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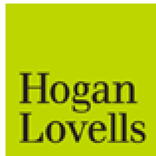

PLANNING QUARTERLY BULLETIN

Summer 2010

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Coalition Government Reform - overview

Nearly 3 months after the general election heralded the start of "a new kind of politics" we are beginning to get a feel for the direction in which the Coalition Government is taking the planning system. In recent Newsflashes we have dealt in detail with two recent changes of major importance - amendments to PPS3 and the revocation of regional spatial strategies. Now, in this Summer Bulletin, we provide a more general overview of the situation as it appears today. In particular, we consider the following.

- Who's who at the helm?
- The essence of the reforms - the Decentralisation and Localism Bill
- Regional planning
- "Radical reform" based on Open Source Planning
- Regional Development Agencies and Government Offices
- Changes to PPS 3
- Infrastructure Planning Commission
- Schools
- Legislative repeal and consolidation
- Other proposed reforms

Read full article

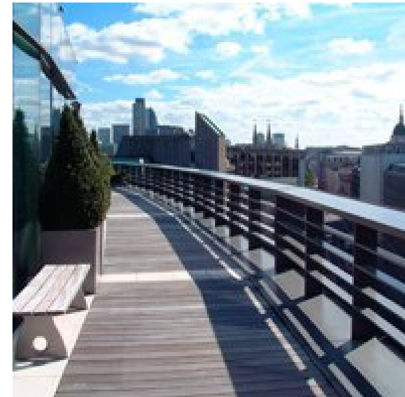
Penfold Review makes case for reform

In 2009 the Labour Government commissioned Adrian Penfold, Head of Planning and Environment at British Land, to undertake a review of the way in which the planning system interacts with other regulatory, consenting regimes. How, Penfold has published a series of recommendations for reform contained in a Final Report. We summarise those recommendations and consider their implications in this Bulletin.

Read full article

Case notes - fast food and proceeds of crime

The decisions in two court cases warrant attention in this quarter's Bulletin. The first, in which permission for a hot food takeaway was quashed because of a local school's healthy eating policy, acts as a useful reminder to developers of the breadth of issues they need to consider when contemplating development. The second tells the story of an individual who had a nasty surprise when finding himself pursued under asset confiscation legislation for carrying on unlawful development. It should be treated as a



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warning to anyone considering defiance of enforcement proceedings

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Newsdesk

- Roanne - OGC issues guidance on procurement rules and planning
- EH guidance on spatial planning
- Welsh planning policy
- Groceries Market Investigation (Controlled Land) Order 2010
- London update
- Funding for eco-towns halved
- Waste strategy review
- Marine Management Organisation launched

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Ask the expert

I have recently acquired a disused farmyard with a range of semi-derelict buildings. I intend to submit an application to develop the yard but first need to ascertain its current status in planning terms. I understand that the farmyard is very old but has not been used for many years – has the right to use it survived?

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PLANNING QUARTERLY BULLETIN
Summer 2010

Coalition government begins to dismantle planning system - overview

Nearly 3 months after the general election heralded the start of "a new kind of politics" we are beginning to get a feel for the direction in which the Coalition Government is taking the planning system. In recent Newsflashes we have dealt in detail with two recent changes of major importance - amendments to PPS3 and the revocation of regional spatial strategies. Now, in this Summer Bulletin, we provide an overview of the situation as it appears today.

Who's who at the helm?

With the dust now firmly settled following a period of considerable uncertainty, here is a list of the most relevant Government posts and their (current) occupants.

- Secretary of State for Communities and Local Government: Eric Pickles (Con)
  - Minister for Decentralisation (including responsibility for Big Society, planning policy and the Decentralisation and Localism Bill): Greg Clark (Con)
  - Minister for Housing and Local Government: Grant Shapps (Con)
  - Parliamentary Under Secretary of State with responsibility for local government and planning: Bob Neill (Con)
  - Parliamentary Under Secretary of State with responsibility for Big Society, housing and regeneration: Andrew Stunell (LD)
- Secretary of State for Transport: Philip Hammond (Con)
- Secretary of State for Environment, Food and Rural Affairs: Caroline Spelman (Con)
- Secretary of State for Energy and Climate Change: Chris Huhne (LD)
- Attorney General: Dominic Grieve QC (Con)
- Solicitor General: Edward Garnier QC (Con)
- Baroness Hanham (Con) will represent DCLG in the House of Lords

The essence of the reforms - the Decentralisation and Localism Bill

At the heart of the new Government's proposals for the planning system is the concept of "localism". Consistent with the David Cameron's "big society" election catchphrase, this is about decentralisation and the promotion of community involvement in decision-making and the formulation of policy. The primary instrument by which this will be achieved is the Decentralisation and Localism Bill, set out in the Queen's Speech of 25 May. The purpose of the Bill will be to "devolve greater powers to councils and neighbourhoods and give local communities control over housing and planning decisions". According to the recently published CLG Draft Structural Reform Plan the Government intend to achieve Royal Assent by November 2011.

