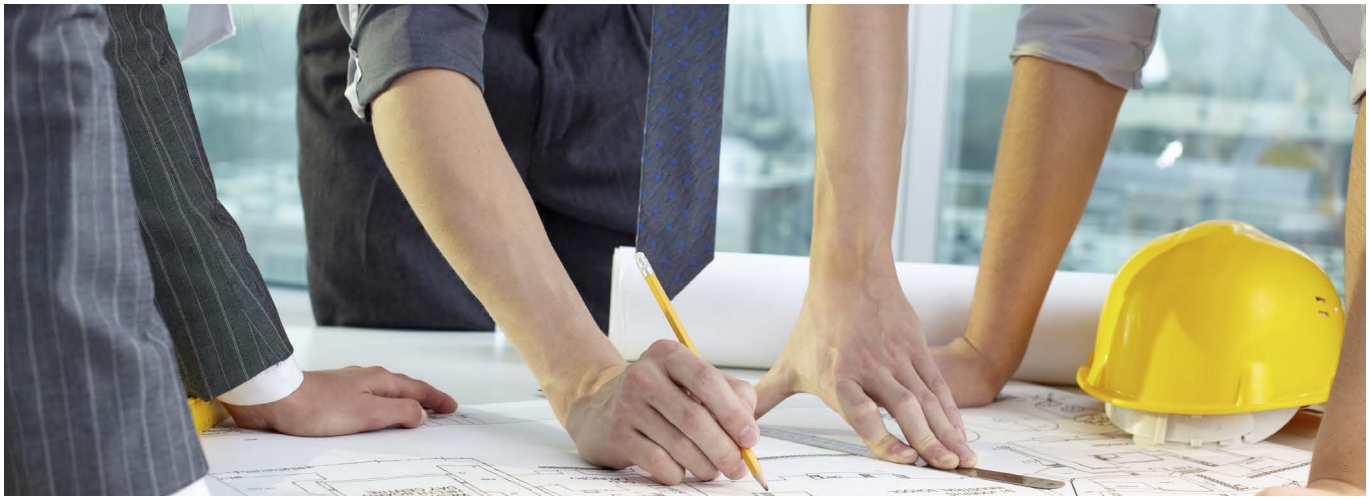

INTRODUCTION

Welcome to the 39 Essex Chambers' May newsletter. We have articles on topics as diverse as the determination of viability and the law concerning human remains, as well as advice for first time inquiry witnesses and a guide to the newly-introduced changes to the EIA and CIL regulations by Victoria Hutton, who has recently joined Chambers' PEP team from No 5 Chambers. We hope that you enjoy it.

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ARCHAEOLOGY AND HUMAN REMAINS

Richard Harwood OBE QC

Human remains and the circumstances in which they are found tell us something about how our ancestors lived and died. The consequences of burials for development projects are therefore not simply the cost of appropriately removing and reinterring the remains, but archaeological interest in their study. This increases costs and, to a degree, tensions.

Planning policy has had very little to say specifically on human remains. The topic is not mentioned in the NPPF. Earlier, and longer, guidance in Planning Policy Statement 5 *Planning for the Historic Environment* simply referred to the need to comply with burial and human remains legislation[1]. Advice has been given as to when archaeological research should intend to disturb remains and how remains should be handled in *Guidance for Best Practice for Treatment of Human Remains Excavated from Christian Burial Grounds in England*[2] but that advice is not directed at planning authorities. Whilst informal notes have been produced by some council archaeologists, whether and when development should be able to disturb human remains has not featured in planning policy. Planning authorities have not sought to devise policy on these matters. This may because the issue does not arise at the planning level that often. The burial grounds practice guidance said that several thousand human skeletons are disturbed each year in England as a result of building and other development work. A very small number of developments do lead to substantial numbers of exhumations. Excavations by the Museum of London between 1991 and 2007 at Spitalfields market have turned up over 10,500 medieval skeletons as well as earlier Roman graves. That is very much an exception and was driven by a political desire to expand the City of

1 PPS5, Policies HE6.3 footnote 11, HE12.3 footnote 17. Similar mentions appeared in the Scottish NPPG5 – Arhcaeology and Planning, para. 27.
2 English Heritage and the Church of England, 2005.

London beyond its historic boundaries and the very high development values which could afford such substantial archaeological work. Small-scale works in churchyards and some historic sites are liable to find remains almost as a matter of course. However the vast majority of developments do not affect human remains. Developers will usually seek to avoid a project which is likely to disturb remains as the cost of the sympathetic removal and reinterment will be considerable, and is increased further by the costs of archaeological investigation and recording.

These costs are illustrated by the Scottish case of *Manorgate Ltd v First Scottish Property Services Ltd*[3]. In 2006 Manorgate Limited purchased a site on the corner of Riggs Road and Whitefriars Street in Perth.

