A number of recent Court cases have challenged the interpretation of the green belt policies set out in the National Planning Policy Framework (NPPF). The cases indicate that a shortage in land supply and housing need may constitute ‘very special circumstances’ for the purposes of the NPPF and justify development on green belt land. This will depend on the circumstances of the case and particularly the area, the nature of any shortage in housing supply and the status of the development plan. The Courts have demonstrated a reluctance to unduly interfere with decisions made on appeal with various finely balanced factors weighing in the final decision as to whether ‘very special circumstances’ exist.

In Hunston Properties Limited v Secretary of State for Communities and Local Government [2013] EWCA Civ 1610, the Court of Appeal held that a shortfall of available housing was capable of amounting to ‘very special circumstances’ and justifying otherwise inappropriate development. The Inspector, in relying on figures contained in a revoked policy document to reach the conclusion that there was no shortfall, had erred in law. Unfortunately, the judgment did little to assist in the interpretation of what constitutes ‘very special circumstances’ in this context, stating that: “the ultimate decision may well turn on a number of factors...including the scale of the shortfall but also the context in which that shortfall is to be seen, a context which may include the extent of important planning constraints in the district as a whole...ultimately, that is a matter of planning judgment for the decision-maker.”

More recently, the High Court in Fox Land & Property Ltd v Secretary of State for Communities and Local Government [2014] EWHC 15 (Admin) upheld the Secretary of State’s decision to reject an Inspector’s recommendation that permission be granted for housing on green belt land in Essex. The Inspector concluded that ‘very special circumstances’ existed because the potential harm to the green belt was outweighed by the valuable contribution the development would make to the shortage of housing in the area.

The Secretary of State concluded that the proposal constituted inappropriate development as the other considerations, including the need for housing, did not clearly outweigh the harm to the green belt. The Court found that the Secretary of State was emphasising the importance of green belt protection in the NPPF. Reiterating that the Court’s role on such an appeal was not to act as the decision maker, and echoing the judgement in Hunston Properties, Mr Justice Blake concluded that “planning policy and the weight to be given to factors that may be narrowly balanced on either side are for the decision maker”.

Is Green Belt Policy changing?

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These cases confirm that the decision in relation to development proposals in the green belt will depend on the material planning considerations in each case and the balancing exercise undertaken by the decision maker. The policies in the NPPF have not changed but the shortage of housing supply is leading to some consents being granted, that may not have otherwise been. That said, in a Ministerial Statement dated 6 March 2014, Nick Boles stated “we are re-affirming green belt protection, noting that unmet housing need is unlikely to outweigh the harm to the green belt and other harm to constitute very special circumstances justifying inappropriate development” so changes may be afoot.

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

Heritage assets afforded special status in planning decision-making

In Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council and others [2014] EWCA Civ 137, the Court of Appeal upheld the High Court’s decision to quash planning permission for a five turbine wind farm on the basis that the Inspector, in granting permission, had failed to give sufficient weight to the importance of preserving listed buildings and their settings, as required by Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

In 2010, Barnwell Manor Wind Energy Ltd sought planning permission for a five turbine scheme in the vicinity of a number of heritage assets, including Lyveden New Bield which is a Scheduled Monument and Grade I Listed Building. The local planning authority refused permission, concluding that the wind farm would result in unacceptable harm to the setting of the asset. Planning permission was subsequently granted on appeal; the Inspector concluding that whilst the wind farm would harm the setting of a number of designated heritage assets (including Lyveden New Bield), the harm would be less than substantial, would be reduced by the temporary nature and reversibility of the development and would be outweighed by the significant benefits of the wind farm in terms of renewable energy production and the contribution it would make towards meeting the Government’s energy and climate change targets.

The planning authority sought to quash the Inspector’s decision on the basis that special regard had not been given to the statutory duty to preserve the setting of listed buildings as required by Section 66(1).

Quashing the permission, the High Court held that the Inspector had failed to fulfil his Section 66(1) duty. Mrs Justice Lang concluded that “in order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the “desirability of preserving the setting” of listed buildings when weighing that factor in the balance with other “material considerations” which have not been given special statutory status”. In her opinion (affirmed by Lord Justice Sullivan on appeal), the Inspector had failed to give proper effect to Section 66(1) in that balancing exercise; for although he had weighed the harm of the proposal against the wider benefits, he had treated those two factors as being of equal importance, when the addition of the word ‘desirability’ in Section 66(1) signals that preservation of setting is to be treated as a desired or sought-after objective, to which the Inspector ought to have accorded special regard.

