Butterworths Planning Law Service

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LEGISLATION

Abolition of the remaining Regional Strategies

All regional strategies have now been abolished.

The East of England regional strategy was abolished on 3 January 2013 and the Yorkshire and Humber regional strategy was abolished on 22 February 2013.

The regional strategy for the South East was abolished on 25 March 2013 by The Regional Strategy for the South East (Partial Revocation) Order 2013). However, policy NRM6 (Thames Basin Heaths Special Protection Area) of the South East Plan (May 2009) is to be retained until the Thames Basin Heaths Special Protection Area Delivery Framework (a non-statutory document endorsed by the Thames Basin Heaths Joint Strategic Partnership Board) is incorporated into all relevant local plans (due to concern about the impact of revocation).

The Regional Strategy for the East Midlands (Revocation) Order 2013 (SI 2013/629) came into force on 12 April 2013, abolishing the Regional Strategy for the East Midlands which comprised the Regional Spatial Strategy and the Regional Economic Strategy for the East Midlands published in 2006.

The Regional Strategy for the North East (Revocation) Order 2013 came into force on 15 April 2013 and abolished the Regional Strategy for the North East, which comprised the North East of England Plan Regional Spatial Strategy to 2021, published in July 2008, and the Regional Economic Strategy for North East England 2006–2016, published in July 2006. CLG has confirmed that the North East plan's policy on the extension of the green belt around Castle Morpeth in Northumberland will remain in place.

On 20 May 2013 The Regional Strategy for the West Midlands (Revocation) Order 2013 (SI 2013/933), The Regional Strategy for the North West (Revocation) Order 2013 (SI 2013/934) and The Regional Strategy for the South West (Revocation) Order 2013 (SI 2013/935) came into force, abolishing the respective regional strategies.

The Growth and Infrastructure Act 2013 – 25 April 2013

The Growth and Infrastructure Act 2013 contains some important amendments to the TCPA 1990 and the Planning Act 2008.

- **Option to make planning application directly to SoS (PINS) instead of the LPA** (s 1 and Schedule 1) – A new s 62A is inserted after s 62 (applications for planning permission) of the TCPA 1990 under which an applicant can chose to make a planning application (and any related listed building consent or hazardous substances consent application) or approval of reserved matters, directly to the SoS if the LPA is 'designated' for such purposes (on the basis of poor performance) and the development to which the application relates is 'major development'.

- **Planning and compulsory purchase proceedings costs** (ss 2 and 3) – Amendments are made to s 320 and 322 of the TCPA 1990 so that the SoS can direct a 'portion' of the costs (as opposed to the whole) to be recoverable from a party in a planning inquiry or hearing, or a party making written representations.

  In relation to compulsory purchase inquiries, the SoS can direct recovery of costs from parties where arrangements are made for an inquiry which does not take place or where a party does not attend.

- **Permitted development rights for domestic extensions for 3 years** (s 4) – the Government's proposals announced in the 6 September 2012 written ministerial statement allowing large domestic extensions as permitted development were met with fierce opposition resulting in amendments to the Bill in Parliament. The PD rights are now subject to a prior notification procedure so that before the PD rights can be relied upon, the householder must give a written description and a plan of the proposed development to the LPA who will then serve notice on adjoining premises giving them a period in which to make representations. Where an objection is made by an adjoining owner/occupier, the development can only be carried out if the LPA considers that *'it would not have an unacceptable impact on the amenity of adjoining premises.'*

- **Local development orders** (s 5) – removal of the SoS's powers to intervene in LDOs before they are adopted. A new requirement is introduced for the LDO to be sent to the SoS after adoption.

- **Limitation on the information to be submitted in support of planning applications** (s 6) – S 62 of the TCPA 1990 is amended so that the LPA's requirements in respect of a planning application must be reasonable having regard, in particular, to the nature and scale of the proposed development. Furthermore, evidence/details on a particular matter should only be required where that matter will be a material consideration when determining the application.

- **Modification or discharge of affordable housing obligations** (s 7 and Schedule 2) – new sections are inserted in s 106 applying to planning obligations in England which contain affordable housing provisions. Guidance ('Section 106 affordable housing requirements: review and appeal') published on 26 April 2013 provides information for applicants and local authorities on the purpose and scope of the new procedures.

- **Disposals of land held for planning purposes** (s 8) – allows the SoS to set out criteria under which local authorities will be able to dispose of land at less than best value.

- **Relaxing of the telecommunications code** (s 9) – in areas such as National Parks, and Norfolk and Suffolk Broads.

- **Periodic review of minerals planning permissions** (s 10 and schedule 3) – Amendments to the Environment Act 1995 relating to the updating of old mineral planning permissions and their periodic review (every 15 years).

- **Stopping up and diversion of highways and public paths** (ss 11 and 12) – the process for an order to stop up/divert a highway can start at the same time as the planning application instead of having to wait until planning permission has been granted (England only).
- **Declarations negating intention to dedicate way as a highway** (s 13) – S 31(6) of the Highways Act 1980 is amended so that the SoS can make regulations prescribing the form of statements, maps and declarations made under the section which a landowner can use to negate any intention to dedicate a public right of way.
- **Town and Village Greens** (ss 14–17 and schedule 4) – s 15(3)(c) (in relation to land in England) of the Commons Act 2006 (the Commons Act) is amended to reduce the period within which a TVG application can be made (after the requisite 20 years of recreational use 'as of right' has ceased) from two years to one year.

  A new s 15A is inserted into the Commons Act under which an owner of land in England can deposit a statement and map with the commons registration authority, which will bring to an end any period of use 'as of right' for lawful sports and pastimes on the land to which the statement relates, i.e. stopping the 20 years from accruing. The form of the statement and map is to be prescribed by regulations which can provide for the statement to be combined with a statement/declaration under s 31 (6) of the Highways Act 1980. The deposit of the statement and map will not prevent commencement of a new period of recreational use as of right, but an owner of land can deposit subsequent statements in order to interrupt future periods of use.

  A new s 15B is inserted into the Commons Act which requires a commons registration authority to keep a register containing prescribed information about statements and maps deposited with it. This information may be included in a register maintained by the authority under s 31A of the Highways Act 1980.

  A new s 15C is also inserted into the Commons Act which prevents an application for a TVG to be made under s 15(1) of the Commons Act if any of the 'trigger events' occur, e.g. an application for planning permission. The right to apply under s 15(1) is restored only where one of the 'terminating events' occurs against its corresponding trigger event, e.g. the planning application is withdrawn. The exclusion of the right to apply does not affect the accrual of any period of user as of right or prevent any such user ceasing to be as of right.