A Carmelite friary had been established on the site in fifteenth century. Over the centuries it fell into disuse and by Victorian times, no visible evidence of the establishment remained. However the name of the adjacent street, Whitefriars Street, may have contained a clue. Archaeological excavations in the area in 1982 had confirmed the existence of the friary and, having found the remains of 21 bodies, a burial ground with it. The dimensions of the buildings and burial ground were not known. The site was subject to a local designation as an area of archaeological interest subject to policy protecting archaeological remains and requiring their recording if disturbance was required. Unfortunately no archaeological designation was identified by the property search company who investigated the planning position on the site.

When pre-planning-application discussions took place with the local planning authority, Manorgate was told of the archaeological designation and the need for investigation. It appears that no archaeological assessment or evaluation took place before the planning application was determined. The planning permission included an archaeological works condition requiring an archaeological programme to be agreed and carried out. The Perth & Kinross Heritage Trust, who advised the local council, then said that the archaeological scheme needed to consider whether archaeological remains needed to be retained in situ.

The archaeological consultants instructed by Manorgate dug trial trenches and concluded that Manorgate's site might include the graveyard. Manorgate thought that any problems could be addressed by foundation design (leaving remains in place) and demolished the buildings on the site. Further archaeological investigations took place and engineers considered how the human remains could be avoided. However they were at a relatively shallow depth, soil conditions made a load-bearing slab unsuitable and a suspended slab was uneconomic, particularly as it still required a grid of foundations which needed to avoid the remains. The decision was taken to proceed with a full excavation to remove the human remains at a quoted price of £100,000 in the expectation that 20 to 25 bodies would be removed.

In the event, far more were found. After just over 100 had been exhumed, the archaeologists estimated that a further 100 would have to be removed. The cost of the works to that point had been £87,900, with a further £250,000 anticipated to complete the removals. That rendered the project unviable and after an unsuccessful attempt to obtain a more valuable planning permission, the site was backfilled and abandoned.

Manorgate sued the property search company for the losses on the project. It was admitted by the search company that it should have referred to the archaeological designation. The Court accepted that Manorgate would not have proceeded if it had been told of the archaeological designation given the potential risks and, once the nature of the issue was understood, the moral aspect of disturbing human remains[4]. Having rejected arguments that Manorgate was itself solely at fault, was contributorily negligent in not investigating the site further before purchase and had failed to mitigate its loss, the Court awarded damages to Manorgate. Manorgate recovered the loss of value of the site, abortive expenditure and loss of trading profits. A claimed loss of development profit from the inability to develop and sell off some of the land was considered to be too remote. The total damages awarded were around £680,000.

This article is based on an extract from Richard Harwood's chapter 'Development of Land and Human Remains'

3 [2013] CSOH 108.
4 Judgment, para. 52-55.

in 'Heritage, Ancestry and Law: Principles, Policies and Practices in Dealing with Historical Human Remains' edited by Ruth Redmond-Cooper and published by the Institute of Art and Law in April 2015. The book is available with a pre-publication discount from http://www.ial.uk.com/hal.php

WHEN IS A DEVELOPMENT TO BE TREATED AS VIABLE?

John Pugh-Smith

The issue as to whether Section 106BA of the Town and Country Planning Act 1990 (the power to vary affordable housing provision) can apply to completed housing developments is one that has, till recently, been the subject of speculation. In one of three appeal decisions under Section 106BC involving residential schemes within Southend-on-Sea, Essex (APP/D1590/Q/14/2228061) the Inspector, Mr P.W. Clark, has now provided some useful pointers as to how the issue of viability should be approached. The scheme comprised 6 flats spread across two blocks, which had been constructed and occupied. Although triggering the planning obligation requirement to transfer two flats these had then been privately rented upon the basis that the affordable housing requirement did not make the development economically viable. The evidence from the parties' surveyors at the Section 106BC appeal hearing was positive albeit modest, 0.25% in the case of the appellant and 11.4% in the case of the Council, though both falling well short of a reasonable risk reward return of between 20-25% profit on cost. The Inspector noted that there is no definition of viability within the Act; that the DCLG publication, *Section 106 Affordable Housing requirements Review and Appeal* (April 2013), advises that the test for viability is that the current cost of building out the entire site is at a level that would enable the developer to sell all the market units on the site at a rate of build out evidenced by the developer and make a competitive return to a willing developer and a willing landowner; and that both the National Planning Policy Framework and the Planning Practice Guidance simply make reference to competitive returns to a willing landowner and willing developer to enable the development to be deliverable. He noted, too, the RICS Professional Guidance Note *Financial Viability in Planning* (94/2012) and its advice that a scheme should be considered viable as long as the cost implications of planning obligations are not set at a level at which the developer's return falls below that which is acceptable in the market for the risk in undertaking the development scheme. However, he concluded that although there was undoubtedly a risk before the development started, which would have justified building in a reasonable expectation of 20% profit on GDV, there was now no longer any noticeable risk. Most matters were now certain because the development has been completed, the market units sold and the affordable units rented, albeit not to a social landlord. Moreover, there was no longer any need to enable the development to be "deliverable" because it had been delivered in all respects except the transfer of two flats to a social landlord. As there was no information to indicate what risk, if any, was now involved in bringing this development to a close, so none requiring a greater return than had been achieved, the Inspector found that the scheme was viable as it had not actually made a loss. He therefore concluded that as the affordable housing requirement did not mean that the development was not economically viable so the planning obligation needed no modification. Accordingly, the appeal was dismissed.

