Butterworths Planning Law Service

Bulletin Editor

Mark Challis, Solicitor, Partner, Bircham Dyson Bell LLP

Shabana Anwar, Senior Associate, Bircham Dyson Bell LLP

LEGISLATION

Further Extension of Permitted Development Rights

The Town and Country Planning (TCP) (General Permitted Development) (Amendment and Consequential Provisions) (England) Order 2014 (*SI 2014/564*) came into force on 6 April 2014, further amending the TCP (General Permitted Development) Order (GPDO) 1995 (*SI 1995/418*). As the name of the order indicates, these new rights apply in England only.

Most significantly, the order:

- Makes a number of amendments to the GPDO in relation to permitted development rights for dwellinghouses.
- Introduces a number of new permitted development rights for change of use, some of which include permission for limited operational development:
  - new **Class CA** allows a building used as a shop to be used as a bank, a building society, a credit union or a friendly society;
  - new **Class IA** allows buildings used as shops or for the provision of financial or professional services, or buildings in mixed use in either case with residential development, to change to residential use, subject to floorspace limits. It also allows for building operations reasonably necessary for the change of use to be done;
  - **Class K** is expanded to allow buildings used for a variety of uses to become nurseries;
  - new **Class MA** allows agricultural buildings to be used for state funded schools or as a registered nursery; and

- new **Class MB** allows agricultural buildings to change to residential use.

Those considering use of these new rights need to read the detail of the legislation with care. The rights do not apply in all cases, as they may not be available in areas of certain descriptions (eg Sites of Special Scientific Interest), are subject to other restrictions and limitations of various kinds and some are subject to a prior approval process, whereby application must be made to Local Planning Authority (LPA) so that the LPA can determine, within a defined time period, whether it wants to have the right to approve certain aspects of the proposed development as specified before it may proceed.

The order also makes various other changes, including that properties that are used as dwellinghouses under the new rights in classes IA and MB do not then enjoy permitted development otherwise available to householders under Part 1 of Schedule 2 of the GDPO.

On the same day the TCP (Compensation) (England) (Amendment) Regulations 2014 (*SI 2014/565*) came into force. They provide that the new classes introduced by *SI 2014/564* are within the list of those for which compensation is payable in certain circumstances where permitted development rights are withdrawn.

New Planning Court Opens in April 2014 – Further Changes Coming in the Criminal Courts and Justice Bill

The Civil Procedure Rules 1998 (*SI 1998/3132*) have been amended to provide for a new Planning Court within the High Court as from 6 April 2014.

The new court has been set up with a view to trying to reduce the time taken for planning related challenges to be dealt with, reflecting the Government's concerns that the delay caused to development schemes by judicial review challenges is economically damaging.

The court is overseen by the Planning Liaison Judge and will hear planning-related judicial reviews and statutory challenges, including claims relating to:

- Planning permissions, other development consents, the enforcement of planning control and the enforcement of other statutory schemes.
- Applications under the Transport and Works Act 1992.
- Wayleaves.
- Highways and other rights of way.
- Compulsory purchase orders.
- Village greens.
- European Union environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control.

- National, regional or other planning policy documents, statutory or otherwise.

All planning-related judicial reviews and statutory challenges issued after 6 April 2014 should be issued in the Planning Court. Any such claims issued before 6 April 2014 will be transferred to the Planning Court from that date.

Cases dealt with by the new court will be heard by judges with specialist expertise in planning matters and those categorised as 'significant' will be subject to particular time limits, ensuring faster determination of permission and substantive applications.

Whether a case is 'significant' or not will be a matter for assessment by the court with the following criteria in mind:

(i) relevant economic impacts at a local, regional or national level;

(ii) whether there is significant public interest in the matter;

(iii) whether the case involves significant technical material.

Generally speaking, the expectation is that significant cases to be subject to the new procedural rules in the Planning Court should take about six months to determine, as compared to an average time of over a year under the previous arrangements.

The Planning Court is part of a package of measures that reflect the Government's concerns about planning related legal challenges. Its establishment follows the adjustments made in 2013 of time periods for making legal challenges and it will be followed by a raft of further prospective changes in the Criminal Courts and Justice Bill, introduced in Parliament in February 2014 and currently being considered in the House of Lords. In short the proposals in the bill concern:

- The introduction of a permission stage in respect of s 288 of the Town and Country Planning Act 1990 (TCPA 1990) appeals.
- A requirement to refuse permission where the court considers that the outcome for the claimant would not have been substantially different if the unlawfulness complained of had not happened.
- Prospective costs orders, which would no longer be available at the permission stage, except in environment cases covered by the Aarhus Convention – as would be the case in many planning cases.
- A potential to appeal direct to the Supreme Court from the High Court for appropriate cases.