Regional planning

Fundamental to the proposed reforms is abolition of the regional tier of planning - thus removing, in the eyes of Government, an unelected and therefore unwelcome influence and transferring power to LPAs and the communities they represent. So, on 6 July (as we reported in detail in our Newsflash shortly afterwards) Eric Pickles revoked all existing RSSs, condemning them as "a national disaster that robbed local people of their democratic voice, alienating them and entrenching opposition against new development." In due course the entire regional planning framework will be dismantled formally by the Decentralisation and Localism Bill, to be replaced by a system in which LPAs set their own targets encouraged by "powerful incentives". In the immediate future, authorities are encouraged to revisit the question of housing numbers, reviewing the figures currently used

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where necessary. As we pointed out in our Newsflash, this raises a number of issues, perhaps most important of which is the policy vacuum left behind.

Since then, however, the Structural Reform Plan has been published. Under the heading “Make localism and the Big Society part of everyday life - by meeting people’s housing aspirations" appears a list of "Actions". Of these, Action 2.2 is to "provide strong and transparent incentives for local authorities to build new homes." The timescale is as follows: "Design scheme working with HM Treasury - June 2010; Announce scheme - July 2010." There is also a clear indication that the LPAs will start to receive those incentives from April 2011. What those incentives are to be, and whether they will be effective to overcome the nimbyism that many expect to become a powerful feature of the new system, are two key questions.

Finally, on 28 July the Parliamentary Select Committee for Communities and Local Government (the cross-Parliamentary committee with responsibility for scrutinising the work of CLG) announced that it intends to hold an inquiry into the revocation and abolition of RSSs. Written submissions are invited by 15 September, following which the inquiry will consider, in particular:

- the implications of the abolition of regional house building targets;
- the likely effectiveness of the plans to "incentivise" local communities to accept new housing development; and
- the arrangements necessary to ensure cooperation between separate LPAs on matters formerly covered by RSSs (such as waste, minerals, flooding, the natural environment, renewable energy, and so on).

Following its inquiry, the Committee will produce a report containing, where appropriate, recommendations. Whilst the Government will be required to respond to the report, it will be under no obligation to adopt any of its suggestions.

At this stage it would be wrong to draw any inferences from the Committee's decision to hold this inquiry. However, it is true that such inquiries tend only to be held in relation to Government decisions or policies which are controversial in some respect, or which warrant further investigation for one reason or another. The decision to do so, therefore, does suggest that the widespread industry concern on the subject of regional planning has at last been sensed in Westminster, even if it is yet to reach a sympathetic ear in Government. The Committee may yet become the industry's most effective ally in this respect.

“Radical reform” based on Open Source Planning

Equally important to the Government’s vision is provision to enable “neighbourhoods […] to determine the shape of the places in which their inhabitants live”. This, it is said, will be done in a manner “based on the principles set out in” the Conservative Party Green Paper: Open Source Planning on which we reported in February. This document refers to the following proposals, among others:

- the setting of development targets at the local level, by a new plan preparation process characterised by “collaborative democracy”, building plans “from the bottom up”;
- reform of the appeals system, limiting the scope for planning appeals but at the same time extending the right to third parties;
- the introduction of a presumption in favour of sustainable development; and
- the publication of a new national planning policy dealing with all these matters.

This process is expected to commence in November; the target for publication of the new national policy is April 2012.

Regional Development Agencies and Government Offices

Meanwhile, it seems that RDAs are also facing the guillotine. The Draft Structural Reform Plan and Budget Report make it clear that these organisations - currently responsible for the preparation of Regional Economic Strategies - are to be abolished through a Public Bodies Bill, preceded by a white paper later this summer. By April 2012 the RDAs are expected to play no further role in planning. Replacing them will be Local Enterprise Partnerships, designed to "enable improved coordination of public and private investment in transport, housing, skills, regeneration and other areas of economic development." The process of their establishment is expected to begin in September.

