Butterworths Planning Law Service

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Filing Instructions: Please file immediately behind the Bulletin Guide card in Binder 1. Binder 1 should now contain bulletins 142–153. This bulletin covers material available until 15 January 2013.

LEGISLATION

New planning application fees: The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 (SI 2012/2920)

These regulations came into force on 22 November 2012 and will remain in force for seven years from that date.

The regulations replace the TCP (Fees for Applications and Deemed Applications) Regulations 1989 and provide for the payment of fees for applications made under Part 3 of the TCPA 1990 for, amongst others, planning permission for development or approval reserved matters, advertisement consent applications, requests for confirmation that a condition attached to a planning permission has been complied with and applications for certificates of lawful use or development and for certificates of appropriate alternative development under s 17 Land Compensation Act 1961.

The Community Infrastructure Levy – New Regulations

The new amending regulations in respect of the levy came into force on 29 November 2012

In summary:

- The regulations provide that where a s 73 variation does not alter the CIL liability in any given case, only the original planning permission will attract CIL. However, where a s 73 TCPA 1990 application leads to

the authorisation of additional floor space within a development, the developer is to pay CIL on the permission that is actually implemented. The 2012 regulations also allow CIL payments made in relation to a previous planning permission to be offset against the liability on the s 73 TCPA 1990 permission. By way of transitional provisions, when the original planning permission was granted prior to a CIL charge being brought in, but a s 73 application is granted following the introduction of a CIL charge, the s 73 permission will trigger CIL only for any additional liability it introduces to the development.

- Article 18 DMPO allows developers to apply to extend the life of planning permissions granted prior to 1 October 2010. The 2012 regulations ensure that these extensions will not trigger CIL liability.
- The regulations correct a technical error in the main CIL liability formula for sites involving both demolition and change of use, to eliminate the risk of developers being overcharged.
- The regulations correct an error that meant that social housing relief could be wrongly granted when a development includes retained housing, some of which will be used for social housing.
- The regulations ensure that the regulations dealing with installment policies set by the Mayor of London and London boroughs operate in a complementary way.
- The regulations allow CIL to be chargeable on development that is granted consent by neighbourhood development orders, including community right to build orders.
- The regulations make technical amendments to implement other changes introduced by the Localism Act 2011.

Order to revoke the first regional strategy is laid in Parliament – 11 December 2012

In a written ministerial statement dated 11 December 2012, the Secretary of State for CLG confirmed that he had laid The Regional Strategy for the East of England (Revocation) Order 2012 (2012/3046) in Parliament. The Order revokes the Regional Strategy for the East of England and all directions preserving saved county structure plan policies within the region. The Order is made under s 109 Localism Act 2011 and came into force on 3 January 2013.

Reduction of information requirements for planning applications to be introduced in England on 31 January 2013

The Department for Communities and Local Government (DCLG) published the 'Streamlining information requirements for planning applications:

Government Response' containing its response to the consultation it undertook between July and September 2012 on proposals to reduce information requirements for planning applications. The Government proposed:

- streamlining the information requirements for outline planning applications;
- encouraging LPAs to keep their list of local information requirements under frequent review; and
- merging the standard application form requirements for agricultural land declarations and ownership certificates.

The Government's response confirmed it will amend the Development Management Procedure Order 2010 (DMPO 2010) which it has now done through The Town and Country Planning (Development Management Procedure) (England) (Amendment No. 3) Order 2012 (SI 2012/3109) which comes into force in England on 31 January 2013. It amends the DMPO 2010 to:

- remove the national requirements to provide details of layout and scale at the outline stage, where they are reserved matters; and
- retain the current requirement to indicate access points at the outline stage, even where access is reserved.

For applications made on or after 31 June 2013, the only requirements which are to apply to a particular planning application are those on a 'local list' which has been published in the two years preceding the making of the planning application.

The standard application form will be amended so that the ownership certificate will include a reference to agricultural tenants, thereby removing the need for the separate agricultural land declaration.

The Government will also review opportunities to simplify design and access statement requirements in the DMPO 2010.

CASES OF INTEREST

Can there be a material change of use by intensification?

Hertfordshire County Council v Secretary of State for Communities and Local Government & Anor [2012] EWCA Civ 1473 (15 November 2012) – Pill, Toulson, Munby

Facts

The Council issued two enforcement notices in May 2009 in which it alleged that a material change of use of the land had taken place and buildings had been erected without planning permission on a scrap metal site owned by Metal and Waste Recycling Limited.

In the subsequent enforcement notice appeal inquiry, the inspector found that despite the output from the scrap metal yard almost doubling from an average annual material throughput of 121,174 tonnes, to 231,716 tonnes, a material change of use had not taken place and there had been no, breach of planning control within the meaning of s 174(2)(c) TCPA 1990. The High Court upheld the inspector's decision. The Council appealed on the grounds that:

- there can be a material change of use merely by intensification of the use;
- a material change of use can be established merely by reference to the effect of the use on neighbouring properties;
- in considering a material change of use, it is necessary to look at what is actually carried on and not at what potentially could have been carried on under the existing permission; and
- in assessing the effect of operations on neighbouring land, it is immaterial whether the impact results from decisions of the operator or as a result of the actions of third parties, such as Government requirements.

