



Planning Bulletin

Issue 2: Spring 2010

Since the Christmas bulletin, CLG has been busy issuing new policy, guidance and consultation papers over the past few months. A number of new Regulations and Orders have also come into force. It is not possible to include reviews of everything here but we have sought to cover the most significant developments. Our website contains full versions where it has not been possible to include the full article within the Bulletin. We also provide a review of the recent Leeds case on schemes of delegation

and an update on significant projects we have been involved in recently.

If you have any questions arising out of the topics in this Bulletin, contact Denise Stephenson or Brian Hurwitz (partners). The other members of our Planning team are Lorna Bowry, William Bartlett, Rachel Hey, Emyr Thomas and our current trainee, Georgina Redsell. We also work closely with our Parliamentary team which provides expert input on infrastructure projects.

Recent Developments

Community Infrastructure Levy (CIL) Regulations 2010 and New Policy document for Planning Obligations (Consultation) – Denise Stephenson

The CIL regulations came into force on 6 April 2010, so LPAs can now adopt charging schedules (following an examination process) and collect CIL. Assuming CIL does get off the ground after the general election, it will substantially curtail the use of s106 agreements. The use of s106 agreements is to be limited to what was originally intended: direct impact mitigation and to secure obligations necessary for a particular development. Provision of affordable housing, will remain within the remit of planning obligations. All infrastructure¹ funding will be payable under CIL. The Regulations reform the planning obligations system in three main ways, by: (i) putting the Circular 05/05 tests on a statutory basis for those developments which are capable of being charged CIL, (ii) ensuring there is no overlap between the local use of CIL and planning obligations and (iii) limiting pooled contributions towards infrastructure which may be funded by CIL.

Regulation 122 brings into statute three of the five Circular 05/05 tests. From 6 April 2010 it will be unlawful for a planning obligation to be taken into account when determining a planning application for development that is capable of being charged CIL if the obligation does not meet all of the following tests: (i) necessary to make the development acceptable in planning terms, (2) directly related to the development and (3) fairly and reasonably related in scale and kind to the development.

Regulation 123 prevents a planning obligation from constituting a reason for granting permission for development where it provides funding towards or provision of infrastructure to be funded by CIL. From 6 April 2014 (or earlier if the LPA's first CIL charging schedule takes effect beforehand) LPAs will no longer be able to seek more than five individual planning obligation contributions towards infrastructure that is capable of being funded by CIL. Note that the restrictions imposed in Regulation 123 will not apply to planning obligations that relate to or are connected with the funding of Crossrail.

Circular 05/05 will be replaced with the New Policy Document on Planning Obligations (consultation ends on 21 June 2010). It should provide new guidance on the use of planning obligations and ensure there is no conflict between them and the use of CIL. Once finalised, it will form an annex to the new Planning Policy Statement on Development Management, once the latter is published². The document is based strictly on policy³, as opposed to Circular

05/05 which contained a mixture of policy, legal commentary and guidance.

¹ "Infrastructure" is defined as roads and other transport facilities, flood defences, schools and other educational facilities, medical facilities, sporting and recreational facilities and open spaces – section 216(2) Planning Act 2008.

² Development Management: Proactive Planning from Pre-Application to Delivery – Consultation, published 21 December 2009.

³ The proposed policy is set out in part 2

Infrastructure Planning Commission (IPC) – Brian Hurwitz

The IPC opened up for applications from the beginning of March 2010. Established by the Planning Act 2008, the IPC will now be the body that deals with applications for development consent, if the application concerns a nationally significant infrastructure project (these are listed in the Act). Such a consent avoids the need for consents that may have been required under other legislation including planning permission under the TCPA 1990. Local authorities still have an important part to

play in this process because they will be invited by the IPC to submit a local impact report, which is to give details of the likely impact of the proposed development on the area of the authority. If you would like advice on any applications in your authority's area then please contact Brian Hurwitz, Denise Stephenson or Alastair Lewis. As Parliamentary Agents, we have experience of acting for local authorities under the Transport and Works Act and Harbours Act regimes and hybrid bills in relation to major infrastructure.

Amendments to the GPDO and Use Classes Order – William Bartlett

On 6 April 2010 the Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (SI 2010/653) and the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2010 (SI 2010/654) both came into force. SI 2010/653 amends the Use Classes Order by removing houses in multiple occupation ("HMOs") from Class C3 (dwellinghouses). A new Class C4 is introduced for HMOs. An HMO is defined by reference to s254 of the Housing Act 2004. In broad terms, this occurs where tenanted living accommodation is occupied by persons as their only or main residence, who are not related, and who share basic amenities. Part 3 of Schedule 2 to the GPDO is amended by SI 2010/654 to grant planning permission for development consisting of a change of use from Class C4 to Class C3. But changes from Class C3 to C4 will require permission. The aim of this

change is to stop the spread of high concentrations of shared homes where it causes problems for other residents or changes the character of the neighbourhood.

The reform raises a number of issues for LPAs. In terms of enforcement, LPAs are likely to be faced with difficulties in keeping tabs on the number of occupiers and deciding whether the occupiers are members of the same family or not. It may prove to be a significant burden on LPAs to police this – especially in those areas where there is a high concentration of HMOs. On the other hand, LPAs will also be wary of losing housing (especially affordable housing) given the permitted change from C4 to C3. The Conservatives have indicated that they would revoke SI 2010/653 if they come into power. SI 2010/654 makes other changes to non-domestic permitted development and also enables LPAs to make Article 4 directions without the need for prior approval of the Secretary of State.