  S 17 amends the power in s 24(2)(d) of the Commons Act (in relation to England) to charge fees for applications to amend the register of common land or the TVG register.
- **Variation of consents under s 36 of the Electricity Act 1989 and deemed planning permission** (ss 20 and 21) – provision is made to vary consents for energy infrastructure projects granted under s 36 of the Electricity

Act 1989 and to make associated directions deeming planning permission to be granted under s 90 of the TCPA 1990 where such variation occurs.

- **Extension of the NSIP regime to business and commercial projects** (s 26) – S 35 of the PA 2008, under which a request can be made to the SoS to direct that a project is a nationally significant infrastructure project, is replaced with a new s 35 and a s 35ZA is added. The words 'business or commercial project(s) of a specified description' are added but regulations will set out what types of project are included. Housing is specifically excluded. Consent of the Mayor of London is required if the business or commercial project is wholly or partly in London. The s 35 direction may be given if the SoS thinks the project is of national significance on its own or in combination with other projects of the same kind. The clause does not allow an infrastructure project and a business and commercial project to be considered together.
- **Delegation of the Mayor of London's planning functions** (s 28) – the Mayor will be able to delegate decisions on whether to call-in a potentially strategic application to the Deputy Mayor and other persons prescribed.

The Enterprise and Regulatory Reform Act 2013 – 25 April 2013

Tucked away in Part 5 of the Enterprise and Regulatory Reform Act 2013, under 'Reduction of legislative burdens' (ss 60, 61 and 63 and schedules 16 and 17), are some important heritage reforms in England which, when they come into force, will amend the relevant sections of the TCPA 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990 (PLBCA).

Heritage Partnership Agreements

The Act amends the PLBCA to make provision for the LPA and the owner of a listed building in England to enter a Heritage Partnership Agreement (HPA). The HPA may contain provision granting listed building consent (LBC) and any conditions upon which the LBC is dependent. An HPA could also, among other things, specify works that would or would not affect the character of the listed building, make provision about maintenance and preservation and make provision about the carrying out of specified work.

Listed Building Consent Orders and Local Listed Building Consent Orders

The SoS may make a 'Listed Building Consent Order' capable of applying to the whole of England, which will grant LBC for works of any description for the alteration or extension of listed buildings of any description, similar to the GPDO 1995. The Order may grant consent unconditionally or subject to conditions.

In addition, LPAs will be able to make 'Local Listed Building Consent Orders' which will apply to listed buildings within their administrative areas. The SoS has the power to require the LPA to seek his approval before the LPA adopts such an order.

In considering whether to make such orders, the SOS or the LPA must have special regard to the desirability of preserving listed buildings of a description to which the order applies, their setting, or any features of special architectural or historic interest which they possess.

Certificate of Lawfulness of proposed works

The Act provides for a person to make an application for a certificate of lawfulness to ascertain whether proposed works for the alteration or extension of a listed building in England would be lawful i.e. they would not affect the character of the listed building as a building of special architectural or historic interest. Works specified in the certificate issued are to be conclusively presumed to be lawful, provided that they are carried out within 10 years beginning with the date of issue of the certificate.

Conservation Area Consent (CAC) in England

The Act removes the requirement for CAC prior to the demolition of all or almost all of an unlisted building in a conservation area. Such proposals will instead need planning permission. As a consequence, the GPDO 1995 will be amended to remove demolition of unlisted buildings by way of permitted development rights, and the TCPA 1990 is amended to create a new offence of demolishing an unlisted building without planning permission.

Listing of buildings

Currently, when a building is listed, any structure or object attached to the building and any structure or object within the curtilage of the building which has been there since 1948 is also listed, whether or not it makes any contribution to the architectural or historic interest in the building itself. Consequently, work affecting those structures or objects may require LBC. The Act will change this by allowing for certain structures or objects to be specifically excluded from the listing.

Certificates of Immunity

The PLBCA is to be amended so that a Certificate of Immunity from listing for 5 years can be applied for at any time, rather than only where a planning application is made or has been granted in respect of the building concerned (as is currently the case).

Natural Resources Wales in action from 1 April 2013

Following a public consultation between February and May 2012 seeking views on the proposed arrangements for establishing a new body for Wales' natural resources, the Natural Resources Body for Wales (Establishment) Order 2012 (2012/1903) was made under the Public Bodies Act 2011 and came into force on 19 July 2012. The Order establishes the Natural Resources

Body for Wales (NRB) – a new statutory environmental regulator for Wales whose purpose is to ensure that the environment and natural resources of Wales are sustainably maintained, sustainably enhanced and sustainably used.

The Natural Resources Body for Wales (Functions) Order 2013 (2013/755) transfers the devolved functions of the Forestry Commission, the Environment Agency and the majority of the functions of the Countryside Council for Wales to the NRB as of 1 April 2013 – the date the NRB began operating. This Order also amends the general functions of the body set out in the Establishment Order.

The NRB is the largest sponsored public body in Wales and a statutory consultee for many planning applications.

Revised electric line thresholds under the PA 2008 following consultation

The Planning Act 2008 (Nationally Significant Infrastructure Projects) (Electric Lines) Order 2013 (published in draft) changes the categories of electric line installation that are considered to be nationally significant infrastructure projects (NSIPs) by providing that:

- an electric line (of any voltage) which is less than 2km in length is not a NSIP; and
- the replacement of an existing line with a new line of a higher voltage is not a NSIP if:
  - (1) the new line supports are no more than 10% higher than the existing supports; and
  - (2) the new line is no more than 60 metres from the position of the existing line (in which case the existing line must be removed within 12 months of the installation of the new line).

Applications for these types of development would be made under s.37 of the Electricity Act 1989 instead of the Planning Act 2008.

Regulations amending the Community Infrastructure Levy came into force on the 24 April 2013

The Community Infrastructure Levy (Amendment) Regulations 2013 came into force on 24 April 2013.

Where all or part of a chargeable development is in an area where there is a parish council in England and where all or part of a chargeable development is within an area that has a neighbourhood development plan in place, the charging authority must pass 25% of the relevant CIL receipts to the parish council. In England, where all or part of a chargeable development is not in an area that has a neighbourhood development plan in place but permission is granted by a neighbourhood development order made under s 61E or 61Q

(community right to build orders) of TCPA 1990, the charging authority must pass 25% of the relevant CIL receipts to the parish council for that area.

In England, where all or part of a chargeable development is not in an area that has a neighbourhood development plan in place and was not granted planning permission by a neighbourhood development order the charging authority must pass 15% of the relevant CIL receipts to the parish council. In Wales, if all or part of a chargeable development is within the area of a community council then the charging authority must pass 15% of the relevant CIL receipts to that community council. In both of these cases, this is subject to a cap of £100 per household in the parish council or community council area per year.

