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JUNE 2014 *Planning, Environment & Property Law Newsletter*

Welcome to the June edition of this newsletter.

In this month's edition, Stephen Tromans QC provides an update on biodiversity offsetting and Richard Harwood OBE QC explains the new power under section 26H Planning (Listed Buildings and Conservation Areas) Act 1990 to issue certificates of lawfulness for proposed works to listed buildings. Colin Thomann considers the recent decision of the High Court in *R (RSPB) v DEFRA and BAE Systems (Operations) LTD* and Jack Anderson discusses the amendments to the EIA Directive under EIA Directive 2014/52/EU, which was adopted on 14 April 2014.

We hope you enjoy it.

Philippa Jackson

Certificates of lawfulness of proposed works to listed buildings

Richard Harwood OBE QC

The Enterprise and Regulatory Reform Act 2013 has introduced a new section 26H into the Planning (Listed Buildings and Conservation Areas) Act 1990 to introduce certificates of lawfulness of proposed works to listed buildings. This is modelled on the lawful development certificate regime which applies to the need for planning permission.[1] These provisions came into force on 6th April 2014[2] and procedural details are set out in the Planning (Listed Buildings) (Certificates of Lawfulness of Proposed Works) Regulations 2014 and the rules and regulations on planning enforcement appeals.

The certificate system only applies to proposed works. It is not possible to apply for a certificate after the works have been carried out as the government did not want to encourage owners to carry out works first and then seek a determination that consent was not required afterwards.

By section 26H(1) a certificate application may be made by 'a person who wishes to ascertain whether proposed works for the alteration or extension of a listed building in England would be lawful'. In principle works may be lawful for a variety of reasons: if they do not alter the building (such as the removal of a statue which is not part of the listed building), do not affect the special interest of the building or are consented by a listed building consent, development consent order, listed building consent order or heritage partnership agreement. Indeed lawful development certificates in respect of planning control[3] may be granted for actions which are lawful for any reason.

However the meaning of 'lawful' in section 26H is problematic. Section 26H(2) says that 'For the purposes of this section works would be lawful if they would not affect the character of the listed building as a building of special architectural or historic interest'. This raises two issues. Firstly carrying out works in breach of a condition on a listed building consent would be an offence under section 9(2) and so not lawful in any ordinary meaning of the word. The second is whether sub-section (2) is exclusive or whether works could be lawful for the other reasons discussed above.

The application must specify the building and describe the works, be in a prescribed form and accompanied by statements justifying the application.

[1] Much of the caselaw on lawful development certificates under sections 191 to 195 of the Town and Country Planning Act 1990 will apply to the listed building certificates: see *Planning Enforcement* Richard Harwood QC, published by Bloomsbury Professional (2nd Edition, 2013), chapter 23.
[2] Enterprise and Regulatory Reform Act 2013 (Commencement No.6, Transitional Provisions and Savings) Order 2014, Article 3.

[3] Sections 191 and 192, Town and Country Planning Act 1990.

No consultation or publicity is required in the legislation. Local planning authorities may choose to consult English Heritage or specialist conservation bodies or to publicise an application.

If the local planning authority are provided with 'information satisfying them that the works described in the application would be lawful at the time of the application, they must issue a certificate to that effect; and in any other case they must refuse the application'. They are though allowed to allow or refuse an application for all or part of the listed building or the works.

Where a certificate is refused, allowed in part or the description modified, the decision notice must 'state clearly and precisely the authority's full reasons for their decision'.

The works in a certificate are 'conclusively presumed to be lawful' provided that they are carried out within 10 years beginning with the date of issue of the certificate and the certificate has not been revoked.

Certificate of lawfulness appeals

There is a right of appeal to the Secretary of State against refusal of the application in whole or in part, modification or substitution of the description or a failure to determine the application within six weeks or any longer period agreed in writing. Notice of appeal has to be given within six months.

Appeals determined by hearings or inquiries are subject to the enforcement notice appeal rules. An appeal will be allowed if refusal was, or would not have been, well-founded.[4]

Revocation of works certificates

Revocation of a certificate by the local planning authority is only possible:[5]

"if, on the application for the certificate –

(a) a statement was made or document used which was false in a material particular; or

(b) any material information was withheld."

