Newsletter

BURGES SALMON

Planning & CPO

Spring 2015

Welcome

Welcome to the latest issue of Planning & CPO, our bulletin in which we aim to keep you informed of current issues and news in planning.

For further information on any of the topics covered in this issue of **Planning & CPO**, please contact **Gary Soloman** on **+44 (0)117 902 2791** or email: **gary.soloman@burges-salmon.com** or **Sarah Sutherland** on **+44 (0)117 307 6964** or email: **sarah.sutherland@burges-salmon.com**

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What do the election manifestos say about planning?

With the election looming, the main political parties have published their election manifestos which cover each party's plans for the planning system, housing, energy and infrastructure in varying degrees of detail. We have summarised the headline points which are most likely to have an impact below.

Conservatives

The Conservatives want to ensure that local people are in charge when it comes to planning decisions. They want to strengthen the Community Right to Bid initiative, and support Business Improvement Districts and other business-led collaborations. They have also pledged to protect the Green Belt, which has been the subject of many recent controversial decisions.

In terms of energy, they want to "halt the spread" of onshore wind farms by ending any new public subsidy and giving local people the final say on windfarm applications. They do however support the safe development of unconventional gas extraction.

Labour

Labour want to give local authorities "use it or lose it" powers to encourage developers to build. They are keen to limit permitted development rights relating to payday lenders and betting shops to limit the number of conversions.

Labour wants to implement ambitious domestic carbon reduction targets, including a legal target to remove carbon from the electricity supply by 2030. They also want to establish a "robust" regulatory regime before extraction of unconventional onshore oil and gas can take place.

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Liberal Democrats

The Lib Dems would create a Community Right of Appeal, while restricting the right of developers to appeal against decisions that are in line with the local plan. They also want to end the permitted development right for converting offices to residential units, which is currently due to expire in May 2016 and has been used widely recently.

They want to encourage onshore wind in appropriate locations, and end ideologically motivated interference by Government Ministers in local wind farm decisions. They also want 50% of any tax revenues from shale gas to fund energy efficiency projects.

UKIP

UKIP want to replace the NPPF and introduce fresh national planning guidelines that will prioritise brownfield sites for new housing and protect the green belt. They want to allow large-scale developments to be overturned by a binding local referendum.

Greens

The Green Party also want to scrap the NPPF to "put planning back in hands of local people and government". They want restrict the right of the SoS to call in planning applications, and to ensure through planning that everyone lives within five minutes' walk of a green space – a somewhat ambitious task!

Scottish National Party

Powers over the planning system in Scotland are devolved to the Scottish Parliament, but the SNP has said it wants to maximise support for offshore wind, and will press for onshore wind to continue to receive support. It backs a moratorium on shale gas extraction.

Plaid Cymru

Plaid Cymru are calling for additional planning powers, and natural resources and energy to become Welsh government responsibilities. They want to reform the planning system in Wales to put local need and benefit, sustainability and Welsh language at its heart.

We are eagerly awaiting the results of the Election and will publish an updated briefing post-election to keep you updated.

For any queries regarding upcoming changes to the planning regime, please contact Sarah Sutherland on 0117 307 6964 or sarah.sutherland@burges-salmon.com

Update on Infrastructure Act 2015

The Infrastructure Act 2015 entered the statute books in February 2015 – the last piece of primary legislation affecting developers this side of the election. As outlined in our February 2015 briefing note on the Act, it covers several topics including the deemed discharge of planning conditions, fracking rights and community electricity rights. The provisions of the Act come into force at different times. Some of the most recent of those in force relate to Nationally Significant Infrastructure Projects (NSIPs). A date has also been set for other provisions relating to NSIPs as outlined below.

The Examining Authority for an NSIP application can now (as of 12 April 2015) be appointed when the application is accepted - earlier in the process than previously. This should improve the efficiency with which an application is examined.