Decision

The Court of Appeal dismissed the appeal. It held that intensification of a use is capable of constituting a material change of use as confirmed in a number of cases (*Guildford Rural District Council v Fortescue* [1959] QBD 112, *Lilo Blum v Secretary of State and Another* [1987] JPL 278, *R v Thanet District Council* [2001] 81 P & CR 37). However, the test for deciding whether there has been a material change of use is whether there has been a change in the character of the use and not what a particular occupier's purpose is:

> 'what must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in such a change in the definable character of the use that it amounts to a material change of use. It is necessary to first look at the effects of what has been done at the site.'

The court held that the increase in tonnage was substantial but as the test was whether the character of the use had changed the inspector was entitled to conclude that it had not. The premises were still used as a scrap yard, albeit on a larger scale.

Interpretation of a planning permission

Peel Land and Property Investments Plc, R (on the application of) v Blackburn with Darwen Borough Council & Ors [2012] EWHC 2959 (Admin) (31 October 2012) – Judge Waksman, QC

Facts

Peel Land and Property Investments Plc ('Peel') owns a large retail park which is subject to restrictions, under s 106 agreements, on the type of retail goods that can be sold. Each of the s 106 agreements contains the proviso:

> 'Nothing in this Agreement shall prohibit or limit the right to develop any part of the Site in accordance with any planning permission … granted (whether or not on appeal) after the date of this Agreement.'

Between 2008 and 2011 Peel obtained further planning permissions for the units in the park for various changes including external work, the insertion of mezzanine floors and the division of single units into two units.

Later, Peel applied for certificates of lawful development to the effect that as a result of the later permissions, the provisos were now triggered so that the units were now free of the s 106 restrictions on the type of goods that could be sold. The Council refused to grant the certificates and Peel issued a JR claim against the Council, at the same time as launching a statutory appeal under s 192 TCPA 1990.

A further issue relating to the precise meaning of s 55(2)(a)(i) was raised. S 55(2)(a)(i) states that works of maintenance, improvement or other alteration of any building which only affect its interior are not development. The issue was raised because most of the later permissions were for internal works which, if taken by themselves, would not need permission.

Peel also argued that as a result of s 75(3) TCPA 1990 the altered retail units could be used for the purpose for which they were designed, namely unrestricted class A1 retail use or alternatively, the later permissions created a new chapter in the planning history of the park and because of the proviso, the restrictions in the s 106 agreements that limited the type of retail goods that could be sold no longer applied.

Decision

Peel's claim was dismissed but permission to appeal was granted. The court held that:

- if there are alteration works which include both internal and external works, then they cannot be said to affect only the interior. The correct approach in such cases is to ask what alteration works are contemplated which might require planning permission and then see whether they do.
- S 75(2) and (3) TCPA 1990 provides that where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used and if no purpose is specified then the permission shall be construed as including permission to use the building for the purpose for which it is designed. The court held that the later permissions did not result in new retail units and reliance could not be placed on s 75(3) to argue that the altered retail units could be used for unrestricted class A1 retail use. S 75(3) applies where there is something substantial such as the erection of a building, because only then is it likely that an implicit change of use is involved. In the current case, there was no material change of use as the use of the retail units before and after the alterations was the same.

- The later permissions did not create a new chapter in the planning history of the units and therefore did not enable the planning history of the site to begin afresh. The prior burdens (the s 106 restrictions) and any prior rights were therefore not removed, as in essence the use remained as before.

The court also held that when construing full planning permissions, the nature and purpose of the units could be referred to in the plans and drawings submitted with the application, regardless of whether they were expressly incorporated into the permission. In addition, in principle, where there were communications between the parties which clarified the basis on which an application was made, they were admissible where they were agreed or accepted. However, planning officers' reports were not admissible as they were subjective. The court also held that the essential function of the plans is to show the details of what is sought in the application; it rejected Peel's argument that the plans took precedence. If the plans showed works additional to those described in the application and permission, it did not follow that they formed part of the application or permission. The works in the plans may be there to show the context of the whole scheme of works, even though only a part of those are the subject of the application or permission.

Holiday rental can be a material change of use

Moore v Secretary of State for Communities and Local Government & Anor [2012] EWCA Civ 1202 (18 September 2012) –Longmore, Sullivan

The Court of Appeal held that the letting of an ordinary dwelling house for short term holidays did constitute a material change of use.

Facts

In May 1999 planning permission was granted for the conversion of part of a former hospital to an eight bedroom dwelling. Until 2007, the property was occupied as a dwelling by a single family within Class C3 (dwelling houses) of the Use Classes Order 1987.

From May 2008 Mrs Moore offered the property for hire for short term holidays. An enforcement notice was issued by Suffolk Coastal District Council stating that the use of the property was a breach of planning control. The Council said it was a change of use without planning permission from a C3 dwelling to use as a commercial leisure accommodation, a sui generis use. The enforcement notice required Mrs Moore to stop using the property for commercial leisure accommodation within six months.

Mrs Moore appealed against the enforcement notice under s 174 TCPA 1990. The Secretary of State upheld the enforcement notice and dismissed the appeal on all the grounds. Mrs Moore appealed to the High Court and subsequently to the Court of Appeal.

Decision

The Court of Appeal dismissed the appeal, holding that the change of use was material and that Mrs Moore must cease the letting business.

Mrs Moore argued that where a property is permitted to be used as a dwelling, that use lawfully includes not only occupation by an individual or family as a permanent home, but also the use of that dwelling for holiday or temporary accommodation and therefore there had been no change of use.

The court agreed that it is possible, in principle, for holiday accommodation to fall within the same lawful use as a dwelling house, but that it is a matter of fact and degree in each case whether such use amounts to a material change of use. The Secretary of State had considered the facts, compared the characteristics of the current use to the previous lawful use and was properly entitled to reach the decision he did.

