Planning and CPO

Summer 2016

Welcome to the Summer edition of *Planning and CPO*, discussing current issues in the planning and CPO sector.

If you would like further details on any of the areas covered in this newsletter then please contact one of our team or visit our website at www.burges-salmon.com.

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Judicial limits in judicial review

The recent case of *The Licensed Taxi Drivers Association, R (on the application of) v Transport for London [2016] EWHC 233 (Admin)* has highlighted key judicial limits to any challenge against the granting of planning permission.

The scheme itself involved the construction of a "cycle superhighway", a segregated cycle lane that was to run continuously for 9.5km on local authority roads and the Transport for London (TfL) road network.

TfL had taken the view that planning permission was not required, due to the works falling outside the definition of "development" in the Town and Country Planning Act 1990 s.55(1) (the Act). TfL believed that the works constituted road improvement works, without significant adverse environmental impact, and were therefore exempted from the meaning of development.

LTDA, who objected to this scheme, contended that the works would have a significant adverse impact, and would therefore be within the definition of development. LTDA sought a declaration from the Court that TfL was in breach of planning control by carrying out the works without planning permission.

The main argument from LTDA was that an environmental evaluation report, commissioned by TfL, contained evidence of adverse effects upon the environment as a result of the scheme generally.

The Judge decided however, that this was not development. Even though the report specified that there were both beneficial and adverse environmental impacts relating to the scheme, when the report was read fairly and as a whole the Judge concluded that it supported TfL's assertion

that the scheme overall would have no significant effect on the environment.

The Judge however went further and reminded the claimant the issue of environmental effect is ultimately an issue which requires an exercise of planning judgement and is not for the Court to make. The only ability the Court had in this situation was whether TfL's conclusion on this matter was erroneous or irrational.

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The Judge held also that the requested declaration would not be possible. This case concerned a matter of planning judgement made by the relevant local planning authority. It would not be appropriate for the Court to usurp the role of a local planning authority in such a way, unless there was evidence provided to the Court that the works carried out were unlawful.

This case clearly identifies the limit to which the Court will look in a judicial review to the substantive decision made by a planning authority and reminds us that the position of the Court is to rule on whether a decision of the planning officer has been made correctly, and not the merits of the decision itself. Similarly, regarding any declaratory relief, the enforcement of town planning rules is a function of the planning authority or Secretary of State and not the Court.

If you have any queries in relation to Judicial Review, please contact Cathryn Tracey on 0117 939 2223 or Cathryn.tracey@burges-salmon.com.

Sustainable housing

The sustainable housing landscape has changed significantly in the last twelve months. This article explains the main changes and sheds some light on what these changes mean for those working in the industry.

Housing Standards Review

The Government's Housing Standards Review introduced a number of changes to the Building Regulations 2010. These took effect in October 2015 and include, amongst other things, new optional requirements for higher standards of accessibility, a new optional higher water efficiency standard and a mandatory security standard for new homes.

In addition, a new 'opt in' national space standard has been introduced. This is not part of the Building Regulations but can be found in a standalone document published by DCLG. The standard specifies minimum floor space requirements in a dwelling.

In order to adopt the new higher standards, a local authority must establish that there is a need to do so and then incorporate them into their local plans. Planning Practice Guidance sets out how local authorities should establish need in the case of each standard.

The other major change resulting from the review was that the Code for Sustainable Homes was withdrawn except in legacy cases.

Deregulation Act 2015 and Changes to the Planning and Energy Act 2008

Section 42 of the Deregulation Act 2015 provides that, in England, technical housing standards should only be included in Building Regulations.

Section 43 of the Act revokes section 1(1)(c) of the Planning and Energy Act 2008, thereby preventing local authorities from requiring higher standards of energy efficiency than those set out in Building Regulations. This change is not yet in force and will apply only to England.

Scrapping of Zero Carbon Target and 2016 Energy Efficiency Standards

The Government had previously set a target for all new homes to be zero carbon by 2016. However, it announced in October 2015 that it is scrapping this target. This followed the announcement in July 2015 that the scheme for carbon offsetting through allowable solutions would also be abandoned, as well as the scrapping of the proposed increase in on-site energy efficiency standards for new homes, intended to help achieve the zero carbon target.