A parish or community council must use the CIL monies received to support the development in its area by funding the provision, improvement, replacement, operation or maintenance of infrastructure or *'anything else that is concerned with addressing the demands that development places on an area'*.

These regulations also allow Mayoral Development Corporations to charge CIL and make provision for when the Corporations are dissolved.

CASES OF INTEREST

Permission is quashed because of an invalid planning obligation

***Westminster City Council v Secretary of State for Communities and Local Government & Anor [2013] EWHC 690* (*Admin*)**
(*27 March 2013*)

Facts

A planning condition prevented a garage being converted to any other use, in order to protect off-street parking and to prevent strain on lawful on-street parking. The owner of the property subsequently applied for permission to turn the garage into a sitting room which was granted on appeal by an inspector. The inspector had taken into account a unilateral undertaking provided by the owner under which the owner agreed not to apply to the LPA for a parking permit in relation to the property (and to surrender any if granted) and to include a covenant in all future disposals of the property requiring the new owner/tenant to observe the obligation.

The LPA challenged the permission on the grounds that the inspector took into account an irrelevant consideration, namely the unilateral undertaking which it argued was invalid.

Decision

The Court held that the unilateral undertaking was not a valid s 106 obligation and should not have been taken into account by the inspector. This was because it did not meet the tests in s 106 TCPA 1990. It did not restrict the development or use of land, it did not require operations or activities to be carried out on the land, it did not require land to be used in a

specified way and it did not require a sum/s of money to be paid to the LPA. It was a purely personal undertaking which did not run with the land and so was incapable of being registered as a local land charge.

The decision to grant planning permission was quashed.

Interestingly, an alternative form of the obligation was put forward by the owner to the court under which the owner covenanted not to occupy the property for as long as an application for a parking permit was being decided or made. This would appear to comply with the requirements of s 106 but the judge commented that the:

> putting out on the street by the Claimant of, say, a family of four because one of them has applied for a parking permit does not strike me as a procedure to which the court would readily lend its aid.

Wind farm permission is quashed for failing to pay special regard to the desirability of preserving a building or its setting

***East Northamptonshire District Council & Ors v Secretary of State for Communities and Local Government & Anor [2013] EWHC 473* (*Admin*) (*8 March 2013*)**

Facts

An inspector granted permission on appeal for a for a wind farm development on farmland in Sudborough which was challenged by the National Trust, English Heritage and the LPA on three grounds including that the inspector failed to give special regard to the desirability of preserving the settings of listed buildings as required under s 66(1) of the PLBCA 1990.

Decision

The planning permission was quashed.

The determination of a planning application (and any appeal) is to be made in accordance with the development plan**,** unless material considerations indicate otherwise (s 38 (6) Planning and Compulsory Purchase Act 2004). The harm to the setting of the listed buildings was a material consideration against granting permission, whereas the wider benefits of the wind farm were a material consideration in favour of granting permission. The weight to be given to a material consideration is normally a question of planning judgment for the planning authority (*Tesco Stores v Secretary of State for the Environment & Ors* [1995]).

However, in this case the judge held that in order to give effect to the statutory duty under s 66(1), the decision-maker should have accorded considerable importance and weight to the *'desirability of preserving … the setting'* of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status (effectively qualifying the *Tesco Stores* principle). The inspector had

erred in treating the harm to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance.

Granting of a CLEUD where pavement outside a restaurant is used for placement of tables and chairs

Westminster City Council v Secretary of State for Communities and Local Government & Anor [2013] EWHC 23 (Admin)

Facts

Westminster CC sought to quash the decision of an inspector to grant a lawful development certificate (CLEUD) authorising the placing of tables and chairs on the pavement in front of a restaurant on the grounds that there had been a continuous period of ten years of such use.

The applicant argued that the restaurant had, since 1991, continuously and without interruption placed pavement furniture on the pavement area in front of the restaurant premises. This use of the pavement only occurred when the restaurant was open. When the restaurant was closed, the pavement furniture was stored within the restaurant.

WCC had refused the certificate on the grounds that no change of use had occurred since there had never been continuous and uninterrupted use of the highway for the location of tables and chairs – they had always been removed from the pavement area overnight and for certain months of the year. WCC contended that during the periods when there was no furniture on the pavement, the pavement reverted back to its original use as part of the public highway as it was not evident to the general public that that area was being used as a site for pavement furniture.

Decision

WCC's challenge was dismissed. The judge agreed with the inspector that intermittent overnight storage of pavement furniture was a necessary feature of most restaurants operating an outdoor eating facility and did not interrupt the 10 years continuous use, nor did the other periods of inactivity, such as holiday periods, winter months and periods of enforced closing or lack of demand.

A council can remove key sites from a proposed neighbourhood plan

Daws Hill Neighbourhood Forum & Ors, R (on the application of) v Secretary of State for Communities and Local Government & Anor [2013] EWHC 513 (Admin) (13 March 2013)

Facts

Daws Hill Neighbourhood Forum (DHNF) challenged the decision of Wycombe District Council of September 2012 to exclude two sites from the Neighbourhood Area for DHNF: the RAF Daws Hill Site and the Handy

Cross Sports Centre. The Council's reasons for exclusion mainly centred upon the fact that the two sites were key strategic sites the development of which would have more than a local impact.

The Council's decision was challenged by the DHNF on the grounds that the Council had acted contrary to the principles of the Localism Act 2011 and the fact that a site was strategic was no reason to exclude it from the Neighbourhood Area.

Decision

The challenge was dismissed.

S 61G (5) of the TCPA 1990 on the neighbourhood area (inserted by the Localism Act 2011) requires the LPA in determining an application for a neighbourhood area to consider whether the area proposed is appropriate. The discretion given to the authority is a broad one. The exercise of discretion turns on the specific factual and policy matrix that exists in the individual case at the time the determination is made. In this case, at the time of the Council's decision, a very detailed and fairly prescriptive policy framework was in the process of being completed for the Daws Hill site and an application for outline planning permission for the Handy Cross Sports Centre was under consideration (and granted in February 2013) which had been subject of extensive consultation.

The Council properly had regard to the specific circumstances that existed at the time when the decision was made to designate a Neighbourhood Area which excluded the RAF Daws Hill site and the Handy Cross Sports Centre site and was entitled to exclude the two sites.

