# Hogan Lovells

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# PLANNING QUARTERLY BULLETIN

## Autumn 2010

This is a commercial communication from Hogan Lovells. See note below.

### Coalition Reform - an update

The vigour with which the Coalition Government has approached reform of the planning system has surprised most who work in the industry. Now, only three months after our Summer Bulletin - in which we considered, among other things, the new Secretary of State's hasty demolition of the regional planning framework - there is again a lot to report. In the main article of this autumn edition of our Quarterly Bulletin, we summarise the current state of play, and discuss the implications.

Read full article

### Government promises reform following Penfold Review

Last year the Labour Government asked Adrian Penfold, British Land's Head of Planning and Environment, to conduct a review of non-planning consents and their interrelationship with the planning regime. Following publication of the results of that review, including a series of recommendations for reform to simplify the consenting landscape, the Government has now, through the Department of Business, Innovation and Skills, published its formal response. We look at the main points in our Bulletin this autumn.

Read full article

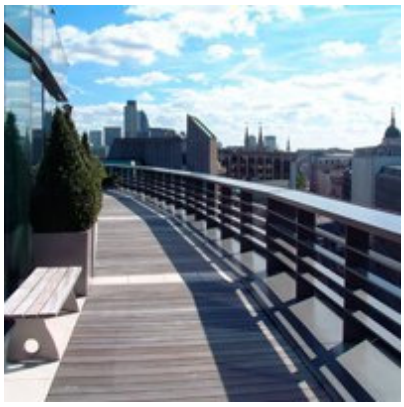
### Consultation on amended Environmental Impact Assessment regulations

Environmental Impact Assessment is a subject that continues to exercise both the legislators and the courts. Despite significant developments in the field in the last few years, the Government has recently been consulting on yet further changes. These relate principally to proposals for extensions and changes to existing developments, and the manner in which such proposals should be treated by the EIA regime. We set out the proposed changes and consider their effect in this season's Bulletin.

Read full article

### Case Notes

Case Notes in this edition of our Quarterly Bulletin draws attention to two interesting cases, both raising matters of importance for those dealing with land and their advisors. The first is a useful reminder that in an appeal it is the whole of a decision letter, rather than simply the passage granting planning permission, that dictates the scope of the resulting consent. In the



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second the quashing of a valuable consent emphasises the importance of paying due regard to the question of race, when promoting development schemes.

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## Newsdesk

- Consultation on proposals to change the TPO regime
- Changes to HMO regime introduced but subject to judicial review
- Greater flexibility for planning permissions - guidance issued
- Compensation for the removal of permitted development rights
- Marine Policy Statement issued for consultation
- Natural environment white paper proposed
- London views
- PPS 21 - additional advice published
- London Housing Design Guide - interim edition published
- Standing Advice on Protected Species - consultation
- Appeal decision - retail an 'employment' use
- Natura 2000 sites designated
- Infrastructure Planning Commission accepts first application
- Advice Note on Responding to Nationally Significant
- Infrastructure Projects
- National Infrastructure Plan published by Government
- Consultation on new permitted development rights for schools
- Changes in relation to gypsies and travellers

Read full article

## Ask the expert

I am considering acquiring a part-completed residential scheme - a victim of the current economic climate. Some development on site, such as garages, car parking and a play area, does not appear in the description of development, but is shown on plans and drawings. How can I be sure that it forms part of the scheme for which permission has been given?

Read full article

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Autumn 2010

## COALITION REFORM - AN UPDATE

Change takes place apace these days in Westminster, and three months after our Summer Bulletin there is, again, lots to report on this front. We summarise here the major recent developments falling under the heading "Coalition Reform" and set out our thoughts on some of them.

### White Paper - Local growth: realising every place's potential

28 October saw the latest official indication from Government of the manner in which reform of the planning system will take place. The white paper *Local growth: realising every place's potential* is published by the Department for Business, Innovation and Skills and sets out the Coalition's proposals to encourage sub-national economic growth. The document deals with a range of matters in that context including, for example, Tax Increment Financing to enable councils to borrow against future tax revenue, the Regional Growth Fund to stimulate enterprise and support dependent communities, and a Business Increase Bonus scheme to reward councils where business rate yields increase substantially. It also addresses a number of issues central to reform of the planning system, in some cases adding little to the volume of drip-fed information accumulated over the last few months; in one or two others adding important flesh to the bones of proposals so far set out in skeleton. In the paragraphs below we cover those matters and others.

### Local Enterprise Partnerships

Following the Government's invitation in June to submit proposals for new Local Enterprise Partnerships, 62 such submissions were made. The white paper *Local growth* revealed that 24 of those submissions had been accepted, and provided important new detail on the operation and status of LEPs.

Designed at least in part to replace the Regional Development Agencies – whose abolition the white paper confirms – LEPs should reflect geographically and economically distinct areas of the country. Setting out a wide brief, the Government envisages that LEPs will be expected to take on roles across a diverse and varied spectrum, including the following:

- setting out transport and other infrastructure priorities;
- making representations on national planning policy;
- ensuring business is involved in the development and consideration of strategic planning applications; and
- assisting in the delivery of strategic housing development, "including pooling and aligning funding streams to support this."

The 24 accepted bids cover much, but not all, of the country, with great swathes of the West Country and East Anglia in particular evidently unable to convince the Government that they are "ready to establish their boards", instead needing "longer to build on progress to date and develop their vision". There is an invitation to submit revised proposals "as they become ready."