The position is that if a holiday let comprises fairly small accommodation which is likely to be occupied by family groups constituting a single household, then it will not involve a material change of use and will continue to fall within Class C3. However, if there is a larger property with a greater number of guests staying at any one time, then it may fall out of the C3 use into a sui generis use. If this happens, then the ten year rule (not the four year rule) will apply in relation to any claimed immunity from enforcement.

NEWS

Revised criteria on call-in of planning applications under s 77 TCPA 1990 – 26 October 2012

In a written ministerial statement Nick Boles MP, the under Secretary of State for CLG explained the criteria which the Secretary of State will use to determine whether to call in a planning application under s 77 TCPA 1990. The full statement is set out below. The Caborn criteria have not been changed but two additional criteria have been added to the original five.

Nick Boles wrote:

'The Localism Act has put the power to plan back in the hands of communities, but with this power comes responsibility: a responsibility to meet their needs for development and growth, and to deal quickly and effectively with proposals that will deliver homes, jobs and facilities.

The Secretary of State for CLG has the power to 'call in' planning applications for his own consideration. There will be occasions where he considers it necessary to call in a planning application for determination, rather than leave the determination to the local planning authority.

The policy is to continue to be very selective about calling in planning applications. We consider it only right that as Parliament has entrusted local planning authorities with the responsibility for day-to-day planning control in their areas, they should, in general, be free to carry out their duties responsibly, with the minimum of interference.

In the written ministerial statement of 6 September 2012, Official Report, column 29WS, Ministers noted that the recovery criteria already include large residential developments. To align this with the call-in process, we stated we would consider carefully the use of call-in for major new settlements with larger than local impact. Consequently, we have resolved to amend the existing call-in indicators (the 'Caborn' principles, 16 June 1999, Official Report, column 138W).

The Secretary of State will, in general, only consider the use of his call-in powers if planning issues of more than local importance are involved. Such cases may include, for example, those which in his opinion:

- An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.
- may conflict with national policies on important matters;
- may have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority;
- could have significant effects beyond their immediate locality;
- give rise to substantial cross-boundary or national controversy;
- raise significant architectural and urban design issues; or
- may involve the interests of national security or of foreign Governments.

However, each case will continue to be considered on its individual merits.'

New web home for DCLG and DfT from 15 November

The DfT (www.gov.uk/dft) and the DCLG (www.gov.uk/dclg), along with Driving Standards Agency (www.gov.uk/dsa), the Building Regulations Advisory Committee (www.gov.uk/brac) and the Planning Inspectorate (www.gov.uk/pins) became the first Government organisations to move their corporate and policy web content onto the new GOV.UK website – the new single home for all government services and information. The remaining Government departments and organisations are expected to move their information to GOV.UK by March 2014.

A review of judicial review – 19 November 2012

David Cameron's speech to the CBI conference on 19 November 2012 on action the Government has taken so far, and action it will take in the near future, to boost the economy has caused controversy because of its proposals to reform judicial review. The Prime Minister said that the Government would be:

- cutting back on judicial reviews;
- reducing Government consultations;

- streamlining European legislation; and
- stopping the gold-plating of legislation at home.

In a written ministerial statement also published on 19 November, Chris Grayling MP stated that judicial review has significantly grown over the years from 160 applications in 1975 to around 11,000 in 2011. Much of this growth is attributed to the increase in immigration and asylum cases, but planning decisions are also specifically mentioned. The increase in judicial review applications results in unnecessary costs and lengthy delays, and may stifle innovation and frustrate reforms to promote economic recovery. He stated that the purpose of the reforms is not to deny or restrict access to justice, but:

> 'to provide for a more balanced and practicable approach, ensuring that weak, frivolous and unmeritorious cases are identified early, and that legitimate claims are brought quickly and efficiently to a resolution.'

See the consultation published on 11 December 2012.

The Secretary of State for CLG, Eric Pickles, publishes an Explanatory Memorandum on the EU proposals to amend Environmental Impact Assessments – 6 December 2012

On 26 October 2012, the European Commission adopted a proposal for a new Environmental Impact Asessment Directive that would amend the current Directive. On 6 December Eric Pickles published a written ministerial statement in which he stated that the DCLG had published an Explanatory Memorandum setting out the initial response to the proposal.

He stated that DCLG will be consulting in 2013 on the application of thresholds for development going through the planning system in England, below which the EIA regime does not apply. The aim of the consultation is to remove unnecessary provisions from regulations, and to help provide greater clarity and certainty on what EU law does and does not require.

In the statement he lists the number of Directives which have implications for land use planning and voices his frustration that rulings from the ECJ on the Strategic Environmental Assessment (SEA) Directive had added, 'significant delay and complexity' to the administration's progress on the proposed abolition of regional strategies.

The Explanatory Memorandum outlines that the proposals could result in a significant increase in regulation, add additional cost and delay to the planning system, and undermine existing permitted development rights. It also states that although the EC's proposals to streamline the EIA process and introduce provisions to reduce the number of unnecessarily undertaken environmental assessments are supported, the proposals do not achieve the appropriate balance between protecting the environment and imposing burdens on developers.

Possible merger of the Environment Agency and Natural England – 12 December 2012

On 12 December 2012, in a written ministerial statement, the Environment Secretary announced the start of the Triennial Review of the Environment Agency (EA) and Natural England (NE), part of the Government's rolling programme of reviews of non department public bodies. The announcement was accompanied by a discussion paper: Triennial Review of the Environment Agency and Natural England setting out initial ideas on reforming the two bodies. It states that all scenarios are being considered ranging from *'reforms involving significant ongoing change for the EA and NE, but without major change to the current structural form of either body'*, through to, *'single delivery of the EA and NE functions'*.