For any queries regarding heritage assets and their protection, please contact Fiona Barker on +44 (0)117 307 6043 or fiona.barker@burges-salmon.com.
National Planning Policy Guidance

As part of the ongoing effort by the Coalition Government to simplify the planning system, on 6 March 2014, the Department for Communities and Local Government ("DCLG") released a suite of practice guidance which sits alongside the National Planning Policy Framework ("NPPF"). Published in draft form in August 2013, the aim of the revised guidance is to consolidate previous guidance, which included over 150 different documents dating back as far as 1978. A full list of the cancelled guidance is available online and includes Circulars 11/95 (Conditions), 02/99 (EIA) and 03/09 (Costs) as well as the technical guidance to the NPPF.

In a written statement released on 6 March, Nick Boles MP emphasised that, amongst other things, DCLG was issuing robust guidance on flood risk, re-affirming green belt protection, making it easier for local authorities to demonstrate adequate land supply for policy purposes and incorporating the guidance on renewable energy published during 2013.

The new guidance comprises a suite of web pages under 41 separate headings. Much of the guidance is presented in a ‘question and answer’ format. For example, the guidance on rural housing sets out information in the format of an answer to the question: "How should local authorities support sustainable rural communities?" The 41 headings can be broadly categorised; for example, some relate to procedural matters (e.g. "When is permission required?", "Before submitting an application" and "Determining a planning application"), whilst others relate to specific subject areas (e.g. ‘Conserving and enhancing the historic environment’, ‘Hazardous Substances’ and ‘Noise’). A full list of topics for which guidance is available can be viewed on the planning portal at http://planningguidance.planningportal.gov.uk/.

Whilst the new guidance is undoubtedly more accessible than the documents it replaces, how useful the consolidated guidance will be for experienced applicants and their advisors remains to be seen. Interpretation of the NPPF has already been the subject of cases which have reached the Court of Appeal (see the two articles above for examples), and there is a danger that the Government, in pursuing the aim of making the planning system more accessible, risks over-simplification which ultimately may need to be addressed by applicants or local planning authorities through the Courts.

For further information on the government planning guidance and policy, please contact John Arthur on +44 (0) 117 307 6289 or john.arthur@burges-salmon.com.

Now In! The ever changing CIL regulations

The Community Infrastructure Levy (Amendment) Regulations 2014 were laid before Parliament on 23 February 2014 and came into force in 24 February 2014. As the CIL regime is constantly changing, it is crucial to keep track of how it is developing over time if it affects projects you or your clients are involved in. The most recent amendments relate to the following:

- **Differential rates:** authorities can set varying rates for different types and uses of development and geographical zones. In addition to this, the size of a development can now be used to differentiate rates. This may impact decisions relating to the scope of proposed developments on the basis of financial viability.

- **Existing building credit:** previously, if an existing building was in continuous use for a period of 6 out of 12 months prior to a consent being granted and was either being demolished or retained, the area chargeable to CIL was reduced by the gross internal area of that building. As a result of the changes, the time period of 6 months out of 12 months has been extended to 6 months out of 3 years to allow the ‘credit’ to apply to more buildings.

- **Mandatory relief:** the limited exceptions to the application of CIL have been extended to apply to individuals building houses for their own use (including communal development) and residential annexes and extensions.

- **Phasing:** previously, CIL payments could be phased in relation to outline consents only. The Regulations set out that if any planning permission (full or outline) is phased, each phase will be subject to a different chargeable amount and attract a separate payment.

- **In kind:** CIL is capable of being paid in kind through the acquisition of land for the purpose of facilitating infrastructure. Charging authorities now also have the option to accept payments in kind through the provision of infrastructure either on-site or off-site for the whole or part of the CIL payable.
Judicial reviews of decisions relating to nationally significant infrastructure projects

There have been interesting developments in the Nationally Significant Infrastructure Project consenting regime, with the High Court determining two judicial review claims in the past few months.

The first was An Taisce’s (the National Trust for Ireland) claim against the Secretary of State’s decision to grant a development consent order (DCO) for the Hinkley C nuclear power station (R (on the application of An Taisce) v Secretary of State for Energy and Climate Change [2013] EWHC 4161 (Admin)). An Taisce claimed that the failure by the developer to consult with the Irish government over possible trans-boundary effects (e.g. in the event of a UK Fukushima type incident) did not comply with the requirements of the Environmental Impact Assessment Directive. The potential for transboundary impacts from NSIPs is something that the Planning Inspectorate must consider and where such effects are identified the Planning Inspectorate should consult with the bodies likely to be affected. Those bodies can be invited to participate in the examination of the project.

