The calm before the storm

While planning news has been quiet ahead of the outcome of the general election, a number of recent developments will still be of interest to practitioners, say **Julian Boswall** and **Alex Minhinick**

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The run-up to a general election is a relatively quiet period for generating planning news. The permutations of the possible outcomes for the election are so complex and unpredictable that developers have been unable to make their normal plans around the most likely policy outcomes – with the exception of Wales, where the next elections are not until May 2016.

The biggest news is the creation of Highways England under the Infrastructure Act, with the responsibility for delivering a huge road programme. While a massive reform of compulsory purchase law is gestating in Scotland, a much more modest set of proposals has emerged from Westminster, with no Welsh equivalent currently on the cards. A key landmark on the community infrastructure levy (CIL) has been reached and there has been yet another Supreme Court decision on town and village law, which continues to pose a threat to development, particularly for greenfield strategic land sites, despite the changes in the Growth and Infrastructure Act in England.

Infrastructure Act 2015

The Infrastructure Act contains a mixed bag of measures intended to assist in the delivery of new infrastructure, which will come into force in stages. The highlights of the legislation are the provisions enabling the creation of a strategic highways authority, which is at arm's length from government. This took effect on 1 April 2015 with the designation of Highways England Company Ltd, a government-owned entity, as highway authority, street authority, and traffic authority for the strategic highways network previously managed by the Highways Agency.

Highways England will be regulated by the Office of Rail Regulation and now holds a formal licence which sets out the Department for Transport's statutory directions and guidance to the new entity. This new structure is intended to put the road investment programme on a more stable footing, to give confidence to the supply chain that it can invest in capacity with greater certainty that the planned investment will be delivered. The government considers the reform 'an opportunity to catalyse and drive forward a genuine transformation of the network over the long term'.

Various tweaks are made to the nationally significant infrastructure regime (NSIP) under the Planning Act 2008, the most important of which involves amending the procedures for making material and non-material amendments to development consent orders which have been granted. This is particularly welcome as the cumbersome and lengthy mechanism for material changes has been an issue of concern now that schemes are going into construction.

There is also provision for the deemed discharge of conditions under planning permissions in England. This will be an important change, though the exclusions and time period before deemed discharge will apply will have to wait for secondary legislation.

Compulsory purchase consultation

Eleven years on from the 'Towards a compulsory purchase code' report, the Department for Communities and Local Government (DCLG) 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 the compulsory purchase order (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 process across the board.

Consideration is given to the extension and harmonisation of notice of entry period 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 three months. Options are also canvassed in respect of measures to avoid an acquiring authority delaying entry after that notice period has in fact expired.

The advance payment code is also addressed: the process of commencing negotiations of the figure, dispute resolution mechanisms, and, perhaps most strikingly, the date on which advance payments would be available. On one analysis, DCLG is proposing that advance payments should be available prior to an authority serving notice of entry under a confirmed CPO.

The consultation document contains a wide range of proposed changes, 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 are laudable, and 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 see the aspirations of government thwarted. 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.

CIL stalemate

CIL continues to be an area of complexity and concern for developers and local authorities. The most significant change to the structure of planning gain for at least ten years took effect on 6 April 2015.

Regulation 123 of the Community Infrastructure Levy Regulations 2010 prevents a planning obligation comprising a reason for the grant of planning permission where five or more planning obligations for that same piece, or type, of infrastructure have been entered into since 6 April 2010.

To put this in plain English, where five or more planning obligations exist which relate to a specific piece of infrastructure (i.e. a school) or a type of infrastructure (i.e. education), a local authority cannot require that any further planning obligations for that type or piece of infrastructure are entered into. What's more, if a local authority does allow such a planning obligation to be entered into, and that planning obligation comprises a reason for the grant of planning permission after this date, that decision will be vulnerable to judicial review on the grounds that it contravenes regulation 123.

This provision is the stick which is designed to beat local authorities into compliance with the emerging CIL regime – which is intended to (for the most part) do away with the provisions of the existing planning obligation system under section 106 of the Town and Country Planning Act 1990, save in very limited circumstances (those five obligations allowable under the pooling restriction).

This restriction took effect for those local authorities that have been in the vanguard of the CIL regime with the adoption of their CIL charging schedules. However, as between two-thirds and three-quarters of local planning authorities did not have charging schedules in place at the date of writing (early April 2015), the potential for stalemate appears to be real. This could arise, for example, where a scheme has a substantial impact which obviously needs mitigation, but where the developer's offer of a section 106 obligation to address the point cannot lawfully be taken into account in the decision-making process. To expressly disregard the issue, however, would appear to offend the normal rule that material planning considerations must be taken into account. It is simply not clear how this is going to be resolved, and whether it will give rise to legal challenges.

Beaches and village greens

The welcome trend of the courts to constrain the ambit of town and village green law in its threat to development continues with the Supreme Court decision in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7 in relation to a beach at Newhaven. The port owner and operator had made by-laws for the port's regulation, including the beach – the use of which by local inhabitants was held to meet the test for registration as a village green. The court held that the by-laws meant that use had been 'by right' and not 'as of right', even though they were not publicised.

The court went further and held that a public authority which has acquired land for specified statutory purposes and continues to carry out those purposes cannot suffer the acquisition of prescriptive rights which would be incompatible with those purposes. In this case, there was a clear incompatibility between the operation and maintenance of a working harbour, including dredging and the mooring of vessels, and the criminal offences which such activities might constitute if the beach were registered as a village green. **SJ**

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