Many in the industry remain to be convinced about the merits of LEPs. Whether they can attract the necessary funding – particularly given that they will "be expected to fund their own day-to-day running costs" – together with essential support from within business and local government, remain important questions. Despite the white paper, there continues to be uncertainty over exactly what role the new organisations will fill; indeed the absence of prescription in this respect is a marked feature of the new regime. The extent to which LEPs can become involved effectively in local planning – in particular in relation to the planning and delivery of strategic infrastructure – is a matter of very considerable importance given the abolition of the regional planning regime. Finally, it is not yet clear what will happen in those areas of the country not covered by an LEP, or where

proposed LEP areas overlap. Resolving these and other issues will be crucial if LEPs are to provide the support necessary to deliver the growth needed in many parts of the country.

**"Passing power to communities" - neighbourhood plans and a community Right to Build**

At the heart of the reformed system will be the concept of the neighbourhood plan. Designed to put communities "centre stage" these will give local people "greater flexibility and the freedom to bring forward more development than set out in the local authority plan" according to the recent white paper. It is not yet clear exactly what the new neighbourhood plan will comprise, how it will fit into the existing development plan framework, or how and under what circumstances it will be prepared. Nevertheless it will, evidently, "need to respect the overall national presumption in favour of sustainable development, as well as other local strategic priorities such as the positioning of transport links and meeting housing need." In the post-RSS era it has not yet become clear, it might be noted, how those strategic priorities will be identified or delivered.

On a related note, in late July Grant Shapps announced the Government's proposals for a new "Community Right to Build" scheme. In recent days the proposal has been reiterated in the white paper *Local growth*. Designed to "give power to local people to make it simpler for them to build new homes or other development that their community wants", this idea is at the heart of the Government's Big Society agenda.

The essence of the scheme is a relaxation of the planning rules to allow groups of people to bring forward development in their area where it meets certain criteria. The Government envisages that development likely to benefit includes "homes for existing local residents […] market housing to attract new residents to move to the area […] other services for the benefit of local people [such as] a village shop on a serviced tenancy, a community hall, or a sports facility."

Aimed principally at rural parts of the country, the idea was initially to set a threshold of 90% community support before a project could proceed without planning permission. Subsequently, and presumably in order to prevent the blocking of most proposals by objectors, the proposed threshold has been reduced to 75%.

A number of questions arise, including the following.

First, it is not at all clear what will comprise a "neighbourhood" under the arrangements. Given the degree of uncertainty over this concept as it exists in town and village green law, this is likely to prove a contentious issue in this situation also. Similar difficulties might arise in relation to calculating the level of support for a proposal - how, for example, will it be shown that the 75% threshold has been met? There is a real risk that apathy resulting in a lack of engagement will prove problematic in this context. Achieving even 75% support might turn out to be more difficult than the Government has envisaged.

Second, it is apparent from the *Local Growth* white paper that the right will apply to “small-scale development” proposals only. It is not clear where the size limit will lie but, in the circumstances, there will be doubts about the scheme’s ability to deliver significant amounts of beneficial development. In addition, it appears that schemes will need to satisfy LPAs of their sustainability and environmental acceptability, before they qualify for the Right to Build. It is not clear to what extent conventional "design" issues will fall within the scope of "environmental acceptability" but in any event, in the light of all of this, and given the degree of subjectivity over all these matters, the "right" appears somewhat more qualified than has been suggested by Government.

Finally, the challenges facing local groups proposing to make use of the new rights will be stiff. It is not at this stage evident what support will be available to assist with matters such as site assembly, funding, environmental and other technical issues, construction and so on, but it seems likely that without such help, projects will be slow both in coming forward and implementation.

**New Homes Bonus**

Essential to the delivery of new housing in the absence of regional targets is, according to the Coalition Government, the incentives offered by the New Homes Bonus Scheme. The current problem, says the white paper, is that increases in an LPA's council tax base results in a reduced overall return due to the formula grant allocation. The result is that "communities and their elected representatives […] object to many proposed developments." Abandoning the "top-down" regional target approach, the Coalition identifies the New Homes Bonus in the white paper as the "cornerstone of the new framework for incentivising housing

growth. It will ensure that communities and the local authority decision-makers enjoy the benefits of growth and not just the costs."

According to Housing Minister Grant Shapps, speaking in the House of Commons in the last few days, the scheme will start in April 2011. "For every home built, there will be match funding for six years at the actual band price at which it is built. By the way, if it is affordable housing, 125% of receipts will be provided. We will consult on the split between district and upper-tier authorities, but something like 80 per cent is likely to go to the planning authority." A consultation paper is due to be published shortly, setting out the proposals in more detail.

We have in previous publications drawn attention to questions arising out of all of this. For example, the prospect of housing being delivered in those areas where the incentives most appeal, rather than where the homes are most needed, is a clear danger. Whether financial incentives can and should amount to a material consideration in decision-making is another question. There is further uncertainty whether the proposed incentives will be sufficient to overcome the nimbysim that will surely be encountered in many cases. These and other questions remain to be answered.