With regard to Hinkley, the High Court ruled that as the risk of a nuclear accident was between 1 in 50,000 and 1 in 33,000,000 this was not a “likely” occurrence. This decision is also interesting in that it confirms that the appropriate time to challenge a part of the NSIP process (here consultation) is after the scheme has been determined.

The second decision was a claim brought by Halite Energy Group, challenging the Secretary of State’s decision to refuse a DCO for an underground gas storage facility1. The claim was successful on the basis that although the Examining Authority (ExA) had recommended approval of the scheme and in doing so was clearly satisfied as to the likely impacts of the proposal, Halite had not been given a ‘fair crack of the whip’ per Mrs Justice Patterson to address issues raised by the ExA concerning the capacity of the proposed salt mines used for gas storage, which were then relied upon by the Secretary of State in refusing the application.

The process of examination is essentially a written one with parties responding to questions raised by the ExA. The procedure allows for issue specific hearings (ISH) or open floor hearings (OFH) if the ExA think that is an appropriate way of proceeding. This inquisitorial approach means the ExA sets the agenda for examination and the applicant has limited control over what issues are raised or evidence heard.

In this case the issue that resulted in a refusal was considered at an ISH and the ExA considered how breaches of maximum working gas storage capacity could be enforced. As nothing further was mentioned of these concerns, Halite was under the impression that the ExA had accepted the views set out in a joint expert report, which turned out not to be the case.

Patterson J recognised that there is no obligation on the ExA to share its provisional conclusions though she considered that there is an obligation on the ExA to share with the Developer how they reach such conclusions where they relate to a main issue at the examination, that was especially the case where the ExAs approach was based on options that had not been put into the public domain.

The Court considered that Halite’s opportunity to respond on certain matters which might have made a difference to the ultimate decision was restricted. As the Secretary of State did not disassociate himself from the findings of the ExA and adopted its approach to the evaluation of the geological evidence, the lack of fair process affected his decision, which was a breach of natural justice.

Whilst concerned with the NSIP regime, the decision highlights the importance of decision makers giving all parties a fair crack of the whip, especially in inquisitorial procedures such as hearings where the Inspector is responsible for setting the agenda of the evidence to be heard.

For further information about the NSIP regime, please contact Stephen Humphreys on +44 (0)117 902 2709 or stephen.humphreys@burges-salmon.com.

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1[2014 EWHC17 (Admin)]

- new Class CA and IA allow a change of use from a shop to a bank, building society, credit union or friendly society and new Class IA allows shops or buildings used for the provision of financial or professional services to change to residential use;
- class K is expanded to allow buildings used for a variety of uses to become nurseries and new Class MA allows agricultural buildings to become schools or nurseries;
- new Class MB allows agricultural buildings to change to residential use.

The change to allow agricultural buildings to change to a dwelling house has attracted the greatest interest. This amendment will allow the change of use of a building and any land within its curtilage from an agricultural building to a dwelling house, subject to certain limitations. Prior approval from the Local Planning Authority is also needed for both the proposed change of use and any building operations needed to bring about the change.

Limitations

The change of use and or building operations will only be permitted where:

1. The building was used solely for an agricultural use as part of an established agricultural unit as at 20 March 2013 or whenever it was last in use prior to that date and if after 20 March 2013, for a period of ten years before the date the proposed change takes place;
2. The total floor space of the original agricultural building (and the subsequent developed dwellinghouse(s)) does not exceed 450m². The ‘land within its curtilage’ cannot exceed 450m²;
3. The agricultural unit has no more than three separate dwelling houses;
4. That the building operations used are restricted to the installation of windows, doors, roofs, exterior walls, water, drainage, electricity, gas or other services to the extent ‘reasonably necessary’ for the building to function as a dwelling house;
5. No more than ‘partial demolition’ takes place to the extent ‘reasonably necessary’ to carry out the building operations;
6. The site is not designated in any way (i.e. it is not a listed building or scheduled ancient monument or located in a national park or site of special scientific interest).

If the conditions are not satisfied, planning permission will be required for the change of use and ancillary building works.