Perhaps unsurprisingly, the regional Government Offices will also go, "subject to the satisfactory resolution of consequential issues through the Spending Review." It is not clear at the moment who will take on existing roles such as management of the Secretary of State's planning caseload.

Changes to PPS 3

On 9 June the Government made important amendments to Planning Policy Statement 3 - removing the "national indicative minimum" housing density guide of 30 dwellings per hectare and taking private residential gardens out of the definition of "previously developed land". In our Newsflash at the time (in which we considered this development in detail) we drew attention to the inevitable consequences of these changes, including in particular increased pressure on greenfield land.

Infrastructure Planning Commission

Another victim of the new Government's attack on the planning system is the IPC. This, it seems, is set to go - at least as an independent organisation. Greg Clark, Decentralisation Minister, announced on 29 June that the Commission will be replaced by a Major Infrastructure Unit within the Planning Inspectorate, and the Structural Reform Plan (which, incidentally, refers to a “Major Infrastructure Programme Unit”) indicates that this is expected to be established by April 2012. The intention is, evidently, to retain the "same statutory fast track timeframe" for decision-making on schemes, but with the democratic legitimacy and accountability absent from the current regime as the Government sees it.

Mr Clark's press release made it clear that legislation will be introduced to make the changes "as soon as possible" and that "in the interim, the Infrastructure Planning Commission and the Planning Inspectorate will consider how they can work together and identify efficiency savings." This means, it appears, that for the immediate future at least, matters remain as they are now.

For schemes under active consideration by the IPC when the new regime takes effect in due course, the Government promises a "seamless transfer" and that there will be "no question of applications having to restart the process" so that the "statutory timetable for decision-taking will be no longer than the current regime."

By contrast, the Government is committed to retention of the National Policy Statement framework, albeit subject to one important change. In future all NPSs will be ratified by Parliament before designation, in order to confer on them the "strongest possible democratic legitimacy." Mr Clark's statement indicates that the Energy NPSs currently in draft will be ratified as soon as possible, and that a timetable for the remaining documents will be issued later this summer.

More specifically, it is now clear that there will be a fresh round of consultation on the draft energy NPSs later this year, following the process already undertaken in late 2009 and early this year. This reflects, it seems, changes to the Appraisal of Sustainability for the Overarching Energy National Policy Statement. Nevertheless the Government remains committed to ratification by Parliament in the spring.

Schools

On 27 July Mr Pickles issued a written ministerial statement about schools and the planning system. Its purpose appears to be threefold:

(i) to "underline the Government's commitment to supporting the creation of new free schools through the planning system";

(ii) to "make it easier for promoters of schools to build new premises, or find and if necessary adapt buildings suitable for the needs of a school"; and

(iii) to set out the Government's "policy approach to support the establishment of new schools until the proposed new national planning framework is in place."

The statement sets out the approach that planning authorities should take when dealing with applications for new schools. That approach is, in essence, as follows.

- Very significant weight should be attached to the desirability of establishing new schools and to enabling local people to do so.

- Decision-makers should adopt a "positive and constructive approach towards applications to create new schools" and mitigate negative impacts through conditions and obligations.
- Planning permission for a new school should only be refused "if the adverse planning impacts on the local area outweigh the desirability of establishing a school in that area."

The statement also makes it clear that if a local authority "nevertheless refuses permission on this basis, the Government will ask the Planning Inspectorate to deal swiftly with any appeal that is lodged." In addition, there will shortly be consultation on changes to the use classes order to "reduce unnecessary regulation and make it easier for buildings currently in other uses to be converted to schools."

Legislative repeal and consolidation

Another feature of this Government's approach is its intention to deregulate. Accordingly, on 7 July Mr Pickles invited council employees and experts in the local government sector to suggest items of secondary legislation and central guidance ripe for repeal or revocation.

At the same time he published a list of legislation that is already being considered for revocation. It includes the following.