[4] Section 26K(4), Listed Buildings Act 1990.
[5] Section 26I(6), Listed Buildings Act 1990.

High Court challenges to certificate decisions

A local planning authority's decision to grant a certificate could be challenged by judicial review in the Planning Court. A decision on an appeal would be challenged by an application to the court under section 63 of the Listed Buildings Act.

This article is based on the Supplement to Historic Environment Law published by the Institute of Art and Law http://www.ial.uk.com/helsupp.php

Protection of Species under the Wild Birds Directive

***R (RSPB) v DEFRA and BAE Systems (Operations) LTD & anr* [2014] EWHC 1645 (Admin)**

Adjoining the left bank of the Ribble Estuary there is an extensive area of mud flats and saltmarsh. It has supported, in recent years, 4,100 breeding pairs of Lesser Black-backed Gull and 500 pairs of Herring Gulls. On the right bank of the Estuary is Warton Aerodrome. Here, British Aeropsace operates the principal UK facility for developing, manufacturing and testing military aircraft. It was with a view to mitigating the risk of aircraft damage and crashes through ingestion of large, thermalling birds that British Aerospace sought a consent for a cull of a limited number of breeding pairs.

In the action for judicial review, the Royal Society for the Protection of Birds challenged the decision of the Secretary of State to direct Natural England to give consent for the culling of 552 pairs of Lesser Black-backed Gull as well as further operations to maintain population levels of Herring Gull at a reduced level following the cull of 500 breeding pairs. The case turned primarily upon the impact of the plan upon the population of Lesser Black-backed Gulls, which had been notified to the European Commission as a designated feature of the site. It was argued that, Natural England having accepted that there was a stable "baseline" population of 4,100 breeding pairs on site, any human intervention reducing these numbers constituted, by definition, a breach of the Secretary of State's Directive obligations.

In his judgment of 21 May 2014, Mr Justice Mitting observed that, in so far as Directive 2009/147EC

had sought to codify the Wild Birds Directive "in the interests of clarity and rationality", the European legislator had failed to achieve that aim. By Article 6(3) of the Council Directive 92/43 ("the Habitats Directive") it was clear, however, that the determinative question was the impact of the plan consented to upon the integrity of the special protection area. This involved an exercise of judgement on the Secretary of State's part. He had regard to the exponential increase in numbers of breeding pairs of these large gulls since the 1970s. It was self-evident that the habitat of the gulls would not be interfered with, except temporarily. The Secretary of State had plainly been entitled to conclude that the long-term viability of the designated species on this site would not be impaired, nor would the integrity of the site be affected.

The judgment is of interest principally for a number of observations which did not ultimately bear upon the judge's robust endorsement of the Secretary of State's assessment. Thus Mr Justice Mitting took it to be settled law that, in assessing the appropriateness of steps taken to avoid deterioration of special protection areas, for the purposes of Article 6(2) of the Habitats Directive, regard had to be had to the objectives of the Habitats Directive rather than the Wild Birds Directive. He thereby confirmed the approach of the First Division of the Inner House of the Court of Session in *Royal Society for the Protection of Birds v Secretary of State for Scotland* [2000] SLT 1272.

By contrast, the assessment of plans and projects under Article 6(3) of the Habitats Directive presented less difficulty. Project impact was to be assessed, as the wording of Article 6(3) made clear, by reference to the site's "conservation objectives". Those objectives were not defined in either Directive, but, at a higher level, were those of ensuring the survival and reproduction of migratory species of birds in their area of distribution: Articles 4(1) and 4(2) of the Wild Birds Directive. He further accepted as material the aim in Article 2(1) of the Habitats Directive: contributing to biodiversity through the conservation of natural habitats and of wild fauna and flora.

Secondly, Mr Justice Mitting addressed the role of Natural England in setting conservation objectives. By Regulation 5(1) of the Conservation of Habitats and Species Regulations 2010, Natural England was the appropriate nature conservation body for England. Its duty in the context of a European marine site was, as regulation 35 made clear, to *advise* other relevant authorities as to conservation objectives. It was thereafter for the Secretary of State to determine the conservation objectives for the Ribble Estuary site, taking into account Natural England's views.

