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 137–155. This bulletin covers material available until 22 January 2014.

LEGISLATION

Regulations bringing business and commercial projects within the PA 2008 regime came into force on 18 December 2013

The Infrastructure Planning (Business or Commercial Projects) Regulations 2013 (SI 2013/3221) were made on 17 December 2013 and came into force on 18 December 2013.

The Regulations enable the Planning Act 2008 (PA 2008) regime for the authorisation of nationally significant infrastructure projects to be used for those categories of business or commercial projects prescribed in the Regulations. Applicants who wish to use this procedure (there is no compulsion to do so) must first obtain a direction from the Secretary of State, who can only make a direction if he thinks that the project is of national significance. The Secretary of State published a policy statement in November 2013 setting out the matters that the Secretary of State will take into account when considering whether a project is of national significance eg whether the project is likely to have a significant economic impact, or is important for driving growth in the economy.

The Regulations list the winning and working of minerals in, on or under land and the construction of buildings or facilities for use for the purposes of one or more of the following matters as the types of business and commercial development which can use the PA 2008 regime:

1. Office use.

2. Research and development of products or processes.
3. An industrial process or processes.
4. Storage or distribution of goods.
5. Conferences.
6. Exhibitions.
7. Sport.
8. Leisure.
9. Tourism.

The winning or working of peat, coal, oil or gas, or the construction of one or more dwellings is specifically excluded.

Further changes to planning fees introduced on 1 October 2013

The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2013 (2013/2153) came into force in England on **1 October 2013** and amend the TCP (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 (SI 2012/2920) by:

- enabling the planning application fee to be paid to the Planning Inspectorate where planning applications are made directly to the Secretary of State as a result of LPAs being designated under s 62A of the Town and Country Planning Act 1990 (TCPA 1990) (inserted by s 1 of the GIA 2013);
- allowing for planning applications which replace conservation area consent to continue to be free – this maintains the status quo as no fees were charged for conservation area consent applications (planning applications for the demolition of an unlisted building in a conservation area are also exempt from the requirement to pay a fee);
- introducing measures to refund the planning application fee where a planning application is not determined within 26 weeks – this underpins the Planning Guarantee set out in the Government's 'Plan for Growth' of March 2011;
- introducing a fee of £80 for the use of the prior approval process under Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (GPDO 1995) where planning permission is granted for a change of use (there is an exemption where a corresponding planning application for planning permission on the same site is made at the same time as the prior approval application); and
- including two minor technical amendments.

Extension of electronic communications code operators PD rights in force from 21 August 2013

The Town and Country Planning (General Permitted Development) (Amendment) (No 2) (England) Order 2013 (SI 2013/1868) came into force on **21 August 2013** in England only.

The order increases the existing permitted development rights for electronic communications code operators set out in Class A of Part 24 of Schedule 2 to the GPDO 1995 by for example, allowing existing masts to be altered or replaced to increase their height (up to a maximum height of 20 metres) and make them up to a third wider, although not on article 1(5) land or on SSSIs, and subject to prior approval on other land.

More amendments to the CIL regulations to come into force end of January 2014

Following a consultation in April/May 2013, the Government confirmed in its response published on 25 October 2013, that it would proceed with making further changes to the Community Infrastructure Levy (CIL) Regulations.

The Government has now laid the draft Community Infrastructure Levy (Amendment) Regulations 2014 before Parliament. Some of the key changes to be made to the Community Infrastructure Levy Regulations 2010 are:

- they will push back the date from which pooling restrictions on s 106 obligations will apply to for a further year from April 2014 to April 2015;
- requiring a charging authority to strike an appropriate balance between the desirability of funding infrastructure from CIL and the potential effects of the levy on the economic viability of development across its area;
- charging authorities would be allowed to set differential rates by reference to the size of the development (in addition to geographic zones and for different uses of development);
- amendment of the vacancy test under which buildings will only have to have been in use for six continuous months out of the last three years for CIL to be payable only in relation to the net addition of floorspace (previously the requirement was for a building to have been in continuous lawful use for at least six of the previous twelve months);
- clarifying that agreements under s 278 of the Highways Act 1980 cannot be used to fund infrastructure for which CIL is earmarked, in order to ensure developers do not contribute twice to the same infrastructure. It is proposed that this measure will not restrict the use of s 278 agreements by the Highways Agency, Transport for London or Welsh Ministers;

- giving charging authorities the option to accept payments in kind through the provision of infrastructure either on-site or off-site for the whole or part of the CIL payable on a development;
- a new mandatory exemption for self-build housing, including communal development, and new mandatory exemptions for residential annexes and extension;
- a change which ensures that if any planning permission is phased, then each phase will be a different chargeable amount and an amendment to allow CIL to be paid through the provision of infrastructure.

Pre-application consultation requirements for onshore wind applications in force from December 2013

The Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2013 (2013/2932) came into force on 17 December 2013 and amends the Town and Country Planning (Development Management Procedure) (England) Order 2010 by introducing a new requirement for applicants to undertake pre-application consultation with local communities prior to the making of an application for development involving the installation of more than two turbines or where the hub height of any turbine exceeds 15 metres.

This order also amends the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (2013/2140) which sets out the procedure to be followed in relation to s 62A applications made directly to the Secretary of State.

New application form and notification requirements for onshore oil and gas applications in force from 13 January 2014

The Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment No 2) Order 2013 (2013/3194) came into force in England on **13 January 2014** and amends the provisions for notifying the owners of land in respect of planning applications for development consisting of the winning and working of oil or natural gas in relation to land to be used solely for underground operations (including exploratory drilling).

