



Christmas 2009



Planning Bulletin

Welcome to our first Sharpe Pritchard Planning Bulletin. Planning law is constantly evolving and it is easy to miss an important change in legislation or new guidance. It is necessary for all planning practitioners to keep abreast of those changes, but this can prove difficult. This is where the Sharpe Pritchard Planning Bulletin comes in. Our intention is to keep you informed about interesting and relevant changes in the world of planning, from new Planning Policy Statements to topical Judicial Review cases. We also take the opportunity to tell you what we are up to in the Planning team. We will inform you of

seminars we are running and relevant cases we have worked on.

If you have any questions stemming from any of the issues raised in this and subsequent Bulletins, please do not hesitate to contact Denise Stephenson (Partner) or Brian Hurwitz (Partner).

Other members of our Planning team are Lorna Bowry, William Bartlett, Rachel Hey, Emyr Thomas and our current trainee, Katy Signy. We also work closely with our Parliamentary Team which provides expert input on infrastructure projects.

Recent Developments

Greater Flexibility for Planning Permissions

CLG Guidance (November 2009) ¹ covers the topics below.

Minor Material Amendments – Rachel Hey

Following the Killian Pretty Review (published 24 November 2009), WYG Planning and Design (“WYG”) were commissioned to consider options for dealing with minor material amendments to development proposals after planning permission has been granted. The consultation exercise concluded that the existing route under section 73 of the Town and Country Planning Act 1990 (the “1990 Act”) should be used.

- There is no statutory definition of a minor material amendment, however, WYG’s proposals endorsed by DCLG

suggest that “A *minor material amendment is one whose scale and nature results in a development which is not substantially different from the one which has been approved*”. This definition is vague and leaves much scope for local authority discretion.

- Section 73 only applies to circumstances where a condition is attached to a planning permission. This may include a condition listing approved plans. If no condition is attached to the permission which is capable of being varied then it appears that the section 73 route cannot be used for a minor material amendment. A fresh application for planning permission would need to be made.

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<http://www.communities.gov.uk/documents/planningandbuilding/pdf/greaterflexibilityguidance.pdf>

Non-Material Changes to Planning Permissions – Rachel Hey

On 1 October 2009 section 96A was inserted into the 1990 Act by section 190 of the Planning Act 2008. It allows a local planning authority (in England) to make a change to any planning permission (including the power to impose, remove or vary conditions on a planning permission) if it is satisfied that the change is not material. The main points to note about section 96A are:

- Potential applicants: Persons who have an interest in the land to which the planning permission in question relates, or someone else acting on their behalf.
- Any existing planning permission can be subject to a section 96A application. However, the section cannot be used for non-material amendments to listed building and conservation area consents.

Extension of Time Limits for Implementing Planning Permission – Katy Signy

Provisions came in to force on 1 October 2009 which allow for the time within which a planning permission must be implemented to be extended. The basic idea is that an existing planning permission will be able to be replaced by a new permission before it expires.

It is hoped that the new provisions will allow greater flexibility and certainty in the planning system. In the current economic climate a large number of planning permissions are not being implemented due to lack of funding or just because of uncertainty in the market, and therefore the planning permissions fall foul of the three year time limit set out in section 91 of the Town and Country Planning Act 1990 (although the LPA may allow a different period). Points to note:-

- Where development has already started or where the original planning permission was granted after 1 October 2009, it is not possible to use this procedure. It can be applied to outline planning permission, but the same restrictions apply.

- There is no definition of what constitutes a “non-material change”, this is a matter of discretion for the local planning authority. The local planning authority must have regard not only to the proposed change but also the cumulative effect of any previous non-material changes on the development as originally granted by the original permission.
- There is a right of appeal against non-determination, conditional grant or refusal of an application and the usual time limits apply (6 months (or 12 weeks for householder applications) from end of determination period or date of decision)

- Developers will only be able to make one application to extend a permission.
- The previous permission is not revoked, but a new permission granted with a new time limit.
- This is the only method by which a planning permission can be extended, as the mechanism that existed under regulation 3(3) of the Town and Country Planning (Applications) Regulations 1988 has effectively been removed.
- The application should be made on the standard application form which has been amended for this purpose and the LPA can request further information.
- The application should be decided pursuant to section 38(6) of the 2004 Act, but the LPA should take “a positive and constructive approach”.
- Where there are unilateral or bilateral obligations tied to the original planning permission it may be necessary for the developer and the LPA to enter into a supplemental agreement to ensure the original obligations are tied to the new permission.