- There are proposals to streamline the approach to tree protection, so as to "reduce the administrative burden and [create] a more equitable system." The intention is to consolidate three sets of regulations (two of which are amending regulations) producing a unified and simpler system.
- In October the Government plans to simplify the 1995 General Development Procedure Order by "combining seventeen statutory instruments into one. This will greatly clarify the planning application system for local authorities, applicants, and other interested parties. The greater clarity provided will free-up valuable local planning authority officer time, which can be redirected towards more fruitful actives than wading through pages of amendments to secondary legislation." It is not entirely clear what is meant by this and, as with tree protection, it certainly seems to beg the question whether Mr Pickles has fully grasped the purpose and effect of amending legislation. Surely there is absolutely no need for anyone to "wade through pages of amendments" so long as consolidated versions of legislation are regularly published - which, of course, they are.
- Statutory guidance on local economic assessments is to be cancelled, thereby "freeing up local authorities to decide locally how they monitor their local economy."
- The final guidance on Multi Area Agreements, promised by the previous Government, is to be abandoned. "No partnerships have taken up MAA duties and given the Coalition Government's focus on local enterprise partnerships we are not expecting any partnerships to do so in the future, so there is no need for final guidance."
- There will be consultation on changes to the 1999 Environmental Impact Assessment Regulations in order to "reflect recent EIA case-law and to ensure the regulations remain fit for purpose and more accessible to users."

Other proposed reforms

In the longer term the Government is planning further major changes. These include the following.

- A "simplified and consolidated national planning framework" will be presented to Parliament "covering all forms of development and setting out national economic, environmental and social priorities."
- A new designation - similar to SSSI - will be created "to protect green areas of particular importance to local communities."
- Changes are to be made to the Use Classes Order to change the law on houses in multiple occupation, in order to allow LPAs "greater flexibility to manage concentrations of shared housing […] in their area." The proposal involves retaining the C4 use class (small HMOs) and extending permitted development rights to allow changes between the C4 and C3 classes. LPAs will be entitled to use Article 4 directions to remove those rights in areas where there is a need to control HMO development - such as where there is already a high concentration of such uses.
- There are also plans to "promote the role for a simplified planning consents process in specific areas where there is potential or need for business growth, through the use of Local Development Orders."

- There is also to be a scheme “to bring more empty homes back into use, working with the local authorities and housing associations and some of the property owners, neighbours and others affected.” This is to take place during the second half of 2010.

It is not clear, at this stage, what else from Open Source Planning will find its way onto the statute books, or when. So, for example, we are still in the dark on proposals to reform the section 106 / Community Infrastructure Levy regime by the introduction of a “single unified local tariff, set at the local level.” Equally, there has been talk of new rules to allow applicants to "compensate" neighbours of development schemes (thereby, in effect, buying them out), simplification of the Use Classes Order and the creation of new enforcement powers to allow LPAs to attack developments granted permission following “substantially misleading” applications. It is not clear what will come of these proposals or when.

In recent newsflashes we have drawn attention to a range of issues arising out of the changes afoot and summarised some of the concerns felt by many in the industry about the direction in which things are moving. This Bulletin is not the place to repeat those points. In any event, it appears that Mr Pickles and his team are determined to press ahead with their series of reforms - comprising, as they do, only a part of the Government's broader "localism" agenda. Nevertheless, in this context, three general points deserve expression.

First, the absence so far of any real engagement with the industry is particularly striking. Despite the increasing sense of inevitability about things, many feel that the Government would be well-advised to take steps to involve, in this process of wholesale reform, the organisations and individuals who will in due course be expected to deal with the consequences.

Second, it is to be hoped that there are, despite appearances, clear proposals for a realistic, longer-term and comprehensive framework to replace those parts of the system that are currently being dismantled.

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PLANNING QUARTERLY BULLETIN
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Penfold Review makes case for reform

Adrian Penfold - author of the Penfold Review and Head of Planning & Environment at British Land - has published his Final Report. Commissioned by the last Government to examine the scope for reform of the way in which the planning system interacts with other regulatory, consenting regimes, Penfold has, in a 130 page document, explained his findings and made a series of recommendations for reform.

A summary of the Review's findings are as follows:

- Non-planning consents (i.e. consents in relation to matters such as protected habitats and species, highways, footpaths and pollution control) play an important role in achieving a wide range of government objectives.
- However they also have a serious impact on the operation of the development process, and represent a sizeable factor in determining the investment climate in the UK.
- Non-planning consents are too numerous and complex, with responsibility for their regulation too fragmented.
- Overlap and duplication between planning and non-planning consents create inefficiency and blur the boundary between the decision of principle about whether a development should go ahead and the detail of how it should be built and operated.
- Delays arising out of non-planning consents can have an adverse economic impact, whilst developers' experiences are characterised by inconsistency and frustration.

As a result of these findings, Penfold has examined the scope for changes to introduce more certainty and speed, and to reduce duplication and costs. He has focussed in particular on those areas seen to be the most problematic - heritage, highways and environment-related consents. In essence, his recommendations are as follows.

