Newsletter

BURGES SALMON

Planning & CPO

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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 **0117 902 2791** or email: **gary.soloman@burges-salmon.com** or **Sarah Sutherland** on **0117 307 6964** or email: **sarah.sutherland@burges-salmon.com**

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Case law update

Strike one, two...

The case of *Hartleyburn Parish Council v Secretary of State for Communities and Local Government and others [2013] EWHC 1650 (Admin)* is a rare example of a summary judgment application to strike out a statutory challenge under s.288 of the Town and Country Planning Act 1990. It serves as a useful reminder to parties involved in such proceedings of the prerequisites for bringing such a challenge.

The facts of the case are that planning permission was refused by the Council for opencast extraction of coal with restoration of the land but subsequently granted on appeal. The Parish Council challenged the Inspector's decision under s.288 on the grounds that the Inspector (1) had misinterpreted policy, (2) erred in his view that national benefits outweighed the likely impacts to justify the grant of permission by failing to carry out the balancing exercise under paragraph 149 of the NPPF and (3) did not adequately justify his conclusion regarding the potential harm to lapwings.

The developer issued an application for summary judgment under Part 24 of the Civil Procedure Rules on the grounds that the High Court challenge had no real prospect of success and there were no other compelling reasons for a trial, contending that the grounds of challenge were thinly disguised challenges to the planning merits and did not give rise to any points of law. The Parish Council then applied for this application to be struck out or joined with the substantive application but this was refused by the High Court.

In considering and granting the summary judgment application, the High Court revisited the fundamental principle that a s.288 challenge may only be brought on a point of law and that the grounds of challenge broadly correspond with those relating to judicial review. The key point to remember is that statutory challenges are concerned with the legality of the Inspector's decision making process rather than the merits of the decision.

For any queries regarding statutory challenges, please contact Sarah Sutherland on 0117 307 6964 or sarah.sutherland@burges-salmon.com.

"Need" v demand

In R (on the application of Cherkley Campaign Ltd) v Mole Valley DC [2013] EWHC (Admin), a local campaign group challenged Mole Valley District Council's decision to grant planning permission for the development of a luxury golf resort on a country estate, on the basis the Council had erred in considering the requirement to demonstrate a "need" for further golf facilities contained within a saved policy of the local plan.

The policy in question provided that "applicants proposing new golf courses will be required to demonstrate that there is a need for further facilities" (para 12.71, Policy REC12). The planning officers recommended refusal of the application on the basis that the applicant had not, given the sheer number of existing golf courses in the Mole Valley area and Surrey generally, demonstrated such a need. Planning permission was, nevertheless, granted.

In considering the meaning of "need", the High Court Judge, Mr Justice Haddon-Cave, commented that *"…a clear distinction is always drawn between public "need" (i.e. what is in the public planning interest) and private "demand" (i.e. what is in the developers interest by having this particular type of development). The latter not being equiparated to the former…"* and more particularly that "…the word "need" in paragraph 12.71 means "required" in the interests of the public and the community as a whole i.e. "necessary" in the public sense. "Need" does not simply mean "demand" or "desire" by private interests".

In his judgment, the Council had failed to (1) appreciate the

fundamental distinction between "need" in the public interest sense and commercial "demand" for such facilities and (2) heed the advice of the planning officers that the 'exclusive' nature of the proposed golf facilities did not obviate the requirement to show the "need" for such facilities. As there was no evidence upon which the Council could rationally come to the conclusion that the requirement to demonstrate a "need" for further golf facilities had been satisfied (as well as other grounds), the Council's decision was quashed.

For any queries regarding "need", please contact Fiona Barker on 0117 307 6043 or fiona.barker@burges-salmon.com.

Justice in planning appeals

That justice must not only be done, but that it must also manifestly seen to be done; is a maxim well known to those appearing before the Courts. In the case of *San Vicente v Secretary of State for Communities and Local Government* [2013] EWHC 2713 (Admin), Collins J. applied this principle in a judgment which will be of relevance to all participants in planning appeals.

The case before the Court related to an appeal against the refusal of Uttlesford District Council for planning permission for residential development in Essex. Permission was subsequently granted on appeal, and it is the manner in which that appeal was conducted which was challenged in the High Court.

