights already enjoyed by water undertakers.

The consultation paper also invites suggestions upon further increases in PD rights that might be appropriate to decrease the administrative burden on LPAs.

Planning Conditions

The Government is concerned about some LPAs taking too long to process applications for the discharge of planning conditions and about too many conditions sometimes being imposed in the first place, such that even with the benefit of planning permission the developer is faced with a lot to do before any works can start.

Accordingly the Government is keen upon the possibility of conditions, in some cases, being deemed to have been discharged if the LPA has not made a determination within the prescribed time period. Enabling powers for this is being made in the current Infrastructure Bill but in this consultation paper views are sought upon how the procedure might best work in practice.

Some conditions are proposed not be subject to this deeming process, such as where EIA development is involved or where the development in question is likely to have a significant effect upon a qualifying European site, or where the development is in an area of high flood risk. Conditions to the effect that a s 106 agreement or highways agreement must be made before an aspect of the development may proceed would also be exempt as would conditions requiring the approval of reserved matters.

Views are sought upon whether the deemed discharge should be automatic or whether the developer should first serve a notice on the LPA to notify it that the condition will be treated as discharged if no determination is made within, say a two-week period.

It is also proposed that for major developments, the LPA should be required to provide the applicant with a set of draft conditions for consideration and discussion a short time before a permission is issued and what should happen if changes to the proposed conditions are made by the LPA thereafter, perhaps following discussion at a committee meeting.

To meet concerns about the over use of pre-commencement conditions, it is proposed that LPAs must provide a written justification for a pre commencement condition where imposed.

Statutory Consultees

Various amendments to the current arrangements are proposed in order to ensure that statutory consultees do not cause delay and that their resources are used efficiently. In particular the relevant provisions relating to Natural England, the Highways Agency and English Heritage are proposed to be adjusted, as these bodies are those with the greatest number of applications referred to them.

The proposed changes are tabulated in the consultation paper. For example, there would no longer be an automatic requirement for Natural England to be consulted about any proposed development within an area notified to the LPA by Natural England and which is within 2 km of an SSSI. Instead, it would be for the LPA to consult if they consider a development is likely to affect an SSSI.

The proposed changes in respect of English Heritage are more complex not least in view of the complexity of the current arrangements. They are proposed to simplify the position and align the arrangements as regards proposals inside and outside Greater London, where at present different and confusing rules apply. As part of this process it is also proposed to remove English Heritage's power of direction in London. Further the arrangements for notification and referral of applications to the Secretary of State so as to streamline and simplify.

As regards the protection of railway infrastructure, not least in view of an incident in Hackney, where a construction drill penetrated a railway tunnel, it is proposed that the LPA should notify railway infrastructure managers of

any proposed development within 10 m of a railway. At present there is a more limited requirement to consult, relating to likely increased use of level crossings.

It is also proposed to consolidate the Development Management Procedure Order to accommodate these changes and amendments already made to it.

EIA Thresholds

To try and avoid over implementation of the EIA Directive a number of changes to the thresholds whereby EIA is required are proposed to be raised. In particular the screening threshold for industrial estate development is proposed to be changed, by raising it from 0.5 hectares (which catches almost all industrial estates) to 5 hectares.

EIA and 'urban development projects' has always been problematic because of the potential to define an urban development project so widely. It is proposed to raise the screening area threshold from 0.5 hectares to 5 hectares for residential development with a view to excluding from the process (generally speaking) housing schemes of less than 150 units, with a view to reducing the number of screenings for residential development in England from around 1,600 each year to about 300.

Nationally Significant Infrastructure Projects

Various changes are proposed to the way in which such projects are dealt with under the Planning Act 2008 and various regulations made thereunder.

As regards making non-material changes to a development consent order (DCO), adjustment to the relevant regulations is proposed such that the responsibility for publicising the proposed changes and for consultation fall upon the applicant instead of, at present, the Secretary of State carrying out the necessary steps to publicise the application.

As regards material changes to an DCO, the current approval process is broadly as for applying for an DCO afresh. A simpler process is considered appropriate. Consultation would only be required in respect of those directly affected by the change, although the requirement to consult local authorities and other prescribed bodies would not be changed. Some consultation requirements would be removed as would the need for certain documents to accompany the application. It is also proposed to provide in the regulations for no examination to held in respect of scheme changes applications where that is appropriate, or for an examination process of reduced duration where circumstances so dictate.

Guidance is promised upon what constitutes natural and non-material changes in due course, pending the enactment of the Infrastructure Bill, although some useful pointers appear in the consultation paper (e g whether a change to the ES would be appropriate).

Proposals are also included in the consultation paper to allow a further ten non-planning consents to be brought within the ambit of an DCO where the applicant so wishes. At present these consents must be separately obtained

unless the consenting body agrees otherwise. Often they do not. The consents in questions are listed in Annex A of the consultation paper and are required under the Water Industry and Water Resources Acts 1991, the Land Drainage Act 1991 and the Habitats Regulations.

Responses on all matters are requested by **26 September 2014**.

The Proposed Ebbsfleet Development Corporation

In August DCLG published a consultation paper inviting views upon proposals to create this Development Corporation, the precise area in which it should operate, its planning powers and the composition of its Board.

The Corporation is said to be needed to help deliver development and particularly new housing, in the Ebbsfleet, Northfleet and Swanscombe areas. The area has long been regarded as one in the Thames Gateway with particular development potential, although it has been slow to materialise.

Under the Local Government, Planning and Land Act 1980 the Secretary of State can provide, by order that a development corporation is to be the LPA for some or part of its area. It is proposed that the Ebbsfleet Development Corporation will have full planning powers for the whole of its area, invest in infrastructure and to compulsorily purchase land. The Board would be appointed by the Secretary of State. It would not have plan making powers transferred to it, this being beyond the powers in the 1980 Act.

REPORTS/PUBLICATION

Consultation on Planning Performance and Planning Contributions – Government Response

The Government has published its response to responses to March 2014 consultation paper 'Planning Performance and Planning Contributions'. The consultation concerned s 1 of the Growth and Infrastructure Act 2013 under which, in the cases of designated under performing LPAs, planning applications can be made directly to the Secretary of State. Views were sought on changing the criteria originally set for assessing LPA performance for the purpose of this legislation.

Of 145 responses about two-thirds were from LPAs. They were generally supportive of the proposals, with some questioning as to whether speed of decision making was an appropriate measure of performance and that other factors, such as whether an LPA had a local plan in place, should also be taken into consideration.

The Government considers that:

- The 30% threshold (ie decisions on major applications inside time limit) should increase to 40%.
- LPA which have determined two or less major applications within the assessment period should be exempted from designation based on the speed of their decision making.

- The proposed tests for exceptional circumstances such that there would be no designation should be as proposed.

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