The proposals follow a consultation between September and October 2013 on ensuring that application requirements for onshore oil and gas development (and with shale gas exploitation in mind) are 'fit for purpose and proportionate'. The changes proposed were:

- how landowners and tenants are notified by applicants of applications for onshore oil and gas development;
- the form on which any application for onshore oil and gas development should be made; and

- calculation of the fee to accompany planning applications for onshore oil and gas development.

Following that consultation, the Government has amended the Town and Country Planning (Development Management Procedure) (England) Order 2010 (DPMO) to provide:

- For the Secretary of State (not the LPA) to publish the application form for planning permission consisting of the winning and working of oil or natural gas by underground operations (including exploratory drilling); and
- where the land in question is solely to be used for underground operations the applicant must notify the owner and tenants by: (1) publishing a notice in a local newspaper and (2) putting up a local site notice in each parish or ward (where the land is unparished) in which the land is situated.

Prior to the changes, all planning applications, except those concerned with mining operations or the winning and working of mineral-deposits, had to be submitted on a form published by the Secretary of State (the forms are published online on the Planning Portal). For development involving the winning and working of minerals by underground workings, an applicant had to notify the owners and the tenants of the land to which the application related by: (1) serving each owner and tenant; (2) publishing a notice in a local newspaper and (3) putting up a local site notice in each parish in which the land is situated. The Government has removed the requirement to notify individual owners on the grounds that it is not reasonable nor practicable to require applicants for planning permission for underground oil or natural development to serve individual owners or tenants of land across a such widely drawn area.

The draft Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2014 have also been laid in Parliament and amend the TCP (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 (SI 2012/2920) to clarify the way in which fees are calculated for applications/deemed applications for operations connected with drilling for oil or natural gas by excluding from the calculation of fees any part of the site area required solely for underground operations (so fees should be calculated on the basis of the area of the above ground works only).

Town and villager greens trigger and terminating events – draft order

Section15 (1) of the Commons Act 2006 contains a right to apply for registration of land as a town or village green. The GIA 2013 s 16 and Schedule 4 introduced a new s 15C and Schedule 1A into the 2006 Act restricting the right to apply for registration of land as a green where one of a number of specified trigger events occur. The restriction is lifted when a

corresponding 'terminating' event subsequently occurs in respect of the land. If there has been a trigger event, then any application to register land as a town or village green will be rejected, unless its corresponding terminating event has occurred.

Between July and August 2013 the Government consulted on a draft order (Consultation on registration of new town or village greens: proposed amendments to Schedule 1A (Exclusion of Right under section 15) to the Commons Act 2006) to add additional trigger and terminating events. The Government's response to that consultation was published in December 2013 (Consultation on registration of new town or village greens: proposed amendments to Schedule 1A (Exclusion of Right under section 15) to the Commons Act 2006: summary of responses and government response).

The consultation paper proposed further changes to Schedule 1A and set out proposals for additional terminating events to ensure that all outcomes of plan-making are covered and that the exclusion on applications for town and village green registration is not open ended if there is no longer a development proposal, but draft plans are not withdrawn, adopted or made. The consultation paper also invited views upon the need for a series of additional trigger and terminating events in order to protect development proposed and/or permitted by virtue of three matters not already included in Schedule 1A, namely in relation to Local Development Orders, Neighbourhood Development Orders and Orders under the Transport and Works Act 1992.

The draft Commons (Town and Village Greens) (Trigger and Terminating Events) Order 2013 has now been published and extends the protection from town or village green registration to development proposed or permitted by Local Development Orders, Neighbourhood Development Orders and orders under the Transport and Works Act 1992.

Changes to how Local Development Orders are made

On 9 December 2013, the following orders came into force:

- The Growth and Infrastructure Act 2013 (Commencement No 5 and Transitional and Saving Provisions) Order 2013 (2013/2878); and
- The Growth and Infrastructure Act 2013 (Local Development Orders) (Consequential Provisions) (England) Order 2013 (2013/2879).

Both orders relate to s 5 of the GIA 2013 which removes the Secretary of State's powers to intervene in local developments orders (LDOs) prior to their adoption. The Secretary of State will no longer be able to direct that an LDO be submitted for his approval, and will no longer be able to approve, reject or modify the LDO prior to adoption.

The commencement order brought s 5 of the GIA 2013 into force and the second order made consequential changes in connection with the commencement of s 5. It provides that the LPA must send the Secretary of State a copy of the LDO, any environmental statement and statement of reasons as soon as reasonably practicable, and no later than 28 days, after adoption.

The orders contain transitional provisions so that the changes do not apply to LDOs whose consultations began before 9 December 2013. The changes apply to England only.

Abolition of conservation area consent in England from 1 October 2013

The Enterprise and Regulatory Reform Act 2013 amended ss 74 and 75 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to provide that the requirement for conservation area consent in respect of the demolition of certain unlisted buildings in a conservation area no longer applies to England. Instead, an application for full planning permission must be made, and a new s 196D was inserted into the TCPA 1990 to make it an offence to fail to obtain planning permission for such demolition.