PPS 5: Planning for the Historic Environment

By adopting a significance-based approach and requiring LPAs to take a more active

role in managing heritage assets PPS 5 and its accompanying Practice Guide will potentially result in increased workloads for LPAs, both in plan making and decision

making. An article by Brian Hurwitz and William Bartlett on PPS 5 and its application to decision-making appears in Planning

Magazine on 23 April 2010 and a copy will be posted on the Sharpe Pritchard website.

Emerging PPSs: “Planning for a Low Carbon Future in a Changing Climate” and “Planning for a Natural and Healthy Environment” – William Bartlett

These new draft PPSs were published by CLG on 9 March 2010. Consultation for both closes on 1 June 2010 and CLG intends to publish the final versions later in 2010. The draft PPS on Climate Change is the more notable of the two: it will be a consolidated supplement to PPS 1 and as such will take precedence over policies in other PPSs. Its aim is to help secure progress against the UK's targets to cut greenhouse emissions. The Government sees planning as a key tool in tackling climate change by influencing the location, scale, mix and character of development – both development that generates energy and development that uses energy. It includes proposed policies which must be taken into account and can be applied directly when determining planning applications.

Notable policy requirements include requiring RPs to set regional minimum targets for renewable energy for 2015, 2020 and 2030 and monitor performance against these targets. Policy LCF 6 sets out the criteria against which LPAs should assess

the suitability of sites for new development (opportunities for decentralised energy, contribution to heat demand, impact on travel, loss of carbon sink, etc) and requires that where sites perform poorly against the criteria they should not be allocated for development. Policy LCF 13 sets out what new development should provide (reduction in greenhouse gas emissions, provision of open space, sustainable drainage systems etc) and requires that when determining ‘major applications’ (10 or more dwellings or commercial development with 1,000m² or more of commercial floorspace) LPAs should give “great weight” to compliance with the policy criteria.

The Planning for a Natural and Healthy Environment PPS consolidates existing planning policies (from PPS9, PPS7, PPG20 and PPG17). The only new policies relate to green infrastructure (requiring LDFs to set out a strategic approach for the creation, protection and management of networks of green infrastructure) and to the floodlighting of sports and recreational activities (where LPAs are required to weigh the benefits delivered by the sports pitch against the potentially harmful impact of the floodlights).

Recent Cases

In the second and final judgment in the case of R (on the application of (1) Technoprint PLC and others) v Leeds City Council the claimants won their case and the planning permission in issue was quashed, writes **Lorna Bowry**.

The first judgment relating to ground 2 (that there was no valid scheme of delegation in force when the permission was granted) was given on 9 December 2009. The Council's Constitution stated that the scheme of delegation would be agreed by full Council at its annual meeting. However, the judge found that the Council's practice of agreeing only variations at each annual meeting, was “perfectly sensible”, and that the full Council, by its conduct, had impliedly agreed the whole scheme of delegation each year.

The second judgment, relating to grounds 1, 3 and 4, was handed down on 24 March 2010. Under ground 1, the claimants contended that the decision to grant planning permission was reached in a manner that was procedurally unfair. However, despite some criticism of the way the matter was handled, the judge dismissed this particular ground. The remaining grounds were considered together. Ground 3 was that the planning officer had acted beyond the scope of his delegated powers, whilst ground 4 was that the decision to grant permission was irrational or unreasonable. The judge referred extensively to previous case law on delegation⁴ and carefully considered the “Delegation Report”. Ultimately, however, he quashed the permission because he considered that some of the conditions imposed were unreasonable. One condition

required a scheme to be approved by the Council for the provision of additional or improved green space, on or off site. However, no consideration had been given as to how this condition might actually be fulfilled. The second set of conditions related to the issue of contaminated land, and the judge decided it was unreasonable to grant permission when so many issues of potential land contamination were unresolved.

Despite the decision, the Council's scheme of delegation appears to have survived

intact. The lesson to be learned from this case is not simply to check all aspects of the council's scheme of delegation, and the scope of its delegated powers, but also (regardless of whether the decision is to be delegated or not) to give careful thought to all conditions attached to planning permissions, especially if they relate to a "main issue".

⁴ In particular, R (Carlton-Conway) v LB of Harrow [2002] EWCA Civ 927 and R (Springhall) v LB of Richmond-upon-Thames [2006] EWCA Civ 19.

Recent Work

Clay Farm and Glebe Farm (Cambridge Southern Fringe) Appeals

Decisions were issued in February 2010 dismissing both appeals (which sought a reduction in affordable housing) and rejecting the appellants' proposed unilateral undertaking. We assisted the District and County Councils in drafting and negotiating the s106 obligations and advising on the inadequacy of the unilateral undertaking.

Danetree and Church Fields Appeals

Decisions were issued in March 2010 supporting the decision by Daventry District Council to oppose the grant of planning permission for two large sites (providing in excess of 4,000 and 5,000 dwellings respectively). We acted for the Council in the public inquiry, dealing with policy, landscape, heritage and archaeology.

Kidbrooke Development Area Compulsory Order Inquiry

We advised Greenwich Borough Council in relation to the Kidbrooke Development Area CPO, which is a key element of the Council's major regeneration project for the Kidbrooke Development Area (one of the largest housing-focused regeneration schemes in Europe). Work included advising on negotiations with objectors, drafting and negotiating legal agreements to remove those objections and preparing and managing presentation of the Council's case at the public inquiry. The balancing of harm to individuals' rights against public benefit is never straightforward, especially when people's homes are involved. But here, where there was an urgent need to comprehensively regenerate a large inner city area and deliver much needed new housing, compulsory purchase was an essential tool to enable the Council to deliver its vision.

Seminars

A list of seminars that we have given (including any papers issued in connection with them) can be found on our website.

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