It was common ground that the Council had failed to properly notify interested persons of a hearing at which the appeal was first considered. Accordingly, and having complied with the requisite notification requirements, a second hearing was heard by the same Inspector. It was intended to be a fresh hearing, and conducted as if the first hearing had not happened, to avoid any unfairness to those objectors who had been unaware of, and had not attended, the first hearing.

The question for the Court was whether procedural unfairness had arisen, and if so, whether that unfairness resulted in prejudice to the objectors to the scheme. Collins J. questioned the merit in appointing the same Inspector to consider both hearings. Whilst not precluding an Inspector's ability to hear a second fresh appeal fairly, the High Court made it clear that this approach led to a real risk that the appeal participants would consider that the Inspector may have had regard to the first hearing. That impression could be easily avoided through the appointment of a new Inspector.

Collins J. also held that there had been procedural unfairness and prejudice to the objectors in the manner in which certain matters had been dealt with more abruptly and in less detail at the second hearing. The objectors had not been allowed the fair 'crack of the whip' which they should have been afforded in the appeal process.

This judgment is a warning to developers and local authorities that it is as important to safeguard the integrity of the appeal process, as it is to obtain the decision on the planning merits of the case.

For any queries regarding the conduct of planning appeals, please contact Alex Minhinick on 0117 307 6874 or alex.minhinick@burges-salmon.com.

Professional fees for CPO - Surveyors beware

An issue of concern for surveyors involved in CPO, and of note for those authorities promoting a scheme, is the recent position taken by the Upper Tribunal on surveyor's fees.

There is no issue that these can be claimed in the CPO context: where statutory powers exist to acquire interest in the land of another, the owner of that interest has the right to make a claim for compensation. Rule 6 of section 5 of the Land Compensation Act 1961 provides for compensation "for disturbance or any other matter not directly based on the value of the land". Any other matter has long been established as including professional fees.

The issue is the basis on which these fees should be assessed. Traditionally this has been on the Ryde Scale (fee scales based on the level of compensation/the value of the claim). However, recognising that these scales did not assess how much work was undertaken and therefore the actual loss to the claimant, professionals have in recent times tended to charge fees on an hourly basis. The acceptance of this approach has been confirmed in a trio of decisions: *Matthews v Environment Agency (2002), Newman v Cambridgeshire County Council (2011) and Poole v Southwest Water (2011).*

The high point from the surveyor's perspective is the Poole case, where the Tribunal supported reimbursement of such fees including the time spent in arguing the basis of fees with the acquiring authority.

However, the case of *Downworth v Manchester City Counci*l, heard earlier this year, has dampened the approach. This case concerned a regeneration CPO with an hourly rate agreed between surveyor and claimant of £175. However, the Council did not agree the rate nor the amount of the claim. A reference was subsequently made to the Lands Tribunal solely in relation to the issue of fees.

The level of fees incurred make interesting reading. The claim itself was fairly modest - £4,900 claimed for negotiation of the compensation. Contrast that with a claim of just under £10,000 for arguing the issue of fees with the Council and in preparing the claim/reference. The Council contested these figures.

The claimant's case was that he was bound to pay £175 per hour to the surveyor as evidenced by the terms of appointment, that was his normal hourly rate and payment of any lesser amount would result in the claimant receiving less compensation than that to which he were entitled. The Council maintained that the level of fees claimed was unreasonable and disproportionate, the hourly rate was higher than one would normally expect to pay in a case such as this and that the Council had a duty to act fairly and to pay a disproportionate amount to one particular professional advisor would impact on the cost of future regeneration initiatives.

The Tribunal agreed with the acquiring authority. It considered that £175 was too high and that too long had been spent in relation to this matter. It considered that the claim was "unrealistic and overstated". In particular, it considered the reference was misconceived and awarded no costs for preparation of the claim.

What does this mean? It is for the claimant to decide who will represent him and to agree the terms of engagement. However, such fees must be reasonable; which extends to both the hourly rate charged and the time taken. Account must also be taken of the scale and complexity of the work in hand and the time, effort and expertise required to complete it. Surveyors therefore need to approach the issue of fees with consideration and care and need to be prepared to back up any position they take on fees with appropriate evidence.

For any queries regarding CPO or compensation claims, please contact Gary Soloman on 0117 902 2791 or gary.soloman@burges-salmon.com.