Analysis

There will undoubtedly be some concern amongst local authorities as to how the need for higher standards will be demonstrated. However, perhaps more concerning from a sustainability perspective is that for many authorities, the new 'higher' standards may be lower than their current requirements.

The scrapping of the Code for Sustainable Homes, the zero carbon target and the proposed increase in energy efficiency standards is disappointing from a sustainability perspective, although would appear to have achieved the aim of simplifying the regulations and standards. Despite this, sustainability remains a key theme of the NPPF and NPPG.

As mentioned above, it is not clear when the change to the Planning and Energy Act 2008 will come into force. It would nonetheless be prudent for local authorities to take it into account in their plan making.

If you have any queries in relation to Sustainable Housing, please contact John Arthur on 0117 307 6289 or john.arthur@burges-salmon.com.

Implying words into planning conditions

Skelmersdale Ltd Partnership, R (on the application of) v West Lancashire Borough Council & Anor [2016] EWHC 109 (Admin) and *Trump International Golf Club Scotland Ltd v The Scottish Ministers [2016] 1 WLR 85*

In Trump the Supreme Court examined the ability or otherwise to imply words into a condition. The condition concerned required submission and approval of a detailed design statement but did not go on to require compliance with the statement as approved; it was therefore argued that the condition was uncertain and unenforceable. In obiter comments concerning the interpretation of such conditions, the Court departed from previous judicial decisions[1] and determined that the previous position preventing implication of an obligation to comply into such conditions was too strict. Instead, the Court should determine what a reasonable reader would determine the condition to mean in the context of the consent as a whole, and that in such cases "as a matter of common sense" a requirement to comply with an approved statement is implicit.

The interpretation of conditions was further considered by the High Court in Skelmersdale. This concerned a retail led town centre scheme which the LPA was concerned would damage the viability of the existing Concourse Shopping Centre. The Concourse Centre was considered to be outdated and vulnerable to losing key retail occupants to a new, modern centre with better parking facilities. In order to protect the viability and initiative of the Concourse Centre, the LPA imposed on the new centre permission a condition providing that no retail floor space could be occupied by any retailer who had occupied floor space exceeding 250sqm in the Concourse Centre within the previous 12 months. An exception was allowed where the retailer, submitted and had approved, "a scheme which commits to" occupation of the Concourse continuing for five years notwithstanding the further occupation of a unit in the new centre (the "two-store strategy"). The condition did not go on to require compliance with the approved scheme and was challenged as unenforceable as it did not contain an implementation clause. In obiter comments the High Court agreed with the reasoning in Trump that there is no absolute bar in implying conditions into a planning permission.

In the same case the meaning of a scheme which "commits" to retaining a presence in the Concourse Centre was also considered. It was argued that this did not require a legally binding commitment. The Court dismissed this argument in short course and considered that such an interpretation is justified by the formal context of use within a planning condition. The acceptability of the condition was also alleged to discriminate against particular retailers (through the floor space limit) but not others. The Court found that the condition serves the legitimate planning purpose of protecting the viability of the existing centre, in achieving that purpose it was not unreasonable to concentrate on

larger retailers as the consequences of their removal from the Concourse centre on its continuing viability would be greater.

While care is needed in implying wording into planning conditions there is, in principle, no reason to exclude implication from the interpretation of planning conditions altogether. Developers of retail units and retailers should also note that the imposition of restrictions tied to maintaining a presence at a separate retail centre and impacting on the retailers choice of location can be considered to serve a proper planning purpose where they seek to protect the viability of existing sites and will be an enforceable condition despite limiting the commercial freedom of retailers. The danger of a condition requiring a legally binding agreement through the use of verbs such as commit should also be borne in mind when considering planning conditions.

If you have any queries in relation to these cases, please contact Paula McGeady on 0117 307 6253 or paula.mcgeady@burges-salmon.com.