The preliminary conclusions of the review, which applies to England only, will be published in spring 2013. They will then be examined by a group chaired by Civil Aviation Authority chair Dame Deirdre Hutton.

Comments are invited by 4 February 2013.

Revised Community Infrastructure Levy guidance is published – 14 December 2012

On 14 December 2012, DCLG published the Community Infrastructure Levy Guidance under s 221 PA 2008 which replaces the earlier 'Community Infrastructure Levy Guidance: Charge setting and charging schedule procedures' published in March 2010. The new guidance does not apply to draft charging schedules already submitted for examination before 14 December 2012 – the 2010 guidance continues in relation to those. Any preliminary charging schedules published before the changeover date however, will need to be reconsidered in case any changes are needed. Equally, where CIL has already been adopted, early consideration should be given as to whether any review of the charging schedule is needed in view of the new guidance.

The new updated guidance takes into account the National Planning Policy Framework and the Localism Act 2011 but is not fundamentally different to the 2010 guidance. In particular, the guidance deals in greater detail with the relationship between s 106 agreements and CIL, particularly the issues of being charged twice for the same development.

The guidance also states at paragraph 87 that when CIL is introduced, s 106 requirements should be scaled back to those matters that are directly related to a specific site and are not set out in a regulation 123 list (a list of those projects or types of infrastructure that charging authorities intend to fund through CIL). Furthermore, where the regulation 123 list includes a generic item – such as education or transport, s 106 contributions should not normally be sought on any specific projects in that category.

The guidance states that charging authorities should avoid setting a charge right up to the margin of economic viability across the vast majority of sites in their area.

House of Commons DCLG committee report into the Government's proposals to extend PD rights – 20 December 2012

The Government's plans to extend permitted development rights for home-owners and businesses (a consultation took place between November and December 2012) have received a scathing response from the Commons CLG Committee in its report published on 20 December 2012. The proposals include increasing the size limits for single storey rear extensions from 4m to 8m for detached houses and 3m to 6m for all other houses in non-protected areas, for a period of three years.

The Committee found the Government's arguments that the need to submit planning applications for small domestic extensions was unnecessary and that changes would speed up development and reduce costs *'so tentative, broad-brush and qualified as to provide little assurance that the financial benefits suggested will be achieved.'*

The Government had also failed to address or evaluate the social and environmental arguments put forward against the proposed changes. Its approach has therefore disregarded two of the components of sustainable development as set out in its own NPPF.

The Committee concluded that the case for the changes the Government proposed has not been made and it suggested a number of changes.

CONSULTATION

Two DCLG consultations on extending the NSIP regime to business and commercial projects and expanding the 'one stop shop' approach – 26 November 2012

DCLG has published two six-week consultations on changes to the nationally significant infrastructure projects (NSIP) regime which are considered below.

DCLG: Nationally significant infrastructure planning – Expanding and improving the 'one stop shop' approach for consents – A consultation

This consultation covers the following four matters:

- removal of the requirement to obtain separate certificates and consents from the Secretary of State under the PA 2008;
- better managements of specialised ongoing and regulatory or operational consents;
- removal of certain consents which cannot be included in a development consent order without the consent of the consenting body; and
- reducing the list of consultees.

DCLG: Nationally significant infrastructure planning – Extending the regime to business and commercial projects – A consultation

This consultation invites views on the type and forms of business and commercial projects (and the thresholds) that are to be added to the PA 2008 via the Growth and Infrastructure Bill. It will be up to the applicant to decide whether to use the PA 2008 route and if so, make a request to the Secretary of State, but only if the project is prescribed in the regulations.

The consultation also sets out the criteria the Secretary of State could use to determine whether a project is nationally significant following a request:

- scale of the proposed development;
- possible impacts of the development, especially if they are more than local;
- location, if it gives rise to cross-boundary or national controversy;
- economic impact, particularly where it is likely to be significant;
- for minerals extraction, the rarity and importance of the mineral; and
- whether issues of national security or foreign Government are involved.

It also seeks views on whether one or more National Policy Statements should be produced for the new category of business and commercial development and whether retail developments should be included.

Both consultations closed on 7 January 2013.

Planning performance and the planning guarantee – 22 November 2012

The Planning Performance and the Planning Guarantee consultation published on 22 November 2012 provides details and seeks views on the proposals contained in the Growth and Infrastructure Bill providing the option to make a planning application directly to PINS where the LPA is performing poorly. The Government estimates that the proportion of major applications determined within the 13 week statutory time limit has dropped from 71% in 2008/9 to 57% in 2011–12.

Only LPAs with a 'track record of very poor performance' relating to the speed and quality of decisions on planning applications will be designated as 'performing poorly' and the Government expects to use the power 'sparingly'. A measure of quality will be the proportion of all major decisions made by the LPA that are overturned at appeal, over a two year period. Speed will be based on the number of the major applications determined within 13 weeks (or 16 weeks if subject to EIA) averaged over a two year period. The threshold for designations is where 30% or fewer of major decisions have been made on time *or* more than 20% of major decisions have been overturned at appeal.

Designations would be made once a year and would remain in place for a year. They will be made automatically after the publication of the relevant

statistics on processing speeds and appeal outcomes for the year. The first designations are expected to be made in October 2013.