**Third party right of appeal**

The development industry has been breathing a cautious sigh of relief as the prospect of the imminent introduction of third party rights of appeal recedes, after having experienced something of a roller-coaster ride on this issue in recent months. First, the measure was proposed in the Conservative Green Paper *Open Source Planning*. Subsequently, hopes that the matter had been forgotten began to take hold but were then, at the Conservative Party Conference in early October, dashed once more. In response to a journalist's question, Bob Neill is reported to have said that the issue was "still very much on the agenda." This came as an unwelcome surprise to many, but more recently, in late October, a statement from CLG suggested that the proposal had been hit into the long grass for the moment. It receives no mention in the recent white paper - *Local growth*. Currently, therefore, there seems little prospect of a third party right of appeal appearing in the Localism and Decentralisation Bill, due to be published shortly.

Whether the proposal might in the future be resurrected remains to be seen. Despite widespread concern that the move would result in stagnation across the planning system, as objectors use the mechanism to frustrate and delay acceptable development proposals, organisations such as CPRE continue to argue its case.

On a related note, there is every reason to assume that proposals to limit the existing developer right of appeal remain as firm as ever.

**Regional strategies**

As the repercussions of the Secretary of State's decision to withdraw all RSSs continue to be felt across the country, a number of developers are seeking legal redress. Cala Homes, Catesby Property Group and Colonnade Land have all issued proceedings in the High Court questioning the lawfulness of the decision by Eric Pickles on 6 July.

The first to reach court was the Cala Homes case, heard by Sales J. on 22 October, in which Cala claimed judicial review of the Secretary of State's decision. Cala argued, first, that the Secretary of State was wrong to have relied on section 79 of the Local Democracy, Economic Development and Construction Act 2009 when revoking RSSs; second, that a Strategic Environmental Assessment should have been carried out.

Cala's first ground was based on the proposition that although section 79 of the 2009 Act grants a power to "revoke all or any part of a regional strategy" this must be read in the context of the overarching obligation for each region to have an RSS, and the general purpose of the Act (and its predecessor) in establishing a system of regional plans. It was argued that in this context it was clear that revocation was permitted only as a temporary step, and in any event that subsequent replacement was required. The Secretary of State argued that no such pre-condition could be implied and that the power should be given full effect based on its wording.

As to the second ground, Cala relied on European and domestic legislation requiring a Strategic Environmental Assessment when a "plan" is prepared or modified. They argued that an RSS should be viewed as part of a wider development plan, removal of any element of which would comprise a modification, triggering the requirement for SEA. The Secretary of State

contended that the RSS was itself the plan in question, and that as it was not being modified, but abolished, the case fell outside the scope of the SEA legislation.

The build up to the case generated a lot of interest, and at the hearing the court benches were filled, leaving standing room only, even before the hearing had started. Predictably, the many spectators were left disappointed, as judgement was reserved, and it is understood that this will not be available until mid-November.

These events are important, and should the decision to revoke RSSs be quashed, the implications will be significant, complicating yet further an already muddled policy picture and casting additional uncertainty across the planning regime. Eventually, the matter will be dealt with once and for all in legislation arising out of the imminently-expected Localism Bill but, in the meantime, the promoters of many sites depending on RSS support will be hoping for good news emanating from the High Court.

Meanwhile, the Select Committee for Communities and Local Government's Inquiry into Mr Pickles' decision is well underway. The invitation to submit written evidence resulted in an unusually large post bag, with over 150 individual submissions being completed. The evidence sessions have commenced and are proceeding in Portcullis House. At the moment it is not possible to predict with certainty how the timetable will proceed hereafter, but it seems likely that the report will be published sometime in early 2011. Much depends on the measure of agreement between members of the Committee.

**A national planning framework**

The Government has been revealing more detail about its proposed national planning policy. In the House of Commons on 13 October Bob Neill, Parliamentary Under Secretary of State at CLG, explained how the Government proposes to reconcile its national policy with the concept of localism at the heart of its current reforms. Planning, he said, should be a local matter, with planning decisions being made at local level wherever possible. We will ensure that national planning policies support local decision making". Referring next to the current national planning policy framework, he said that PPGs and PPSs "cover a broad range of policy themes and are piecemeal in nature. This is why we said in the coalition agreement that we will publish and present to Parliament a simple and consolidated national planning framework covering all forms of development. This simple and consolidated framework will set out not only what the Government's economic and environmental priorities are, but how they relate to each other. Such a framework would also set out in general terms but in sufficient detail to provide clarity what was expected, both of the planning system and in terms of delivering national priorities."

The recent white paper explains that the new framework will provide a "transparent and positive context for local decision making" aiming to "increase certainty" for investors and developers about the way in which planning decisions will be taken. According to the Government's recent formal response to the *Penfold Review of non-planning consents* (in relation to which, see elsewhere in this Bulletin) further detail will be provided in the spring of 2011.

**Presumptions in favour of development?**

It is no secret that there is to be a new "presumption in favour of sustainable development". This, so the white paper tells us, is to "support the strategic provision of new homes, offices, schools and other developments that help drive the growth of our economy."

In addition, however, Eric Pickles made clear at the Conservative Party conference that, in those areas where LPAs fail to put in place a new local plan, there would be a more general "presumption in favour of development".

This raises the prospect of substantial additional pressure on LPAs to ensure that they put in place up-to-date policy. The implications of failing to do so will evidently be significant, although one assumes that in any event proposals for development will not be considered in a policy vacuum; national policy - whether in its existing or new, slimmer form - will presumably continue to exercise influence over decision making, notwithstanding the Government's localism agenda. It will be more important than ever, in such circumstances, to scrutinise national policy and engage properly in consultation.