Substantial Changes to the EIA Directive

The Environmental Impact Assessment (EIA) Directive has been in force since 1985 and amended three times, in 1997, in 2003 and in 2009.

The purpose of EIA, according to the recently issued planning practice guidance, is '*to protect the environment by ensuring that a local planning authority when deciding whether to grant planning permission for a project,*

which is likely to have significant effects on the environment, does so in the full knowledge of the likely significant effects, and takes this into account in the decision making process'.

The product of such a process is the Environmental Statement (ES) submitted as part of the application for consent.

The 1997 Directive widened the scope of the EIA Directive by increasing the types of projects covered and the number of projects requiring mandatory EIA. It also provided for new screening arrangements, including new screening criteria for projects and established minimum information requirements.

The 2003 Directive sought to align the provisions on public participation with the Aarhus Convention on public participation in decision-making and access to justice in environmental matters.

The 2009 Directive added projects related to the transport, capture and storage of carbon dioxide.

The EIA Directive 2014 was published in the Official Journal on 25 April 2014 (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment). It came into force 20 days after publication, and member states are required to implement the EIA Directive 2014 by 16 May 2017.

Background to the changes

A review of the EIA Directive was carried out from 2009, in the context of the Better Regulation policy of the EU. Problems identified that led to unsatisfactory implementation included the lack of provisions to ensure the quality of information and quality standards for the EIA process and implementation gaps.

The shortcomings of the Directive were grouped into three specific problem areas: (1) the screening procedure, (2) the quality and analysis of the EIA and (3) the risks of inconsistencies within the EIA process itself and in relation to other legislation.

This review generated proposals that were adopted by the Commission on 26 October 2012 for an amended directive. The overarching aims were to lighten unnecessary administrative burdens and make it easier to assess potential impacts, without weakening existing environmental safeguards.

Proposed changes to the EIA Directive received approval from the European Parliament in March 2014 and were approved by the Council of Ministers in April 2014. The plans for an amended EIA directive were not popular with the current Government from the beginning. In December 2012, Communities and Local Government Secretary Eric Pickles warned that the proposals could result in a significant increase in regulation and additional cost and delay to the UK planning system.

The changes

The key provisions of the new directive include:

Definition: the new directive adds a definition of EIA, which is not defined in the EIA Directive 2011. EIA is defined as the whole process, comprising:

- preparation of the EIA by the developer;
- consultation with relevant authorities, the public and, where relevant, other member states;
- examination of the EIA by the decision-making authority;
- a decision on the significant impacts of the project on the environment; and
- integrating the decision on environmental impacts into the decision to grant or refuse development consent or equivalent decisions.

One stop shop: the new directive introduces a one stop shop under which the competent authority must coordinate all consents derived from EU law to be decided by the same authority at the same time.

Detail on screening: the amended directive includes a list of information to be provided by the developer in the screening process and sets out the criteria used for screening, including consideration of the cumulative impact of a project.

The original proposals suggested removing thresholds for determining which types of development require an EIA, which would have meant that almost all planning applications would have to be accompanied by a screening report, in order to determine whether an EIA is needed. The amended directive has retained the thresholds so that only those projects with the potential to generate a significant environmental impact require screening.

Screening decision reasons: the relevant authority will have to provide an explanation of the reasons behind its decision. Where it is decided that no EIA needs to be carried out, this should include a description of the measures envisaged to avoid, prevent and reduce any significant effects on the environment.

Quality control: mechanisms are introduced to guarantee the completeness and sufficient quality of the environmental reports, for example requiring the project promoter to employ 'competent experts' to produce the ES and the relevant authority to employ 'sufficient expertise' in verifying it.

The original proposal was for EIAs to be carried out by 'accredited and technically competent experts'.

Additional assessment requirements: the list of what effects are to be assessed is extended to include biodiversity, climate change, disaster risks and the use of natural resources, but limiting this to significant effects only. Reasonable alternatives must also be assessed.

Time frames: the amended directive introduces a time limit of 90 days for screening decisions and requires the consultation period for an ES to not be less than 30 days.

The original proposals suggested setting a six month deadline for decision-makers to decide whether to grant development consent.

Monitoring: post-consent monitoring is introduced for projects that will have significant adverse environmental effects, with the purpose of assessing the implementation and effectiveness of mitigation and compensation measures. The procedures for monitoring are to be determined by the member states.

Penalties: member states are required to introduce penalties for infringement.