- The non-planning consent regime should be simplified and the number of consents should be reduced. In particular the following should take place.
  - There should be a "light-touch review" of many non-planning consents to see whether they are still needed.
  - Conservation Area consent should be merged with planning permission; listed building and scheduled monument consent should be combined in a single heritage assets consent.
  - Consideration should be given to the scope for reform and rationalisation of other groups of related consent, such as those dealing with species protection, highways and so on.
  - The introduction of a scale threshold should be considered, below which certain planning and non-planning applications either require no consent or fall subject to an alternative process, such as deemed consent.
- Developers should be provided with easy access to clear, accurate and up-to-date information on the process of applying for non-planning consents. This should make increased use of the Planning Portal and BusinessLink.
- The boundary between planning and non-planning consents should be clarified. Greater certainty should be provided to developers, along with the removal of duplication, by improving the way planning and non-planning consents operate together. The centrality of the planning system should be emphasised. "Rules of engagement" between LPAs and other decision-makers should be established, to ensure that the decision in principle (the 'if' question) and decisions of detail (the 'how' questions) are approached properly.
- There should be improvements in co-ordination and governance around decisions involving multiple decision-makers. The service culture of decision-making bodies should be strengthened by, for example, setting timetables for the determination of non-planning consents, providing incentives and introducing further accountability.

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- Changes should be made to specific non-planning consent regimes to remove duplication, reduce cost and uncertainty, and avoid delay. In particular this applies to the town and village green regime, protected species licensing, rights of way and highways procedures and building control regulation.
- The Government should create a clear system for oversight of the planning and non-planning landscape, to ensure effective and efficient operation of individual and related regimes.
- In due course, but not yet, consideration should be given to the introduction of a unified consents system similar to the Development Consent Order regime proposed by the last Government for nationally significant infrastructure projects.

There will be considerable industry support for much of what Mr Penfold is suggesting. Despite existing Government guidance (see, for example, PPS 23, paragraphs 8-12) and an ever-expanding body of caselaw on the relationship between planning and the other consenting regimes, there remains uncertainty amongst both developers and LPAs as to the proper approach. Increased clarity will be welcomed on all sides, not least because the issue currently causes confusion, cost and delay in the promotion of schemes. It is to be hoped, therefore, that the Government will find time to take on board his recommendations, despite its ambitious program of reform in other areas.

Finally, it is interesting to see Mr Penfold's remarks about a unified consent regime. He is unquestionably right to stop short of a recommendation to move to such a system in the current resource-stretched climate, given the complexity and cost that such a change would involve. Nevertheless, many will see the attractions of a regime that "pulls together a bundle of related consents" and thus avoids the need entirely for a long and complex series of separate but overlapping applications.

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Case notes - fast food and proceeds of crime

There are two cases of interest to report this quarter. One arises out of the grant of planning permission for a hot food takeaway near to a school and examines the issues that can arise; in the other the court fires a powerful warning shot across the bows of those seeking to profit from illegal development.

R (Copeland) v Tower Hamlets LBC [2010] EWHC 1845 (Admin)

In this first case a planning permission for a hot food take-away was struck down because the planning authority had failed to consider the healthy eating policy of a nearby school. The decision acts as a useful reminder of the breadth of interests that the modern planning system seeks to protect, and therefore the wide scope of potential issues any developer contemplating development should be alive to.

The case related to a site in Shadwell, East London, which had for many years been used as a grocery shop. The owner, Mr Miah, made an application to change the use to a hot food takeaway. On the basis that the proposal appeared to comply with policy, officers recommended approval and permission was granted by the relevant committee.

The claimant, a local person, challenged the decision in judicial review proceedings. He alleged that the LPA had not taken sufficient account of the site's location in relation to a school in the immediate proximity. This school - the Bishop Challoner Catholic Collegiate School, which educates some 1700 students - had adopted a "healthy living" programme. This involved, among other things, promoting the virtues of a healthy diet - issuing advice on healthy eating, and gearing its kitchen facilities and caterers towards the provision of healthy food. The claimant alleged that the presence of the proposed takeaway would damage the programme, and that the LPA had not properly taken this into account when it granted permission.

At the trial the Judge - Cranston J. - reviewed the history to the application. It became clear that there had been objections to the planning application, including from the school itself. The officer's report had addressed the healthy eating issue, suggesting that whilst it was a "valid concern" it was not a material planning consideration that could have weight in determining the application. Subsequently, the LPA contended that the planning system was concerned with character of the use of land and the potential effect of a proposed use on the dietary choices of school children was immaterial.