14 July 2015 is a key date and will see various changes to the regime to vary a development consent order (DCO) including:

- the Secretary of State (SoS) will be able to refuse an application to vary a DCO if he considers the proposed change warrants a new DCO;
- the applicant (rather than the SoS) will be responsible for publicising and consulting on an application to vary a DCO;
- the applicant must consult with persons who may be directly affected by the proposed changes (rather than every person consulted for the original DCO application) and a Statement of Community Consultation (SoCC) will no longer be required;
- the SoS will be able to opt not to hold an examination;
- the time limits for examination and decision will be shorter - 4 months for examination (previously 6 months), 2 months for the examining body to write a report to the SoS (previously 3) and 2 months for the SoS to decide the application (previously 3 months).

If you have any queries on the Infrastructure Act 2015, please contact Sophie Summers on sophie.summers@burges-salmon.com or 0117 307 6966.

"the last piece of primary legislation affecting developers this side of the election"

A day too late – court deadlines for planning cases

Time is critical in filing claims for judicial review in planning cases.

Four judicial review claims against the Thames Tideway Tunnel development consent order (DCO) issued last Autumn were dismissed by the High Court on 15 January 2015. Issues over timing were raised in two of the claims.

Section 118 of the Planning Act 2008 (the 2008 Act) enables a decision on an application for a DCO to be challenged by judicial review within "six weeks beginning with the day on which the order is published", meaning, 'including' the day on which the order is published.

Blue Green London Plan v SOS [2015] EWHC 495 (Admin)

The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 was published on 12 September 2014. However, London Borough of Southwark and the campaign group, Blue Green London Plan filed claims for judicial review of the Order on 24 October 2014 - a day late.

The claimants argued that "six weeks beginning with the day on which the order is published" had the same meaning as "six weeks beginning after the day on which the order is published".

The High Court held that as a matter of ordinary statutory construction, a period of six weeks beginning with the day on which an event occurred **includes** the day on which the event occurred. The claims had been filed out of time and section 118 of the 2008 Act contained no power for the Court to extend the time limit.

It is important to note that section 118 differs from the provisions of part 54.5(5) of the Civil Procedure Rules (CPR) and the latter would have meant the claimants had filed their claims on time. In this case however, part 54.5(5) did not apply as it covers decisions "made by the Secretary of State or local planning authority under the planning acts" only. The planning acts, as defined by the CPR, do not include the 2008 Act, so the CPR provision was not relevant.

Applying Interpretation to the Rule

In the recent case of *Nottingham City Council v Calverton Parish Council [2015] EWHC 503 (Admin)*, the Parish Council made an application to quash the City Council's development plan document (DPD) on 20 October 2014. However, the actual six week period expired on Sunday 19 October, when the court office was closed. The City Council therefore made an application to strike out the claim.

An application to quash a DPD must be made not later than the end of the period of six weeks starting with the relevant date (section 113(4), Planning and Compulsory Purchase Act 2004). This is equivalent to the former wording of section 118 "beginning with". However, the Court held that Parliament must have intended for the six-week period to end on the next working day and therefore, in this case, the claim was brought in time.

Timing is essential to the validity of a claim and caution should be taken when ascertaining the time limit for making a claim. When in doubt, applications should be made sooner rather than later.

For any queries regarding judicial review claims, please contact Kristen Read on 0117 307 6254 or kristen.read@burges-salmon.com

Speeding up the planning process

Spring 2015 has seen the introduction of two new measures designed to speed up the planning process in England:

1. New planning guidance in respect of section 106 agreements;

2. Deemed discharge of planning conditions.

New guidance on section 106 agreements

In February 2015 the Government consulted on speeding up negotiations in respect of section 106 planning obligations. That consultation ended on 19 March 2015 and the results have already been published and changes made to the online Planning Practice Guidance.

The new guidance:

- Confirms that section 106 negotiations should be concluded within statutory timescales;
- Promotes the use of standardised clauses to minimise the need to draft agreements from scratch;
- Sets expectations of earlier engagement at the pre-application stage by all parties;
- Promotes greater transparency about the contributions which have been secured through section 106 agreements; and
- Encourages the use of flexible approaches for boosting local authority capacity – for example sharing resources across local authorities.