[1]In particular *Sevenoaks District Council v First Secretary of State* [2005] 1 P&CR 13

Recent consultation round-up

If there's one thing you can rely on, it is government tinkering of the planning system. The winter months haven't provided a let up in reviews and proposed reforms of planning policy and legislation, the roots of which can be found in various Government announcements including its Election Manifesto[2], the HM Treasury Productivity Plan[3], the Rural Productivity Plan[4] and the Autumn Statement[5]. Whilst the Government is seeking to implement a number of its reforms through the recently enacted Housing and Planning Act[6] and the Energy Act, there are also a number of other consultation documents out there >

[2]https://www.conservatives.com/manifesto

[3]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443897/Productivity_Plan_print.pdf

[4]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454866/10-point-plan-rural-productivity-pb14335.pdf

[5]https://www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents

[6]The Housing and Planning Bill was enacted just as this newsletter was being finalised and at the time of writing the text of the Act was not available. We will cover this in a future update.

and the table below provides, a quick overview of what these are:

Consultation/Review	Publication Date	Consultation Response Date if applicable)
Rural planning review call for evidence about planning system in rural areas	11 February 2016	21 April 2016
Technical consultation on the implementation of planning changes	18 February 2016	15 April 2016
Consultation on London planning policy change to permit upwards extensions for housing	18 February 2016	15 April 2016
National Infrastructure Commission consultation	7 January 2016	17 March 2016
National Planning Policy: consultation on proposed changes	7 December 2015	22 February 2016
Community Infrastructure Levy Review Questionnaire	19 November 2015	15 January 2016

Rural Planning Review: Call for evidence (February 2016)[7]

As its name suggests, the Call for Evidence is not a consultation on specific Government proposals but is aimed at gathering evidence on areas of the rural planning system that the Government is seeking to improve. It is assumed there will be a separate consultation on any proposals the Government puts forward as a result of this Call for evidence. The intention of this Call for Evidence is to take forward commitments the Government has made in its general Productivity Plan – 'Fixing the foundations: Creating a more prosperous nation' as well as the subject specific Rural Productivity Plan – 'Towards a one nation economy: A 10 point plan for boosting productivity in rural areas'.

In short, the Call for Evidence is primarily seeking views and evidence on the planning constraints facing rural businesses and measures that can be taken to address them and the current thresholds for agricultural buildings to convert to residential buildings and how these could better support the delivery of new homes.

There are also three annexes to the Review which set out specific questions aimed at different groups of people as follows – Annex A for individual users of the planning system; Annex B for local planning authorities; and Annex C for everyone else (i.e. planning consultants and representational organisations).

The Review requested that evidence was submitted by 21 April 2016.

Consultation on Upward extensions in London (February 2016)[8]

Like every other part of the country London needs to provide more homes but with space at a premium the Government and the Mayor of London have jointly put forward proposals targeted at reducing the pressure to "build out"' in London by allowing greater freedom to "build up" instead. The foundations for this consultation were included in the HM Treasury's July 2015 Productivity Plan – "Fixing the foundations: Creating a more prosperous nation".

The consultation identifies three options, however, it is made clear that these are not mutually exclusive and a combination of all three could be introduced. In summary, the options are:

1. Permitted development (PD) right (with prior approval) for additional storeys on existing buildings. The new PD right would be conditional on the additional space being used for self-contained housing units, development up to the height of an adjoining roofline and a maximum of two additional storeys to be added.
2. London boroughs to use existing powers to make local development orders (LDOs) for additional storeys in specific areas.
3. New London plan policies to be introduced to support additional storeys for new dwellings.

In all cases the consultation proposes that upward extension be allowed not just on existing residential buildings but also on existing offices, retail and other high street uses. Structures and areas subject to special designations, such as listed buildings, would be excluded, but conservation areas and protected views would not be. These would be subject to additional prior approval processes where PD rights are being relied on and specific consideration and consultation where development is to be brought forward through LDOs or policy support.

The consultation set out 18 questions that it was seeking views on by 15 April.