Some of the changes above reflect decisions of the European court made since the directive was last amended. This suggests that the changes introduced by the recent new directive will have the least effect on councils and developers that are currently applying best practice.

Several of the proposals in the Commission's draft directive published in October 2012 have not been included in the final directive, including in relation to mandatory scoping. Under the new directive the developer can request a scoping opinion; however, member states can make scoping mandatory.

The UK has until 16 May 2017 to implement the amended directive.

POLICY

Secretary of State extends policy on deciding planning appeals on renewable energy developments to April 2015

On 9 April 2014 the Secretary of State for Communities and Local Government, announced that he is extending his policy on recovering planning appeals relating to renewable energy developments for 12 months, to April 2015. The intervention had initially been for a six-month trial period from October 2013. He clarified that a number of renewable energy appeals may be recovered, but not all. The policy applies to England only.

CASES

Judge rejects first CIL schedule legal challenge – Fox Strategic Land and Property Ltd, R (on the application of) v Chorley Borough Council [2014] EWHC 1179 (Admin) (17 April 2014)

This case concerned a challenge by Fox Strategic Land and Property Ltd, a major residential developer, against the level of Community Infrastructure Levy (CIL) proposed to be charged by Chorley BC and two other authorities. It challenged the legality of a charging schedule adopted following an

examination in April 2013. The company argued that the evidence used to produce the relevant charge (£65 per square metre) was flawed and hence the issues before the court were:

Issue 1: whether the examiner's approach to the evidence he had as regards the likely value of residential land and certain data in reports produced by the Valuation Office Agency was irrational;

Issue 2: whether the examiner had properly understood the evidence about the size of dwellings, density and cost, had taken into account an immaterial consideration, namely that cost was directly proportionate to the size of a dwelling; and

Issue 3: whether it was lawful for the charging schedule to be adopted without allowing for the potential effects of a requirements of future development plan policy, due to apply from January 2016, regarding sustainability levels to met in new dwelling houses (and hence involving more cost).

Resolution of the issues turned upon a thorough examination of them by the court by reference to a complex factual situation involving detailed technical evidence. The court rejected the claim on all three grounds and in particular that:

(a) on issue 1 the court held, in summary, that the examiner had reached reasonable conclusions on the issues and applied the correct tests in coming to the view that the councils had taken an 'appropriately measured' approach in having to deal with a range of variables and unknown factors to set the rates at an appropriate level, leaving, in the examiner's view, sufficient scope for housing development to bear the burden of the levy.

(b) on issue 2 the court rejected to contention that there had been a failure of understanding on the examiner's part – he had to exercise his judgment and had done so. Moreover he did not have to decide whether the council's assumptions about the size of dwellings and the density of development were correct – he had to understand their effect upon viability and whether he could rely upon the council's assessment of viability even if the assumptions were not correct. He found that he could as although generic in nature they were basically sound. On the issue as to whether he had taken an immaterial consideration into account, the court found that the examiner had not simply accepted that cost was directly proportionate to the size of a dwelling but had noted criticisms of the evidence that had been made on that account and dealt adequately with the issues in his report in a way he was entitled to so.

(c) on issue 3 again the court found there to be no error of law. First the relevant forthcoming policy provided, in its application, for viability to taken into account, second the examiner was satisfied that the level of the proposed charge had adequately taken into account the forthcoming policy and in any event the councils intended to review the CIL charges in 2015.

Enforcement Notice Inspector should have considered fall back alternative – Mahfooz Ahmed v Secretary of State for Communities and Local Government and L B Hackney (2014) EWCA Civ 556

This case concerns an enforcement notice issued by the London Borough of Hackney in 2010 in respect of a block of flats, with retail floorspace on the ground floor, built so as not to be in accordance with a planning permission issued in 2005. In particular, the planning permission was for a six storey block with a butterfly roof. The building as constructed had seven flats, because the roof line had been adjusted accordingly, involving omission of the butterfly roof. By the time that the enforcement notice was issued the planning permission had expired. The enforcement required demolition of the whole block in order to remedy the breach of planning control, under s 172(4)(a) of the 1990 Act. It had not been issued under s 173(4)(b) to remedy injury to amenity and this was relevant to the appeal and court proceedings that followed.

Mr Ahmed appealed the enforcement notice under grounds (a), (e) and (f) of s 172(4) of the TCPA 1990, of which two are relevant here – namely (a) that planning permission should be granted for the building as built and (f) that the steps required to be taken exceed what is necessary to remedy and injury to amenity. In short that all that was necessary was for the building to be modified so as to conform to the 2005 permission and that the Council's requirement to remove the building was unnecessary and punitive.