**Other matters**

Publication of the *Local growth* white paper has confirmed the Government's intention to proceed with a number of other proposals, already heavily trailed over the last few months. These include the following measures.

- Councils are to be given a general power of competence.
- Directly elected Mayors are to be established in the 12 largest English cities.
- Councils, public bodies involved in plan-making and private bodies essential to the process – such as infrastructure providers – are to be subjected to a new statutory duty to cooperate.

**Big Society "vanguard areas"**

In late July the Prime Minister announced the launch of four Big Society "vanguard areas" each of which is expected to prepare "proposals to take forward innovative local projects which embrace Big Society principles." The four areas in question are Liverpool, Eden Valley (Cumbria), Windsor and Maidenhead and the London Borough of Sutton.

The idea is that each area is to be "supported by a dedicated team of civil servants" whose purpose will be to help achieve individual projects "by, for example, removing bureaucratic barriers such as: unnecessary planning regulations, restrictions on local involvement in decisions about issues affecting them and excessive form filling which prevents local initiatives."

**Re-consultation on energy National Policy Statements**

The Government has commenced a second round of consultation on draft National Policy Statements for Energy Infrastructure. This reflects a number of changes made to the original draft documents. The principal ones are as follows.

- The text dealing with the 'need' for the infrastructure has been updated.
- Additional alternatives to the main proposals have been developed and appraised.
- Kirksanton and Braystones in Cumbria have been removed from the list of potentially suitable sites for new nuclear power stations.
- The documents now include a draft Appraisal of Sustainability Monitoring Strategy.

Consultation closes on 24 January. Subject to Parliamentary scrutiny and ratification, the Government expects to designate the documents as NPSs later in 2011.

**Conclusion**

Those of us familiar with a more leisurely approach to reform of the planning system continue be surprised at the pace with which developments occur under the Coalition Government. So fast and furious is activity in Westminster and Whitehall that this section of our Bulletin will almost certainly be out of date by the time it reaches its readers. For example, we expect publication of the Localism Bill imminently (only a matter of days, incidentally, after presentation to Parliament of the white paper *Local growth*) with further revelations about the Government's plans for the future of the system. There is indeed some anxiety in the industry at the speed at which this is all taking place. It is not so much the pace itself that creates concern, but the possibility that it comes at the cost of the careful and detailed preparatory analysis that such important changes require.

Obviously, we will report on all new developments as and when they occur. The months ahead promise to be interesting, important and almost certainly controversial.

# PLANNING QUARTERLY BULLETIN
Autumn 2010

## GOVERNMENT PROMISES REFORM FOLLOWING PENFOLD REVIEW

In 2009 the Labour Government commissioned Adrian Penfold, British Land's Head of Planning and Environment, to undertake a review of non-planning consents and their interrelationship with the planning regime. Earlier this year Mr Penfold completed that review and made a series of recommendations for reform to simplify the consenting landscape. Now, on 3 November, the Government, through the Department of Business, Innovation and Skills, has published its formal response.

The Government's document acknowledges the often unnecessary complexity and cost of the consent process, and indicates the intention to adopt a phased approach to implementation of Mr Penfold's recommendations. It does so by identifying and addressing in turn four separate themes - changing working practices, simplifying the landscape, improving the interaction between planning and non-planning consents, and managing the landscape and making change happen. A summary of the most important points to emerge under those headings is as follows.

**Changing working practices:**

- The Government accepts that there is a need to improve the provision of information to applicants, to increase co-ordination between consenting bodies, and to consider greater skill-sharing between those bodies.
- There are some examples of current good practice which should be commended. In particular Natural England and English Heritage provide good guidance and information to developers. But work will be done to improve information provision across the board.
- Joint-working between councils will be explored, and professional bodies will be encouraged to work smoothly together.
- The Highways Agency will in future be expected to appoint a "'named point of contact" for each application, to work with the developer, the LPA and other parties. Other consenting bodies will in due course be expected to adopt this approach.
- Consenting bodies will be invited to consider charging for "premium services".

**Simplifying the landscape:**

- Proposals to merge conservation area consent with planning permission will proceed when the opportunity arises.
- The Environmental Permitting framework will be expanded to include water abstraction and impoundment consents, and other consent regimes if this proves practicable.
- Consideration will be given to the introduction of a streamlined consent process for renewable energy infrastructure.
- The possibility of changes to the village greens registration system will be explored.
- Further measures to simplify the planning system will be set out in the spring, including proposals for the new National Planning Framework.

**Improving the interaction between planning and non-planning consents:**

- The Government agrees that the boundary between planning and non-planning consents should be made as clear as possible.

- The interface between environmental permitting and planning permission is to be the subject of a protocol currently under preparation in draft. The purpose is to reduce duplication and smooth the process for developers whilst reducing the burden for consenting bodies.
- It is not at this stage realistic to adopt a unified system dealing with planning permission and all other consents; instead the Government accepts Mr Penfold's recommendation for incremental change.
- There is a new "barrier-busting" team to support the Big Society agenda across Government. This is working with "vanguard communities" to identify and overcome bureaucratic barriers, including those in the planning and non-planning consent regimes.
- Good practice, including constructive pre-application advice, will be encouraged across all consenting bodies.