Major applications supported by Planning Performance Agreements are excluded from assessment as are post-application agreements to extend the timescale for determination provided there is explicit written agreement to the extension of time from the applicant and the agreement specifies a clear timescale for reaching a decision.

In order to make an accurate assessment, the Government needs accurate data from local authorities. To discourage local authorities from withholding unfavourable data, the Government proposes penalty provisions; any authority with a whole year of missing data will automatically be designated as poor performing.

Unitary authorities will have their 'county matters' applications assessed separately from their 'district' matter applications. The Mayor of London, the HCA, the Mayoral Development Corporation and UDCs are immune from designation.

Where a LPA is designated, the applicant will have the option of submitting an application for 'major development' (as defined in the DMPO 2010) directly to PINS, bypassing the LPA. Related listed building consent and conservation area consent applications will also go to PINS. The application fee will be paid directly to PINS and regulations will be amended to ensure fees remain at the same level as those payable to the LPAs.

A designated LPA would still have to carry out certain functions, such as putting up site notices, providing a planning history of the site and undertaking the cumulative impact assessment. It will also continue to maintain the planning register and discharge any conditions. S 106 agreements will continue to be entered into between the LPA and the applicant and will be a material consideration for PINS to take into account.

There will be a presumption that the application will be dealt with by written representations but there will be an option to have short hearings, principally in acknowledgement of the fact there will be no committee stage.

The consultation states that PINS will initially be required to determine 80% of cases within 13 weeks (or 16 weeks where an EIA is required) and other than judicial review there will be no right of appeal from a PINS decision, as is currently the case for appeals against non determination.

A policy statement will be published once the Bill receives Royal Assent. It will set out the criteria for assessing LPA performance and the thresholds for designating any LPAs.

The consultation also sets out further details on implementing the planning guarantee announced in the March 2011 Plan for Growth under which cases are expected to spend no more than 26 weeks with the LPA or PINS. As an additional incentive for LPAs and PINS to meet the guarantee, the consultation proposes refunding the planning application fee where a planning application remains undetermined after 26 weeks.

The planning guarantee will not apply to: applications which are the subject of a PPA, planning appeals subject to a bespoke timetable, recovered appeals and call-ins, enforcement appeals or those re-submitted for re-determination following a successful JR.

The consultation closed on 17 January 2013.

Changing the planning appeal procedures

In the November 2011 Autumn Statement, the Government announced that it would review the planning appeals process to make the process faster and more transparent, improve consistency and increase certainty of decision timescales. The Technical review of planning appeal procedures: Consultation published on 1 November 2012 proposed changes to the appeal process but made no change to the existing appeal time periods: six months from the date on the decision notice/expiry of the period in which the LPA had to determine the application or 12 weeks for householder appeals.

The consultation proposed the following changes:

- Submission of appeal statements – requiring the appellant to submit their full appeal statement as part of their grounds of appeal at the same time as submission of the appeal.
- Notification of interested parties – LPAs notify interested parties within one week (rather than the current two weeks) after they have received notice of a valid appeal.
- Statements of Common Ground – the Development Management Procedure Order and the Inquiry Rules are to be amended so that the appellant will be required to submit a first draft of the Statement of Common Ground containing the factual background to the case at the time they make the appeal. Currently, the Statement is required six weeks after the start of the appeal. The LPA would then have until week five to negotiate with the appellant a final version of the Statement. There will be an assumption that a Statement is agreed if the LPA does not tell the appellant that they disagree with it. The consultation also suggests that there may be merit in asking for a Statement of Common Ground for other appeal routes, such as hearings.
- Date of appeal hearings and inquiries – currently, the appeal hearing should be held within 12 weeks of the start date, or an inquiry should be held within 20 weeks of the start date (unless considered impracticable by the Secretary of State). The consultation states that only around 20% of hearings are held by week 12 and 60% of inquiries by week 20. It proposes new timings so that an inquiry is held within 16 weeks and hearings within 10 weeks after the start date unless such a date is considered impracticable.
- Number of witnesses and length of time – making it a requirement that parties provide information on the appeal forms of the number of witnesses and the length of time they need to give their evidence. Powers will be given to inspectors to hold parties to their forecast time

estimates and award costs. The consultation states that *'New separate legislation will enable inspectors to initiate costs in the future.'*

- Establishment of an expedited commercial appeals service – for appeals on some minor commercial planning applications. The type of appeals are: advertisement consent appeals; appeals on changes to shop fronts; change of use and other minor development that relate to straight forward proposals of under 1000m2.
- Householder appeal statements – will be subject to a word limit.
- Other planning related appeals – the existing rules and regulations will be amended so that PINS will be able to determine the procedure (in consultation with appellants and LPAs) for other types of appeals, such as advertisement consent, LBC and Lawful Development Certificate appeals. The proposed change will, for example, enable PINS to choose the most appropriate procedure where a listed building consent appeal is linked to a planning permission appeal.
- Enforcement appeals – amending the enforcement appeals rules to bring them in line with the proposed changes to the s 78 TCPA 1990 appeals, including removal of the stage at which parties could make additional comments (week 9 stage).
- Appeal procedures rules and regulations merger – the intention is to simplify and merge the statutory instruments where this would be helpful to users.
- One guide to planning appeal procedures – the Government proposes to issue a single, streamlined, clear procedural note on appeals to replace the current suite of guidance documents including the existing planning circulars and other formal procedural guidance, as well as the 17 good practice advice notes issued by PINS.
- Other non-regulatory actions – the consultation also proposes moving towards more online appeal submissions, the revision of the current criteria that PINS use to determine the correct procedure for planning and enforcement appeals and the extension of the bespoke procedure currently applying to around 10% of inquiries.