The meaning of the Aarhus requirement that environmental judicial reviews should not be 'prohibitively expensive'

David Edwards, v Environment Agency, [2013] EUECJ C-260/11 (11 April 2013)

In response to a request for a preliminary ruling from the Supreme Court, the ECJ has provided clarification on the meaning of the requirements of Article 9 of the Aarhus Convention that judicial procedures to challenge environmental decisions must not be 'prohibitively expensive' – a requirement which appears in Article 10a of the EIA Directive and Article 15a of the Integrated Pollution Prevention and Control Directive (2008/1/EC).

Mr Edwards challenged the decision of the Environment Agency to approve the operation of a cement works, including waste incineration, in a plant in Rugby, relying on the fact that the project had not been the subject of an EIA. The challenge was dismissed in the High Court and appeals before the Court of Appeal and the House of Lords also failed. During the CA hearing, Mr Edwards withdrew from the case and Ms Pallikaropoulos was granted leave to take his place in the remainder of the proceedings. The case concerns

Ms Pallikaropoulos's liability for the costs of the Environment Agency in the proceedings totalling just over £88,000.

Ms Pallikaropoulos challenged the costs order, arguing that the procedure was prohibitively expensive within the meaning of the above two Directives. The Supreme Court stayed the proceedings and sought a preliminary ruling from the ECJ.

The ECJ stated that the requirement that judicial proceedings should not be prohibitively expensive does not prevent the national courts from making an order for costs. The requirement means that people should not be prevented from pursuing a claim because of the financial burden that might result from it. When determining costs, the national court must satisfy itself that that this requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment. This means that the court should not make a decision on costs based solely on the basis of the financial situation of the person concerned but also on an 'objective' analysis of the amount of the costs. This means that the cost of proceedings must not appear to be objectively unreasonable. As regards the analysis of the financial situation of the person concerned, the assessment by the national court cannot be based solely on the estimated financial resources of an 'average' applicant, since this may have little connection with the situation of the person concerned. Instead, the court may take into account:

- the relevant provisions of national law, particularly any legal aid scheme or costs protection regime;
- the situation of the parties concerned;
- whether the claimant has a reasonable prospect of success;
- the importance of what is at stake for the claimant and for the protection of the environment;
- the complexity of the relevant law and procedure; and
- the potentially frivolous nature of the claim at its various.

Furthermore, the fact that the claimant has not been deterred, in practice, from asserting his/her claim is not in itself sufficient to establish that the proceedings are not prohibitively expensive.

The ECJ also held that the national court should apply the same criteria, regardless of the stage of the proceedings at which it was making the costs order (first instance, appeal or second appeal).

The above decision has been welcomed by the WWF and other environmental campaigners who believe the judgement will make it easier to challenge decisions affecting the environment. The decision also coincides with the publication of substantial changes to the Civil Procedure Rules which took effect on 1 April 2013 and which cap the costs that a court can order a party to pay under a PCO in environmental judicial review cases (£5,000 for individual claimants).

A Supplementary Policy Document on wind turbine separation distances is quashed

R (RWE Npower Renewables Ltd) v Milton Keynes Borough Council [2013] EWHC 751

'Wind turbines generate passionate arguments as well as energy'. So commenced the judgement in this case, which has also generated considerable press coverage.

The case concerns a judicial review challenge to the adoption by Milton Keynes Council of a 2012 SPD. The SPD states that planning permission for wind turbines will be granted unless any turbine over 25m in height is not separated from residential premises by at least a certain minimum distance which varies according to its height (for example, 350m for turbines 25m high, 1,000m for turbines 100m high or higher). The SPD also sets out minimum distances between a turbine and bridleways, public footpaths and high pressure fuel lines.

RWE, concerned that the emerging policy would be copied by other authorities and have an adverse impact on its two wind farm proposals in the borough, challenged the SPD on four grounds: the SPD was in reality a DPD and not a SPD so should have been subject of an independent examination prior to its adoption; even if it was a valid SPD, it conflicted with the Council's development plan; the Council failed to have regard to national policy on wind turbine development; and even if the SPD was a SPD, the Council should have treated it as a DPD.

In a lengthy judgement, the court rejected all grounds of challenge except one. It held that the SPD was in conflict with the adopted development plan which recommends a minimum gap of only 350m, regardless of turbine size but the SPD states that only if the minimum distance is in excess of 350m, will planning permission be grated. The SPD therefore amends the relevant minimum distance in the adopted development plan policy and is in conflict with it.

Milton Keynes Council has been granted permission to appeal.

Permission is quashed for failure to take Government policy into account

Oxford Diocesan Board of Finance v Secretary of State for Communities and Local Government & Anor [2013] EWHC 802 (Admin) (11 April 2013)

The claimant challenged SoS's decision to dismiss its appeal against the refusal of Wokingham Borough Council to grant permission for residential (and associated) development on land in Berkshire on six grounds.

The challenge succeeded on one ground: the SoS's failure to consider the 'Planning for Growth' Ministerial Statement of March 2011, which was issued after the close of the inquiry but two months before the SoS's decision.

The Statement encouraged development and growth by urging LPAs to grant permission for sustainable development by stating that the SoS would attach significant weight to the need to secure economic growth and employment when determining applications.

The court held that it was clear from the decision letter that the SoS had failed to take the Statement into account. This was made obvious by the fact that the letter recited every other relevant provision but not the Statement. Whilst accepting that the Statement was low in the hierarchy of matters to be taken into account, falling below statutory provisions and national policies, it nevertheless had potential relevance to housing development and could have made a difference to the decision; it was a material consideration. As the SoS had failed to have regard to a material consideration, the decision was quashed and remitted for reconsideration.

Had the SoS shown he had had regard to the statement, it was then open to him to conclude it had no or little bearing on his decision, as the weight to be given to any material consideration is a question of planning judgement of the decision maker.

Material submitted to the inspector after the close of an inquiry should have been considered by the inspector

***Wainhomes* (*South West*) *Holdings Ltd v The Secretary of State for Communities And Local Government [2013] EWHC 597* (*Admin*) (*25 March 2013*)**

This case concerns a challenge to an inspector's dismissal of an appeal against the non-determination by Wiltshire Council of a proposal to build up to 50 houses on land in the countryside. Of the five grounds of challenge, the most interesting, and the only one upheld by the court, was the failure by the inspector to take into account as a material consideration two decisions by another inspector in relation to sites in Calne, also in Wiltshire. Those decisions held that strategic sites should be excluded from consideration of the supply of deliverable sites for housing; in this case the inspector decided that they should be included. The difference in approach was important because the Calne inspector's approach supported the claimant's conclusion that there was a shortfall in supply of housing so that planning permission should be granted for its site. The issue for the inspector was whether the strategic sites were 'deliverable' as defined in the NPPF so that they should be included in the assessment of housing land supply.

The Calne decisions were sent to the inspectorate after the close of the inquiry but they were not considered by the inspector.