But the Judge disagreed. He reached the following conclusions:

- Promoting social objectives may be a material consideration in the planning context and may require control over physical land use.
- Whether a social objective is relevant in a particular case turns on the circumstances. As long as the promotion of the social goal is lawfully within the planning sphere it matters not that it falls elsewhere as well.
- The proximity of a fast food take-away near to Bishop Challoner School was, particularly given the healthy eating programme, an important issue that related to the use of land was therefore capable of being a material consideration.
- The LPA had wrongly treated the issue as immaterial and its decision was therefore flawed.

Afterwards, a councillor from the planning authority is reported to have referred to the case as "a very important" one which "clarifies the law and sets a benchmark" to enable LPAs to "take account of health and wellbeing – particularly of school children – as factors in determining planning applications."

This is not strictly true, as in practice the decision establishes no new principle of law. The pursuit of social goals has long been relevant in the development control process. And, of course, PPS 1 refers to the desirability of promoting personal well-being and the need for LPAs to seek outcomes which enable social, environmental and economic objectives to be achieved together.

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But the case is, nevertheless, a useful reminder of the scope of the modern planning system, and the wide range of issues that can today be material to a determination. It will further encourage developers to adopt the 'safety first' approach described by Adrian Penfold in his Review (referred to elsewhere in this Bulletin); prudent operators will be sure to cast their nets early and wide - beyond the range of the more predictable physical impacts - when trawling for potential objections to their proposals, in order to avoid being caught out later in the process.

R v Del Basso [2010] EWCA Crim 1119

This second case relates to the asset confiscation provisions contained in the Proceeds of Crime Act 2002. Rarely encountered by those of us working in the planning system, they nevertheless deserve our attention. The decision reported in the following paragraphs will act as a warning note to those who continue to pursue profitable but unlawful development in the face of enforcement action.

Mr Del Basso was the owner of a company, Timelast, which itself owned a plot of land north of London and leased it to the Bishops Stortford Football Club. In 1999 the LPA granted permission for the use of the site for car-parking by football supporters attending home games. The permission was strictly limited by condition to match days.

Shortly afterwards, however, the LPA realised that the site was being used as a park-and-ride site for Stansted Airport. A planning application to regularise this unlawful use was rejected, as was an appeal against the inevitable enforcement notice and, finally, a high court challenge to the Inspector's decision. So by early 2004, as the Judge said "the end of the line had been reached."

Nevertheless, by this stage, the illegal parking operation had expanded substantially. So, later in 2004, the LPA commenced criminal proceedings. Timelast, the football club and another individual were each convicted and fined £20,000. Still the parking continued and so, in early 2006, a second prosecution was brought, this time against a wider range of defendants but still including Mr Del Basso. Following his conviction, Mr Del Basso was fined a total of £15,000, in default of which he would go to prison for six months, and ordered to pay £20,000 in costs.

But this was not the end of it. Mr Del Basso then found himself subject to confiscation proceedings under the Proceeds of Crime Act 2002. This resulted in further litigation which culminated in an appeal to the Court of Appeal. The principal issues were whether Mr Del Basso's activities in breach of the planning system brought him within the scope of the 2002 Act's application and, if so, what assets could be confiscated. The outcome of the arguments in those contexts is interesting and important. The following is a summary of the Court's findings.

- The park-and-ride operation was essentially a criminal one from the moment the enforcement notice took effect. This was despite the fact that, in all other respects (such as employment legislation, income tax obligations and VAT liability) the activity was entirely lawful.
- Thus, and despite the fact that Mr Del Basso was otherwise an entirely respectable local businessman who, it was said, had merely been trying to help his local football club, he must be treated as a person with "a criminal lifestyle" who had profited accordingly. He therefore fell within the scope of the 2002 Act and was subject to confiscation.
- As to what sum should be confiscated, Mr Del Basso argued that his net gains from the whole episode were very limited. Because he had ploughed almost all his receipts back into the business, he had himself profited by only a small amount - about £180,000 over the period in question. It was this net figure, rather than the gross receipts, that ought to be relevant for the purposes of confiscation. But the court took a markedly different approach - the Act was concerned with what an offender had obtained through the illegal business in the first place, no matter what he subsequently did with it. Of the £1.8million that Mr Del Basso was adjudged to have received, £760,000 was still available and this would be confiscated, in default of which there would be a prison term of 18 months on top of the six already referred to.
- Finally, the suggestion that the claim was an abuse of process was also dismissed, despite the lack of environmental harm and notwithstanding Mr Del Basso's otherwise respectable nature and the devastating consequences of the episode for him.