Annex A of the consultation contains a useful comparison table of the key stages in the current and proposed revised planning appeal process and also contains a timeline for s 78 planning appeals. Annex B sets out a list of all the relevant Regulations and guidance notes on appeal procedures.

The consultation closed on 13 December 2012.

Simplification of guidance on the Habitats and Wild Birds Directives – 11 December 2012

Following the recent review of the Habitats and Wild Birds Directives Defra has published Habitats and wild birds directives – Simplification of guidance in England – A consultation which seeks views on two matters:

1. Evaluation of the clarity and effectiveness of the large body of existing guidance published by the Government, agencies and the EC. The intention is to move towards a 'pyramid structure'. This is likely to be primarily web-based, with clear sign-posting to point customers quickly to the guidance they need. The new overarching guidance will provide a common reference point for quick start guides explaining the requirements in simple terms and to detailed technical guidance where needed. Recommendations will be published in March 2013 on how the guidance should be simplified, with actions following thereafter.
2. Draft new overarching guidance providing an overview of the sites and species requirements of the Directives. The consultation document is accompanied by draft Core guidance for developers, regulators & land/marine managers. The draft guidance is split into three modular sections covering: the 'appropriate assessment requirements' which apply to plans or projects which may affect European sites; the application of 'derogations' rules under Article 6(4) and the 'protected species requirements' relating to animals and plants, European protected species protected by the Habitats Directive and wild birds protected by the Wild Birds Directive. The guidance is intended to be non-statutory and aims to establish broad principles to which regulatory decision makers must have regard, particularly in borderline cases.

The consultation closes on 5 February 2013.

Proposals for Judicial Review reform – 13 December 2012

David Cameron's speech to the CBI on 19 November 2012 on proposals to cut back on judicial reviews generated much press coverage and comments. The rationale behind the speech and subsequent MoJ proposals is to halt the increasing number of applications for judicial review which have risen dramatically from 160 in 1974 to over 11,000 in 2011.

On 13 December 2012, the MoJ published a consultation on reforming the judicial review procedure in England and Wales in three areas as follows:

- Time limits – Changing the time limits for applying for judicial review from the current 'promptly and in any event not later than three months after the grounds to make the claim first arose' to within 30 days of when the claimant knew or ought to have known of the grounds of claim in relation to procurement cases. Following the Uniplex case, this 30 day time limit already applies to challenges to the majority of procurement decisions brought under the Public Contracts Regulations 2006. The Government is proposing that all judicial review challenges (based upon the 2006 Regulations) be subject to a 30 day time limit. For planning permission decisions, a six week time limit is proposed reflecting the statutory appeal provisions in the TCPA 1990. Any challenge to a continuing breach or cases involving multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incident of the grounds.

- Permission stage – Currently, an application for judicial review is normally dealt with on paper and if it is refused, the claimant has an unqualified right to request an oral hearing. If permission is refused at the oral hearing, then permission can be sought to appeal to the Court of Appeal. The Government is keen to tackle what it sees as too many opportunities for claimants to argue their case and seeks views on two complementary or alternative options: first, removal of the right to an oral hearing where there has already been a prior judicial hearing on substantially the same matter; and/or removal of the right to an oral renewal in cases which a judge has ruled are 'totally without merit'.
- Fees – Introducing a new fee payable when an application is made for oral renewal. This fee would be equal to the level of the fee for the full JR hearing, currently £215 but potentially increased to £235 (this has been consulted on separately). The fee for a full judicial review hearing would be waived if the claimant is successful at the oral renewal hearing.

The consultation closes on 24 January 2013.

The consultation document states that the reforms are not intended to deny or restrict access to justice, but to provide for a more balanced and proportionate approach. What the consultation leaves unclear is at what point the grounds of challenge arise. Following Birkett, in planning cases, it is currently the date on which the planning permission under challenge is actually issued, rather than the date of the committee resolution. The suggestion that time should run from the earliest date on which grounds of challenge arose could, in principle, put the date back to the original committee resolution and will remove much of the certainty provided by Birkett. In addition, matters can change between the resolution being passed and a planning permission actually being issued, and the LPA must take into account any change of circumstances between the resolution being passed and the permission being issued (see *Kides v S Cambs DC* [2002] EWCA Civ 926). Accordingly grounds of challenge (or additional grounds) might well arise between these two dates and may result in premature JR claims.

Changes to increase PD rights for extensions to homes and business premises in non-protected areas

On the 12 November 2012, DCLG published Extending permitted development rights for homeowners and businesses: Technical consultation. The Government proposed *'to make it quick, easier and cheaper to build small-scale single-storey extensions and conservatories, while respecting the amenity of neighbours.'*

The consultation estimated that 20,000 new extensions could generate up to £600m of construction output, supporting up to 18,000 jobs. In addition, each family who benefits will save up to £2,500 in planning and professional fees, with total savings of up to £100m a year.

The Government proposed changes to the following parts of Schedule 2 of the General Permitted Development Order (GPDO) 1995 where property is

not in a protected areas as defined in Article 1(5) (National Parks, Areas of Outstanding Natural Beauty, conservation areas, World Heritage Sites, Norfolk and Suffolk Broads) and Sites of Special Scientific Interest. In addition, the changes will only be in force for three years from the date the regulations implementing the changes come into force in recognition of the current economic circumstances which require 'exceptional measures to assist hard-pressed families and businesses and to stimulate growth'. In a departure from the normal position, developments would need to be completed within the three years and to ensure this is done; the LPA will need to be notified on completion of the development. How the LPA will check if the notice is given but the development is not completed until after the three years is not explained.