Four SIs (applying to England only) came into force on **1 October 2013** as a consequence of the above provisions:

- The Town and Country Planning General (Amendment) (England) Regulations 2013 (2013/2145) amend the Town and Country Planning General Regulations 1992 to provide for the Secretary of State to determine applications made by LPAs for planning permission for the demolition of an unlisted building in a conservation area and the procedure to be followed on such applications;

- The Enterprise and Regulatory Reform Act 2013 (Abolition of Conservation Area Consent) (Consequential and Saving Provisions) (England) Order 2013 (2013/2146) amends a number of statutory instruments as a consequence of the provisions in the 2013 Act so as to remove the references to 'conservation area consent' from existing secondary legislation;

- The Town and Country Planning (General Permitted Development) (Amendment) (England) (No 3) Order 2013 (SI 2013/2147) amends Part 31 (demolition of buildings) of Schedule 2 to the GPDO to provide that "relevant demolition" is not permitted development – full planning permission will therefore be required; and

- The Town and Country Planning (General Permitted Development) (Amendment) (England) (No 4) Order 2013 (2013/2435) amends the GPDO so that 'relevant demolition' (demolition of certain unlisted buildings in conservation areas in England) is not permitted development for the purpose of Class B of Part 31 of Schedule 2 to the GPDO. The (No 3) Order 2013 above makes equivalent amendment to Class A of Part 31. This order is required because without an equivalent amendment to Class B, demolition of gates, fences, walls etc in a conservation area would be permitted under that class.

New regulations in force from 1 October 2013 dealing with planning applications where the LPA has been 'designated'

Under s 1 of the GIA 2013 a new s 62A was inserted into the TCPA 1990 dealing with the situation where an LPA is underperforming and as a consequence 'designated' so that certain types of planning applications and connected applications (eg for listed building consent) can be made directly to the Secretary of State, rather than LPA.

The following three SIs came into force on **1 October 2013** and set out the procedure to be followed where a person submits such an application:

The Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (SI 2013/2140) which sets out the procedures to be followed in relation to s 62A applications made directly to the Secretary of State;

The Town and Country Planning (Section 62A Applications) (Hearings) Rules 2013 (SI 2013/2141) which provide rules in relation to hearings held to consider s 62A applications; and

The Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Regulations 2013 (SI 2013/2142) set out provisions which apply where the s 62A application is to be determined by way of written representations instead of a hearing.

New appeal regulations came into force in England on 1 October 2013

On **1 October 2013**, the following regulations dealing with planning appeal procedures came into force in England:

- The Town and Country Planning (Development Management Procedure) (England) (Amendment No 2) Order 2013 (2013/2136);
- The Town and Country Planning (Hearings and Inquiries Procedure) (England) (Amendment) Rules 2013 (SI 2013/2137);
- The Town and Country Planning (Appeals) (Written Representations Procedure and Advertisements) (England) (Amendment) Regulations 2013 (SI 2013/2114); and
- The Planning (Listed Buildings and Conservation Areas) (Amendment No 2) (England) Regulations 2013 (SI 2013/2115).

The above legislation follows a consultation (Technical review of planning appeal procedures) which took place between November and December 2012 on proposals for how the planning appeals process could be sped up and streamlined, so that earlier decisions can be taken. The above regulations and rules put a number of those proposals into effect. Essentially, applicants will

be required to submit a greater amount of information with their appeal forms with the aim of making the appeal process faster and more transparent.

The key reforms for LPAs include the need to:

- notify interested parties of an appeal within one week, instead of two;
- submit the appeal questionnaire to PINS within one week, instead of two;
- submit any further representations by week 5, instead of week 6;
- agree a statement of common ground for hearings and inquiries with the appellant by week 5, instead of week 6;
- notify applicants and interested parties when planning applications are within scope of the new Commercial Appeals Service (advertisement consents and shop fronts) using new model letters in the Town and Country Planning (Development Management Procedure) (England) (Amendment No 2) Order 2013;
- respond to week 5 interested party comments by week 7 (written representations only).

The key reforms for appellants include the need to:

- submit a full statement of case when the appeal is first made;
- submit a draft statement of common ground for hearings and inquiries when the appeal is first made;
- finalise the statement of common ground by week 5, instead of week 6;
- respond to week 5 LPA and interested party comments by week 7 (written representations only).

The key reforms for interested parties include the need to submit representations on an appeal by week 5, instead of week 6.

On 3 October 2013, the Department for Communities and Local Government (DCLG) also published the Planning and other appeals, and the award of costs: guidance which provides information on planning and other appeals and the award of costs, and the introduction of the Commercial Appeals Service (an expedited procedure for some minor commercial appeals such as those relating to advertisement consent or shop fronts).

CASES OF INTEREST

Supreme Court decides against HS2 objectors – 22 January 2014

R (*on the application of HS2 Action Alliance Ltd*) (*Appellant*) *v The Secretary of State for Transport and anor* (Respondents)

R (*on the application of Heathrow Hub Ltd and anor*) (*Appellants*) *v Secretary of State for Transport and anor* (Respondents)

R (*on the application of Hillingdon London Borough Council and ors*) (*Appellants*) *v The Secretary of State for Transport* (*Respondent*) [2014] UKSC 3

On 22 January 2014, the Supreme Court unanimously dismissed the challenge to HS2 brought jointly by three appellants: HS2 Action Alliance (representing almost 100 protest groups and residents' associations), Heathrow Hub Ltd (which promotes the expansion of Heathrow Airport), and a group of local authorities. Their arguments raised important questions of environmental and constitutional law. 'The appellants' case', commented Lord Neuberger (the President of the Court) and Lord Mance, amounted 'to challenging the whole legitimacy of Parliamentary democracy as it presently operates.'

The two issues before the Court both concerned the environmental assessment of the HS2 project.

The project itself has been the subject of a large Environmental Statement (ES) which accompanied the publication of the hybrid bill in Parliament (the consultation deadline for comments on the ES has been extended to 27 February 2014).

However, the first issue centred on the environmental assessment not of the HS2 project itself but at a higher level. The question was whether the Government should have carried out a 'Strategic Environmental Assessment' (SEA) under European Directive 2001/42/EC (on the assessment of the effects of certain plans and programmes on the environment) of its decision to proceed with HS2 announced in its command paper 'High Speed Rail – Investing in Britain's Future: Decisions and Next Steps' published in January 2012. The aim of the SEA Directive is to ensure that 'plans and programmes' against which projects will be determined will be subjected to the same environmental scrutiny as that to which the projects themselves are subjected.