National Planning Policy: consultation on proposed changes[9]

This consultation sought views on >

[7] https://planningjungle.com/wp-content/uploads/Rural-Planning-Review-Call-for-Evidence-February-2016.pdf

[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501191/Consultation_on_Upward_Extensions_in_London.pdf

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488276/151207_Consultation_document.pdf

proposed changes to national planning policy in the following areas:

1. The definition of affordable housing.
The Government proposes to broaden the definition of affordable housing to include a wider range of low cost homes, for example Starter Homes.

2. Housing Development around Commuter Hubs.
The Government wants to amend national planning policy so that local planning authorities, in their plan making and decision making, require higher density of development around commuter hubs (i.e. public transport interchanges) to make more efficient use of land in suitable locations. The Government wants to achieve this without setting a 'one size fits all' minimum density requirement.

3. Housing Development – New settlements, brownfield land and land allocated in Local Plans.
The Government wants to strengthen national planning policy to support sustainable new settlements, development on brownfield land and small sites (up to ten units), and the delivery of housing agreed in Local Plans. For example, the intention is to make clear that development on brownfield land should be supported unless there are overriding conflicts with the Local Plan or National Planning Policy Framework;

4. Starter Homes.
The Government is keen to push forward with its starter home initiative and the consultation proposes a number of policy changes that the Government considers will strengthen/make easier the delivery of starter homes. Firstly, it proposes to amend paragraph 22 of the NPPF to make clear that unviable or underused employment land should be released unless there is significant and compelling evidence to justify why such land should be retained for employment use. The consultation suggests this may be done through limits on the length of time that land designated for commercial and employment use can be protected. The Government also proposes to expand the exception site policy to incorporate other forms of underused brownfield land such as land previously used for retail, leisure and non-residential uses. If starter homes are brought into the definition of affordable housing then the Government also proposes to allow for starter homes to be built on rural exception sites. There are also proposals to enable local communities to allocate sites in the Green Belt for small scale starter home developments.

This consultation sought views on 23 questions across the above areas. The consultation is now closed and we await the Government's response…

If you have any queries in relation to the consultations, please contact Laura Fuller on 0117 902 7232 or laura.fuller@burges-salmon.com.

NSIPs

Since our previous planning and CPO newsletter, there continues to be a steady stream of NSIP projects being granted consent. One DCO is of particular interest, the East Midlands gateway strategic rail freight interchange.

In January, the Secretary of State granted development consent for a Strategic Rail freight Interchange (SRFI) in Leicestershire. The proposals included intermodal facilities, warehousing and highway improvements.

This was the first time that a Secretary of State went against a recommendation by the ExA to refuse consent for a NSIP. The Examining Authority (ExA) gave their recommendation on the basis of a number of issues including, the lack of direct rail connection and the lack of provision for future expansion within the design for the facility which in their view did not comply with the National Policy Statement for National Networks (NPS).

The Secretary of State adopted a more flexible interpretation of the NPS, recognising the need to allow the developer to respond to market requirements and stating that the need for the project and the benefits which it would bring outweigh the Examining Authority's concerns based on the narrow approach to interpreting the NPS. The Secretary of State also demonstrated willingness to consider the wider benefits of a scheme when making a decision and gave significant weight to the benefits arising from the highway proposals.

The Secretary of State acknowledged in his decision that there were areas of discrepancy between the project specification and the requirements of the NPS, but decided in any event to take a more holistic approach, taking market requirements into account.

This decision can be seen as an example of the Government's willingness to intervene in NSIP decisions to promote particular infrastructure developments and demonstrates that the Secretary of State's involvement in DCO determination is not just a rubber stamp on the ExA's report.

If you have any queries in relation to NSIPs, please contact Elizabeth Dunn or Julian Boswall on 0117 939 2000 or Elizabeth.dunn@burges-salmon.com or Julian.boswall@burges-salmon.com.

Planning in Wales and the DNS

We have written extensively before about the changes to the planning system in Wales brought through the Planning (Wales) Act 2015. This Act amends the provisions of the Town and Country Planning Act 1990 as it applies to Wales and many of the enabling regulations have been long awaited. The most significant incremental changes from a practical perspective have been now introduced; through the amendment Order to the *Development Management Procedure (Wales) Order 2012* (DMPO) and a number of statutory instruments relating to the new category of Developments of National Significance (DNS). The changes to the DMPO became effective from 1 March and in relation to the DNS on 16 March.