New Circular 02/2013: The Strategic Road Network and the delivery of Sustainable Development

The Department for Transport published *Circular 02/2013 "The Strategic Road Network and the Delivery of Sustainable Development" on 10 September 2013*. The Circular replaces the policies set out in DfT Circular 02/2007 and DfT Circular 01/2008 and is applicable to the whole strategic road network in England.

The Circular sets out the way in which the Highways Agency will engage with communities and the development industry to deliver sustainable development (with the intention of promoting economic growth) whilst still safeguarding the primary function and purpose of the strategic road network. The policy indicates that development proposals are likely to be acceptable if they can be accommodated through the existing strategic road network, or if they do not increase demand for the use of a section already operating over-capacity. However, development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.

This Circular will be of interest to anyone involved in a development proposal which may impact on the strategic road network. The Government has reported that the overall balance of opinion stemming from the consultation is supportive of the proposals and the Highway Authority's commitment to engage in the planning process has been welcomed.

For any queries regarding strategic transport, please contact Sarah Sutherland on 0117 307 6964 or sarah.sutherland@burges-salmon.com.

Government consults on further changes to Judicial Review

The Government has opened a consultation on new measures to the judicial review process which it considers will support infrastructure development and in turn strengthen economic growth. These changes are intended to supplement the judicial review reforms introduced through the Growth and Infrastructure Act 2013.

The consultation document "Judicial Review – Proposals for further reform" was published by the Ministry of Justice on 6 September 2013 and invites comments by 1 November 2013. This recognises that the recent reforms to the judicial review process have gone some way towards improving the efficiency of the regime, but further change is needed. The Government is seeking views on numerous reforms, the most notable proposals being:

- limiting the scope for local authorities to challenge the grant of a Development Consent Order (DCO) which permits a Nationally Significant Infrastructure Project ("NSIP");
- establishing a planning tribunal, led by planning judges, to streamline planning judicial reviews and remove them from the 'clogged' High Court list;
- limiting the scope of locus standi (i.e. the interest a party has to demonstrate in order to proceed with a judicial review claim) which the Government considers too wide (e.g. a claim can be brought in the public interest without an individual having to have any personal interest in the claim);
- introducing a 'no difference' principle into judicial review matters which would look to restrict proceedings brought against minor administrative procedural deficiencies which, even if successful, result in the same decision being taken on re-determination;
- making third party / intervening parties in judicial review matters bear their own litigation costs. This is clearly intended to deter such intervention;
- restricting the use of Protective Costs Orders (PCOs) and scope of the Corner House rules (on which the grant of PCOs is based), including limiting their use only to those with a personal interest in the matter who have been adequately means tested; and
- making it easier to leap-frog the Court of Appeal, by appealing a High Court decision directly to the Supreme Court to prevent the delay of an inevitable decision (perhaps HS2 is on the Government's mind).

Many of these proposals are directed at discouraging spurious and unmeritorious claims and, if implemented, could be beneficial for developers as they should restrict unnecessary delay caused by unfounded challenges and persistent appeals. However, the proposals have been criticised as being contrary to access to justice and the Government has been criticised for being an "over exuberant executive". If it comes down to a battle of will, it may well be governmental will against parliamentary won't.

For further information about changes to judicial review, please contact Stephen Humphreys on +44 (0)117 902 2709 or stephen.humphreys@burges-salmon.com.

TVG Risk: Comfort for developers?

One of the key risks that developers of rural and greenfield sites face is the registration of land as a town or village green ("**TVG**"). The effect of registration is that it is unlawful to build on a TVG in perpetuity and the development value of many sites has been lost due to this.

Following calls from the development industry for protection against such applications being made, changes to the TVG regime in England were introduced in April by the Growth and Infrastructure Act 2013. These changes introduce restrictions on the ability for TVG applications to be submitted where a 'trigger event' has occurred, such as when a planning application has been submitted to the local planning authority and publicised. There is also the associated concept of 'terminating events', which puts an end to the bar on submission of a TVG application. In the case of a planning application for example, the protection is lost upon the application being withdrawn, or refused by the local authority (with all methods of appeal having been exhausted).

It is important to note that the provisions do not apply to Wales, where a TVG application can be made at any time if land is being used for informal recreation and there are no signs or fences restricting access.

