Planning and Environmental Law Newsletter

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Here is a round-up of news and cases from the world of planning that have caught our eye. We look at regulations laid in Parliament allowing an increase in planning fees and the publication by the DCLG of a Brownfield Land Register template and we have summarised some recent cases that may have implications for your practice. Steve Bell gives an update on concealment cases and Phillip Hopkins, shares his thoughts on planning applications, enforcement notices and certificates of lawfulness.

20% increase in planning fees moving closer

Draft regulations have been laid in Parliament which provide for an increase in planning fees. This follows the publication in February this year of the Housing White Paper which stated that local planning authorities would be allowed to raise their fees by 20%, as long as they were ring-fenced to fund planning departments.

The draft regulations provide for an increase of approximately 20% for all existing fees to be paid to local planning authorities in respect of applications, deemed applications, requests or site visits. The regulations will now be subject to Parliamentary debate.

Brownfield Land Register template published

The Department for Communities and Local Government (DCLG) has published a Brownfield Land Register template.

The Secretary of State has the power to require local planning authorities (LPAs) to provide information from their brownfield land registers in a particular format. To enable LPAs to meet this obligation, the DCLG have defined a data standard which LPAs are encouraged to follow in preparing and publishing their brownfield land registers and have also produced an Excel template as an optional tool that LPAs can use. The first registers must be published by 31 December 2017.

Can a whole new term be implied into a planning condition?

The High Court's judgment in the important case of London Borough of Lambeth v SSCLG and others [2017] EWHC 2412 (Admin) has caused a stir as it held that in principle a whole new condition could be implied into a planning permission, as the claimant argued for. Permission to appeal to the Court of Appeal has been granted and we await the outcome with great interest.

Deliverability and 5 year land supply

The Court of Appeal has finally delivered judgment in St Modwen v SSCLG & ERYC [2017] EWCA Civ 1643 concerning the meaning of the phrase “deliverable sites” in the context of the requirement in paragraph 47 of the National Planning Policy Framework for a five year housing land supply.

Lord Justice Lindblom said that, to be deliverable in this sense, a site has to be capable of being delivered within five years, but it does not need to be certain or probable that the site actually will be delivered within five years. Sites can be included in the five-year supply if the likelihood of housing being delivered on them within the five year period is no greater than a realistic prospect.

He also said that, just because a particular site is *capable* of being delivered within five years, it does not mean that it necessarily will be. In his view, there is a distinction between the identification of deliverable sites for the purpose of showing a supply of specific deliverable sites sufficient to provide five years’ worth of housing against an authority’s requirements and the expected rate of delivery to be reflected in a housing trajectory. The Judge also noted that the NPPF recognises that local planning authorities do not control the housing market.

Of course, if the government do not like this they can change the NPPF in this respect when the other proposed changes are made early next year.

Adequacy of reasons when granting planning permission

On 16th October 2017 the case of CPRE Kent (Respondent) v China Gateway International Limited (Appellant) was heard by the Supreme Court. The case concerns the correct legal standard to be applied in assessing the adequacy of reasons provided by local planning authorities when granting planning permission.

The brief facts of the case are that CGI applied to DDC for planning permission for a large-scale residential development in an area of outstanding natural beauty ("AONB"). The planning committee granted permission contrary to their planning officer’s recommendations. The Respondent brought a claim for judicial review of the decision inter alia on grounds that the planning committee had not provided adequate reasons for its decision. The claim was dismissed at first instances but allowed on appeal.

We anticipate that the judgment should be issued shortly and we will include it in our next newsletter.

Prior Approval— LPA’s failure to respond within deadline

In the recent case of Keenan v Woking Borough Council & Anr [2017] EWCA Civ 438 the Court of Appeal considered the impact of the Council’s failure to respond to a request for a prior approval determination within the 28 day deadline set by the Town and Country Planning (General Permitted Development) Order 1995. The case involved a hardcore track laid to access a Christmas tree plantation, for which works were carried out without planning consent.

Mr Keenan had applied to Woking Borough Council for a determination as to whether prior approval was required for the track or whether it would be permitted development of agricultural land.

The council did not respond to the application within the 28 days required by the Town and Country Planning (General Permitted Development) Order 1995, and Keenan went ahead with the work. The council later issued two enforcement notices, requiring removal of two sections of the track. Keenan's challenge to those notices was rejected by a planning inspector in June 2015 and the matter has made its way through the courts.