The Government also intends to consider changes to the legislative framework, including the introduction of stricter timescales for negotiations and the creation of a dispute resolution mechanism to be used where timescales are not adhered to.

These changes should be welcomed and should assist to prevent the delays which are often encountered in the grant of planning permission where it is conditional upon the completion of a section 106 agreement.

Deemed discharge of planning conditions

On 15 April 2015, the new Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO") came into force. As well as consolidating the previous 2010 Order, the new DMPO also brings in provisions relating to the deemed discharge of planning conditions.

Deemed discharge can be used by applicants for planning permission to deem certain planning conditions to be discharged if the local planning authority (LPA) fail to deal with the discharge application within a prescribed period.

In summary, once an applicant submits sufficient information to the LPA to enable discharge of the condition, a decision must be made on the discharge within 8 weeks. Once 6 weeks have passed from the date the discharge application was submitted, the applicant can serve a deemed discharge notice on the LPA.

The notice must include the date on which deemed discharge is to take effect, which will be either the end of the 8 week determination period or 14 days following the receipt of the notice by the LPA. If the LPA fails to determine the discharge application before the date specified in the notice, then it will be deemed to be discharged on that date, unless otherwise agreed between the applicant and the LPA.

Deemed discharge is not available in relation to specific exclusions, which include conditions attached to a planning consent for EIA development or development within a SSSI and conditions relating to flooding, contaminated land and archaeology. In addition, any conditions which require a section 278 highways agreement or the entry into of a planning obligation or approval of reserved matters cannot rely on deemed discharge.

This change has been long awaited by developers and will provide greater certainty in terms of timing, particularly where conditions must be discharged prior to the commencement of development.

If you have any queries on s.106 agreements or conditions, please contact Jen Ashwell on jen.ashwell@burges-salmon.com or 0117 307 6063.

Discounting CIL liability: in “lawful use” and “in-use building”

The recent High Court case of *R (on the application of Hourhope Ltd) v Shropshire Council* [2015] *EWHC 518 (Admin*) has introduced judicial guidance on what will be considered to constitute “in lawful use” and an “in-use building” for the purposes of obtaining a reduction in the amount of CIL charged under Regulation 40 of the Community Infrastructure Regulations 2010 (CIL Regs).

Facts of the case

Hourhope owned a site on which a public house formerly stood. The pub ceased to trade in May 2011 and was subsequently sold. The pub use was not recommenced, and the premises were partly destroyed by fire in April 2012. In August 2013, planning permission was granted to demolish the original building and erect residential units.

When a CIL liability notice was served, Hourhope claimed that the pub had been “in lawful use” and should therefore attract a discount. The claimant stated that parts of the premises had been in lawful use because a director of the company that previously ran the pub had lived on-site for a period of time (being less than six months), that equipment relevant to the running of a pub had been left at the property in the hope of re-opening, and that the property was being used for storage, or an ancillary use.

The key matters addressed in the judgment were:

- When determining whether a building is an “in-use building” and “in lawful use”, it is not enough that a building has a lawful use to which it may theoretically be put; the building must actually be being used for that purpose;
- The presence of items left behind in a property which related to a lawful use of that property could not be regarded as continuing that use;
- Ancillary uses are only relevant in determining whether a property is in lawful use or if it is an in-use building, where the main permitted use is still being carried out.

What does this mean for developers?

The judgment in *Hourhope* provides a strict interpretation of the discount available under Regulation 40 of the CIL Regs. Where properties have been left empty for a period of time, with no apparent use lasting over six months within a three year period prior to the grant of planning permission, developers are likely to find it hard to qualify for any deduction to the amount of CIL charged to their developments.

Following this ruling, developers would be wise to ensure that a building is made use of, and that evidence of that use can be adduced for a period of at least six months prior to re-development if they are seeking to rely on this discount.

For any queries regarding CIL, please contact Alex Minhinick on 0117 307 6874 or alex.minhinick@burges-salmon.com

Can rights of common be registered over common land?