There are a few points to bear in mind:

- The time when 'trigger events' are considered to have occurred may not be suitable in all cases. For example, a major planning application may be subject to pre-application consultation, but the 'trigger event' which precludes a TVG application being made (publicity of the application) is not yet in place although the proposal is firmly in the public domain.
- The new protection is naturally still evolving, and the Government has recently consulted on expanding the number of 'trigger events' and is currently considering the responses received.
- From 1 October 2013 in England, the grace period during which TVG applications can be made following the cessation of recreational activities on land has been reduced from two years to one year, providing a further level of comfort for landowners and developers (albeit not instant protection).
- In addition, provisions (in force from 1 October 2013) have been introduced whereby a landowner may lodge a statement with the local authority stating that their land no longer satisfies the tests for TVG registration. Whilst these provisions may offer some comfort to landowners, TVG applications will still be able to be made within one year from the lodging of such statements, so they will not offer instant protection. Further, such statements are required to be publicised, for example by the siting of notices on the relevant land for at least 60 days.

- Case law in this area is still developing. For example, there are a number of legacy TVG applications that need to be resolved in the courts which rest on, among other issues, whether land held by local authorities under the Housing Acts can be registered as TVGs.

The overall TVG risk in England has been substantially reduced, but developers of greenfield and rural sites should still be vigilant. The threat in Wales, in contrast, remains the same and care should be taken if land is currently being used for qualifying sports and pastimes.

For further information about TVG risk generally, please contact George Wilson on +44 (0)117 307 6051 or george.wilson@burges-salmon.com.

Support for oil, gas and coal sectors

Two recent developments by the Government and Courts provide encouraging signs that developers involved in the oil, gas and coal sectors are not being left behind in the move towards a simplified planning system to assist energy growth in the UK.

- Firstly, a Department for Communities and Local Government (DCLG) consultation paper issued on 2 September 2013 invites comments on proposed changes to the planning application process for onshore oil and gas schemes. The changes are designed to simplify and speed up the procedure for obtaining consent for onshore development. One of the headline changes, if implemented, would mean that developers proposing to carry out underground operations would only need to notify landowners whose land was affected by any associated surface operations and not those affected solely by the underground operations. The scaled down notification procedures will undoubtedly save developers a considerable amount of time. The consultation is due to end on 14 October 2013 and details of the responses will then be published on the DCLG website.
- Secondly, the case of *Europa Oil and Gas Limited* [2013] EWHC 2643 (Admin), heard in July 2013, provides useful clarity for those involved in exploratory drilling. Europa, an oil and gas company, had applied to Surrey County Council for permission to conduct exploratory drilling on a Green Belt site. Permission was refused by the Council and by the Secretary of State on appeal. The company challenged the Inspector's decision and the crux of the case was whether exploratory drilling amounted to 'mineral extraction'. If it did, Europa could take advantage of paragraph 90 in the

National Planning Policy Framework (NPPF) which provides that mineral extraction on Green Belt land may not be inappropriate if it preserves openness. The Court held that 'mineral extraction' included exploratory drilling and quashed the Inspector's decision. The Judge noted that it would be illogical to provide an exception for extraction operations without also providing an exception for smaller-scale exploratory drilling, as without exploratory drilling no recovery operations would be able to take place.

For further information about these developments, please contact John Arthur on +44 (0)117 307 6289 or john.arthur@burges-salmon.com.

"Special measures" for underperforming Local Planning Authorities

DCLG has published revised data on the performance of LPAs against the criteria for assessing under-performance under section 62B of the Town and Country Planning Act 1990.

LPAs will be placed in "special measures" if either:

(a) They determine 30% or fewer major applications on time; or

(b) More than 20% of major decisions are overturned on appeal.

If an LPA is designated under section 62B, developers can submit applications for major developments direct to the Planning Inspectorate, bypassing the LPA. Special measures designations will be made, and reviewed, once a year. The first designations are expected in October 2013.

The revised data published by DCLG contains interim statistics only, as information for the whole assessment period is not yet available. The data reveals that no Councils have exceeded the 20% threshold in relation to appeals being overturned. In terms of determining applications on time, up to 15 District Councils and 3 County Councils have determined fewer than 30% of major applications within 13 weeks - with only one District Council achieving 100%.