The judge rejected, finally, the suggestion by the Royal Society for the Protection of Birds that the Wild Birds Directive should be construed as prohibiting any non-natural intervention, or cull, of a designated species below its present stable population level within a special protection area. The specification of population levels was but a feature of the national application of more general requirements set out in Article 6(3). The judgment repays close reading.

Stephen Tromans QC and Colin Thomann represented the Secretary of State for Environment, Food and Rural Affairs.

Biodiversity offsetting and housing land supply

In the last Newsletter we referred to the appeal in respect of housing development at Thaxted, where objections relating to biodiversity effects had been overcome by provision of an offsetting site. The appeal has now been allowed and planning permission granted: *Appeal Reference APP/C1750/A/13/2206357, 22 May 2014, Tim Wood BA (Hons), BTP, MRTPI.* As well as endorsing the offsetting approach, the admirably concise decision letter deals with the issue of housing land supply. The council could not demonstrate a 5 year housing land supply at the time of refusal, but claimed that it could by the date of the inquiry. The inspector accepted the evidence of the appellants that housing supply was fragile and dependent on windfall sites and draft local plan allocations, which was inappropriate. Accordingly the relevant policies for the supply of housing could not be considered up to date in the light of the NPPF and that the proposal represents sustainable development.

Stephen Tromans QC represented the appellants, instructed by Barr Ellison LLP (partner Elizabeth Deyong). Witnesses were Guy Kaddish of Bidwells (planning policy and housing land supply), Roland Bull of Bidwells (land management), and Max Wade of RPS Group (ecology).

Amendments to EIA Directive 2011/92/EU

On 14 April 2014, the Council of Europe adopted a directive amending the EIA Directive 2011/92/EU with a view to strengthening the role of EIA (EIA Directive 2014/52/EU). It will of course be for the UK Parliament to see to the transposition of the Directive but a number of significant changes will be required.

In order to establish whether EIA is required, developers will need to submit a screening report: the new Article 4(4). Member states may set thresholds or criteria to determine when projects need not undergo such a determination or shall in any case be subject to a determination. A new Annex IIA to the Directive prescribes what information the developer is to submit in order for there to be a determination as to whether EIA is required. A description of the project is required to include a description of the physical characteristics of the project and, where relevant, of demolition works and a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected. A description of the aspects of the environment likely to be significantly affected is required. A description of any likely significant effects, to the extent of the information available on such effects, of the project resulting from the expected residues and emissions and waste and the use of natural resources, in particular soil, land, water and biodiversity, is required.

Article 3, which defines the effects which EIA shall identify, describe and assess is amended: EIA assessment shall now address the direct and indirect significant effects on a project on population and human health; biodiversity; land, soil, water, air and climate; material assets, cultural heritage and the landscape and the interaction between these factors. A new Article 3(2) provides that the effects on those factors shall include the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project.

As to the EIA assessment itself, environmental statements are to be replaced by EIA reports. EIA reports are to include at least:

(a) A description of the project comprising information on the site, design, size and other relevant features of the project.

(b) A description of the likely significant effects of the project on the environment.

(c) A description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment.[1]

(d) A description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment.

(e) A non-technical summary of the information above.

(f) Any additional information specified in Annex IV of the Directive relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.

Annex IV sets out additional information that must be provided by the developer where EIA is required in relation to specific characteristics of a particular project or type of project and the environmental features likely to be affected.

A description of operational energy use is also required [Annex IV(1)(c)] and information as to the nature and amount of waste likely to be produced during construction and operation [Annex IV(1)(d)]. There must also be assessment of the cumulative effects with other existing and approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources.

EIA reports must be prepared by "competent experts", a term left to be defined by member states. It will be interesting to see how Parliament defines this key term. The recital to the Directive records that "experts involved in the preparation of environmental impact assessment reports should be

[1] This wording amends the wording of the existing Directive, which requires a developer to provide "an outline of the main alternatives studied". However the significance of, and rationale for, this change of wording is not currently clear.

qualified and competent. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality."