The court held that whilst an inspector has discretion whether to admit or to refuse to admit late-submitted material, the inspector failed properly to exercise that discretion, and failed to give proper reasons for his decision. There was no doubt that the Calne decisions might have caused the inspector to reach a different conclusion to the one he in fact reached.

The court held that a previous inspector's planning decision is capable of being a material consideration, though the importance to be attached to it will depend upon the extent to which the issues in the previous decision and the current decision overlap. An inspector is:

> free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

(*North Wiltshire DC v SoSE and Clover* [1992]).

Although the inspector in this case would have been entitled to disagree with the Calne inspector's conclusion, he should first have had regard to the importance of consistency and should have given his reasons for departure from those decisions.

The judge accepted that in some cases where information is submitted late:

> 'there may be a tension between the need for finality and proportionate expense on the one hand and a willingness to admit evidence which has not been submitted in accordance with the normal procedural timetable under the [TCP Appeals (Determination by Inspectors) (Enquiries Procedure) (England) Rules 2000].
>
> However, there is no material available to the Court to suggest that there was any significant tension in this case. In particular, there is no evidence to suggest that the Calne decisions, though highly material, would open up any new issues or indicate the need for further evidence or hearings. On the evidence that is available to the Court, it would have been possible for any supplementary submissions to have been made shortly and in writing.

He stated that:

1) lateness is not of itself necessarily or even probably the determinative factor when considering whether late information should be admitted; and

2) the determinative considerations should be those that go into the mix of a reasoned assessment which balances those factors that tend in favour admission or rejection on the facts of a particular case.

What is a 'material consideration'?

Watson, R (on the application of) v London Borough of Richmond Upon Thames [2013] EWCA Civ 513 (15 May 2013)

Watson concerned a challenge to a planning permission for the redevelopment of Twickenham Railway Station on the grounds that a report on the proposed development, submitted to the LPA by an advisory body set up by the LPA itself, should have been taken into account as a material consideration. As it was not, planning permission should be quashed.

Although the court expressed 'surprise' that the report was not considered by the LPA's planning committee, this failure did not amount to a breach of the statutory duty to have regard to material considerations because all the points of substance made in the report were covered in the officers' report and were taken into consideration in any event and it contained nothing capable of affecting the committee's conclusion. There was no real possibility that the planning committee would have reached a different conclusion if the report had been taken into account. It was not something that would (or even might) have tipped the balance to any extent. The court criticised the way the report was handled by the LPA but held that this did not render the grant of planning permission unlawful.

Application of the NPPF where the development plan documents are out of date

Colman v Secretary of State for Communities and Local Government – & Ors [2013] EWHC 1138 (Admin) (09 May 2013)

A challenge was brought to the decision of an inspector to grant planning permission for the construction of nine wind turbines of 103m in height to blade tip on land at Batsworthy Cross, Knowstone, North Devon. The main ground of challenge was that the inspector failed properly to analyse a number of relevant policies and also reached conclusions on consistency with the NPPF which were wrong.

The inspector had concluded that the relevant policies in the development plan were outdated and inconsistent with the NPPF. As a consequence, paragraph 14 of the NPPF came into play. This provides that planning permission should be granted unless adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF as a whole.

The judge dismissed the claim and held that the inspector was entitled to conclude that the relevant policies in the development plan were outdated and that the provisions of the NPPF should be given decisive weight. He referred to the recent case of *Tewkesbury Borough Council v Secretary of State for Communities and Local Government & Ors* [2013] EWHC 286 (Admin) (20 February 2013) where the High Court held that the weight to be given to a development plan would depend upon the extent to which it was up-to-date and that paragraph 14 of the NPPF provides for what should be done when an existing plan was out-of-date. The result in practice would be that the relevant policies would be regarded as carrying little weight and there would be a presumption in favour of granting permission.

A challenge to the Chiltern Railway (Bicester to Oxford Improvements) TWA Order on the grounds that there was a breach of the Habitats Directive fails

***Feeney v Secretary of State for Transport* (*2*) *The Chiltern Railway Company* (*3*) *Natural England [2013] EWHC 1238* (*Admin*)**

This case concerns a challenge to the Chiltern Railway (Bicester to Oxford Improvements) Order 2013 made under the Transport and Works Act 1992 Act. The Order authorises the construction of a new length of railway, a section of which would pass about 1km to the east of parts of the Oxford Meadows Special Area of Conservation (SAC).

At the TWAO inquiry, Chiltern had argued that that it had carried out an assessment which showed there would be no likely significant effect on the SAC from its project and so no appropriate assessment under the Habitats Directive or the Conservation of Habitats and Species Regulations 2010 was required, nor further assessment or mitigation. The inspector, however, held that further survey work was required in order to satisfy the requirements of the Directive and Regulations and imposed a condition requiring such work, followed by the implementation of mitigation measures if necessary. The SoS accepted the inspector's recommendation and imposed such a condition.

The applicant contended that the Directive and Regulations required an appropriate assessment to be carried out unless the SoS was convinced that there was no possibility of an appreciable adverse effect. He argued that the condition required information to be obtained about the present state of nitrous oxides (NOx) pollution on the lowland hay habitat, and about the effect of the scheme on the levels of NOx on it, leading to an analysis of remedial measures and their implementation. The imposition of the condition therefore showed that the inspector and SoS did not have enough information about those matters, nor could they know whether the remedial measures which were then required to remedy the effects of the scheme could be implemented. Therefore, an appropriate assessment was required.

The challenge was dismissed.

The court stated that under regulation 61(6), the authority 'must have regard' to the manner in which the scheme is proposed to be carried out *'or to any conditions or restrictions subject to which they propose that the consent …should be given.'* So, on the face of the Regulations, the SoS was entitled, as he did, to take account of the condition which he proposed to impose, in judging whether or not there was a need for an appropriate assessment. The screening assessment can also take account of mitigation measures which form part of the project, as was recognised in *Hart* and is the logical companion to Regulation 61(6). As Sullivan J pointed out in *Hart*, if the condition leaves doubt as to its efficacy in excluding the risk of a significant effect, an appropriate assessment will still be necessary.

The imposition of the condition had to be seen in context. Its purpose was to assess and then eliminate the effects of the residual range of uncertainty

between no harm and harm which is 'unlikely'. The uncertainty in the predictive data could not be eliminated by 'baseline assessment'; it required measurement of what happened once the railway was in operation.

So, applying *Gillespie*, this was a case in which there was evidence that the uncertainty would be overcome, and harm would be avoided by the use of well tried techniques. These management techniques would not cause significant effects themselves.