- At present the DCLG has not published its amendments to the fee regulations, and therefore the fee payable with an application to extend a time limit is the same as if the application was for a new planning permission.
- The proposed figures are £500.00 for an application for a major development, £50.00 for householder developments and £170.00 for all other developments. No fee is applicable for an element of an application which is in respect of a listed building or a conservation area.
- The right of appeal is the same as for non-material changes as detailed above.
- This is only a temporary measure introduced to deal with the current economic climate.
- Effectively, it will achieve the same outcome as the old section 73, prior to the introduction of the 2004 Act, which prohibited applications to vary the time for implementation.

Case Update – Emyr Thomas

Sharpe Pritchard acted for the defendant planning authority in *R (on the application of The Friends of Hethel Ltd) v South Norfolk DC & Ecotricity* ([2009] EWHC 2856 (Admin)).

Friends of Hethel Ltd (“H”) sought to challenge South Norfolk DC (“SN”)’s decision to grant planning permission to erect three wind turbines, which were to be constructed by Ecotricity (“E”) in a Norfolk village. H comprised local residents opposed to the application. The application was originally considered by one of SN’s area planning committees and refused on grounds of visual intrusion. Since the decision had gone against the officers’ recommendation and the vote of five votes to three had been made by less than two thirds of the committee’s membership, the application was referred to the full planning committee. Members of that committee subsequently voted eight to seven in favour of the application, subject to conditions.

H argued that (1) the area committee’s decision to refer its decision to full committee was unlawful because a two thirds majority had not been obtained, and so under SN’s constitution, the planning committee did not have jurisdiction to determine the application; (2) the planning committee had failed to consider fully issues regarding the setting

of listed buildings, noise and safety and so its decision making was flawed; (3) planning conditions which had an off-site impact were irrational and unenforceable; and (4) the local authority had failed to inform the public of the decision by publishing a notice to the public under reg 21 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

Cranston J held that (1) H’s constitutional challenge wrongly characterised what had occurred, and once the area committee’s vote had been taken, it was clear that under SN’s constitution, it did not have decision-making power; (2) no real complaint could be made of the way SN had considered the setting of listed buildings etc; (3) the conditions were not unreasonable and unenforceable on the basis of their off-site impact, they had to be read in the light of the everyday reality that access to third party land would ordinarily be granted; and (4) there was a clear obligation under reg 21 of the 1999 Regulations for SN to publish a notice informing the public of its decision. Publication on a website was insufficient to satisfy reg 21. This did not, however, mean that the grant of permission could be quashed. SN’s failure to comply fully with reg 21 would be marked by the making of a declaration, something Cranston J described as “a preventive” rather than a “curative” instrument.

Our Experience

The Planning team at Sharpe Pritchard carry out a much wider range of work than you might think. Many of us have previously worked for local authorities and in addition to negotiating complex

section 106 agreements, acting as advocate at planning inquiries and advising on enforcement action and applications for certificates of lawfulness, there is

considerable expertise within the team that enables us to undertake other work.

Planning Policy

- We undertake advocacy and advice in development plan inquiries and regularly advise on the policy aspects related to planning applications (particularly concerning refusals on grounds of prematurity).

Prosecutions and other Magistrates' Court Work

- We have experience of prosecuting for planning offences, including non-compliance with enforcement notices and breaches of the advertisement regulations. Work undertaken includes drafting the information, advising on the strength of the evidence and advocacy in the magistrates' court. We also conduct section 215 appeals. The team also undertakes prosecutions for non-planning offences such as housing benefit fraud, fly-tipping and breaches of noise abatement orders.

Highways

- We can advise on highway status on obstructions to highways. We

frequently draft highway agreements under sections 4, 38 and 278 of the Highways Act 1980 and process stopping up orders through the magistrates' court.

Environmental Health

- The team regularly advises on issues relating to noise nuisance, fly-tipping and health and safety and undertakes prosecutions relating to offences under environmental health legislation.

Licensing

- The team has experience of advising local authorities in relation to licences under the Licensing Act 2003 and other licensing regimes. This includes advising on relevant legislation and case law, acting as legal adviser to sub-committees and conducting licensing appeals.

Compulsory Purchase

- The team works closely with our Property team in relation to the planning aspects of progressing compulsory purchase orders. Our next CPO Public Inquiry commences 19 January 2010.

Seminars

We frequently run seminars and the following are coming up:

- Central Law Training Annual Planning Law Conference - 23 February 2010. Brian Hurwitz is delivering a paper on Climate Change: Law and Planning Policy.
- Procurement in Planning Seminar – 25 February 2010. Denise Stephenson

is delivering a paper on section 106 agreements and procurement and other topics will be covered by members of our projects team.

- Central Law Training Seminar: Community Infrastructure Levy and Section 106 Obligations - 19 May 2010. Denise Stephenson is delivering a paper for this seminar.

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