Ashurst Planning Update

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Welcome to our quarterly round up of all things planning.

Highlights from this edition include a judicial review being allowed some five years after the grant of the original permission and a local authority error which resulted in a non-food restriction on a retail unit being lost.

On the legislation front, we touch on changes to the EIA regime and the law relating to pre-commencement conditions.

We also bring you a roundup of the plethora of reports that have been released of late, including those by Messrs Letwin and Raynsford.

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Case Law

Judicial Review Permitted Out of Time

In the unusual case of R (oao Thornton Hall Hotel Ltd) v Wirral Metropolitan Borough Council and Thornton Holdings Limited [2018] an application for judicial review was allowed some five years after the permission had been granted.

In November 2011, planning permission was granted for the erection of three marques within the grounds of Thornton Manor. Contrary to the planning committee's resolution to grant permission for a limited period of five years, the permission was granted without such limitation. Following the expiration of the five year period, the error came to light resulting in the operator of a nearby hotel seeking to have the permission quashed.

The initial question for the court was whether to permit an extension of time of several years so that the application could proceed. On the facts, the court found that justice required the extension to be granted.

In reaching its decision, the court took the view that the interested party (Thornton Holdings) bore considerable responsibility for the lateness of the claim because it knew of the error and chose to remain silent about it. It only revealed its hand when it was asked, in 2016, to submit a further application for the retention of the marquees.

The court went on to determine that the permission that was issued, without the requisite condition, was unlawful and as such, quashed it.

It should be noted that very special circumstances did exist, such as the fact that the development was in the green belt, the marquees had originally been erected without a planning application being submitted (and indeed were the subject of enforcement proceedings) and most notably, the behaviour of the interested party.

Further, cases of this nature are extremely rare. In a 2016 decision (R (oao Gerber) v Wiltshire Council and others) the High Court allowed a claim to proceed 14 months after the grant of planning permission. However, the Court of Appeal reversed the decision and found that no good reason existed for the extensive delay in bringing the claim.

> *…an application for judicial review was allowed some five years after the permission had been granted.*

Given that permission to appeal has been granted in this case, it will be interesting to see if this judgment is able to withstand the Court of Appeal's scrutiny.

From a practical perspective, the risk of other applications for judicial review following this route is low. Accordingly, changes in practice are not likely to be necessary, but nonetheless, it is a decision worth bearing in mind.

Section 73 – A Cautionary Tale for LPAs

The next case demonstrates that errors in planning permissions don't always result in hardship for the recipient of the permission.

In London Borough of Lambeth v Secretary of State for Communities and Local Government & Others [2018], planning permission was granted for a DIY store, subject to a condition that the unit could only be used for the sale of certain goods (excluding food and drink). A section 73 application was made to vary this condition which was subsequently granted.

Although the description of development stated that the unit could only be used for the sale and display of non-food goods, this was not replicated in the conditions. Subsequently, an application was made for a certificate of lawfulness of proposed use or development for open/unrestricted A1 retail purposes. This was granted on appeal and following a challenge by the local planning authority (LPA), was upheld in the High Court.

The LPA then took the dispute to the Court of Appeal, who agreed with the lower court, concluding that the requisite condition could not be implied, nor could the court take an interpretive approach.

It noted that *"[a]lthough the decision notice probably did not achieve the result that Lambeth wanted it to achieve [nothing had] gone wrong with the language of the decision notice. What*

went wrong was Lambeth's failure to exercise a power that it had under the Act."

Accordingly, the certificate of lawfulness stood, allowing the unit to be operated on an open A1 basis.

The key message from this case is to ensure that conditions are accurately replicated when permission is granted pursuant to section 73 to avoid unintended consequences.

> *What went wrong was Lambeth's failure to exercise a power that it had under the Act."*

Mayor of London's Affordable Housing and Viability SPG

May saw the High Court hand down judgment in R (on the application of) McCarthy and Stone Retirement Lifestyles Ltd & Others v Greater London Authority [2018].

A consortium of developers of specialist housing for the elderly challenged the SPG on grounds including that it was unlawful because it contained new policy, rather than supplementing policies in the London Plan.

The claim on the whole failed, including its key aspect - that the SPG's adoption of a 35 per cent affordable housing threshold to avoid planning applications being viability tested was inconsistent with the London Plan.

However, it was successful in one respect – that the SPG's requirement for late stage viability reviews on all developments over ten units was unlawful.

This was on the basis that the language of the current London Plan does not permit the imposition of such a requirement for all sites over 10 homes. It permits it only where, in general, the timescale or scale of development means that it is likely to take many years to complete a phase or the whole.