It remains to be seen whether the submission of applications directly to the Planning Inspectorate will be favoured by applicants or whether they will resort to the "tried and tested" method of submitting applications directly to LPAs followed by an appeal to the Planning Inspectorate.

For further information about special measures designations, please contact Laura Fuller on +44 (0)117 902 7232 or laura.fuller@burges-salmon.com.

Now In! 1 October 2013 Legislative Changes

Appeals process

In accordance with the Government's pursuit of streamlining the planning regime, focus has now turned to the planning appeal process. From 1 October 2013, the Town and Country Planning (Development Management Procedure) (England) (Amendment No.2) Order 2013 (SI2013/2137) give effect to a series of changes in an attempt to speed up and make the planning appeal process more transparent.

Section 78 Appeals

The changes will not apply to enforcement appeals but will apply to most appeals under section 78 of the Town and Country Planning Act 1990. The changes require the frontloading of the appeal process to reduce the time for decisions to be determined.

Appeals against decisions made on or after 1 October 2013 will need to include, with the appeal form, a full statement of case, a statement setting out which procedure (written representations, hearing or inquiry) the appellant thinks is most appropriate and, if the appeal is to be heard by way of hearing or inquiry, a draft statement of common ground.

The timescales for hearings and inquiries has also been amended. LPAs will be required to notify interested third parties, and submit their questionnaire and supporting documents, within one week of the appeal start date. Additionally, the time for LPAs (if not relying on their questionnaire as their full submission) and interested third parties to submit their full statement of case has been reduced to 5 weeks from the appeal start date, rather than 6.

To enable faster decision making, hearings and inquiries will also be heard sooner. Hearings are to be heard within 10 weeks (rather than 12) and inquiries within 16 weeks (rather than 20) from the appeal start date.

Listed building and conservation area appeals

Changes to listed building and conservation area appeals mirror the amendments to section 78 appeals. Appellants will therefore need to submit, with the appeal form, their full statement of case, a statement setting out their preferred appeal procedure and a draft statement of common ground (if relevant).

Expedited appeal process

Amendments have also been made to the written representations appeal process for both minor commercial development and advertising consent appeals to replicate the expedited household appeals process. Such appeals are require to be made within 12 weeks of the decision notice and determined within 8 weeks of the appeal start date.

Comment

Although these changes are intended to streamline the process and enable swifter decisions to be made, appellants will need to undertake considerable additional preparation prior to submitting an appeal. Appellants should therefore carefully consider the changes to ensure they adhere to them. If they are not followed, late submissions may not be accepted or considered by the Inspector or the appellant may face an application for costs for unreasonably behaviour relating to the late submission of appeal documents.

Heritage planning

Several new statutory instruments have been made which came into force on 1 October 2013 in England relating to heritage planning as a result of the impending abolition of conservation area consent. These include:

- The Town and Country Planning (General Permitted Development) (Amendment) (England) (No. 3) Order 2013 provides that demolition of certain unlisted buildings in conservation areas is not permitted development and will therefore require planning permission.
- The Enterprise and Regulatory Reform Act 2013 (Abolition of Conversation Area Consent) (Consequential and Saving Provisions) (England) Order 2013 amends a number of statutory instruments as a consequence of the provisions in the Enterprise and Regulatory Reform Act 2013 ("ERRA 2013"). The provisions of ERRA 2013, which are not yet in force, are due to abolish the regime of conservation area consent and require planning permission to be sought for works to buildings in conservation areas in England.

Planning fees

The Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2013 also came into force in England on 1 October 2013. These amend the previous 2012 Regulations to:

- enable the application fee relating to pre-application advice to be paid to the Planning Inspectorate where applications are made directly to them;
- stipulate that there is no fee for submitting an application for planning permission in respect of the demolition of certain buildings in conservation areas;
- introduce measures to refund the planning application fee where a planning application or application for approval of reserved matters is not determined within 26 weeks (unless otherwise agreed between the parties);
- introduce a fee of £80 for an application for prior approval under the General Permitted Development Order 1995, for development involving a material change of use to any buildings or other land. This fee will not apply where a planning application is submitted for the same site, at the same time, by/on behalf of the same person.

For further information about these legislative changes, please contact Ben Andrews on +44 (0)117 902 7715 or ben.andrews@burges-salmon.com.

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