In the Court of Appeal, Lord Justice Lindblom said that the "central question" was the effect of a local planning authority's failure to respond within 28 days to an application under the order for a determination "as to whether its prior approval would be required for details of a hardcore track said by the applicant to be 'permitted development' on 'agricultural land'".

The Judge rejected the appeal and found that the track had not become "permitted development", within the meaning of the order merely by virtue of the council's delay in reaching a decision.

He agreed with the inspector's observation that "it would have assisted if a timely explanation from the council as to why the application could not be entertained could have been provided". But he said that "the fact that it was not given cannot make any difference to the true position in law".

Concealment cases – an update

This article by Steve Bell of nplaw was originally published in the Local Government Lawyer on 28 September 2017

Two recent cases have addressed the issue of concealment in planning from two differing angles.

A recent case before the Magistrates Court in Nuneaton confirmed that Stratford-on-Avon District Council could take enforcement action against a couple who disguised their house as a garage on the basis that the use had been deliberately concealed. It appears that in December 2016 a certificate of lawful use and development for a garage argued that in June 2011 the garage had been converted into a 'habitable residential dwelling' that they had permanently occupied since early 2012. The council were not aware of the change of use and was out of time for taking enforcement action in the usual way.

Interestingly an appeal decision issued by the Planning Inspectorate for a site address in Abergavenny, dated 13 September 2017, (following an enforcement notice issued by Monmouthshire County Council) found that there had been deliberate concealment in the conversion of a barn to a home. In the decision the Planning Inspector stated: "….However, this case turns on whether the breach has been deliberately concealed such that the provisions of s.171B(2) are not engaged, in the context of the principles established by *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15

and subsequent legal judgements…"

Both cases illustrate that although you can apply to the Magistrates Court for an enforcement order as set out in the Town and Country Planning Act 1990 s.171BA, s.171BB and s.171BC (as was the case with Stratford-on-Avon District Council) this is purely a supplemental procedure and does not replace the principles set out in *Welwyn Hatfield Council v SoS* [2011] UKSC 15 ("Welwyn case") as followed in *Jackson v SoS* [2015] EWHC 20 (Admin) ("Jackson case").

I make this point as it can be confusing for local planning authorities as to which way to deal with concealment matters. However as both courses (either Magistrates Court or arguing the point before the Planning Inspector) are available and there is no obligation to apply for an enforcement order as set out in the Town and Country Planning Act 1990 as amended first.

From experience I consider that it can be difficult to argue planning issues before the Magistrates Court. There is also a higher risk of costs in the Magistrates Court than before a Planning Inspector.

However, if you are arguing the matter before a Planning Inspector you will need to be mindful of the four features identified by Lord Mance in the *Welwyn* case that takes a case outside the scope of s.171B(2) of the Act. Although the *Jackson* case stated that not all cases would need to meet all four points for the *Welwyn* principle to apply it is well worth looking at each criteria in respect of a potential case (as each case is determined on its facts). The criteria are that there was positive deception in matters integral to the planning process; the deception was directly intended to undermine the planning process; the deception did undermine the planning process; and the wrong doer profited directly from the deception.

It will be interesting to see how the law on deception/concealment in planning develops as it is clear whatever way you approach deception cases there will be no immunity if there is deliberate concealment.

Planning applications, enforcement notices and certificates of lawfulness

This article by Phillip Hopkins of nplaw was originally published in the Local Government Lawyer on 13 October 2017

This article explores the wording and intentions of:

- Part A: s70C of the Town and Country Planning Act 1990 ("TCPA") with regards to the consideration by Local Planning Authorities ("LPA") of planning applications following issue of an enforcement notice ("EN"); and
- Part B: s191 (2) / s175 (4) TCPA with regards to the consideration by LPA's of certificates of lawfulness of existing use or development following service of an EN which is then subsequently appealed.

Part A

The Localism Act 2011 amended the TCPA 1990 by inserting s70C which reads:

70C Power to decline to determine retrospective application

(1) A local planning authority in England may decline to determine an application for planning permission for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission, a "pre-existing enforcement notice" is an enforcement notice issued before the application was received by the local planning authority.