Where the competent authority produces a scoping opinion (whether at the request of the developer or otherwise), a developer will have to use the response as the basis for their EIA report [new Article 5(1)]. That could substantially increase the significance of a scoping opinion, and the difficulties if such opinion is ill considered. Member states are empowered to require competent authorities to give a scoping opinion whether or not the developer requests that they do so.

Article 8(a) requires all design modifications, mitigation and monitoring proposals relating to significant adverse effects to be incorporated in a development consent (new Article 8a) and, importantly, requires Member States to ensure that developers comply with those obligations when the development goes forward [Article 8a(4)]. A new Article 10a requires states to lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive, such penalties to be effective, proportionate and dissuasive.

States must also endeavour to coordinate EIA assessment with other assessments required by EC legislation such as assessments under the Habitats Directive and designate an authority for that purpose [new Article 2(3)]. The wording of this provision is relatively weak but developers and prospective objectors alike might welcome better coordination of the various processes.

Member states have three years to implement the new Directive i.e. until 16 May 2017.

Strategic Environmental Assessment

Stephen Tromans QC delivered a paper to the Planning and Environmental Bar Association (PEBA) Annual Conference on Strategic Environmental Assessment. The paper, co-written with Ned Helme, is available on the Thirty Nine Essex Street website. It provides an overview and commentary on the rash of recent cases on SEA, including the Supreme Court decisions in Walton and HS2. It highlights the growing tension between a wide purposive approach to the SEA Directive, as adopted by the European Court of Justice and the more legally principled approach of the Supreme Court in HS2. It also addresses the controversial question of relief following the obiter remarks of Lord Carnwath JSC in HS2.

Stephen Tromans QC is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

Richard Harwood OBE QC specialises in planning, environmental, Parliamentary and public law. He appeared before Select Committees on the Channel Tunnel Rail Link Bill and Crossrail Bill and has drafted over 1500 amendments to Parliamentary Bills. Richard was awarded "Environmental /Planning Junior of the Year" at the Chambers Bar Awards 2011. He is the author of Historic Environment Law and Planning Enforcement. To view full CV click here.

Colin Thoman's public and environmental law practice covers planning inquiries, judicial reviews and regulatory matters. He acted for DEFRA in a number of cases engaging the Habitats Directive including the *Wightlink litigation (R (Akester) v DEFRA* [2010] EWHC 232 (Admin). He has a particular interests in legal issues arising from carbon emissions trading and acted for the interested party in *Edwards v The Environment Agency* [2008] 1 WLR 1587 (HL). Other reported planning cases include *Rafferty & Jones v SSCLG* [2009] EWCA Civ 809 (whether unoccupied plot of land could engage the Convention right to a "home"). He has been recommended as a leading junior for environmental law in the Legal 500 and Chambers and Partners was appointed to the Attorney General's B Panel of counsel in 2010. To view full CV click here.

Jack Anderson is instructed by both individuals and local authorities in relation to planning matters both at Inquiry (including enforcement appeals) and in the High Court. Recent work has included advice on the enforceability of s.106 agreements and advice on the scope of powers under the Buildings Act 1984 in the context of a listed building in a state of serious disrepair. Jack also has experience of highways law including arbitration proceedings under s. 265 of the Highways Act, Crown Court proceedings under s. 66 of the Highways Act in relation to maintenance of the highway and proceedings for obstruction of the highway and in relation to obtaining compensation for damage caused by improvements to the highway. He has advised on questions of environmental law including waste and permit trading and is a contributor to Westlaw Insight in relation to environmental law. To view full CV click here.

Philippa Jackson undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents, and challenges in the High Court. She has been listed for the past two years as one of the top planning juniors under 35 by Planning Magazine. Recent cases include *Stratford on Avon District Council v SSCLG & Ors* [2013] EWHC 2074 and *R (Church Commissioners for England) v Hampshire County Council & Anor* [2013] EWHC 1933. Recent inquiries include acting successfully for a Local Planning Authority in resisting a proposed supermarket in a conservation area (March 2014). To view full CV click here.

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