The inspector upheld the enforcement notice. He acknowledged that a building in the form allowed by the 2005 permission would be acceptable but considered that he did not have powers under s 176(1) of the TCPA 1990 to correct or vary the enforcement notice so as to impose that requirement. In effect this left Mr Ahmed in the position of having to demolish the building to comply with the notice and to apply for planning permission to replace the permission that had expired in 2005. Mr Ahmed had not argued under his 'ground (a)' appeal that permission should be granted to adjust the building so as to conform to the expired 2005 permission – he had argued that under his 'ground (f)' appeal.

Mr Ahmed appealed to the High Court which found, in his favour, that the case should be remitted to the inspector because he had failed to consider the obvious alternative of granting planning permission to adjust the building so as to conform to the expired 2005 permission, using the 'ground (a)' appeal and the powers in s 177(1) of the TCPA 1990 to grant planning permission in respect of a breach of planning control specified in an enforcement notice, even though the case for this 'fall back' had been made by Mr Ahmed under ground (f).

Before the CA the Secretary of State argued that in circumstances where planning permission for this fall back position had not been sought by Mr Ahmed in his ground (a) appeal and as the notice had been issued to remedy a breach of planning control (and not in respect of injury to

amenity), the inspector had correctly considered that he had no power to give planning permission for the 2005 scheme and nor was he under any requirement to find such a solution to assist Mr Ahmed.

A number of cases were considered, including *Tapecrown Ltd v Secretary of State* (2006) EWCA Civ 1744 and the more recent *Moore v SSCLG* (2013) JPL 192. In the *Moore* case, it was held that where a fall back position is argued for under ground (a), then it can be applied in relation to a ground (f) appeal.

The CA, bearing in mind that the enforcement system is intended to be remedial rather than punitive, held that it would have been appropriate for the inspector to have considered Mr Ahmed's fall back argument as part of his ground (f) appeal and grant planning permission accordingly under ground (a), as the 2005 permitted scheme can be seen as a part of the scheme as built – this was therefore a legitimate response to the ground (a) application for planning permission and would not involve granting planning permission for something completely different. That possibility should have been considered but it was not – an error in law justifying the Secretary of State's appeal being dismissed.

Leisure Complex and Golf Course Scheme Planning Permission upheld by the Court of Appeal – R (on the application of Cherkley Campaign Ltd) v Mole Valley District Council (2014) EWCA Civ 567

In this case the LPA granted planning permission for a hotel and spa complex with an 18 hole golf course, contrary to officer recommendation. The proposal was controversial not least because the entire site was in the green belt. It was permitted following a close vote (10 to 9) at the LPA's Development Control Committee.

The permission was challenged by Cherkley Campaign Ltd. The High Court allowed the appeal on a number of grounds and quashed the grant of planning permission. The LPA and the developer appealed to the CA. The CA disagreed with the HC and overturned its decision.

The CA proceedings were in relation to various grounds, namely:

1. whether there was a requirement to demonstrate a need for the development;
2. whether the LPA's conclusions on landscape character were rational ones;
3. whether the green belt had been properly addressed; and
4. whether the reasons for granting permission (which were set out and many) were adequate.

The factual position was complex but in essence in allowing the appeal the CA took into account that committee members had been mindful of relevant

policy and that policy prevails over the reasoned justification for policy, relevant though that justification is. In this case the policy itself did not require a needs test to be satisfied.

Otherwise the CA reiterated that the test for irrationality was high and had not been satisfied in this case. The members had seen the site, were mindful of policy and had plainly taken concerns raised by the officers in their reports into account. They had not reached a perverse decision in disagreeing with the recommendation to them. Further the summary of reasons given for granting permission, although longer than needs be, were not deficient.

To treat housing development as enabling development for a new mushroom facility was lawful – R (on the application of Thakenham Village Action Ltd) v Horsham District Council (2014) EWHC 67 (Admin)

In the circumstances of a failing mushroom business in Thakenham, an important and long standing industry in Thakenham, housing development was proposed on a part of the site and a new mushroom production facility on another part of it. Although the housing development was contrary to the development plan, it was proposed on the basis that it would provide finance for the new mushroom facility, something that would provide jobs and otherwise benefit the community.

Applications were made accordingly, but in respect of the site for the proposed new mushroom facility, an alternative proposal was applied for at a later date. In any event in April 2013 planning permission was granted for the residential development and for the revised mushroom facility, subject to a s 106 agreement requiring a payment of £3.75m to be paid to the prospective mushroom producer and the freehold of the mushroom facility site being transferred. The housing development could not, under the planning obligation, be implemented until certain works (paid for by the £3.75m) had been done and the land transferred.