This section is clearly drafted and states that a LPA can refuse to determine an application for planning permission if granting such planning permission would involve granting planning permission of the matters specified within an EN. Subsection 2 is helpful in clarifying that the enforcement notice referred to in subsection 1 is a "pre-existing enforcement notice" being one issued BEFORE the application for planning permission was received by the LPA.

This position has been clearly confirmed in the recent High Court decision *H.C. Moss (Builders) Limited v South Cambridgeshire District Council* (2016) in which Dove J applied the case of *Wingrove v Stratford-upon-Avon District Council* [2015] EWHC 287 (Admin.) and held that s70C equipped LPA's with a "broad discretion" to refuse to determine planning applications which seek permission for the whole or any part of land to which an existing enforcement notice relates specifically to the development proposed.

I have read commentary which raises the issue of a "conundrum" in respect of enforcement notices which have been appealed (and whether these fall within the scope of being a "pre-existing enforcement notice" pursuant to S70C (2) TCPA) but this conundrum (which I will come to in Part B of this article) is not an issue here because the language used in subsection 2 is explicit and does not include limitations on whether the enforcement notice must actually be in force or not – all that is required for the provisions of s70C to kick in is the issuing of an EN on the land and a

subsequent planning application which seeks permission for development covered by the pre-existing EN (regardless of whether that EN has been appealed or not). If it was Parliaments intention to only include active (non-appealed) EN's then subsection 2 would have clearly have provided for this.

Part B

The conundrum I refer to above in Part A of this article appears to come into play in S191 TCPA which relates to certificates of lawfulness of existing use or development ("CLEUD"). The provisions of concern relate to subsections 1 and 2 and read:

191 Certificate of lawfulness of existing use or development

(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice ***then in force****.*

This section allows an applicant to submit a CLEUD application to a LPA for consideration to determine whether existing uses / operations are lawful. Subsection 2 goes on to say that uses and operations are lawful at any time if time for enforcement has expired (the 4 or 10 year rule) or they do not contravene the requirements of an enforcement notice **"then in force"**.

S175 (4) TCPA clarifies the meaning of "then in force" as follows:

(4) Where an appeal is bought under section 174 [the section that deals with appeals against enforcement notices] the enforcement notice shall…be of no effect pending the final determination or withdrawal of the appeal

When read with S191 TCPA, this means that two possible scenarios can occur:

Scenario 1

An applicant can submit a CLEUD application for determination to a LPA, and if the applicant has not met the 4 year or 10 year rule for immunity (for instance) the LPA can serve an EN on the applicant. The applicant may then submit a second CLEUD application to the LPA BUT in that situation the operations would not be lawful (pursuant to S191 (2) TCPA) because the operations would constitute a contravention of the requirements of the enforcement notice **then in**

force. This would make perfect sense because it would not be logical for the LPA to determine a CLEUD application for development for which it has served an EN against and so we have a situation similar to that provided for by S70C (as discussed in Part A of this article).

Scenario 2

To get around the scenario above, the applicant can exercise their right to appeal against the EN. If he or she does so, this means that according to S175 (4) TCPA the EN is not "then in force" pending the final determination or withdrawal of the appeal. This means that the LPA would then be obliged to determine the second CLEUD application. If no further evidence is submitted by the applicant with the second CLEUD application then the LPA is within its rights to refuse it again and the determination / withdrawal of the appeal would run its natural course. The conundrum however occurs where the use or operation subject to the CLEUD application then reaches the 4 or 10 year period of immunity whilst the appeal to the enforcement notice is still pending final determination (which can be a time consuming process as we know). Does this now mean that the LPA has to determine the CLEUD application in favour of the applicant?

The inclusion of the wording "then in force" as found in S191 (2) seems to create a potential loophole as highlighted in scenario 2 above which creates an illogical situation whereby an enforcement notice is issued by the LPA for a breach of planning control only for the LPA's hands to then be tied and permission forcefully granted by the determination of a second CLEUD application pending determination of an appeal to the enforcement notice.

This is a potential trap for LPA's, and must be considered where determination of a CLEUD application demonstrates a breach of planning control which is nearing either the 4 or 10 year immunity rule. Unless the legislation is revised here, applicants are free to gain the extra time they need to make their development lawful, by tactically appealing against an EN served on the back of their CLEUD application.

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