A local planning authority can rely on the advice by Natural England when discharging its duty under regulation 9(5) of the Habitats regulations

Prideaux, R (on the application of) v Fcc Environment UK Ltd [2013] EWHC 1054 (Admin) (29 April 2013)

The applicant challenged a planning permission granted for an energy from waste facility on land in Buckinghamshire. The proposed development is intended to take all of the waste produced by the county's residents – some 500,000 people.

The development will affect the habitat of three European Protected Species, and a number of important invertebrates. There are also four SSSIs within close proximity to the railway line.

The decision to grant permission was challenged on the basis that an LPA could not rely on Natural England's view on whether a development was compliant with article 12 of the Habitats Directive, but had to carry out its own 'shadow assessment' to find out whether there will be a breach of article 12.

The challenge failed.

The court held that it was the function of Natural England to enforce compliance with the Habitats Directive, by prosecuting those who commit offences contrary to its provisions. The LPA's duty under regulation 9(5) of the regulations was to have regard to the requirements of the Habitats Directive so far as those requirements might be affected by its decision whether to grant planning permission. The Supreme Court decision in *Morge v Hampshire County Council* [2011] 1 WLR 268 makes clear that regulation 9(5) does not require a planning authority to carry out the assessment that Natural England has to make when deciding whether there would be a breach of article 12 of the Habitats Directive. If a proposed development is found acceptable when judged on its planning merits, planning permission for it should normally be given unless, in the LPA's view, the proposed development would be likely to offend article 12(1) (paragraph 29 of Lord Brown's judgment in *Morge*).

The court provides further guidance on 'tailpieces'

Treagus, R (on the application of) v Suffolk County Council & Anor [2013] EWHC 950 (Admin) (24 April 2013)

A planning permission for the construction and operation of an anaerobic digestion plant was challenged on the grounds that a condition attached to the planning permission which stated that the feedstock had to originate from locations within a 30 mile radius of the facility contained the unlawful tailpiece: *'unless otherwise approved in writing by the Waste Planning Authority'*. It was alleged to be unlawful because it allowed the limitation to be relaxed or dispensed with without a formal statutory process.

In (*R* (*Midcounties Co-operative Ltd*) *v Wyre Forest District Council* [2009] EWHC 964 (Admin), the court held that a condition which contained a tailpiece which enabled the LPA to vary the permitted floor space of a retail development was unlawful as it went to the heart of the development and enabled the creation of a development of a very different scale to the one approved. In contrast, in *R* (*Salford Estates* (*No 2*) *Ltd*) *v Salford City Council* [2011] EWHC 2097 (Admin), a tailpiece which concerned ancillary highway works was held to be lawful.

The claimant in this case argued that the tailpiece was more akin to the *Midcounties* case and therefore unlawful.

The judge found that the tailpiece did not allow for a key element of the planning consent for the anaerobic digestion plant to be changed at all. However, as the tailpiece was not supported by any clear reasoning, and as the evidence was that the 30 mile radius was reached after appropriate consultation with other LPAs, the words *'unless otherwise approved in writing by the Waste Planning Authority'* were unlawful and were consequently severed from the planning permission.

The court refuses to order a council to take enforcement action for unauthorised EIA development

Baker, R (on the application of) v Bath and North East Somerset Council [2013] EWHC 946 (Admin) (25 April 2013)

The claimant challenged the decision of the LPA not to take enforcement action in respect of a waste composting site operated by Hinton Organics Limited.

The site has a complicated history with a total of six planning applications made in relation to the composting of waste, some of which have expired and others quashed by previous court proceedings. By March 2012 the LPA had three retrospective planning applications from Hinton Organics and a positive screening direction by the SoS in respect of the applications. Following the submission of an unsatisfactory ES and a failure to provide information under regulation 19 of the EIA regulations, the LPA decided not to take enforcement action but to give Hinton Organics yet further time to submit a satisfactory ES.

The case of *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) has established that the grant of retrospective planning permission in respect of an EIA development is allowed if there are exceptional circumstances In light of that, the judge was not prepared to accept that the LPA was compelled to issue an enforcement notice as soon as the screening direction had been issued by the SoS, as it would mean that wherever there was EIA development without a planning permission, the LPA was required to take immediate enforcement action. If this had happened, Hinton would have had justifiable cause to object, because it was not until receipt of the screening direction that the development was definitively recognised as EIA development and the need for an ES was established.

He also held that it was fair and reasonable for the LPA to give further time to produce a suitable ES (in addition to the 14 months from the date of the screening direction it had had already) because there was a real possibility that Hinton would produce a suitable ES and had enforcement action been taken, Hinton would have appealed and stayed the enforcement notice in any event.

As the judge stated in this case, Hinton was fortunate that the LPA took the decision that it did. Another Council might have taken a tougher stance and refused the planning permissions, *'an outcome … the developer would have had real difficulty in challenging in any proceedings for judicial review.'*

The imposition of a condition results in the quashing of a planning permission

Champion v North Norfolk District Council [2013] EWHC 1065 (Admin)

Planning permission was granted for development on a site located about 500 metres away from the River Wensum – an SSSI and a SAC. A number of detailed reports were prepared in the course of the application on the impact on the river but no EIA or Appropriate Assessment was carried out. The claimant argued that an EIA and Appropriate Assessment should have been carried out.

The LPA had decided that neither an EIA nor an AA was needed, but then imposed conditions on the permission which required monitoring of the water quality. The claimant argued that the LPA could not hold that there was no relevant risk of pollution entering the river but then impose conditions to deal with just such a risk. This proved to be fatal for the LPA. The court held that conditions could only be imposed if they were considered 'necessary' as per circular 11/95, which suggested that the LPA considered that there was a risk that pollutants could enter the river. The planning permission was quashed.

The court took the view that if the LPA thought there was no risk of pollutants entering the river, then planning permission can be granted without the conditions. However, if there is a risk, an EIA and AA would need to be carried out. The LPA could not rationally adopt both positions.

NEWS

First Neighbourhood Plan in the country is adopted by Upper Eden – 8 March 2013

In a historic first, the Upper Eden Neighbourhood Plan (Cumbria) was approved at a local referendum on the 7th March 2013. Voter turnout was 33.67% with 90.22% voting in favour. On 11 April 2013 Eden District Council made the Neighbourhood Plan part of Eden's Development Framework.

The Plan covers Brough Parish and 16 surrounding parishes in East Cumbria and is one of the largest neighbourhood planning areas in the country.

Thame, Oxfordshire, swiftly followed and approved their Plan, which is the first to set out specific sites for development, at a local referendum on 2 May 2013 (39.8% turnout, 76.5% voting in favour).