DMPO

The DMPO has been amended to include new requirements for pre-application consultation for major development. It requires a report to be submitted with the planning application to the LPA demonstrating how concerns raised by those notified of the planning application have been addressed in the scheme. Design and Access Statements are now only to be included with proposals for major development and for proposals which include more than one dwelling house. There is now a requirement for the developer to notify the LPA once development has commenced and for the LPA to update its decision notices to ensure that they reflect the most up to date planning position (i.e. note whether planning conditions have been discharged, partially discharged or removed/varied).

DNS

The new thresholds for the new category of 'DNS', where the planning application needs to be made directly to the Welsh Ministers, as opposed to the LPA, are provided for in the *Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016* (DNS Regulations). In an energy context, the DNS Regulations set the threshold for onshore generating stations as DNS where they have a generating capacity between 10MW and 50MW. However, this does not apply to on-shore wind. As the Westminster Government has removed on-shore wind from the Development Consent Order regime, the DNS

This Act amends the provisions of the Town and Country Planning Act 1990 as it applies to Wales and many of the enabling regulations have been long awaited.

Regulations were updated two days later to reflect this change. As such, for on-shore wind, any scheme above 10MW will now be a DNS. With plans in the draft Wales Bill to devolve all other generating stations in Wales up to 350MW to the Welsh Ministers, developers operating in Wales will need to come to terms with the impacts of the Planning (Wales) Act 2015 (and other Welsh legislation including the Well-being of Future Generations (Wales) Act 2015 and Environment (Wales) Act 2016). It is plainly time to become better prepared for the impacts of new devolution legislation on businesses.

If you have any queries in relation to the planning position in Wales, please contact Stephen Humphreys on 0117 902 2709 or Stephen.humphreys@burges-salmon.com.

Enforcement update

Two recent Court of Appeal cases have provided clarification on the law relating to planning enforcement.

The case of *Bonsall v Secretary of State for Communities and Local Government and another* [2015] EWCA Civ 2146 concerned the interplay between planning enforcement notices and the *Welwyn* decision. In conjoined appeals, the developers appealed against decisions that the time limits in section 171B of the Town and Country Planning Act 1990 ("TCPA") for enforcing their breaches of planning control did not apply because they had deceived the planning authority about the nature of their developments.

The well documented *Welwyn* case introduced the principle that where there is a breach of planning control which is deliberately concealed then the landowner cannot rely upon the time limits for enforcement action in section 171B (four or ten years, depending on the type of development). In each of the cases in the *Bonsall* appeal, it had been held by a planning inspector, following the issue of an enforcement notice, that there had been positive deception and, following the *Welwyn* rule, the normal time limits for enforcement action did not apply.

The High Court upheld that decision but permission was granted to appeal further on the issue of whether the enactment of the Planning Enforcement Order ("PEO") provisions in sections 171BA to 171BC of the TCPA removed the effect of the *Welwyn* decision, so that LPAs should follow the PEO procedure and could no longer rely on the *Welwyn* approach. The PEO procedure provides a mechanism where planning authorities can apply to the court for a PEO in cases where they had been deceived as to the true nature of the development.

It was held in the Court of Appeal that the PEO procedure was an alternative and additional means of permitting enforcement outside the normal time limits in cases involving deliberate concealment. The Judge pointed out that there were good reasons why an LPA may prefer to use the PEO method, for example where the extent of concealment may be insufficient to engage the Welwyn principle but could justify the making of a PEO. The use of a PEO may also be attractive to avoid an appeal relating to the time limits for taking enforcement action. Conversely, the Welwyn approach may be the preferred route where, for example, an LPA has faced difficulty in obtaining information on the history of the site, particularly when deception has been used to conceal activities.

The decision is consistent with the government's objective of strengthening enforcement powers for planning authorities and so is likely to be welcomed by LPAs.