The Government did not carry out SEA of the command paper, arguing before the Court that it did not need to do so as the requirements to undertake a SEA did not apply to the command paper because it was not a 'plan or programme' of the type covered by the Directive.

The Court agreed and held that while the command paper described the HS2 project and the Government's rationale behind it including its rejection of the alternatives, it did not constrain the decision-making role of Parliament. It did not set the criteria by which the HS2 project was to be determined by Parliament and so was not a 'plan or programme' for the purposes of the SEA Directive.

The second main issue was whether the Government's decision to seek authorisation of HS2 via the hybrid bill procedure – as opposed to seeking consent under the PA 2008 or the Transport and Works Act 1992 – was compatible with the requirements of the Environment Impact Assessment (EIA) Directive. Unlike the SEA Directive, which covers plans and programmes, the EIA Directive covers the assessment of projects themselves. It includes various requirements for scrutiny and public participation, which the appellants argued could not be achieved through the hybrid bill process.

In arguing that the hybrid bill route did not allow for effective scrutiny and public participation, the appellants focused on three areas:

1. MPs voting on the HS2 bill will have to toe party lines, preventing them from giving proper, independent thought to environmental concerns;
2. the environmental information accompanying the hybrid bill was 'voluminous and complex' so that MPs could not possibly give it suitable attention; and
3. the remit of the Parliamentary select committee tasked with examining the bill will be severely curtailed by the fact that it will not be able to question the principle of the bill which would be settled after the second reading, ie a high speed rail line running between London and Birmingham.

The Supreme Court rejected these arguments. There was no reason, in their view, to doubt that MPs would properly examine and debate the HS2 project.

The Court also declined to refer the above issues to the European Court of Justice on the basis that the answers to the issues raised by the appellants were clear and capable of being determined by them without a reference.

This may not be the end of this challenge however: 'we are very disappointed', said Emma Crane of HS2 Action Alliance, 'but it is absolutely not the end of the road. We believe this is a wrong decision. … We will make a complaint to the European Commission to say the UK government has not complied with its European law obligations on the environment.'

The correct interpretation of paragraph 47 on the supply of housing in the NPPF

St Albans v Hunston Properties Ltd, R (On the Application Of) [2013] EWCA Civ 1610 (12 December 2013)

This case concerns the interpretation of paragraph 47 of the National Planning Policy Framework (NPPF) which under the heading of 'Delivering a wide choice of high quality homes' states:

> '47. To boost significantly the supply of housing, local planning authorities should:
>
> •Use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
>
> •Identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record

> of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land.'

Hunston Properties Ltd applied for outline planning permission for the construction of 116 dwellings, a care home and some associated facilities on 5 hectares of agricultural land. Permission was refused by the Council principally on the ground that the site was almost entirely within the Green Belt.

Hunston's subsequent appeal was dismissed by an inspector but the High Court quashed the inspector's decision. The Council appealed.

Sullivan LJ gave permission to appeal the High Court decision not on the basis that the appeal had a real prospect of success, but because found that there was a compelling reason for the appeal to be heard so that there could be a 'definitive answer to the proper interpretation of paragraph 47' of the NPPF, and in particular the interrelationship between the first and second bullet points in that paragraph.

The Council did not have a local plan in place and in the light of this; the inspector adopted the housing target figure of 360 dwellings per annum from the revoked East of England RSS. This figure reflected the constraints for development in the Council's area as virtually all the undeveloped land in the district outside the built up areas forms part of the Green Belt. Consequently, the inspector held there was no shortfall in supply.

The issue in the case was the approach to be adopted as a matter of policy towards a housing development proposal on a Green Belt site where the housing requirements for the relevant area have not yet been established by the adoption of a local plan produced in accordance with the policies in the NPPF.

The Court of Appeal dismissed the Council's appeal and held that the words 'as far as is consistent with the policies set out in this Framework' in paragraph 47 qualified the extent to which the local plan should go to meet the housing requirement and were not be interpreted to mean that the housing requirement figure itself should be qualified to reflect any constraints on development.

The Court held that the inspector had erred in law in the approach she adopted to calculating the housing land requirement over the five-year period. The Court held:

> 'Where this inspector went wrong was to use a quantified figure for the five year housing requirement which departed from the approach in the Framework, especially paragraph 47. On the figures before her, she was obliged (in the absence of a local plan figure) to find that there was a shortfall in housing land supply'.

It was then a matter of planning judgement as to whether fulfilling the need for housing clearly outweighed the harm that would result to the Green Belt.

The challenge to permitted development allowing change of use from offices to residential fails in the High Court

London Borough of Islington v Secretary of State for Communities & Local Government [2013] EWHC 4009 (Admin) (20 December 2013)

In this well publicised case, the claimants, a group of London local authorities, challenged the consultation process which led to the insertion of a new permitted development class J into Part 3 of Schedule 2 of the GPDO (allowing the conversion of B1 (a) offices into C3 residential units) which came into force on 30 May 2013 (The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013).

Prior to the new permitted development rights being introduced, local authorities were given an opportunity to apply for an exemption from the PD rights for specific parts of their areas. The exemptions were to be granted in exceptional circumstances and only where it could be demonstrated that the new PD rights would lead to:

(a) the loss of a nationally significant area of economic activity; or

(b) substantial adverse economic consequences at the local authority level which are not offset by the positive benefits the new rights would bring.