The case of *R (on the application of Littlejohns) v Devon County Council 2015 EWHC 730 (Admin)* considers whether rights of common can be registered under the Commons Act 2006 (the 2006 Act) over land which is already registered as common land. The legislation being considered in this case is only in force in 7 pilot areas at the moment, of which Devon is one. However, it is anticipated that the legislation will be brought into force more widely across the UK in due course.

The sole issue in the case was whether the Council had acted correctly when it determined that it was unable to register the Littlejohns claimed rights of common under the transitional provisions provided in the 2006 Act.

The Littlejohns, and their predecessors in title, had grazed sheep and cattle on the common land adjacent to their farm for decades until 2001 when the foot and mouth disease outbreak occurred and their animals had to be slaughtered. After that, the common land was subject to a grazing management scheme which restricted the grazing rights. In 1968 the Littlejohns notified the Council that they intended to register rights over the common in accordance with the Commons Registration Act 1965 (the 1965 Act). The Council's records show that no application to register the rights was received and therefore the rights of common were not registered within the time period provided by the 1965 Act (which ended on 2 January 1970). The Littlejohns only became aware of this in 1984 although they continued to use the common for grazing throughout.

In 2010, the Littlejohns made an application under the 2006 Act to amend the commons register to include their rights. The basis of their application was that, after 2 January 1970 and before 1 October 2008 (the relevant dates in the 2006 Act), they had grazed sheep and cattle for more than 20 years on the common land and therefore had acquired a prescriptive right to graze livestock over that land. The Council refused the application on the ground that, although they had provided evidence that rights of common had been used for more than 30 years, a right of common could not be created by prescription after 2 January 1970 over land that had been registered as common land. The Littlejohns challenged this decision by way of judicial review.

The challenge was refused by the Court and the Council's decision was held to be correct as the Littlejohns could not establish that they had acquired rights of common when they applied to register them. The legislative intention of the 1965 Act was that all rights of common should be registered and that registration would be conclusive evidence of the matters registered. The legal effect of rights of common which were not registered by 2 January 1970 was that they were extinguished and no new rights of common could be acquired by prescription over registered common land. The purpose of the transitional provisions in the 2006 Act is to provide a brief window within which the commons register could be updated and corrected by incorporating any registrations which could have been, but were not, made under the 1965 Act.

For any queries regarding common land or town and village greens, please contact Cathryn Tracey on 0117 939 2223 or cathryn.tracey@burges-salmon.com

Highways England takes over from the Highways Agency

From 1 April 2015, Highways England, a new government-owned company, became the highway authority for the strategic road network in England. This means it now has responsibility for managing England's motorways and major A-roads (with a few minor exceptions).

Highways England has taken over this role from the Highways Agency, the executive agency of the Department for Transport (DfT) which previously carried out the role of highways authority on DfT's behalf.

Reasons for the change

DfT has said that by establishing Highways England as a separate legal entity, more independent from government, it will ensure that its relationship with government is transparent, its funding settlement is robust, and there is a clear 'performance contract' through the performance targets.

Although Highways England is a separate corporate entity, ministers will exercise strategic control over the company by issuing statutory directions and guidance to the company to shape how it must go about delivering its requirements.

Monitor and watchdog

The Office of Rail Regulation has been renamed the Office of Rail and Road, and acts as the "Highways Monitor". Its role is to scrutinise Highways England's performance and report on it to the Secretary of State.

The role of watchdog for road users will be carried out by Passenger Focus, which has been renamed Transport Focus.

Planning powers altered

Formerly, the Highways Agency (on DfT's behalf) had the power to direct that a planning application should be refused, or that certain conditions be attached to it. By contrast, Highways England can only make a recommendation to the relevant local authorities, who can then decide whether to follow it (although they must be prepared to justify their decisions).