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A second case worth mentioning is *Miaris v Secretary of State for Communities and Local Government and another* [2016] EWCA Civ 75. In this case, the Court of Appeal clarified when it is possible to entertain an appeal against a planning enforcement notice on the basis of "ground (f)" when no "ground (a)" appeal has also been made.

An appeal against a planning enforcement notice can be made on any of the grounds set out in section 174(2) of the TCPA. Ground (f) allows an appeal where the enforcement notice steps specified exceed what is necessary to remedy any injury to amenity caused by the breach of planning control. A ground (a) appeal is based on the proposition that planning permission should be granted or the conditions attached to a planning permission should be discharged.

In this case, the Court held that an appeal under ground (f) cannot be entertained when:

- there is no appeal under ground (a) that planning consent should be granted; and
- the planning objections which the step in question addresses are not limited to any injury to amenity.

A ground (f) appeal my be entertained when there is no appeal under ground (a), if the step in question is one solely to remedy any injury to amenity. The nature of the planning objection that the step being contested seeks to remedy is therefore extremely relevant. In practice it is unusual for an appeal to be brought only on ground (f) but the case does provide clear authority on when ground (f) can be used in isolation.

Environmental Impact Assessments (EIA) are now firmly a part of development and with EIA comes requests for EIA screening opinions. A couple of recent cases highlight the importance of procedure and timing for decision makers when delivering an EIA screening opinion.

If you have any queries in relation to these cases, please contact Jen Ashwell on 0117 378 6711 or jen.ashwell@burges-salmon.com.

EIA case law update

R (Roskilly) v Cornwall Council and others

In the case of *R (Roskilly) v Cornwall Council and others*[10], Tidal Lagoon Swansea Bay plc (TLSB) made an application to Cornwall County Council (CCC) in December 2015 for planning permission for development at Dean's Quarry (in an AONB in Cornwall), including a reception building and other buildings to support the reopening of the quarry.

In March 2015, Silke Roskilly (Roskilly) objected to the planning application on the basis that it was Schedule 2 development in a sensitive area and required an Environmental Impact Assessment. Later that month, CCC issued a screening opinion which determined that the proposed development would not have significant environmental effects and therefore did not require an EIA.

On 7 April, Roskilly requested a screening direction from the Secretary of State in respect of the proposed development. The following day, CCC granted planning permission on recommendation of the planning officer.

Following the screening direction published by the Secretary of State in June 2015, which concluded that an EIA was required, the Roskilly made an application for judicial review of CCC's decision to grant planning permission and argued that planning permission was unlawful under the EIA Regulations 2011, because the Secretary of State's screening direction was binding and determinative, so that planning permission had been granted for environmental impact development but without the EIA required by the EIA Regulations 2011.

The court agreed that the screening direction issued by the Secretary of State rendered the planning permission unlawful despite the screening direction of Secretary of State being issued after CCC had granted planning permission and quashed the planning permission.

This is a stark reminder that a screening direction from the Secretary of State is conclusive in determining whether an EIA is required. Even though the EIA Regulations 2011 do not specifically require a local authority to await the decision of the Secretary of State on a request for a screening direction, Councils beware; in granting permission before the Secretary of State has issued its screening direction, the local authority is taking a risk that the Secretary of State will decide that the proposed development requires an EIA and that the planning permission will be unlawful.

R (Jedwell) v Denbighshire County Council and another[11]

This case provides guidance to the local planning authority (LPA) when delivering an EIA screening opinion. The decision of the High Court on 10 March 2016, confirmed that the LPA duty to provide reasons for both positive and negative screening decisions. Furthermore, the court clarified that the reasons cannot be an ex post facto (or after the event) justification, but must be the reasons the LPA had in mind at the time of the decision.

This is also a reminder to LPAs that they should keep a record of the decision maker's reasons for any screening decision, so that those reasons may be provided in the event a request is made.

If you have any queries in relation to EIA, please contact Kristen Read on 0117 307 6254 or kristen.read@burges-salmon.com.

[10] [2015] EWHC 3711 (Admin)
[11] [2016] EWHC 458 (Admin)

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