**Managing the landscape and making change happen:**

- The Government accepts that the "lack of a single strategic oversight" is one reason for the complexity that characterises the planning landscape.
- To address this complexity, "offsetting simplification measures" will be used "where there are newly proposed non-planning consents, such that the overall burden […] upon developers does not increase."
- This will be achieved by work carried out by a cross-departmental task force, and the Reducing Regulation Committee, which, respectively, will consider the impact of newly proposed consents and ensure that regulation is used sparingly.

The Government promises to publish an analysis of progress to date, and detail of further proposed steps, in the spring.

Evidently seen by Whitehall as an incremental and iterative process, effective reform of the system in this regard is much-needed and will be widely welcomed. The recently-published document does not, however, contain many concrete proposals for specific changes and it will be interesting to see how seriously the issues are taken by a Government with various other, arguably more eye-catching, priorities in this field. The plethora of attractive-sounding soundbyte initiatives ("barrier-busting team", "one-in, one-out regulation", and "smooth working", are some examples) will raise eyebrows in some quarters; tough decisions resulting in recognisable progress towards a simpler, quicker and cheaper system, just as advocated by Adrian Penfold, is what the Government will be judged on.

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# PLANNING QUARTERLY BULLETIN
Autumn 2010

## CONSULTATION ON AMENDED ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS

The law on Environmental Impact Assessment gets ever more complex. Despite significant developments in both legislation and caselaw in the last few years, the Government has recently been consulting on further changes. This time, changes are required "to take account of the latest case law" - in particular in relation to extensions and changes to existing development.

CLG also intends to take the opportunity to carry out a consolidation of the existing regulations "to make them more accessible and to make a limited number of other amendments." There is, apparently, no intention to carry out a wholesale or fundamental review of the EIA regime.

The consultation document, published on 9 August, also makes it clear that the European Commission is undertaking its own review of the Directive and that additional proposals for change are expected, in due course, as a result. In the meantime, however, CLG considers that "the current proposals will provide a sound basis for making any future changes which may be required in years to come to take account of any changes to the Directive at the European level."

A summary of the principal proposed changes is as follows.

- As to changes or extensions to existing development:
  - the thresholds in Schedule 2 to the 1999 Environmental Impact Assessment Regulations will apply to the development as a whole once modified, and not just to the change or extension;
  - there will be a new requirement that any change or extension to an existing or approved Schedule 1 project is screened for EIA, even where the change or extension is not a Schedule 1 development in its own right.
- There is to be a new requirement to make available reasons for negative screening decisions.
- In the context of multi-stage consents, the "unnecessary" (i.e. “gold plating”) provision introduced in 2008 requiring public consultation on an ES at each stage of the process, is to be relaxed.
- There are some other minor changes which include:
  - a proposed amendment to the threshold and criteria for wind farms;
  - the addition of the Marine Management Organisation as a statutory consultee; and
  - the relaxation of provisions creating criminal liability where an applicant is required to publicise an ES.

The consultation ran until 25 October. Consolidated legislation is expected early in 2011.

The intention is also to cancel Circular 2/99 and replace it with updated guidance soon after the new regulations come into force.

The purpose of the proposed changes is to comply with recent judicial interpretations of EU law. There are various implications to be considered.

First, because of the amendment in respect of changes and extensions to schemes, developers and LPAs will be required to consider carefully the effects of those changes or extensions together with the effects of the original scheme. This may require some complex analysis. It is possible, for example, that an original assessment will need updating to take account of changed baseline conditions, such as traffic or noise levels, before the net environmental effects can be considered. This raises the prospect of considerable additional work at the second stage of the process.

Second, the new requirement to give reasons is likely to persuade LPAs of the need for additional care in screening decisions. In addition, it will provide an additional opportunity to objectors seeking to frustrate development through legal challenge by arguing that reasons are inadequate.

Finally, on a related matter, there is still no sign of the long-awaited guidance on application of the 2008 amendments dealing with "subsequent applications". Recent news suggests that this is likely to be incorporated into the new circular scheduled to coincide with the coming into force of the new legislation, early in 2011.

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# PLANNING QUARTERLY BULLETIN
Autumn 2010

## CASE NOTES

We report on two interesting cases this quarter. The first, in the context of a successful appeal, is a useful reminder of the importance of reading decision a letter as a whole when construing the scope of the resulting planning permission. The second addresses the relevance of racial discrimination in the determination of planning applications.

### R (on the application of Barnes) v Secretary of State for Communities and Local Government [2010] EWHC Admin

In this case planning permission was granted, on appeal, for 6 wind turbines near Kendal in Cumbria. A local couple, living very near to the site, challenged the decision in the courts.

In particular, they raised the question of conditions. The environmental statement, prepared in support of the application, had assessed the impact of turbines of a specific size, namely 100m to blade tip. When the Inspector granted permission, he included a condition that required the developer to secure the LPA's approval of the detailed design and specification of the turbines, but which contained no restriction as to overall size. The couple claimed that this was a wrong because without such a restriction, there was nothing to stop the developers and LPA from agreeing turbines larger than those assessed in the environmental statement.

The judge disagreed with the couple. He said that where planning permission is granted on appeal, in determining the scope of that permission it is proper to look at the terms of the decision letter as a whole. He drew attention to a number of paragraphs in particular. These included a sentence which read: "the hub height would be 60m and the height to blade tip would be 100m. I have determined the appeal on this basis." In the light of all this, the judge said that there could be no doubt, reading the various references together, that the inspector was granting planning permission for 6 wind turbines of the dimensions referred to. It would not be open to the LPA to approve turbines of different dimensions.