In addition, local authorities will now only need to consult Highways England on development "likely to result in an adverse impact on the safety of, or queuing on a trunk road". Previously, local authorities had to consult the Highways Agency in any case where development was "likely to result in a material increase in the volume or a material change in the character of traffic entering or leaving a trunk road".

If you have any queries on highways, please contact Sarah Sutherland on sarah.sutherland@burges-salmon.com or 0117 307 6964.

> *"it will ensure that its relationship with government is transparent, its funding settlement is robust, and there is a clear 'performance contract'"*

Energy developments: further devolved powers to Wales

Following publication of the second report from the Silk Commission, set up to provide recommendations for further devolution in Wales, a command paper has recently been published which is endorsed by the main political parties in the UK. The paper sets out plans for further devolution in Wales, and is considered a blueprint for the next Wales Bill.

Among the Silk recommendations that are likely to be implemented through the next Wales Bill, are proposals to:

- Give responsibility for all energy planning development consents for projects up to 350MW to the Welsh Government (including those within Welsh territorial waters);
- Include the Welsh Government as a statutory consultee for all energy projects above 350MW and for Welsh planning policies to be taken into account in the Development Consent Order process; and
- Give control of shale gas extraction licences and marine licences in Welsh offshore waters to the Welsh Government.

Prompted by the publication of these proposals, the Select Committee currently considering the Planning (Wales) Bill have raised questions over how the Welsh Government intends to deal with developments between 50MW and 350MW once responsibility for such schemes is devolved to Wales. There is some uncertainty regarding how expected new powers will be implemented, although a new Development Consent Order regime in Wales could create four separate consenting regimes for energy projects:

- "up to 25MW" made to the Local Planning Authority;
- "25MW to 50MW" to the Welsh Government as Developments of National Significance;
- "50MW to 350MW" to the Welsh Government under a possible Welsh DCO regime; and
- "over 350MW" as a DCO to the Secretary of State in England.

For any queries regarding Welsh devolution, please contact Stephen Humphreys on 0117 902 2709 or stephen.humphreys@burges-salmon.com

Weight of the effect of development on listed buildings

"The judgment demonstrates that the considerable weight which must be given to the protection of heritage assets must be demonstrated in the reasons for the decision."

The case of *Jane Margaret Mordue v. Secretary of State for Communities and Local Government & Others (2015) EWHC 539 (Admin)* concerns the quashing of a decision by an Inspector to grant planning permission for a single wind turbine at a farm outside the village of Wappenham. The Claimant was concerned about the impact of the turbine on the setting of listed buildings in the village including a Grade II* listed Church. The basis of the statutory challenge was that the Inspector had failed to demonstrate that he had given considerable weight to the harm to the setting of each of the listed buildings in the reasons for his decision.

The High Court found that whilst the Inspector had clearly identified the harm to the setting of heritage assets as a material consideration and had assessed that harm in his report, he had not demonstrated that he had accorded considerable weight to the harm to any listed building or setting and that failure caused the Claimant substantial prejudice. The Inspector had referred to and complied with the provisions of the NPPF in reaching his decision, however this was found to be insufficient to demonstrate that the required weight had been accorded. The judgment demonstrates that the considerable weight which must be given to the protection of heritage assets must be demonstrated in the reasons for the decision.

In the case of *Gerber v Wiltshire Council [2015] EWHC 524 (Admin)*, the resident of a Grade II* listed building challenged an implemented permission for a solar array development on the basis of (amongst other reasons) failure to properly discharge the duty to have special regard to the listed building and its setting and to give considerable weight to this. The Council's conservation officer had considered the impact on the listed building and its setting but failed to consult English Heritage when he should have done so. The officer's report relating to the application failed to demonstrate that considerable weight had been given to the effect on the setting of the listed building. The decision accordingly did not comply with the legal requirements and was quashed on the grounds of illegality. The Court took into account the significant financial detriment to the developer of having the implemented planning permission quashed but still found that the failure to give proper consideration to the effect on the heritage asset outweighed that detriment.