DCLG subsequently engaged Ove Arup consultants to examine the requests for exemptions with each application assessed using the same criteria on its own merits. It was decided by DCLG that an equal weighting was to be applied to the strength of the case for exemption and the robustness of the evidence in support. Any assertions made by an applicant had to be clearly supported by referenced and submitted evidence.

The claimants contended that the failure to inform them of the way in which their exemption applications would be assessed was unfair and therefore unlawful. It was submitted that DCLG should have settled in advance how it would approach the assessments and should in particular have told applicants of the decision to award marks for robustness of evidence separately from the strength of the application so that a meritorious application could be marked down if the evidence was regarded as insufficiently robust. The claimants also said that there was no reference to any need to refer to planning policies. Had they been aware of this, they could easily have included the material cross-references and could have geared the submissions to focus on the matters which were regarded by the assessor as important.

In addition it was argued that the four-week time limit given for the submission of the applications was unreasonable and unfair.

The court dismissed the challenge. While accepting that 'it would have been sensible for the defendant to have worked out in advance how applications were to be assessed and to have given that information to the LPAs' the 'failure to do what is best is not to be equated to unfairness justifying a decision that what was done was unlawful'. There was no unfairness in this case.

The planning enforcement time limits are not incompatible with the EIA Directive

Evans, R (On the Application Of) v Basingstoke and Deane BC [2013] EWCA Civ 1635 (20 November 2013)

A planning permission was granted for a change of use of land from agricultural use to a mixed agricultural and industrial use (industrial being predominant) on the basis that the change of use was immune from enforcement action by virtue of s 171B of the TCPA 1990 (the breach having persisted for more than ten years).

The permission was challenged on the grounds that as the change of use to predominantly industrial use was schedule 2 EIA development, the time limit on an LPA's ability to take enforcement action should not apply in cases such as this where EIA development had taken place without any screening or EIA ever having been carried out.

The appellant sought to rely on the obiter observations from judgments in *Ardagh Glass v Chester City Council* [2009] EWHC 745 (Admin) [2009] and *R* (*Prokopp*) *v London Underground Ltd* [2003] EWHC Civ 961 [2004]. However, the Court pointed out that both these cases were concerned with situations in which the time limits for immunity from enforcement action had not yet expired and where a decision by the LPA not to enforce (within the time limits) might amount to a breach of the EIA Directive.

By contrast, in the current case, the appellant was contending that the LPA's lack of power to take enforcement action after the expiry of the relevant ten-year time limit was a breach of the EIA Directive.

The Court of Appeal held that the enforcement time limits in s 171B fell squarely within the principles in *R* (*on the application of*) *Wells v Secretary of State for Transport, Local Government and the Regions* [2004], a case concerning the need to carry out an environmental assessment of new conditions imposed in respect of an old mining permission. In that case the ECJ held that competent authorities were obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project under the EIA Directive. However, it was for the national court to determine whether it was possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects.

As the time limits on taking enforcement action are not in principle incompatible with a member state's obligations to ensure compliance with the EIA Directive, then the precise nature of the time limits is a matter which falls within the principle of procedural autonomy of the member states, provided that the time limits imposed by the member state comply with the principles of equivalence and effectiveness.

The Court rejected the contention that the statutory immunity from enforcement conferred by s 171B of the TCPA 1990 was incompatible with article 2(1) of the EIA Directive and ought therefore to be disregarded. Further, the appellant or anyone else could have challenged the lawfulness of the industrial use of the site within the ten-year time limit – there had been ample opportunity to do so.

Withdrawal of an inspector's decision issued in error

Gleeson Developments Ltd, R (On the Application Of) v Secretary of State for Communities and Local Government [2013] EWHC 3166 (Admin) (21 October 2013)

This case concerns an inspector's decision letter in respect of a planning appeal which was issued by mistake.

Planning permission was refused by the council for a development of up to 180 residential dwellings in Malmesbury and the claimant appealed. A public inquiry was held in 2013 while at around the same time the Malmesbury draft neighbourhood plan was published by the Malmesbury Neighbourhood Steering Group which proposed housing development other than on the site subject of the appeal.

The Secretary of State decided he wanted to recover the planning appeal as it might impact on the draft neighbourhood plan. Accordingly, on 18 March 2013, a DCLG official emailed an officer at PINS confirming that the Minister had decided to recover the appeal for his determination. Unfortunately, the PINS officer was on leave that day and did not read the email until 19 March 2013.

Meanwhile, another PINS officer issued the planning inspector's decision letter on 18 March 2013 via email allowing the appeal and granting outline planning permission.

PINS discovered the position on 19 March 2013 and sent the claimant a letter via email stating that the Minister had decided to recover the appeal for his own determination and that the decision letter had been issued in error. On 20 March 2013, PINS issued a further letter confirming that the Secretary of State was to determine the appeal himself and the reasons for recovering the appeal by the Minister.

The claimant challenged:

1. the decision by PINS on 19 March 2013 purporting to withdraw the inspector's decision letter on the grounds that it was ultra vires and unlawful as there was no statutory power to withdraw a valid grant of permission under the TCPA 1990. The Secretary of State argued a power to withdraw the planning permission in circumstances such as this case could be implied in the TCPA 1990 as within any legislative code there are implicit ancillary powers which facilitate the powers which an Act expressly confers; and

2. the Secretary of State's letter dated 20 March 2013 purporting to recover the appeal for his own determination on two grounds. First, on the grounds that Secretary of State's direction post-dated the inspector's determination of the appeal because it was not served on the inspector or the parties to the appeal prior to the inspector's determination being issued – ie the service of the appeal was a prerequisite to its effectiveness. Second, even if the recovery direction was effective, it was unlawful because it was issued without consultation and the only justification the Secretary of State gave for it, set out in the letter of 20 March 2013, was the fact that it involved 150 dwellings or covered a site of more than 5 hectares and this reason for recovery had been rejected by the Secretary of State at the beginning of the appeal (the Secretary of State had decided not to recover the appeal when it was first submitted).