This is a significant and somewhat surprising decision because it means that it is the whole of a decision letter, rather than simply the passage referring specifically to the grant of permission, that dictates the scope of a consent. In practice, the ruling is unlikely to affect a large number of cases; in the majority it is unlikely that the decision letter will add much to the description of development and approved drawings. But in the odd case, such as this one, it will be crucial. Certainly, it means that appellants should be careful to define clearly the parameters of the proposal being assessed at appeal, in order to avoid a seemingly inconsequential remark (for example in an environmental statement) ending up as an effective condition. Equally, developers should be careful to scrutinise successful appeal decisions for comments or remarks made by the decision-maker that could, subsequently, be relied on by others seeking to restrict the scope of the development in question. Finally, for those carrying out due diligence, it could be seen as adding a further layer of uncertainty and complexity requiring considerable extra work.

### R (on the application of Harris) v Haringey LBC [2010] EWCA Civ 703

This case is a useful reminder of the obligations under the Race Relations Act 1976 and their relevance in the planning context.

Planning permission had been granted by Haringey LBC for the redevelopment of an indoor market with a strong ethnic minority make up. A local person, trying to save the market, challenged Haringey's decision by judicial review. He argued that Haringey had failed to give proper consideration to section 71 of the 1976 Act, which requires LPAs to have regard to the need to eliminate racial discrimination and promote equality. The implications of the redevelopment on the existing ethnic minority communities had not properly been considered by the council, he said. Haringey, whilst accepting that there had been no reference to section 71 itself in the report to committee, nevertheless argued that the matter had not been ignored.

In the High Court, the judge took a pragmatic approach. It was important not to be too formulaic, he said. Paying "due regard" is not an absolute concept, and in any event the UDP (on whose basis permission had been granted) reflected the need for equality. So it did not matter that there had been no mention of section 71 specifically in the report to committee.

But, in a decision which should act as a warning note to LPAs and developers alike, the Court of Appeal disagreed, making the following remarks.

- The UDP policies might have been admirable in terms of proposing assistance for ethnic minority communities, but it could not be said that they focussed on the specific considerations raised by section 71 – i.e. the need to eliminate racial discrimination and promote equality.
- There was no reference to section 71 in the report to the committee, or in the deliberations of the committee.
- Furthermore, the duty under section 71 to have "due regard" for the need to "promote equality of opportunity and good relations between persons of different racial groups" had not been demonstrated in the decision making process. "Due regard" need not require the promotion of equality of opportunity, but it did require an analysis of the circumstances surrounding the application with the specific statutory considerations in mind. No such analysis had taken place.
- In this case the issues that arose on the planning application were, having regard to section 71, an integral part of the decision-making process. This had not been recognised.

It follows from this that LPAs and developers will need to ensure, when promoting or dealing with proposals for development, that the requirements of section 71 are taken seriously. This almost certainly amounts to a requirement, where ethnic minority communities will be significantly affected, for specific consideration of the objectives set out in the Act. On the other hand it does not follow that the considerations raised by the section will be decisive in particular cases. On the contrary, the weight to be given to the issues will always be for the LPA. So long as the necessary regard has been paid to the matters in question, it is unlikely that the courts will interfere.

Hogan Lovells

# PLANNING QUARTERLY BULLETIN
Autumn 2010

## NEWSDESK

### Consultation on proposals to change the TPO regime

The Government has commenced consultation on proposals to consolidate the TPO regime. The objective is to bring various provisions "currently contained in regulations and tree preservation orders (TPOs) into one universal set of new regulations. At the same time, [the Government proposes] to introduce revisions to streamline the regime, reduce the administrative burden of the TPO system (particularly on local planning authorities) and make it a fairer system which is easier for tree owners to use."

Other than consolidation, the main features of the proposals are as follows.

- There will be a new, shorter, model order for all TPOs, comprising a list of trees and a map.
- All existing TPOs will be amended consistent with that new model order.
- All future TPOs will have immediate provisional effect, thereby removing the need for separate directions to provide urgent protection.
- There will be reduced requirements on LPAs to publicise new TPOs.
- The exemptions justifying works to protected trees are to be clarified, and there will be increased flexibility allowing regular work to such trees to reduce the administrative burden.
- The compensation provisions will amended in order to close the loophole allowing LPAs to avoid paying compensation.

The consultation ends on 20 December 2010.

### Changes to HMO regime introduced but subject to judicial review

The Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2134/2010, which came into force on 1 October, creates new permitted development rights. Specifically it allows the change of use of a dwellinghouse to use as a small scale house in multiple occupation shared by three to six people.

Designed to introduce flexibility into the system and to reduce bureaucratic demands on councils, the changes are nevertheless the subject of controversy. Milton Keynes and other councils are seeking judicial review, arguing that the proposals amount to the loss of an important regulatory tool to control how and where HMOs are established. They also seek the strengthening of Article 4 powers allowing withdrawal of the new rights.