The measures proposed were:

- Single-storey rear domestic extensions under Part 1 Class A (development within the curtilage of a dwellinghouse) – to increase the size limits for the depth of single-storey rear domestic extensions from 4m to 8m (for detached houses) and from 3m to 6m (for all other houses). No changes are proposed for extensions of more than one storey and flats are excluded. All other limitations and conditions contained in Part 1 class A would remain.

- Conversion of garages under PD rights for use by family members – the consultation seeks views on whether more can be done to make it easier to convert garages into family annexes. Currently, improvements/alterations to garages under Part 1 Class A are allowed if the garage is attached to the house or under Part 1 Class E if it is freestanding.

- Extensions to shops and financial/professional services establishments under Part 42 Class A – to increase shop and professional/financial services establishments size limits for extensions from the current 50m2 (provided the gross floor space of the original building is not increased by more than 25%) to 100m2 (and 50% respectively). They should also be allowed to build up to the boundary of the premises, except where the boundary is with a residential property (when the requirement to leave a 2m gap would remain). All other limitations and conditions would remain.

- Extensions to offices under Part 41 Class A – to increase the size limits for extensions to offices from the current 50m2 (provided the gross floor space of the original building is not increased by more than 25%) to 100m2 (and 50% respectively). All other limitations and conditions would remain.

- New industrial buildings under Part 8 Class A – to increase the size limits for new industrial buildings within the curtilage of existing industrial premises from the current 100m2 (provided the gross floor space of the original building is not increased by more than 25%) to 200m2, (50% respectively). All other limitations and conditions would remain.

The consultation also proposed removing some prior approval requirements for the installation of broadband infrastructure (cabinets, telegraph poles and overhead lines) under Part 24 of the GPDO 1995 on Article 1(5) land for a period of 5 years. All works will have to be completed within the 5 years to count as PD. The prior approval requirement will continue to apply in SSSIs.

The consultation closed on 24 December 2012.

Revised guidance on the award of costs in England against statutory consultees – in force from 18 December 2012

On 18 December 2012 DCLG published its response to the consultation DCLG: Statutory consultee performance and award of costs – Summary of responses it undertook between July and September 2012 on proposals to amend the Costs Circular (Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings) in relation to statutory consultees and their advice at appeal.

As a consequence of the consultation, the Costs Circular has been amended to reflect the fact that where a LPA has relied upon the advice of the statutory consultee in refusing an application then the statutory consultee would be expected to substantiate its advice on appeal. The statutory consultee may be required to attend the appeal as a party to the decision where significant weight is placed by the LPA on that advice and so may be liable to an award of costs to or against them. Amendments are also made to deal with accuracy of information supplied by the applicant and the LPA, and to deal with the deliberate concealment of evidence.

Annex B to the response document includes an addendum to the Costs Circular which was published on the GOV.UK website on 18 December 2012 and will apply to all appeals under the Planning Acts in England submitted after that date.

The Government hopes these amendments will lead to behaviour change and improve the quality of statutory consultees' engagement in the planning system. However, it is acknowledged that there is a risk that statutory consultees may become more cautious when giving advice.

Taylor review of planning guidance and a consultation on proposed changes – 21 December 2012

On 16 October 2012 Lord Taylor of Goss Moor was asked by the DCLG to chair a review of the existing planning practice guidance which supports planning policy with the aim of streamlining it. On 21 December, Lord Taylor published his findings and recommendations. Following a detailed review of more than 200 documents the review concludes that the present suite of guidance is unfit for purpose and requires a complete overhaul. In particular:

- there is an assortment of material comprising statements, circulars, letters from the chief planning officer etc. which fall under the banner of 'guidance' purely by virtue of being published by DCLG;

- some documents are out of date and there is no effective system in place to review and keep documents updated;
- best practice guidance notes contain unnecessary commentary and outdated case studies;
- many out of date documents contain nuggets of important information which can be extracted;
- the practice of amending rather than replacing earlier material means that reference has to be made to a number of documents to gain a complete picture which can be dangerous and misleading;
- guidance simply sets out what is in legislation and policy, and leads to a culture of reliance and of bad legislative drafting (if legislation was clearer, then guidance would not be needed to clarify it); and
- the use of the Chief Planner's letters and circulars to highlight and explain changes or current issues further confuses issues.

In conclusion:

> 'historic accumulation of out-of-date, contradictory and unmanageable material must be brought to an end, whittled down to an essential, coherent, accessible and well managed suite of guidance that aids the delivery of good planning.'

The review makes 18 recommendations to tackle the above problems including, making the guidance a web-based, live resource, hosted on a single site as a coherent up-to-date guidance suite which should be actively managed to keep it current. Furthermore, the recommendation is that PINS guidance should be incorporated.

The review recommends an urgent consultation on the recommendations with changes being brought into force as soon as possible with the aim of completing the immediate cancellation of out of date guidance, work on the preparation of the website and the urgent task of updating guidance by 28 March 2013. A second consultation is recommended once the new wed based guidance is live.

As recommended by the review on 21 December 2012 DCLG published a short consultation seeking views on the recommendations. The consultation closes on 15 February 2013.

Serving of Temporary Stop Notices in respect of caravans used as main residence – 21 December 2012

The DCLG published The Changes to Temporary Stop Notices: Changes to SI 2005/206 on 21 December 2012 seeking views on proposals to revoke the TCP (Temporary Stop Notice)(England) Regulations 2005 (SI 2005/206).