Both these cases highlight the need for the reasons for decisions involving listed buildings and their settings to clearly demonstrate that considerable weight has been accorded to these considerations in reaching a decision. Simply holding the effect to be a material consideration will not be sufficient to discharge the duty.

For any queries regarding heritage, please contact Paula McGeady on 0117 307 6253 or paula.mcgeady@burges-salmon.com

Technical consultation on compulsory purchase

Eleven years on from "Towards a Compulsory Purchase Code", the Department for Communities and Local Government has published a technical consultation on improvements to the compulsory purchase process. The consultation paper is said to "present a package of proposals for technical process improvements and guidance to make the process clearer, faster and fairer with the aim of bringing forward more brownfield land for development".

The first proposal for change and the one which is likely to have the most serious implications for CPO as a whole, is to allow a public sector acquiring authority to take into account the overall savings it could make by not pursuing compulsory purchase at the initial negotiation stage with landowners. Allowing local authorities and other public sector bodies to take into account saved legal fees, process costs and other linked costs could significantly "sweeten the deal" for landowners and thereby cut down on the use of the CPO.

Consideration is also given to the extension and harmonisation of notice of entry periods following the confirmation of the CPO. The proposal is that under either a general vesting declaration or a notice to treat, the notice period would be at least 3 months. This will remove the ability to secure access to land earlier using the notice to treat and notice of entry process and mean that at least a 3 month delay will have to be factored in to the development programme. Options are also being canvassed in respect of measures to avoid an acquiring authority delaying entry after the notice period has in fact expired.

The advance payment code is also included in the consultation. Views are sought on changes to the process of commencing negotiations on the compensation figure, dispute resolution mechanisms and bringing forward the date on which advance payments would be available.

There are a wide range of proposed changes throughout the course of the consultation document, all of which are aimed at either speeding up the CPO process at the preparation, confirmation or implementation stages, or improving the perception of fairness of the process as a whole.

The Government's attempts at reform on the whole appear to be well thought out. The real question is whether or not a complicated area of law which has been so resistant to change in the past will once again thwart the aspirations of government. Much is likely to depend on who is in power once the consultation process has run its course.

The consultation is open for 12 weeks from 18 March 2015 to 9 June 2015.

For any queries regarding compulsory purchase, please contact Cathryn Tracey on 0117 939 2223 or cathryn.tracey@burges-salmon.com

"to allow a public sector acquiring authority to take into account the overall savings it could make by not pursuing compulsory purchase"

The Planning team

Patrick Robinson
Partner

+44(0)117 902 6332
patrick.robinson@burges-salmon.com

Gary Soloman
Partner

+44(0)117 902 2791
gary.soloman@burges-salmon.com

Julian Boswall
Partner

+44(0)117 307 6851
julian.boswall@burges-salmon.com

Elizabeth Dunn
Partner

+44(0)117 902 2738
elizabeth.dunn@burges-salmon.com

Laura Fuller
Senior Associate

+44(0)117 902 7232
laura.fuller@burges-salmon.com

Sophie Summers
Associate

+44(0)117 307 6966
sophie.summers@burges-salmon.com

Alex Minhinick
Associate

+44(0)117 307 6874
alex.minhinick@burges-salmon.com

Sarah Sutherland
Associate

+44(0)117 307 6964
sarah.sutherland@burges-salmon.com

Cathryn Tracey
Associate

+44(0)117 939 2223
cathryn.tracey@burges-salmon.com

Paula McGeady
Associate

+44(0)117 307 6253
paula.mcgeady@burges-salmon.com

John Arthur
Solicitor

+44(0)117 307 6289
john.arthur@burges-salmon.com

Stephen Humphreys
Solicitor

+44(0)117 902 2709
stephen.humphreys@burges-salmon.com

Kristen Read
Solicitor

+44(0)117 307 6254
kristen.read@burges-salmon.com

Jen Ashwell
Solicitor

+44(0)117 307 6063
jen.ashwell@burges-salmon.com

Follow @BurgesSalmon

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

6 New Street Square
London EC4A 3BF
Tel: +44 (0) 20 7685 1200
Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

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