### Greater flexibility for planning permissions - guidance issued

The Government has published guidance on the application of recent measures designed to increase flexibility in the timing of planning consent implementation. The guidance deals with minor material amendments (made under section 73 of the 1990 Act), non-material amendments (made under section 96A, 1990 Act) and extensions to the time limits for implementing planning permissions. The guidance document is intended "for use by local planning authorities and developers, as well as individuals who wish to use one of the procedures set out […]. It sets out the key features and statutory requirements for each procedure, provides a practical guide to their use, and explains how they differ from existing procedures."

**Compensation for the removal of permitted development rights**

On 1st October the Town and Country Planning (Compensation) (No.3) (England) Regulations 2010 came into force. These regulations deal with minor matters relating to compensation arising out of directions removing permitted development rights.

**Marine Policy Statement subject to consultation**

The Government has conducted consultation on the draft UK Marine Policy Statement and associated documents. Consultation ran until 13 October.

**Natural Environment White Paper proposed**

The Government is proposing to publish a white paper on the natural environment by spring 2011. The first stage in that process comprised the issue, on 26 July, of a discussion paper called “An invitation to shape the Nature of England”, upon which comments and submissions were invited. A summary of responses will be published later in the autumn. The white paper itself will be a "bold and ambitious statement outlining the Government’s vision for the natural environment, backed up with practical action to deliver that ambition. It represents an opportunity to change the way we think about and manage the natural environment, seeing it as a system and valuing the services it gives us." Ultimately, the Government says, a "more systematic, strategic approach is needed that brings together a wider range of players, provides new options to tackle these challenges efficiently and effectively. This requires, and will encourage, a wider understanding of the value of the natural environment to society and the economy. In order to achieve this, the process of developing the white paper will be accompanied by a wide-ranging process of stakeholder engagement. This Big Society approach to policy development will allow individuals and communities to contribute innovative ideas on how their local environment can be protected and enhanced."

**London views**

A Revised London View Management Framework SPG was published on 29 July 2010. The purpose of this is to outline the policy framework for managing the impact of development on "key panoramas, river prospects and townscape views". The changes include further clarity in relation to the "View Management Plans" and provision to ensure that the widths of all the "Protected Vistas" to St Paul’s Cathedral are consistent with one another.

**PPS 21 - additional advice**

The DoE has published additional advice on the implementation of PPS 21. Policy CTY 10, which governs new dwellings on farms, has been amended to allow consideration of alternative sites on farms away from farm buildings where a justifiable case can be made.

**London Housing Design Guide - interim edition published**

The Mayor of London has published an Interim Edition of the London Housing Design Guide. The Introduction to the document indicates that it has been revised following public consultation in 2009 on the draft Guide, together with the findings of a "cost and delivery impact analysis." Its purpose is "to show the direction of travel of the final guide, to shape the design of London Development Agency supported developments, and to encourage all involved in the design of new housing to embrace the Mayor’s aspirations."

The document has been prepared to consolidate and simplify "a comprehensive set of standards" in order to provide consistency and clarity about acceptable development in London. The expectation is that the standards will be applied across all tenures in the forthcoming draft Housing SPG.

**Standing Advice on Protected Species - consultation**

Natural England has been consulting on the draft of a document called Standing Advice on Protected Species. The purpose of the document is to advise LPAs (excluding those in south east England) on the treatment of protected species in the planning process. It provides "advice on applications where adequate survey information is available and where significant impacts on protected species are likely as a result of development. The advice will apply to all local planning authorities except those in the South East where a second pilot project will run."

**Appeal decision - retail an 'employment' use**

At a recent appeal relating to a site in Salford, the developer appellant managed to persuade the Inspector that a proposed retail use should be treated as an employment use, and therefore benefit from the PPS4 support for uses contributing to economic development, and an employment use. Traditionally, retail has been treated as a non-employment use.

**Natura 2000 sites designated**

15 new Marine Protected Areas have been designated, including reefs and sandbanks. They are listed on the Natural England website - www.naturalengland.org.uk

**Infrastructure Planning Commission accepts first application**

On 26 August the Infrastructure Planning Commission accepted its first application. Covanta Rookery South Limited is seeking development consent for a facility for energy from waste and materials recovery in Bedfordshire.

By early September the IPC's "Programme of Projects" had grown to 50 projects, including the following:

- 18 on- and off-shore wind farms
- 6 electricity lines
- 5 road projects
- 4 nuclear power stations
- 4 biomass power stations
- 4 railway / rail freight interchanges
- 3 gas fired power stations
- 2 waste combustion plants
- 1 tidal power generation facility
- 1 gas storage facility
- 1 gas pipeline
- 1 waste water facility.

Given the Government's proposals to transfer responsibility for determining these applications to the Planning Inspectorate (referred to below) the large number of proposed projects presents a not inconsiderable administrative burden.

**Advice Note on Responding to Nationally Significant Infrastructure Projects**

The Planning Officers' Society has issued guidance to LPAs on responding to applications for development consent made to the IPC. The document, Advice Note on Responding to Nationally Significant Infrastructure Projects, was published on 19 August, and has been written to "help local authority planners quickly brief themselves on the NSIP regime, prepare their elected members, and begin the process of engagement with the scheme promoters. At the same time they will be able to look ahead to later stages in the process to think about how they will organise themselves and plan the necessary resources to be effective and influential right through to the eventual decision and its implementation."

**National Infrastructure Plan published by Government**

The Government has launched a National Infrastructure Plan. The first of its type to be published in the UK, the document is designed to set out a "broad vision of the infrastructure investment required to underpin the UK's growth."