Currently, these regulations prohibit temporary stop notices being used in respect of caravans that are main residences unless the local council consider

that the risk of harm to a compelling public interest is so serious as to outweigh any benefit to the occupier of the caravan.

The revocation of the regulations would give local councils greater freedom to make a decision on the basis of local circumstances.

The consultation closes on 13 February 2013.

REPORTS/PUBLICATIONS

Defra guidance on the Habitats and Wild Birds Directives is published – 11 December 2012

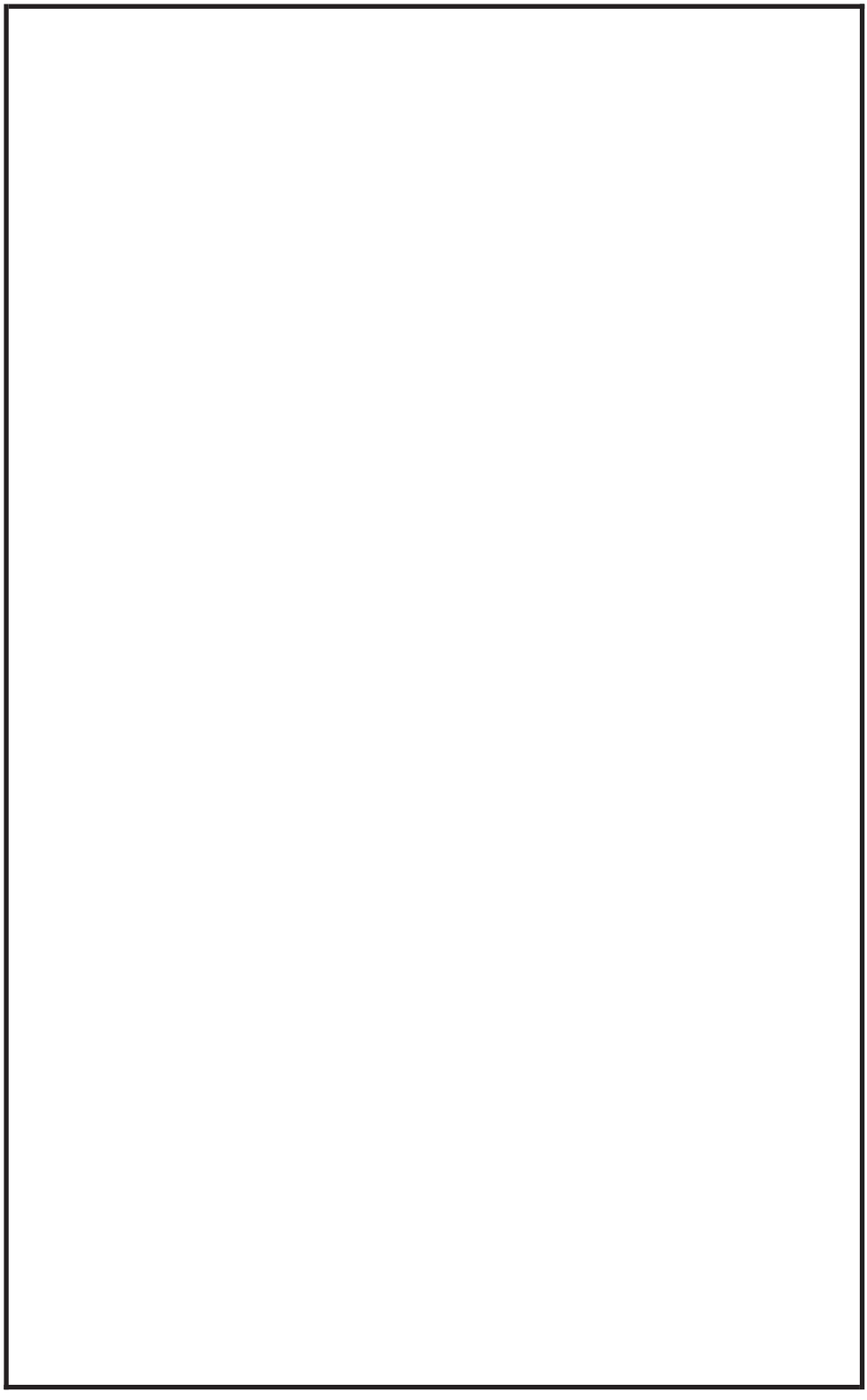
On 11 December 2012 Defra published guidance on the application of Article 6 (4) of the Habitats Directive following a consultation exercise.

Article 6(4) of the Directive provides a derogation which would allow a plan or project to be approved in limited circumstances even though it would or may have an, 'adverse effect on the integrity of a European site'. Under Article 6(4) a plan or project can only proceed provided three sequential tests are met:

- there must be no feasible alternative solutions to the plan or project which are less damaging to the affected European site(s);
- there must be, 'imperative reasons of overriding public interest' (IROPI) for the plan or project to proceed; and
- all necessary compensatory measures must be secured to ensure that the overall coherence of the network of European sites is protected.

The document provides guidance on how these tests should be applied in England and UK offshore waters (except in relation to functions exercised by devolved authorities).

The guidance is issued as a stand-alone document on an interim basis. In early 2013 it will be absorbed into the new overarching guidance on the Habitats and Wild Birds Directives as they affect businesses and others. This interim article 6(4) guidance has been fast tracked to clarify the article 6(4) legal tests, particularly in relation to infrastructure projects.



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