Ashurst Planning Update

AUTUMN 2018

As the scorching temperatures of the Summer become a distant memory, we welcome you to our Autumn planning round up.

In this edition, in our case law edit, the duty to give reasons crops up again, this time in the guise of a Secretary of State decision not to call in a planning application for his own determination. We also look at two cases where attempts were made to avoid complying with section 106 obligations and an unusual scenario where a reserved matters approval was quashed.

On the policy front, we look at the new NPPF, provide an update on the draft London Plan and consider some of the recent changes to the PPG.

We wrap up this edition with news stories including a Heathrow update, details on the Land Value Capture Report and a cautionary tale about CIL.

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Case Law

Duty to Give Reasons

In R (oao Save Britain's Heritage) v SoSCLG [2018], the Court of Appeal ruled that, when refusing to call in planning applications for his own determination, the Secretary of State (SoS) should give reasons.

The case related to the proposed "Paddington Cube" development, a 19-storey, 54-metre tall office tower next to the grade I listed Paddington train station and within the Bayswater conservation area. The proposals attracted significant objection from heritage groups and the St Mary's Hospital Trust, which all put pressure on the SoS to call in the application. The SoS declined the request, but did not give reasons for his decision.

The campaign group Save Britain's Heritage (SAVE) challenged the failure to give reasons in the High Court. The court dismissed the application, finding that the SoS had not been obliged to do so.

SAVE then took the battle to the Court of Appeal, claiming that although there was no statutory duty, there was either a legitimate expectation that reasons would be given or a general common law duty.

The case has been heralded as a triumph for transparency.

The Court of Appeal agreed. It found that, whilst no common law duty existed, the SoS had, in 2001, issued a green paper which contained an unequivocal statement that reasons for not calling in applications would be given and this was reiterated in 2010. Although the practice changed in 2014, so that reasons were no longer always provided, the promise was never publicly withdrawn. This created a legitimate expectation that reasons would be given.

Although Westminster City Council granted planning permission prior to the appeal being heard, thus making the appeal somewhat academic, the case has been heralded as a triumph for transparency and puts down a clear marker that unless and until the 2001 policy is publicly revoked, reasons will now need to be given where the SoS elects not to use his call in powers. However, we anticipate that the SoS will not waste any time in revoking the policy.

Public Sector Equality Duty

In the case of R (oao Buckley) v Bath and North East Somerset Council & Another [2018], the court considered, for the first time, whether the Public Sector Equality Duty (PSED) applied to outline planning applications.

In short, there was a development proposal to demolish and rebuild a housing estate and to decant tenants to a nearby site. The Council had carried out an Equality Impact Assessment (EqIA) of the relevant development plan policies and their rehousing strategy, but not of the application.

The Council argued that:

- an EqIA of an outline application would be meaningless as it did not have sufficient information;
- relevant impacts should be assessed at the reserved matters stage; and
- given that the overarching planning policies had been the subject of an EqIA, their PSED was discharged, because the application was judged against those policies.

The court said no and quashed the decision. The Council had failed to take account of the specific impacts of losing a home on those with protected characteristics (the elderly and disabled) and therefore it had not discharged its duty. The impacts which had been considered when assessing the policies and the rehousing strategy were different to those arising in the context of the application.

The duty could not be discharged at a later stage because, at that point, planning permission would have been granted. If the Council did not have sufficient information, it was incumbent upon it to acquire it.

To avoid challenges of this nature, developers and local planning authorities should consider whether a scheme affects those with protected characteristics (as defined in section 149 of the Equality Act 2010) and ensure that specific impacts are given due regard. A record should be kept of the process undertaken.

Quashing of Reserved Matters

Cases where reserved matters approvals are quashed are rare, but in R (oao Ornua Ingredients Ltd) v Herefordshire Council [2018] this is what happened.

The claimant owned a cheese factory on an industrial estate. Outline permission was granted on appeal for a housing development in close proximity to it, subject to planning conditions including a requirement that a noise mitigation scheme be submitted before development commenced.

A resolution to grant reserved matters approval (which included the layout of the development) was made, despite concerns about noise being raised. The Council took the view that the planning condition would adequately address the issue of noise mitigation at a later stage.

Following the resolution but prior to the issue of the decision notice, the claimant submitted evidence that suggested that any mitigation measures were likely to be inadequate, given the layout proposed.

This new material was not considered by the Council, which argued, during the court hearing, that such consideration was not necessary on the basis that the planning condition would provide adequate protection.

The court disagreed and held that the further information cast significant doubt on the validity of the Council's findings and as such, was a material consideration that should have been taken into account before the decision notice was issued. It had no option but to quash the reserved matters approval.

The case highlights the care that needs to be taken when additional information comes to light before a decision notice is granted and acts as a reminder that reserved matters can be liable to judicial proceedings.

It also reinforces the importance of developers seeking to agree conditions and section 106 obligations up front as a means of reducing the delay between a resolution to approve and the formal release of a decision notice.