Prior Approval Application

The LPA’s prior approval is required in respect of highways, noise, contamination and flooding impacts / risks for the change of use application and for ‘design and external appearance of the building’ for the building operations application.

The changes allow the LPA to impose condition(s) on the approval. It also allows the LPA to refuse the application where they consider that it will be “impractical or undesirable” for the building to change from agricultural use.

The reformed permitted development rights, to change agricultural buildings to residential dwellings, creates a hybrid prior approval process. Only time will tell whether there is a real take up of agricultural buildings being converted or whether development is refused by local authorities as ‘impractical’ and ‘undesirable’.

For any queries regarding permitted development rights, please contact Cathryn Tracey on +44 (0)117 939 2223 or cathryn.tracey@burges-salmon.com.
Introducing The Criminal Justice and Courts Bill 2013-14: Key reforms to Judicial Review and Statutory Challenges

The Criminal Justice and Courts Bill 2013-2014 was published in the House of Commons on 5 February 2014. Subject to its progress in Parliament, the Government expects it to receive Royal Assent by the end of this year. The Bill contains numerous reforms to the judicial review (JR) system, which were contained in a 2013 consultation paper to streamline the process and make it more efficient and less uncertain for all parties involved.

The reforms include the following:

- **Substantially different outcome** test: changes will be made to the test used by the High Court to determine whether to grant permission for a judicial review. The Court may at present refuse to grant permission or award relief on the basis that it is inevitable that the error would not have made a difference to the substantive outcome. As this is a high threshold, the proposal is to lower this so that permission or a remedy should not be granted where the court considers the grounds would be highly likely not to result in a substantially different outcome for the applicant.

- **Protective Costs Orders (“PCOs”)**: the grant of PCOs will only be made following the grant of permission to proceed to the substantive hearing rather than after the claim has been lodged. This reform is aimed at discouraging speculative claims and ensuring that the use of PCOs is limited to exceptional cases with a clear public interest element.

- **Financial backers**: applicants will be required to provide details of any funding they may have access to in order to meet their costs liabilities arising from judicial review proceedings (including third party funding). By requiring such disclosure, Judges will be able to make a more realistic assessment of an applicant’s financial capacity when allocating costs.

- **Leave required for s.288 applications**: statutory challenges under section 288 of the Town and Country Planning Act 1990 (as amended) will be subject to a new permission stage, to bring them in line with judicial review challenges and s.289 statutory challenges.

- **Leapfrogging**: leapfrog appeals move from the High Court to the Supreme Court, skipping the Court of Appeal. The proposal is to allow a case to leapfrog if it raises issues of national importance, where the result is of particular significance or cases where the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal and to remove the requirement for all parties to consent. This should reduce the cost and delay involved in multiple claims being made.

The consultation paper also included other proposals which have not been taken forward in the Bill. These included limiting the scope of *locus standi* (the interest a party has to demonstrate in order to proceed with a judicial review claim) which the Government considers too wide and establishing a planning tribunal, led by specialist judges, to streamline planning judicial reviews and remove them from the ‘clogged’ High Court list. This proposal has been replaced with a proposal to introduce a new Planning Court within the High Court later this year, which will be subject to new timeframes for case progression. As ever, watch this space!

For any queries regarding judicial review or statutory challenges, please contact Sarah Sutherland on +44 (0)117 307 6964 or sarah.sutherland@burges-salmon.com.

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The outcome of the Supreme Court challenge to HS2

**Decision**

The objectors to the HS2 Bill, which authorises the construction of HS2 Phase One, have issued a series of legal proceedings hoping to block its progression through parliament. The most recent and substantive challenge was to the planning provisions contained in the Bill.

On 22 January 2014, the Supreme Court dismissed the five grounds of appeal brought by the group of objectors. The seven Lord Justices unanimously decided that:

(i) the Command Paper detailing the HS2 Scheme (DMS) did not “set the framework for development consent” as it was just a proposal. As such, it did not require Strategic Environmental Assessment;

(ii) there was no contravention of Article 7 of the Aarhus Convention which requires provision to be made for the public to participate in the preparation of plans and programmes relating to the environment. Article 7 and the need for Strategic Environmental Assessment were not intended to cover exactly the same ground. Moreover public participation is secured by the requirements contained in the Environmental Impact Assessment (EIA) Directive and dealt with in the Hybrid Bill procedure;
The Hybrid Bill procedure satisfies the requirements of the EIA Directive. The parliamentary procedure in respect of the Bill (ie second reading, report to committee, third reading, Select Committee hearings and the same process being followed in the House of Lords) is sufficient to allow public participation. The claim was seen as an attack on the UK’s democratic process (focusing on the undemocratic nature of the whips and the party political process) which did not find favour with the Lord Justices;

(iv) the Court could not comment on the validity of a Bill which is before Parliament and subject to amendment;

(v) the clarity of the European case law meant that no reference to the Court of Justice of the European Union (CJEU) was required.