The challenge was dismissed.

The court found implying a power of withdrawal into the TCPA 1990 as 'the most troubling aspect' of the Secretary of State's case. Asking, if Parliament has not incorporated that power, especially in what has been characterised as a code of planning law, how can the court be justified in reading it in?

Nevertheless, and not 'without some doubt' the court held that Parliament intended a 'modest' power of withdrawal to be implied into the TCPA 1990, to enable simple and obvious administrative errors to be corrected, within the relatively short time scale, as in the circumstances of this case.

The court held that the recovery direction took effect, at the latest, when the DCLG official notified PINS by email so the recovery direction was in force when the decision letter was issued later on the same day. At that point, the planning inspector no longer had jurisdiction over the appeal and so the decision letter was of no legal effect. Further, there was no provision in the TCPA 1990 requiring the Secretary of State to first consult the parties before recovering an appeal. The courts are slow to read into legislation obligations to consult where no such provision is provided in the legislation.

Meaning of inappropriate development in the Green Belt policies in the NPPF

Fordent Holdings Ltd v Secretary of State for Communities and Local Government [2013] EWHC 2844 (Admin) (26 September 2013)

This case concerns the interpretation of Green Belt policies contained in the NPPF particularly at paragraphs 79–81 and 87–90.

Paragraph 79 states the Government attaches great importance to Green Belts and then sets out the five purposes of the Green Belt. In relation to development, paragraph 87 reiterates previous Government policy that inappropriate development is by definition harmful to the Green Belt except in 'very special circumstances' and 'very special circumstances' will not exist unless the harm to the Green Belt by reason of inappropriateness, and any

other harm, is clearly outweighed by other considerations (para 88). Paragraph 89 states that the construction of new buildings in the Green Belt is inappropriate, subject to a list of exceptions, which includes provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries. Paragraph 90 of the NPPF sets out the types of development that may be appropriate in the Green Belt, provided that the openness of the Green Belt is preserved and there is no conflict with the purpose of including the land in the Green Belt.

In this case an outline planning application and a subsequent appeal for development compromising a change of use of a site in the Green Belt from agricultural use to a caravan and camping site, shop, reception and office facilities was unsuccessful. The developer challenged the appeal decision on the grounds (among others) that the inspector was wrong to conclude that a change of use from agricultural use to outdoor sport and recreation was inevitably inappropriate development and thus not to be permitted in the absence of very special circumstances, and that the inspector was wrong to conclude that paragraph 89 of the NPPF did not apply to changes of use.

The High Court held that the meaning of 'development' used in the NPPF had the same meaning as the definition in s 55 of the TCPA 1990 which includes not only operational development but also a material change of use. A material change of use was therefore capable of being inappropriate development within the meaning of paragraph 87 of the NPPF.

The Court held that paragraphs 87, 89 and 90 of the NPPF should be read together. These paragraphs set out that all development in the Green Belt is inappropriate (and therefore can only be permitted in very special circumstances) unless it falls within one of the exceptions referred to in paragraphs 89 and 90 of the NPPF. Thus a change of use falling within one of the categories identified in paragraph 90 is in principle capable of being not inappropriate.

The real issue was whether development in the form of a material change of use outside the categories identified in paragraph 90 must by definition be inappropriate development or whether such a change of use has to be considered on its merits with a decision to be taken as to whether it is inappropriate or not inappropriate development (as was the position under PPG2).

Paragraph 89 is exclusively concerned with the construction of new buildings and does not apply to any other form of development. When paragraphs 87, 89 and 90 are read together, the meaning is clear. Development in the Green Belt is inappropriate (and thus can be permitted only in very special circumstances) unless it falls within one of the exceptions identified in paragraphs 89 and 90.

A change of use has to be considered on its merits with a decision to be made as to whether it is inappropriate development or not.

NEWS

The BPF launches the '10 commitments for effective pre-application engagement' in conjunction with the LGA and PAS – 22 January 2014

The British Property Federation has developed ten commitments designed to 'set out the positive spirit that should be embodied pre-application engagement and the arrangements that should make early exchanging information and advice better value for all.'

The commitments are endorsed by the LGA, Home Builders Federation, Planning Officers Society, Planning Advisory Service, RTPI, locality, Federation of Master Builders and Croydon, Essex and Bristol City councils.

In addition, the main statutory consultees (English Heritage, the Environment Agency, the Health and Safety Executive, the Highways Agency and Natural England) are said to have been involved in the development of the commitments and 'are fully committed to effective pre-application engagement with local planning authorities, with developers, and with local communities in accordance with the commitments. They commend this document as setting out a clear framework within which they can further develop and deliver efficient and effective pre-application services to help achieve better, more sustainable development. They will endeavour to ensure that the commitments are embedded in their respective approaches to participation in, and management of, pre-application engagement on schemes where they have a role'.

The ten commitments are:

1. Pre-application engagement should enable sustainable development to proceed quickly and smoothly from proposal to completion. This is a co-operative process that requires a positive, proactive commitment from all participants to achieve this goal.

2. Those providing pre-application services should offer a range of timely, effective services proportionate to the scale and complexity of proposed development. The process, timescales, costs and outputs should all be clearly set out.

3. Prospective applicants should select the level of pre-application engagement necessary to adequately deal with the issues raised by the scale and complexity of the proposed development. Failure to engage at the right time or at the right level could have an adverse impact on the timely consideration of the subsequent application.