Avoiding Affordable Housing Contributions

If the method for calculating an affordable housing commuted sum in a section 106 agreement is no longer workable, does that absolve the covenanting party from its liability to pay? This is the question the Court of Appeal had to answer in City of York v Trinity One (Leeds) Ltd [2018].

The case related to a historic section agreement which required commuted sums to be calculated by reference to "normal grant levels from regional TCI tables … or such equivalent grant calculation supported by the Housing Corporation".

Before the payment was made, the system of funding for registered social landlords completely changed. As such, the developer argued no payment should be made on the basis that it was not possible to substitute an alternative method of calculation to that which the parties had agreed.

> *The courts are reluctant to allow a party to renege on a bargain.*

The Court of Appeal did not agree. It found that the parties had always intended that a commuted sum should be paid and it would defeat that intention if the relevant provision was found to be unenforceable due to a lack of certainty. Therefore it was correct that the court should substitute an alternative method to calculate the sum due, thus illustrating that the courts are reluctant to allow a party to renege on a bargain and will be keen to assist in giving effect to the intention of both sides.

Modifying a Section 106 Agreement– What is "a Useful Purpose"?

An attempt to avoid a section 106 obligation was also the point of contention in R (oao Mansfield District Council) v SoSHCLG [2018].

In 1998, the Council granted planning permission for a mixed use development, subject to a section 106 agreement under which the Council covenanted to carry out highway works and the

developer covenanted to pay 75% of the cost of those works.

The highway works were carried out, but not the development, and no payment was made.

In 2011, a further permission was granted and a further section 106 agreement was entered into which again required a payment to be made towards the highway works. Some of the monies due were paid and again, no development was carried out.

In 2016, the developer applied for the obligation to be modified to release it from the requirement to pay the balance of the sum. This was on the basis that because the highway works had been completed, the obligation no longer served a useful purpose.

At appeal, the inspector agreed to the modification on the basis that the contribution was no longer necessary to make the development acceptable in planning terms. The Council applied to the High Court to judicially review the decision.

The High Court quashed the inspector's decision and held that in determining whether to modify a section 106 agreement, four questions must be considered:

- What is the current obligation?
- What purpose does it fulfil?
- Is it a useful purpose?
- If so, would the obligation serve that purpose equally well if it was subject to the proposed modifications?

So far as the question relating to purpose was concerned, this did not need to be a planning purpose.

In this case, the purpose was to allow the Council to recover some of the costs of the highway works and this continued to be a useful purpose. Whilst the inspector had turned his mind to the question of what the current obligation was, he had not addressed the question of purpose so his decision could not stand.

Accordingly, if a developer is seeking to vary or discharge existing planning obligations, it should turn its attention to the four questions to ascertain if its proposals are likely to be accepted.

Policy Changes

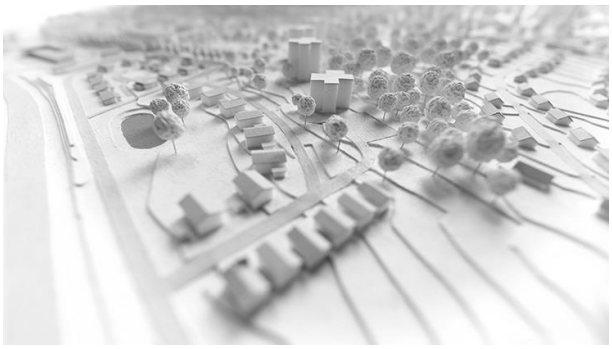
National Planning Policy Framework

The big news for this quarter on the policy front was the publication of the revised NPPF. In our article, The New NPPF - Ten Takeaways, we looked at ten key issues from the revised Framework to give you a broad indication of what's changed.

However, the ink had barely dried on the document before Friends of the Earth mounted a legal challenge on the basis that the government had failed to carry out a strategic environmental assessment (SEA).

Friends of the Earth noted that its intention was to force the government to undertake an SEA, consult the public and modify the framework based on those findings.

Look out for more on this story in one of our future updates.



London Plan

August saw the publication of minor modifications to the London Plan, ahead of its examination in public (EiP) next year.

The changes include more stringent requirements relating to carbon emissions and design scrutiny.

The EiP will open on 15 January 2019 and according to the provisional timetable, will run until 20 May 2019. The report of the panel of inspectors (Roisin Barrett, William Fieldhouse and David Smith) will be prepared between May and July 2019.

Prior to this, technical seminars will take place on 6 and 7 November 2018.

Whilst the Plan will be examined against the 2012 NPPF, James Brokenshire, in his July letter to Sadiq Khan, noted that immediately following adoption, the Plan would need to be reviewed to bring it in line with the 2018 version.

PPG Revisions

In September, it was the turn of the Planning Practice Guidance (PPG) to have an overhaul. Updates were published to the sections dealing with housing need assessments, housing and economic land availability assessments, local plans and neighbourhood planning and new two new sections looking at build to rent and plan-making were also added.

Those operating in the build to rent sector will be pleased to see (in respect of build to rent covenants) the guidance encouraging planning authorities to "recognise that build to rent operators will want sufficient flexibility to respond to changing market conditions and onerous exit clauses may impede development".