The result in this case evidently came as a particularly nasty surprise to Mr Del Basso, and one could be forgiven for the perception that he was harshly treated. But the confiscation regime is one of strict application and, as the court was at pains to point out, it was apparent that Mr Del Basso and others had "failed to appreciate fully the risk that the companies and individuals involved in the park-and-ride operation faced from confiscation proceedings. They have treated the illegality of the operation as

a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings. This may reflect a more general public impression among those confronted by enforcement notices with the decision whether to comply with the law or to flout it. The law however is plain. Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their unlawful businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers."

The Court was entirely correct. Those who find themselves the subject of enforcement action would do well to consider the possibility, however remote it might seem, of confiscation proceedings for a sum vastly in excess of any personal gain. The financial consequences of failing to do so may evidently be disastrous.

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Newsdesk

Roanne - OGC issues guidance on procurement rules and planning

The Office for Government Commerce has issued guidance on the relationship between the planning system (section 106 agreements in particular) and European procurement rules - a complicated but important issue since the European case of Roanne suggested that certain development agreements might trigger European procurement obligations. OGC Note 12/10, published on 30 June, was issued following the European Court of Justice judgment in a case called Helmet Muller. Whilst ridden with equivocation it nevertheless reflects the Government's view that in most cases the grant of a planning permission together with a section 106 agreement will not be caught by the procurement rules. This will provide reassurance to developers, although it should be remembered that the ECJ may yet take a different view should the issue come before it.

English Heritage guidance on spatial planning

English Heritage has published a document called Understanding Place: An Introduction. The purpose of the document is to introduce "historic characterisation, and its application in spatial planning. […] Historic characterisation is the term given to a range of approaches to the identification and interpretation of the historic dimension of the present day landscape (including townscape) within a given area." The document is aimed at LPAs, regeneration agencies, and developers and their agents.

Welsh planning policy

A new, 2nd, edition of Planning Policy Wales has been published. It includes all the policy updates that have been issued since 2002 in the form of Ministerial Interim Planning Policy Statements, and reflects changes to facts, law, policies and other documents referred to in the original document and MIPPs. In particular it is designed to include increased focus in tackling climate change.

Groceries Market Investigation (Controlled Land) Order 2010

On 30 April 2010, the Groceries Market Investigation (Controlled Land) Order 2010 came into force. It follows from the Competition Commission investigation into the grocery retail market, and creates new restrictions on the use of restrictive covenants and exclusivity arrangements designed to promote competition in local markets.

London update

The London Plan:

The Coalition Government has confirmed that whilst it is abolishing Regional Spatial Strategies, the London Plan is being retained. This will provide a greater level of policy certainty for development in London, especially once the Replacement Plan is adopted. The Mayor published the draft Replacement London Plan back in October 2009 and, following the public consultation, he published some minor textual changes in May 2010. The Examination-in-Public started on 28 June 2010 and is likely to last until 22 October 2010. Once the Examination has ended, the EiP Panel will write a report to the Mayor suggesting any changes. The Mayor will then send an amended version to the Secretary of State to decide whether any further changes should be made. The final version of the Replacement London Plan is not expected to be published until late 2011.

Crossrail:

In July the Mayor published Supplementary Planning Guidance on contributions for Crossrail. This states that contributions will only be sought on office, hotel and retail developments that result in a net increase in floorspace of more than 500sq.m and that are located in Central London, the northern part of the Isle of Dogs or in a 1km radius around key Crossrail stations (excluding the Woolwich Arsenal). The contributions sought will range from £16 per sq.m for retail development outside central London

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and the Isle of Dogs, to £186 for office development on the Isle of Dogs. The SPG makes it clear that contributions will be reduced by 20% for developments commencing by 31 March 2013. Developments that receive permission by 31 March 2013, but which do not commence in that period, will be required to pay the full amount subject to viability concerns.

The new Secretary of State for Transport, Philip Hammond, has pledged his commitment to Crossrail, but has said that it will be essential to keep costs as low as possible.

Draft London Housing Design Guide:

Publication of the Draft London Housing Design Guide was expected in April 2010, but several months down the line there is still no sign of it.