The document deals with the following matters: energy infrastructure; transport infrastructure; digital communications; flood management, water and waste; and intellectual capital. In these contexts it provides "an analysis of infrastructure challenges which underpins the Government's bold ambitions; describes the specific policy and regulatory changes the Government will make in order to remove barriers to infrastructure investment, and explains, in each key area of infrastructure, the specific steps the Government is taking to achieve its ambition to give the UK world-leading infrastructure."

Among other matters, the document includes detailed reference to the planning system. This contains few surprises, but draws attention to the following matters, all said by the Government to support the effective and timely delivery of infrastructure projects in a transparent manner:

- replacement of the IPC with the new Major Infrastructure Planning Unit within PINS, details of which will be announced by the end of 2010;
- the current re-consultation on the National Policy Statements for energy, and a commitment to publish an updated timetable for other NPSs by the end of 2010;
- the bringing forward of the Localism Bill in November 2010, as "part of a radical reboot of the planning system, helping to facilitate sustainable development and the provision of infrastructure";
- the consolidation of existing national planning policies into a single document setting the framework for local and neighbourhood plans; and
- a full Government response to the Penfold Review on non-planning consents, also due in November 2010, followed by an update to this response in spring 2011.

**Consultation on new permitted development rights for schools**

The Government has commenced consultation on the introduction of new permitted development rights in relation to schools. Designed to support the establishment of new free schools consistent with the Coalition's policy in this regard, the consultation proposes a relaxation of the rules requiring planning permission for the change of use of a building to a school. Dealing only with changes of use, the scheme contains no proposals to change the rules on associated building works. Accordingly it is only cases involving purely the change of use of non-school buildings that are to be affected.

**Changes in relation to gypsies and travellers**

On 29 August the Government announced proposals to reform the treatment of gypsies and traveller communities. In particular "top-down Whitehall planning rules […] which Ministers believe have undermined community cohesion and harmed the countryside will be scrapped."

This means, in practice, the following.

- The existing circulars on travellers (01/06 and 04/07) are to be revoked. Current policy has, says the Government, "undermined community cohesion by creating a perception amongst many people of 'different' planning rules for the travelling community and for the settled community."
- Councils will be provided with additional powers with which to tackle unauthorised development on traveller sites. It is not at this stage clear what form those powers will take.
- New rights - concerning in particular security of tenure - and responsibilities will be conferred on travellers on official council sites.
- Traveller sites are to be included, along with other types of conventional accommodation, within the New Homes Bonus scheme designed to incentivise LPAs to deliver new housing. This means that councils will receive financial benefit for the construction of authorised traveller sites where they are needed.

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# PLANNING QUARTERLY BULLETIN
Autumn 2010

## ASK THE EXPERT....

**Q: I am considering acquiring a part-completed residential scheme - a victim of the current economic climate. Some development on site, such as garages, car parking and a play area, does not appear in the description of development, but is shown on plans and drawings. How can I be sure that it forms part of the scheme for which permission has been given?**

A: The relationship between the description of development on one hand, and associated plans and drawings on the other, was the subject of a recent and important decision in the courts. Barnett v Secretary of State for Communities and Local Government [2009] EWCA Civ 476 has clarified the position on this often difficult issue.

Until recently it was assumed that, unless the plans and drawings were specifically incorporated by reference in the terms of a planning permission itself, they could not form part of that permission; the permission should be read on its own. This was long thought to be the result of the decision in R v Ashford Borough Council, ex parte Shepway District Council [1999] P.L.C.R.12. But the Barnett case changed this. It confirmed that the Ashford rule about specific incorporation applies only in the case of outline permissions. Where the permission is a full permission, the inference now is that the plans accompanying the application are automatically treated as an integral part of the permission itself.

**Q: In this case it was a full application, so does this mean automatically that all the plans and drawings are part of the permission?**

A: The rule applies so long as there is nothing to suggest otherwise. These days, it is not uncommon to include a condition listing the relevant plans and drawings, and if this is the case, such a list is likely to be treated as determinative. In older consents, such conditions are rarer, so the new rule in Barnett is more likely to apply. You should check whether there is a condition in your case.

**Q: What is the position for outline permissions?**

A: In the case of an outline consent, the rule in Ashford requiring specific incorporation continues to apply. In any event matters may well have moved on - for example there may be reserved matters consents that provide further detail.

**Q: Are there any other implications of the decision in Barnett?**

A: Regardless of the rule in Barnett it has become common these days to prepare a large number of plans and drawings at the pre-application stage, for a variety of reasons. This means it is increasingly important to agree with the LPA a list of those plans and drawings forming part of the application itself. In any event any doubt as to the applicant's intention should be avoided by making clear on the face of the documents submitted which of them comprise the application and which are provided in support. This can usually be done by way of two separate lists contained in the letter of submission itself. Following this approaches will reduce the risk of misunderstandings arising as to what does, and what does not, comprise the development. It also reduces the risk of all plans and drawings being incorporated by default in the increasingly common 'catch all' condition.

The same may be said for all other supporting documents. It is important to prevent the mistaken incorporation of documents including, for example, statements of intent, or assessments of one type or another, that could seriously constrain the manner in which a scheme is implemented or a developer's subsequent activities. So the same approach should be taken - it is important to agree with the LPA exactly which documents form the application.