The inclusion of a 20 per cent benchmark figure for the level of affordable private rented homes to be provided in a build to rent development should also give certainty to those bringing schemes forward, particularly given the guidance's requirement that "[i]f local authorities wish to set a different proportion they should justify this using the evidence emerging from their local housing need assessment, and set the policy out in their local plan."

In terms of housing need assessments, this is an area in disarray. Whilst the guidance itself notes that the method may well need to be adjusted (following lower than expected population projections which are likely to result in the minimum need numbers generated by the method being subject to a significant reduction), the government is remaining tight-lipped about when a consultation on a revised methodology will be forthcoming.

This is proving problematic for those looking to submit local plans for examination after 24 January 2019. Any plans submitted after this date will need to use the standard method, but the question is, what will the method look like at that point?

Instead of the government tinkering with matters such as pre-commencement conditions, which will have a limited effect on improving the housing market, it would be well advised to focus its efforts on the big issues such as this one, given the potentially far-reaching and significantly detrimental impact these matters can and will have, if not fixed in a timely fashion.

Other News

Heathrow Challenges

Last year saw the first attempt in the courts to halt Heathrow's third runway fail but, following the designation of the Airports National Policy Statement early this year, a fresh assault has been launched by a host of parties, including a group of councils and the Mayor of London, private individuals and environmental groups Friends of the Earth and Plan B.

> *2019 promises to be yet another tumultuous year in the ongoing battle for airport expansion.*

The council group's challenge is based on the grounds of air quality (on the basis that the Government has misunderstood and misapplied the law on air quality), climate change and strategic environmental assessment, including failing properly to deal with noise consequences and surface access impacts.

Friends of the Earth and Plan B, who argue that the proposals are inconsistent with the UK government's greenhouse gas reduction commitments, have already been granted the permission they need to take their claim forward and this will proceed to a full hearing in March 2019.

2019 promises to be yet another tumultuous year in the ongoing battle for airport expansion.

In other news, Heathrow Airport has been fined £1.6m in relation to an attempt to restrict a competitor's parking prices. Look out for a further update from us on this.

Land Value Capture Report

September saw the publication of the Housing, Communities and Local Government Committee's Land Value Capture Report.

The key conclusion from the report was that there was "scope for central and local government to claim a greater proportion of land value increases through reforms to existing taxes and charges, improvements to compulsory purchase powers, or through new mechanisms of land value capture."

Amongst the recommendations in the report were the following:

- The CPO process should be further simplified, to make it faster and less expensive for local authorities, whilst not losing safeguards for those affected.
- The Land Compensation Act 1961 requires reform so that local authorities have the power to compulsorily purchase land at a fairer price.
- The compensation paid to landowners should reflect the costs of providing the affordable housing, infrastructure and services that would make a development viable, as well as capturing a proportion of the profit the landowner will have made.
- Local authorities should consider using their existing CPO powers to enforce Local Plan policies, in particular in relation to affordable housing, where some developers seek to use viability assessments to avoid their obligations.
- If the Community Infrastructure Levy (CIL) is to become an effective mechanism for capturing development value for the provision of local infrastructure, it requires considerable reform.

Unsurprisingly, the Local Government Association welcomed the findings, stating that "[g]overnment action on these recommendations would have a significant impact in building more homes with the right infrastructures and places that people want to live and work."

Others, including the British Property Federation, have urged the government to exercise caution when reforming this area, the BPF noting that the recommendations "could have unintended consequences on investment into communities and new housing delivery across the UK."

We too would urge caution in this area. Those involved in the development industry need to be able to invest with certainty. If that certainty is removed, it will not encourage developers to bring forward proposals, nor will it incentivise landowners to release their land for development. Instead of stimulating development, we could see it stifled.

Guidance on Recording Planning Decisions

September saw the Local Government and Social Care Ombudsman (LGSCO) publish guidance for planning practitioners on recording planning decisions.

Backed up by case studies grouped into three key themes (consideration of material planning conditions; information taken into account; and clear records of a decision and reasons), the document looks at the LGSCO's general approach to handling complaints in relation to planning decision making and provides a good practice guide with key points for decision makers to remember when considering and recording planning decisions.

CIL and Retrospective Planning Permission

A recent appeal decision highlights that care must be taken if retrospective planning permission is applied for.

Following the grant of planning permission, a development was built out, but not in accordance with the approved scheme. Therefore retrospective consent was secured.

At the date of the original grant, there was no Community Infrastructure Levy (CIL) charging schedule in place but, prior to the grant of the retrospective consent, one had been adopted.

The development was therefore found to be CIL liable and because a commencement notice had not been served prior to development commencing, the local planning authority was entitled to levy a surcharge for failure to serve the requisite notice.

Although the inspector noted that this was unfortunate, it arose as a result of works not being carried out in accordance with the original permission, so was of the developer's own making.

The decision emphasises that proper consideration should always be given to the potential CIL liability of any proposed development and that a cautious approach should be adopted to ensure that a strategy which protects appropriate exemptions and reliefs is put in place.

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