The grants of planning permission were challenged on two grounds:

(a) that the negative screening opinion for the housing development was unlawful; and

(b) the 'enabling development' rationale for granting permission for the residential development was tantamount to planning permission being bought and so the planning permission was unlawful.

The HC disagreed on both counts.

On the screening issue, the HC held that the LPA (which has treated for the purposes of the screening exercise the two proposals as linked in considering cumulative effects) had not unreasonably concluded that the development was not EIA development and had been provided with sufficient information to do so.

On the second ground, the HC held that the LPA treating the sites as linked was reasonable. The sites were linked by history (as a single entity for many years), geography and purpose in that the development of the housing site was a prerequisite to the viable development of the other site as proposed. The arrangements had been made with no ulterior motive and with proper planning purposes behind them. Enabling development was not only for heritage purposes or where it involves some form of public asset and that the mushroom facility would be operated privately for profit was no bar to the two developments being treated as composite ones in this case. The obligation was within s 106(1)(a) of the TCPA 1990 in restricting the development of land in a specified way and also met the requirements of regulation 122(1) of the CIL Regulations 2010.

LPA acted unlawfully in declining to determine application under s 70A of the TCPA 1990 – R (on the application of Skillcrown Homes Ltd) v Dartford Borough Council (2014) EWHC 365 (Admin)

Dartford Borough Council had refused planning permission for a backland development of eight new houses in place of two. Permission was granted on appeal in 2011 but that decision was successfully challenged in the High Court by the Borough Council in 2012. Upon the matter being remitted to the Secretary of State, a hearing was held and planning permission refused on sustainability and biodiversity grounds.

In April 2013, following some further correspondence with LPA officers, the claimant made a further application for planning permission. It was for substantially the same scheme but supported by an updated planning statement and design and access statement and some additional survey material. In correspondence the LPA declined to determine it under s 70A of the TCPA 1990.

There is no appeal to the Secretary of State against such a decision but such decisions can be challenged by way of judicial review. The challenged failed on two grounds but succeeded on the other three grounds. The case turned on the application of DCLG circular 08/2005 and particularly paragraph 8, which explains that the underlying purpose of the legislation when altered in 2008 was to allow LPAs to decline to determine application whose purpose was top wear down opposition by repeat applications. Although the claimant had not originally identified this guidance (referring in correspondence to earlier guidance relating to the section before amended) the court held that the LPA had not given any explanation as to how its decision had related to this central aspect of the guidance, even though it had dealt with other paragraphs in the circular. This was an error sufficient to justify the application.

Interim Policy Document not a DPD or SPD – R (on the application of Miller Homes Ltd) v Leeds City Council (2014) EWHC 82 (Admin)

This is another case about the adoption of local plans following the making of the TCP (Local Planning) (England) Regulations 2012 and particularly regulation 5, which specifies how different kinds of plans should be categorised. In practice this can be a difficult judgment for LPAs to make since the categories in regulation 5 appear to overlap and are fairly broad in their ambit.

In this case *Miller Homes Ltd* challenged the Council's adoption of an 'interim' policy concerned with potential release of sites for residential development in the longer term in an area identified in the Council's UDP for housing development. The policy was unfavourable to *Miller Homes*' proposals for the area and the company challenged the adoption on two grounds, namely that (a) the policy had not been adopted either as a development plan document (DPD) or a supplementary planning document (SPD) under the procedures prescribed in the 2012 regulations and that (b) the interim plan had not been subject to consultation, rendering it unlawful.

The court dismissed the challenge on both grounds. First, the policy document did not fall within any of the categories described in regulation 5 and so was a residual form of local development document – ie neither a DPD nor a SPD. Accordingly the LPA was not at fault in not adopting it pursuant to the procedure prescribed in the regulations. Second, as such Local Development Document there was no requirement to consult nor, in this case, any legitimate expectation that the LPA would do so.

Correspondence about this bulletin may be sent to Fiona Prowting, Editorial Department, LexisNexis, Lexis House, 30 Farringdon Street, London EC4A 4HH (tel: +44 (0)20 3364 4445, email: fiona.prowting@lexisnexis.co.uk). If you have any queries about the electronic version of this publication please contact the BOS and Folio helpline on tel: +44 (0)845 3050 500 (8:30am–6:30pm Monday to Friday) or for 24 hour assistance with content, functionality or technical issues please contact the Content Support Helpdesk tel: +44 (0)800 007777; email: contentsupport@lexisnexis.co.uk.

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CASES