As a result, at least until the draft London Plan is adopted, London planning authorities will not be able to use the SPG as a lawful basis to impose late-stage viability reviews on developments that do not take 'many years' to build out.

However, we note that in line with its publicly stated intentions, the GLA is already judging developments against the draft London Plan, including in respect of viability reviews. Whilst the draft is a material consideration for planning purposes, at this early stage in the adoption process, the weight afforded to it should be limited. If developers feel that the GLA is affording too much weight to the proposed policies, their recourse would be through the courts, but in our view, in light of this decision and given the timescales involved, any such challenge is likely to result in a pyric victory as best, but more likely, would be unsuccessful.

Benchmark Land Values (BLV)

Last year, in our Planning Nutshell: Benchmark Land Values - Buyer Beware we looked at the planning appeal decision relating to redevelopment proposals for a former Territorial Army centre in Islington. A key aspect of the decision was how BLV should be calculated; the developer favouring a market value (MV) approach, the LPA an existing use value plus (EUV+) approach.

The Inspector found favour with the LPA's approach and dismissed the appeal. The disgruntled developer took the view that the Inspector's decision was unlawful and challenged it in the High Court.

In Parkhurst Road Limited v Secretary of State for Communities and Local Government and LBI [2018], the judge rejected the challenge and added an interesting postscript to his judgment calling for the RICS to review its 2012 Guidance Note "in order to address any misunderstandings

about market valuation concepts and techniques, the "circularity" issue and any other problems encountered in practice over the last 6 years".

Going forward, developers should anticipate a refusal to entertain a MV approach in all bar the most exceptional circumstances, but be ready for a battle over the premium necessary to incentivise a landowner to release its land for development as allowed for by the 'plus' element in the EUV+ approach.

Legislation

Pre-commencement Conditions – More Red Tape

Amendments to the Town and Country Planning Act 1990 take effect on 1 October 2018. The provisions, inserted by the Neighbourhood Planning Act 2017, will prevent the imposition of pre-commencement planning conditions without the written agreement of the applicant.

However, the Town and Country Planning (Pre-Commencement Conditions) Regulations 2018, which take effect on the same day, provide a work-around.

LPAs will be able to serve a notice on applicants to the effect that they intend to grant permission subject to specified pre-commencement conditions and, following the expiry of a 10 day notice period, can go on to grant the permission, unless a substantive response is received by the applicant.

> *Amendments…will prevent the imposition of pre-commencement planning conditions.*

Applicants who want to preserve their right to appeal pre-commencement conditions post 1 October will need to consider their options carefully and may well conclude that failing to provide both written consent and a 'substantive response' to any subsequent notice is their best course of action.

Environmental Impact Assessment (EIA)

For those working on industrial estate projects, an amendment to the EIA Regime, coming into force on 1 October 2018, will mean that those projects under 5 ha will fall outside Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (an increase from the previous 0.5 ha) and therefore will not need to be screened for EIA purposes.

The Town and Country Planning and Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2018 will also add new provisions to enable certain special consenting processes under the Town and Country Planning Act 1990 (modification orders, discontinuance orders and purchase notices) to be screened and will correct various errors.

Policy Changes

New Independent Environmental Body

Following Brexit, the UK will no longer be subject to the jurisdiction of European bodies and agencies which ensure compliance with environmental law (for example the European Commission and the Court of Justice of the European Union).

To address this lacuna, it is proposed to establish an independent environmental body for England and to incorporate environmental principles into UK policy and its legal framework.

An on-going consultation is currently considering options, however, the proposals have cast doubt on whether the body will be capable of filling the European void. In a partial fix, the newly enacted European Union (Withdrawal) Act 2018 contains a provision to the effect that the UK's environmental body should be able to take "proportionate enforcement action", meaning it could be effective at holding the government to account, however, for now, there are many unknowns, including the ultimate make-up of the body, its powers and, most significantly, its effectiveness.

Other News

The last quarter has been somewhat eventful in terms of the publication of reports. We've seen Nick Raynsford, Sadiq Khan and, most recently, Oliver Letwin all postulating solutions to various planning problems.

Independent Review of Build Out Rates

Published at the end of June, Oliver Letwin's draft analysis and accompanying annexes look at "*the significant gap between housing completions and the amount of land allocated or permissioned in areas of high housing demand*".

Although we will have to wait for the Autumn Budget to see what policy changes he ultimately recommends, the interim findings are pleasantly surprising in that they do not contain the attack on large house builders that one might have anticipated.

Instead, Mr Letwin acknowledges that land banking is not consistent with the business model of the major house builders, which depend on generating profits out of sales of housing, rather than out of the increasing value of land holdings.