Despite the current economic climate, Boris Johnson has pledged to combat schemes that provide cramped "hobbit homes". The Guide therefore sets minimum standards for all new publicly funded homes in a number of key areas including: internal space, balcony sizes, dual aspect, ceiling heights, storage space, and units off corridors. These very detailed standards are likely to significantly increase the cost and complexity of public housing development. Not surprisingly the standards have faced considerable criticism from architects, London councils, developers, individuals and organisations alike. The British Property Federation is amongst parties concerned, stating that, whilst "no doubt well intentioned", the guidelines will "deprive Londoners, particularly those in the majority 60% of new 'single' households, of a home". The Federation goes on to say "any credible guide must surely start from the basis of understanding what is economically feasible, as well as what is desirable".

The question whether the Guide should affect planning decisions during this interim period is a contentious one. In a recent appeal decision, an Inspector said that although the Guide is still in draft form, it is still a "material consideration" and is at the stage where "some weight should be attached to its contents". Conversely, during the replacement London Plan EiP, in response to a question on the Guide, the Mayor's representative Andrew Barry-Purssell stated that the Guide will be solely for LDA owned land and that it "has no planning status"

Funding for eco-towns halved

Five months after the Labour Government promised £60m to help fund the first four eco-town scheme, Grant Shapps, Housing Minister, has announced that the sum is to be halved. At the same time, Shapps has made it clear that CLG expects eco-town proposals coming forward to benefit from strong community support, consistent with the "localism" concept at the heart of the Government's plans for reform of the planning system. He said that the Government "will not designate or impose a solution on a particular area and will not support an eco-town if the local community is opposed to it."

Waste strategy review

The Government has announced that there is to be a review of England's Waste strategy. Its purpose will be to examine the most effective ways of reducing waste and the effect of waste policies on local communities and households, and to consider how to maximise financial returns from waste and recycling. Environment Secretary Caroline Spelman announced that the review's terms of reference will be published shortly.

Marine Management Organisation launched

The Marine Management Organisation (MMO) was launched on 15 June in Gateshead. Created under the Marine and Coastal Access Act 2009, the MMO will have responsibility for implementing the new marine planning system also established by that Act. This will include the introduction of a marine licensing regime and the creation and management of a network of protected areas - marine conservation zones.

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Ask the expert

Q: *I have recently acquired a disused farmyard with a range of semi-derelict buildings. I intend to submit an application to develop the yard but first need to ascertain its current status in planning terms. I understand that the farmyard is very old but has not been used for many years – has the right to use it survived?*

A: There is a limited range of ways in which a lawful use right can be lost. The relevant one in this case is 'abandonment' – a concept that depends on the assumption that a use (other than one for which planning permission has been granted) has ceased with no intention of its resumption. The issue here is whether the concept applies to the farmyard.

Q: *But I have no idea what the intention of the owner was when the buildings fell out of use a long time ago, and no way of finding out.*

A: This will not prevent operation of the concept of abandonment, because the owner's stated intention in this context is not decisive. In fact the law works on the basis of an inference. In order to determine whether the concept of abandonment applies, the law will consider four factors.

The first of those is the period during which there has been no use. In your case, where the period of non-use appears to be lengthy, this factor is likely to count against you.

The condition of the land is the subject of the second factor. The more derelict the buildings and overgrown the land, the more likely it is that their use has been abandoned.

Third, whether there has been any intervening use will be relevant. So if, for example, the buildings have been brought back into their former use for short periods from time to time, this will tend against a finding of abandonment.

Finally, the owner's subjective intention is relevant. But in a case such as this, where the previous owner's conduct and its purpose are lost in the mists of time, this element of the test is likely to add very little to the overall picture.

The final analysis will involve a consideration of the four factors taken together; there is no hard and fast rule in a case such as this. Certainly, however, previous decisions suggest that the courts are reluctant to conclude that an otherwise lawful right has been lost through inactivity. Examples include a case where residential use rights in a dwelling house survived despite 35 years of non-use and, by contrast, another where a similar use right was found to have been abandoned after 26 years of inactivity, albeit following some works of demolition.

Q: *In my case the issue looks unclear. How can I get some certainty on this?*

A: As with any other question involving existing use rights, the most unequivocal solution would be to apply for a certificate of lawfulness of existing use or development (CLEUD) pursuant to section 191 of the Town and Country Planning Act 1990. The planning authority will take the decision on the basis of the evidence you give them, and anything else available to them. If a certificate is issued, it is by law conclusive of the issue.

Q: *If the decision the authority reaches is that the use has in fact been abandoned, what are the implications?*

A: If the lawful use is found to have been abandoned, your site will have a 'nil' use status in planning terms. This means you would need planning permission for anything at all – including, even, a return to agriculture!

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