Comment
Constitutionally, the result is not surprising. The Court heavily endorsed the supremacy of Parliament and reinforced its position that it could not criticise parliamentary process.

Compensation for management time: How to equate lost time with lost money?

What can and can’t be claimed under the head of disturbance compensation in compulsory acquisition claims is at the best of times confusing. The Court of Appeal (CA) has, however, recently sought to clarify the position in respect of claims for ‘lost’ management time. In Thomas Newall Ltd v Lancaster City Council (2013) the CA had to consider whether the Claimant (TNL) had provided sufficient evidence to support its disturbance claim for management time.

TNL’s evidence on management time was an undisputed schedule of time spent by its directors which identified the date, nature and time spent in dealing with the compulsory acquisition of their land. TNL’s valuation witness also proposed what he considered an appropriate hourly rate. In many cases, such evidence has been accepted by an acquiring authority and an amount for management time agreed on that basis. In this case, however, the Council claimed that there was insufficient evidence to demonstrate that the time spent by TNL’s directors had caused actual loss to TNL.

The CA agreed, confirming that it is not enough to merely show that a director of a company has devoted time to dealing with compulsory purchase matters. It is necessary to also prove how the director’s devotion of time impacted upon the company and caused it loss. There must be evidence of the cost to the company of the services rendered to it by its directors; for example, by providing the contract of service/employment contract including full details of the director’s normal duties and how time spent on the compulsory acquisition could otherwise have been spent profitably, details of how the director is remunerated i.e. salary, fees or a dividend and details of the employment of any additional staff or making overtime payments to deal with the claim.

Whilst this clarification is very helpful to acquiring authorities, there will of course be concern from the claimant’s perspective that demonstrating a clear link between time spent and actual loss to a company may prove extremely difficult, not least because evidence gathering often takes place some years after the event. It is also unusual, for example, for overtime payments to be made to senior management as, in many cases, they will simply be expected to deal with the fall-out from a compulsory acquisition as part of their day to day job. It will be the responsibility of claimants’ professional advisers to ensure that claimants understand as early in the process as possible what is expected of them and that they keep appropriate records, not just of time spent but of how the time has impacted the business.

For further information about compulsory purchase, please contact Laura Fuller on +44 (0)117 902 7232 or laura.fuller@burges-salmon.com.
Is immune development subject to EIA?

The Court of Appeal in the case of Evans v Basingstoke & Deane BC [2013] EWCA Civ 1635 recently considered this vexed question and has provided what will hopefully remain a definitive ruling on the matter. Vitacress occupied a watercress farm which had previously been in agricultural use. In 2010, the LPA granted planning permission for the change of use of the site to mixed agricultural/industrial use, on the basis of ten years continuous use, precluding enforcement action being taken pursuant to the ten year time limit under s.171B of Town and Country Planning Act 1990 (as amended).

Vitacress conceded that the material change of use was EIA development under Schedule 2 which should have been, but was not screened, to enable the local authority to determine whether the use was likely to significantly affect the environment. The appellant challenged the Council’s decision by way of judicial review, contending that the ten year time limit for taking enforcement action was incompatible with the UK’s obligations under the EIA Directive and that domestic courts should disapply the limits where no screening or EIA had taken place. The appellant also sought a discontinuance order to remedy the breach of Directive. The Court of Appeal dismissed the claim and held that the time limits for enforcement were not incompatible with the EIA Directive. In terms of effectiveness, ten years provided ample time for enforcement action to be taken to remedy breaches under s.171B. Permission to the Supreme Court was refused.

This confirmation by the Court of Appeal will be welcomed by those seeking retrospective consent for EIA development pursuant to ground (d) of an enforcement notice appeal or via a certificate of lawful use.

For any queries regarding immunity periods and EIA development, please contact Sarah Sutherland on +44 (0)117 307 6964 or sarah.sutherland@burges-salmon.com.