In a separate but related development, Communities Minister Don Foster announced on 14 March that a £9.5million, 2-year fund to support neighbourhood plans will be available. Groups of residents seeking to create a neighbourhood plan will be able to bid for up to £7,000 each to contribute to the costs of preparing their proposal.

The PINS Consents Services Unit opens for business on 29 April 2013

The Consents Service Unit became operational on 29 April 2013. It is an extension of the NSIP one-stop-shop, designed to improve co-ordination and communication between PINS, applicants and other consenting bodies with regard to 12 key consents so they are dealt with in parallel to the main DCO. The Unit can be accessed via the PINS National Infrastructure Planning page (under the 'Legislation and advice' tab at the top).

A Prospectus for Developers document and a Frequently asked questions paper explain how the Unit will operate. Points to note about the new Unit:

It will not make decisions on issuing non-planning consents although it can escalate issues within consenting bodies and, if necessary, to relevant Ministers:

- It only deals with NSIPs situated in England (including off-shore projects within English waters).
- The focus of the Unit is on non-planning consents as set out in the Annex 1 to the Prospectus.
- It offers an optional free service for developers (a developer can choose not to use the services of the Unit) and will be most effective to developers if it is engaged at the earliest stage possible and preferably long before an application for development consent is submitted to PINS.

- The process will vary from application to application but will typically involve an initial scoping meeting, the development of a 'Consents Management Plan' and regular liaison on progress towards completion of tasks and meeting of target dates.
- Any information held by the Unit may be subject to requests for disclosure of material under FOI or EIR, which would be considered, as usual, on a case by case basis by PINS.
- The Consents Management Plans will be published, once agreed, via the Planning Portal but will not contain any commercially sensitive information; they will be high level, concentrating on key milestones, events or decisions in relation to each scheme.
- Consenting bodies should take a proactive and positive 'yes if' approach to including consents within a DCO (as per the pre application guidance of January 2013).
- It will maintain an impartial position whilst delivering the role of intermediary or 'honest broker' seeking to facilitate co-operation and engagement in the process.
- It will not duplicate the work of the MIEU in relation to Habitats Regulations issues (separate DECC unit), although the Unit will work closely with MIEU to ensure effective co-ordination and to avoid duplication.

Important new PD rights to change use of commercial premises to residential and other changes

The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 (SI 2013/1101) came into force on 30 May 2013 and makes some significant changes to the GPDO 1995. This Order amends the GPDO as follows:

1) *Home Extensions*

Developers outside National Parks, AONBs, the Broads, conservation areas etc (Article 1 (5) land) have until 30 May 2016 to construct (and complete) single storey rear extensions provided the extension does not extend beyond the rear wall of the original house by more than 8m in the case of a detached house or 6m in the case of any other house and does not exceed 4m in height.

Before taking advantage of this new PD right, the developer must comply with a 'prior approval' procedure involving provision of certain information to the LPA: a written description of the proposed development; a plan showing the proposed development; the addresses of any adjoining premises; and the developer's contact and email address. The LPA will then notify the adjoining neighbours and where no objections are made by the neighbours within a set period (minimum 21 days), the development can proceed. Where objections are made by neighbours, the LPA will need to consider whether the proposed development would have an unacceptable impact on the neighbours' amenity.

Development cannot commence unless one of three events have occurred: the LPA informs the developer in writing that prior approval is not required; written notice giving prior approval from the LPA or expiry of 42 days from when the information was submitted to the LPA.

2) Increased thresholds for business change of use

Thresholds will change from 235m2 to 500m2 for permitted development for change of use from B1 or B2 to B8 and from B2 or B8 to B1.

3) Change of use of empty premises in B1 (a) office use to C3 residential use

A new class J is inserted into Part 3 of Schedule 2 of the GPDO 1995 (changes of use) under which a building and any land within its curtilage can change to a residential use provided:

- The building is not on one of the 17 'exempt land' areas defined as Article 1 (6A) land.
- The building was unused as an office prior to 30 May 2013 – this means that if a building has never actually been in use as an offices before 30 May 2013 it will not qualify for change of use to residential.
- The change to residential occurred before 30 May 2016.
- The site is not part of a safety hazard or military explosive storage area or listed building or scheduled monument.

Before commencing development, the applicant must apply to the LPA to ascertain whether prior approval is required for transport and highways impacts, contamination risks on the site and flooding.

The applicant cannot start the development unless (1) informed by the LPA in writing that that prior approval is not required or prior approval is given by the LPA or 56 days have expired from the date the application was received by the LPA and the LPA neither gives nor refuses prior approval within those days.

4) Change of use to state funded school

A new class K is inserted into Part 3 of Schedule 2 allowing change of use of land and buildings falling within B1 (business), C1 (hotels), C2 (residential institutions), C2A (secure residential institutions), and D2 (assembly and leisure) to a state-funded school provided the site does not form part of a military explosives storage area or a safety hazard area and the building is not listed or a scheduled monument. A prior approval procedure also applies covering transport and highways impacts, noise and contamination.

A new class L allows change of use from K to any previous lawful use.

In addition, a new class C is inserted into Part 4 of Schedule 2 (temporary buildings and uses) under which a building and land within its curtilage can be used for a state-funded school for one academic year. It reverts back to its former use after a year.

Furthermore, Part 32 of Schedule 2 which grants planning permission for the erection, extension and alterations of schools, subject to various conditions and limitations, and for the provision of hard surfaces on school land is amended so that premises approved for use as a state-funded school temporarily under Part 4 above can also take advantage of these rights.

5) Change of use of agricultural buildings and land

A new class M is inserted into Part 3 of Schedule 2 which allows agricultural buildings and land to be used for a range of 'flexible uses' falling within A1 (shops), A2 (financial and professional services), A3 (restaurants and cafes), B1 (business), B8 (storage and distribution), C1 (hotels) and D2 (assembly and leisure).

Development is only permitted if:

- the buildings have been used solely for agricultural use since 3 July 2012 or if after this date then for at least 10 years;
- the cumulative floor space of buildings which have changed within the original agricultural unit exceeds 500sqm;
- the site does not form part of a military explosives storage area or a safety hazard area; and
- the building is not a listed building or a scheduled monument.

In addition:

- a site which has changed use under this class can change to any other of the flexible uses;
- after a site has changed use under this class M, the site is to be treated as having sui generis use;
- after a site has changed use under this class M, it will be able to take advantage of the PD rights under class B part 41 of Schedule 2 (office buildings);
- before changing the use of the site under this class M or any subsequent change of use to another flexible use, the developer has to submit information to the LPA depending upon the size of the buildings changed:
    - for buildings where the floor space is 150m2 or less – the date the site began to be used for any flexible purpose, the nature of the use/s and a plan showing the site and which buildings have changed; and
    - for buildings between 150m2 and 500m2, prior approval is required for transport and highways impacts, noise impacts, contamination risks and flooding risks.