House builders will also be relieved to hear that Mr Letwin's view is that it is "*not sensible to attempt to solve the problem of market absorption rates by forcing the major house builders to reduce the prices at which they sell their current products*".

Instead, he suggests that to obtain more rapid building out of the largest sites, more variety is needed within those sites, including housing of varying types, designs and tenures and more distinct settings, landscapes and streetscapes.

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He also notes that shifting the emphasis to small sites is not the solution and that the development of both large and small sites is needed. Given the shift in focus in the draft NPPF towards small sites, it will be interesting to see if the government takes note of this finding before finalising the draft.

Planning 2020 - The Raynsford Review

Following the establishment by the Town and Country Planning Association of the Raynsford Task Force in 2017, an independent review of the English planning system was conducted with interim findings published in May.

With its stated intention being to "*promote debate about the future of the planning system in England*", the report offers a series of provisional propositions intended to help inform the recommendations of the final report.

It opens with a damning statement that the planning system has been in "*an almost constant state of flux over the past decade and a half…*" and notes that "*the last thing that is needed is more short-term tinkering with the nuts and bolts*" rather "*a deep and hard look at the fundamentals*" is required.

It offers nine propositions, including: planning with a purpose; a new covenant for community participation; a new commitment to meeting people's basic needs; simplified planning law and; a fairer way to share land values.

Again, whilst we will have to wait until the Autumn for the final report, it is encouraging to note that the Task Force is considering solutions from the approach of what is logical against what may be politically feasible, but however hard we try, it is hard to shake the feeling that these are yet more words that have a good prospect of leading nowhere.

Capital Gains: A Better Land Assembly Model for London

In the same week that we saw the release of the Raynsford Review, Sadiq Khan followed suit with

the GLA-commissioned report Capital Gains: A Better Land Assembly Model for London, so entitled because "*it deals with the particular challenges facing the nation's capital, and because it is aimed at harnessing land values for the city's benefit*".

The report's authors propose that this better model will be brought about by the implementation of a Land Assembly Action List, a ten point list with measures which inlcude: allowing confirmation of CPOs ahead of planning consent; allowing Mayoral confirmation of London local authority CPOs; 'use it or lose it' powers for CPO land and; statutory land pooling.

Mr Khan has said that he will implement the recommendations of the report as far as his current powers and resources allow, so given that the majority of the proposals will require the making of not insignificant and somewhat controversial changes to legislation before the 'better model for land assembly' becomes more than wishful thinking, we are no doubt a long way off seeing most if not all of the suggestions taking effect.

Mayor's Housing Strategy

Also from City Hall, we've seen the launch of the final version of the Mayor's housing strategy, following the circulation of a draft last Autumn.

It sets out five priorities, with its central priority being to build "*many more homes for Londoners - particularly genuinely affordable homes*".

Following on from the Mayor's good practice guide to estate regeneration, published in February, the strategy also promotes the use of residents' ballots ahead of estate regeneration schemes and notes that "*For large schemes where demolition is involved, he will only agree to provide funding where there has been a successful ballot of existing residents.*"

In line with the "Capital Gains" report, the strategy also includes a call for "*a radical reform of land assembly rules*", including "*the reform of compulsory purchase powers, the introduction of new land assembly mechanisms and resources, and much stronger powers for City Hall over public land earmarked for new homes, particularly land owned by government*".

PINS Guidance – Plans and Projects Subject to Habitats Regulation Assessment

In April, the European Court of Justice handed down its decision in People Over Wind and another v Coillte Teoranta [2018], a case which turned the screening of plans or projects for Habitats Regulation Assessment purposes on its head.

In short, the court held that when screening a plan or project to determine whether it was necessary to carry out an appropriate assessment under the Habitats Regulations, it was not appropriate to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on the site in question.

Following the decision, PINS issued guidance to planning inspectors on the approach to be taken where a proposed plan or project is subject to Habitats Regulation Assessment in circumstances where the assessment relies on avoidance or reduction measures to conclude there would be no likely significant effects on European site(s).

In short, the guidance concludes that whilst mitigation measures can be taken into account at the assessment stage, for the purposes of screening, this is no longer possible - "*Competent authorities cannot take account of any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether the plan or project is likely to have an adverse effect on a European Site.*"

The effects of the ruling are likely to be wide-spread and we are already seeing its impacts. For example, Waverley Borough Council has announced that it has temporarily suspended planning decisions for new residential developments in the 5 km protected zone of the Thames Basin Heaths Special Protection Area, whilst a planning inspector examining the Central Bedfordshire Council local plan voiced concerns that the document may not be "legally compliant" in light of the ruling. The Council has subsequently agreed to prepare an appropriate assessment.

The effects of the ruling are likely to be wide-spread.

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