4. Pre-application services should be delivered in a timely manner and demonstrate good value for money, irrespective of whether the provider of pre-application services makes a charge for them.

5. Pre-application discussions should bring together the right people to address all of the development issues. All parties should have processes

in place to ensure that advice given and commitments made are carried through to application and permitting stages.

6. Pre-application engagement should be based on an open exchange of the information needed to allow all the relevant matters, including all obligations and viability, to be considered prior to the submission of a planning application.

7. Collaborative working to find deliverable solutions will necessitate that, while the development plan must be the starting point for discussion, the requirements of all parties should be given consideration. Planning Performance Agreements (PPA) are recommended to deal with timing issues and constraints.

8. LPAs should ensure that their pre-application offer provides an opportunity for councillors to be actively involved in pre-application discussions as part of a transparent process.

9. All parties should consider engaging with local communities at the pre-application stage about development proposals in their area. This early engagement should be proportionate to the impact on the wider community and enable community representatives to inform and influence the proposals.

10. All those involved in the pre-application engagement should maintain an agreed record of information submitted, advice given and, where appropriate, agreements reached during pre-applications discussions.

The Environment Agency launches a charged-for pre-application planning advice service in England from 2 January 2014

On 2 January 2014, the Environment Agency (EA) launched a new charge of £84 per hour (legal staff will charge £125 per hour) for 'detailed technical advice' for planning applications or DCOs. This charge for advice is to be provided through a formal agreement made up of an offer letter, a programme of advice and standard terms and conditions. The EA will discuss the advice needed with the applicant and agree a programme to specify the tasks that will be carried out. This sounds very similar to Planning Performance Agreements entered into by LPAs with developers for some large-scale developments, including DCOs.

The EA says that it has introduced this paid-for service due to budget cuts. Applicants will need to submit a red line boundary and description of the proposal directly to the EA (not via the LPA) who will then provide a free preliminary opinion outlining the EA's position and highlighting any environmental issues.

Any further advice required following the preliminary opinion, will be provided at a chargeable rate set out above. This cost will include reviews of technical documents, meetings and site visits.

The free pre-application advice will still be provided but the paid-for service will kick in where more 'detailed technical advice' is sought.

Autumn Statement 2013 and the National Infrastructure Plan 2013 – key planning changes proposed – December 2013

The Autumn Statement delivered by the Chancellor on 5 December 2013 together with the HM Treasury UK National Infrastructure Plan 2013 (NIP) – first published in 2010 and updated every year – contain a number of important announcements relevant to the planning and NSIP regimes as follows (any progress made in respect of each are item is also set out below):

- **Local Plans** – The Government will consult on measures to improve plan-making, including a statutory requirement to put a Local Plan in place (there is already a statutory requirement!);
- **Further permitted development rights** – The Government will consult on liberalising change of use from retail to restaurant or assembly and leisure uses, and liberalising planning restrictions on mezzanine floors in retail premises, where this will support town centres;
- **Planning conditions** – The Government will legislate to treat planning conditions as approved where an LPA has failed to discharge a planning condition on time. The Government will consult on legislative measures to strengthen the requirement for planning authorities to justify any conditions that must be discharged before building can start – this measure is expected to come into force on 6 April 2014;
- **Statutory consultees** – The Government will consult on proposals to reduce the number of applications where unnecessary statutory consultations occur and pilot a single point of contact for cases where conflicting advice is provided by key statutory consultees;
- **Planning authority performance** – The Government will consult on increasing the threshold for designation under the GIA 2013 from 30% to 40% of decisions made on time;
- **Section 106 contributions** – The Government will consult on a new 10-unit threshold for s 106 affordable housing contributions to reduce costs for smaller builders;
- **New Homes Bonus** – The Government will consult on measures to improve further the incentive of the New Homes Bonus, in particular withholding payments where LPAs have objected to development, and planning approvals are granted on appeal.
- **Development Benefits** – The Government wants to ensure that households benefit from development in their local area. Building on measures already put in place at the local authority and community level (including the neighbourhood funding element of the CIL and the New

Homes Bonus), the Government will work with industry, local authorities and other interested parties to develop a pilot for passing a share of the benefits of development directly to individual households.

- **Further judicial review reform** – In early 2014 the Government will establish a specialist planning court with set deadlines to accelerate the handling of cases, and take forward work to ensure that minor procedural claims are dealt with proportionally and allow appeals to 'leapfrog' directly to the Supreme Court in a wider range of circumstances;
- **Nationally Significant Infrastructure Project planning fees** – The Government will freeze planning application fees for the NSIP regime for the remainder of this Parliament;
- **'Top 40' planning applications** – To support the delivery of 'the Top 40' infrastructure investments, the Government will ensure, where possible, that these projects have the option to use the NSIP regime by having regard to the 'Top 40' designation when making considerations under s 35 of the PA 2008;
- **Government support and intervention** – The Government will continue to prioritise delivery of its Top 40 investments through a dedicated Cabinet committee for infrastructure, chaired by the Chief Secretary to the Treasury. It will also create a Top 40 'hot-desk' within Infrastructure UK (IUK), which project owners can contact if they are experiencing specific issues in taking forward their projects. The Commercial Secretary to the Treasury, Lord Deighton will personally oversee the issues raised through this channel, including escalating them to the infrastructure Cabinet Committee where appropriate;
- **Tracking infrastructure progress and performance** – The Government has also established a Major Infrastructure Tracking (MIT) unit within IUK which will allow it to track the progress of each Top 40 investment, including detailed information on the individually identified key projects, identifying any taking early action to address any obstacles to delivery;
- **Draft National Networks NPS** – The draft roads and rail NPS has been published for consultation and Parliamentary scrutiny;

The planning appeals recovery criteria are amended so that the Secretary of State can 'recover' renewable energy appeals – 10 October 2013

In a Written Ministerial Statement on 10 October 2013 Eric Pickles stated he wanted to give particular scrutiny to planning appeals involving renewable energy developments so that he could consider whether the Planning practice guidance for renewable and low carbon energy published in July 2013 (see July 2013 MB) was meeting the Government's intentions. He was therefore revising the appeals recovery criteria and will consider for recovery appeals for renewable energy developments. This new criterion is added to the

recovery policy issued on 30 June 2008 and will be applied for a period of six months from today after which it will be reviewed.