The order sets out the prior approval provisions which apply under Part 3.

6) Temporary uses for 2 years

In addition to allowing buildings to be used for state funded schools for an academic year (see above), a new class D is inserted into Part 4 of Schedule 2 (temporary buildings and uses) under which a building and land within its curtilage falling within classes A1, A2, A3, A4, A5, B1, D1 and D2 uses will be permitted to change use for a period of up two years to A1, A2, A3 and B1 uses provided no more than 150m2 of floor space is changed, the site has not previously relied upon a class D permission, it does not form part of a military explosives storage area of a safety hazard area and the building is not listed or a scheduled monument.

The developer has to notify the LPA of the date of the change and again if within the 2 years a further change is made to one of the uses comprising 'flexible uses.' During the 2 years and for the purposes of the UCO, the site retains its original use and reverts to its previous lawful use at the end of the 2 years.

7) Warehouse and industrial development

Until 30 May 2016, class A of Part 8 of Schedule 2 is amended to increase the permitted development right to erect, extend or alter industrial and warehouse premises from 25% of gross floor space or 100m2 (whichever is the lesser) to 50% or 200m2.

8) Electronic communications code operators

Part 24 of Schedule 2 which sets out permitted development rights in relation to developments by electronic communications code operators is amended so that in relation to article 1(5) land, the construction, installation or replacement of telegraph poles, cabinets or lines for fixed-line broadband services will not require prior approval under paragraph A.3 of Part 24 provided the development is completed before 30th May 2018.

9) Extension or alteration of an office building

Until 30 May 2016, there will be a right to extend or alter an office building (not on a SSSI) from 25% of gross floor space or 50sqm (whichever is the lesser) to 50% of gross floor space or 100sqm (whichever is the lesser).

10) Shops or catering, financial or professional services establishments

Until 30 May 2016, provided a building is not on a SSSI, the permitted development right to extend or alter a shop, catering, professional or financial services establishment is increased from 25% of gross floor space or 50sqm (whichever is the lesser) to 50% or 100sqm. The exclusion of development within 2 metres of the boundary of the curtilage is removed during the same period except in relation to premises which adjoin land or buildings in residential use.

CONSULTATION

Consultation response: the Government will reduce the time limits for bringing judicial review in planning and procurement cases

In a Consultation response published on 23 April, together with an updated Impact assessment, the MoJ has confirmed that in response to the Consultation carried out between December 2012 and January 2013 on measures to reduce the number of judicial reviews being brought, it has decided to:

- Shorten the time to bring judicial review in planning cases to within 6 weeks of the grounds giving rise to the claim (same as statutory challenges and the PA 2008 regime) and to 30 days for procurement cases (as defined in the Public Contracts Regulations 2006) and remove the 'promptly' requirement for these cases – the pre-action protocol will not apply to such cases.
- Remove the right to an oral hearing where a case is assessed as totally without merit on the papers.
- Introduce a new fee of £215 (this may change following the consultation on raising judicial review fees) which will apply to an oral renewal hearing- this fee will be returned where permission is granted.

Despite the majority of the 250 responses to the consultation being opposed to the Government's proposals, the Government still believes the reforms are necessary to tackle weak, frivolous or unmeritorious claims.

The proposals which are not being pursued are:

- the proposal to remove the right to an oral renewal hearing in cases where permission is refused and substantially the same matter has been heard at a prior judicial hearing; and
- the proposal for any challenges to a continuing breach or multiple decisions to be brought within 3 months of the first instance of the grounds and not from the end or the last incidence of the grounds.

The CPR Committee will now consider amending the CPR to reflect the new judicial review time limits and procedure.

Further changes to the Community Infrastructure Levy – DCLG – 15 April 2013

The Consultation on community infrastructure levy further reforms published on 15 April proposes yet further changes to CIL: the fourth proposed amendments to the CIL system since it came into force in April 2010. The main proposed changes are:

- Requiring a charging authority to demonstrate, via evidence at the examination of the charging schedule, that it has struck an appropriate

balance between the desirability of funding infrastructure from the levy and the potential effects of the levy on economic viability of development across its area.

- Allowing differential rates to be set for different uses and locations (as is the case now) and for scales of development.
- Extending the consultation period on the draft charging schedule from the current 'at least 4 weeks' to 'at least 6 weeks'.
- The regulation 123 list of infrastructure LPAs propose to fund wholly or partly through CIL are to be published at the same time as the draft charging schedule, and be part of the relevant evidence at examination.
- A new regulation 123 list can only be brought forward after 'proportionate' consultation.
- Extending the transition period from 6 April 2014 to April 2015 before restrictions on the use of pooled planning obligations come into effect. The consultation clarifies that a s.106 agreement 'may contain more than one planning obligation.'
- Amending the relationship between CIL and s 278 agreements so that they cannot be used to fund infrastructure for which the levy is earmarked. Currently, s 278 agreements are not subject to the limitations imposed on s 106 agreements.
- Allowing charging authorities the choice to accept payments in kind through provision of both land and infrastructure either on-site or off-site for the whole or part of the levy payable on a development.
- Allowing all types of planning permissions (outline or full) to be capable of being considered as multi-phase schemes comprising separate chargeable developments.
- Removal of the vacancy test under which a building which has been vacant for more than 6 months within the 12 months ending with the CIL chargeable planning permission cannot have the existing floorspace credited against the CIL liability, as long as the use has not been abandoned.
- Extension of social housing relief to discount market sales within their areas.
- Making it easier to apply exceptional circumstances discretionary relief by removing one of the preconditions, namely the requirement for a planning obligation to be greater than the value of CIL.
- Introducing relief from CIL for all self-build homes.
- Modifications to the appeals procedures and the allowing of appeals in certain cases after development has commenced.
- Introducing transitional measures so that changes related to the charge setting process should not apply to authorities who have already published a draft charging schedule.

CONSULTATION

The consultation closed on 28 May 2013.

REPORTS/PUBLICATIONS

Updated Community Infrastructure Levy guidance is published – 10 May 2013

DCLG published updated Community infrastructure levy: guidance on the 16 May under s 221 of the PA 2008.

The updated guidance replaces the Community infrastructure levy guidance: charge setting and charging schedules procedure published on 25 March 2010 and the Community infrastructure levy: guidance published on 14 December 2012 which replaced the 2010 guidance.

This new guidance note is an extended version of the 2012 Guidance and includes a section explaining the changes made by the Community Infrastructure Levy (Amendment) Regulations 2013.

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