He reiterated:

> 'For the avoidance of doubt, this does not mean that all renewable energy appeals will be recovered, but that planning Ministers are likely to recover a number of appeals in order to assess the application of the planning practice guidance at national level'.

A new DfT circular on the Strategic road network is published by the DfT – September 2013

The DfT has published Circular 02/2013: Strategic road network and the delivery of sustainable development which explains how the Highways Agency will engage with communities and the development industry to deliver sustainable development, while safeguarding the primary function and purpose of the strategic road network. It replaces:

- DfT Circular 02/2007 Planning and the Strategic Road Network; and
- DfT Circular 01/2008 Policy on Service Areas and other Roadside Facilities on Motorways and All-purpose Trunk Roads in England.

Annex A provides additional policy specific to certain types of development, whereas Annex B sets out the requirements for roadside facilities that are eligible for permanent signing from the strategic road network.

New planning appeals and called-in applications guides published by PINS – in force 3 October 2013

In 2012 the Government consulted on proposals to simplify and streamline the planning appeals process (Technical review of planning appeal procedures: consultation) following which it confirmed in the Technical review of planning appeal procedures: consultation – summary of responses published on 3 September 2013 that it would be introducing a range of measures to implement the proposals including:

- front-loading the appeals procedures so that the appellant would be required to submit a full statement of case at the time of appeal, and LPA would be required to submit their questionnaire and notify interested parties of an appeal within one week;
- the submission of a draft statement of common ground by the appellant at the time of appeal and LPA to submit a jointly agreed version within five weeks – statements of common ground would also be introduced for hearings
- the introduction of earlier hearing and inquiry dates, for those of less than three days' duration. Inquiries lasting longer than three days will be offered a bespoke timetable; and

- the introduction of a Commercial Appeals Service (an expedited appeals process for minor commercial appeals such as advertisement consent and shop front appeals).

The Planning Inspectorate has also published two new guidance notes, both dated 3 October 2013.

The first, Planning Appeals – Procedural guidance – England applies to:

- planning appeals where the LPA's decision notice is dated 1 October 2013 or later;
- planning appeals where the LPA was due to make its decision on or after 1 October 2013 but has failed to do so;
- an application for minor commercial permission (shop fronts) applied for on or after 1 October 2013; and
- advertisement appeals received on or after 1 October 2013

It also contains information about reporting, recording and filming at hearings and inquiries, including the use of digital and social media.

The second, Procedural Guide – Planning appeals and called-in planning applications – England) applies to:

- planning appeals where the LPA's decision notice is dated 30 September 2013 or earlier;
- planning appeals where the LPA was due to make its decision on 30 September 2013 or earlier but has failed to do so;
- advertisement appeals received on 30 September 2013 or earlier;
- all appeals which are "recovered" for the Secretary of State (rather than one of the inspectors) to decide; and
- all planning applications which are "called-in" for the Secretary of State (rather than the LPA) to decide.

Both guides contain revised criteria for determining the appeal procedure which has been extended to apply to planning, enforcement, advertisement and discontinuance notice appeals from 3 October 2013.

Both guides confirm that for appeals received on or after 1 October 2013, and called-in planning applications where the date of the call-in letter is 1 October 2013 or later, costs may be awarded at the initiative of the inspector

Result of the Red Tape Challenge confirm scrapping of regulations in October 2013

The Government's Red Tape Challenge was launched in April 2011 and shifted its focus on planning administration on 31 January 2013. The public consultation which closed on 7 March 2013 focused on approximately 180 planning regulations, under the following four themes:

- **Planning Procedure** – the regulations in this category included many which are familiar to us including the Town and Country Planning (Use Classes) Order 1987, GPDO 1995, the Town and Country Planning (Development Management Procedure) (England) Order 2010 and those covering planning appeals and enforcement;
- **Planning Infrastructure and Major Projects** – this category covered the PA 2008 regulations and some very specific ones such as the spent TCP (Ironstone Areas Special Development) Order 1950;
- **Planning Authorities** – the disparate regulations in this category covered a range of matters including London and development corporations; and
- **Local Planning** – these regulations covered the procedures for local plan-making including the recent neighbourhood planning regulations.

On 29 October 2013, the Government confirmed it will reduce the number of technical planning regulations down to 78 – a reduction of 57%.

The List of Regulations to be scrapped, merged or simplified include the consolidation of permitted development rights which have been amended 17 times and need an overhaul to make them easier to understand.

Launch of the BETA test site for planning practice guidance between August and October 2013

Between August and October 2013, DCLG launched in BETA test mode a new online site to house national planning practice guidance. This new online resource will replace the existing planning guidance which has accumulated to an unmanageable size over the years. This launch follows on from the review of planning guidance by Lord Taylor of Goss Moor.

None of the current planning practice guidance will be cancelled until the final online guidance is in place. The on-line site was originally planned to go live in autumn 2013 but has yet to appear.

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