Whilst this appeal decision needs to be read in the context of the particular requirements of Section 106BA it is now apparent that this provision cannot be used simply to claw back a reduced profit or losses incurred once the commercial decision has been made to develop the land. It is also a striking reminder that, for planning purposes, viability is by no means a fixed concept, and, that risk will continue to play a significant part in how it should be judged.

John Pugh-Smith acted on behalf of the local planning authority, Southend Borough Council.

TWO KEY CHANGES TO FAMILIAR THREE LETTER ACRONYMS – EIA AND CIL

Victoria Hutton

As the planning world turns its attention to the upcoming election and wonders what the future holds post 7 May 2015, it would be wise not to overlook the significance of today: 6 April. Two notable changes to environmental and planning law came into force this morning and they will be likely significantly to impact large development

proposals across the country. They may, in turn, become the subject of litigation in the future. I discuss each below.

EIA – Town and Country Planning (Environmental Impact Assessments)(Amendment) Regulations 2015

In the environmental sphere, an amendment to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ('EIA Regulations') has come into force which raises the threshold for EIA screening.[5]

The amendments have been brought in to raise the thresholds beyond which certain categories of development project will require screening in order to determine whether an environmental statement will be necessary under the EIA Regulations and pursuant to Directive 2011/92/EU.

The relevant threshold changes are as follows:

- The threshold for industrial estate development projects is raised from areas exceeding 0.5 hectares to areas exceeding 5 hectares;

- The threshold for residential development is increased from 0.5 hectares up to 5 hectares. However, residential developments of more than 150 units require screening even if they fall below the 5 hectare area; and

- The threshold for other urban development is raised from 0.5 hectares to 5 hectares.

The new thresholds have been brought into force following the Government's 'Technical Consultation on Planning' (July 2014). The Government's response to that consultation makes clear that in their view these changes will lead to the cutting of 'unnecessary bureaucracy' and that in their view *'developments which will fall below the [proposed] thresholds will not be likely to have significant effects either alone or in combination with other projects because of their nature, location or impact.'*[6]

Note that there is no change to development in sensitive areas where thresholds do not apply for example in: National Parks, Areas of Outstanding Natural Beauty, Special Areas of Conservation, etc. Further, the Secretary of State can issue a screening direction for any project irrespective of whether it falls above or below the screening threshold. This includes in response to a third party request.

Note also that these changes are not the result of any change to the Directive. A new EIA Directive was adopted by the EU in May 2014 and the UK government has until May 2017 to transpose its provisions into domestic law.

Although these changes may be welcome to developers for whom the screening process has sometimes seemed an unnecessary burden, given that the changes represent a ten-fold increase to the relevant threshold their legality may well form the subject matter of a future High Court challenge. As such, given that the case law dictates that a precautionary approach must be taken when applying the EIA Directive[7], developers may wish to consider requesting a screening opinion from the Secretary of State regardless of whether a proposed development falls under the newly raised thresholds or not. The presence of specific site characteristics, for example proximity to an environmentally sensitive area or cumulation with other similar developments may well render such a request prudent.

Community Infrastructure Levy (CIL)

For Local Planning Authorities without a CIL schedule in place, and for those who are applying for development/ appealing adverse committee decisions in those authority areas, today arrives with some foreboding.

On 24 February 2014 the Community Infrastructure Levy (Amendment) Regulations 2014/365 came into force. They amended Regulation 123 the Community Infrastructure Levy Regulations 2010 the relevant parts of which states:

(1) This regulation applies where a relevant determination

5 By virtue of the Town and Country Planning (Environmental Impact Assessment)(Amendment) Regulations 2015
6 DCLG, 'Government response to technical consultation on environmental impact assessment thresholds' (January 2015) Para 26
7 R(oao Loader) v Secretary of State for Communities and Local Government [2012]

is made which results in planning permission being granted for development.

…

(3) Other than through requiring a highway agreement to be entered into, a planning obligation may not constitute a reason for granting planning permission to the extent that –

(a) obligation A provides for the funding or provision of an infrastructure project or provides for the funding or provision of a type of infrastructure; and

(b) five or more separate planning obligations that –

(i) relate to planning permissions granted for development within the area of the charging authority and

(ii) which provide for the funding or provision of that project or provide for the funding or provision of that type of infrastructure,

have been entered into ***on or after 6th April 2010'*** *(my emphasis)*

A 'relevant determination' for the purposes of paragraph (3) is defined at paragraph (4) as being 'a determination made on or after 6th April 2015 or the date when the charging authority's first charging schedule takes effect, whichever is earlier'.

The roots of this long-stop date (which has continually been put back) are found in the Government's intention to ensure that the vast majority of planning contributions are paid through the simplified CIL system rather than through individual s106 agreements. It is no longer possible for a planning obligation to be taken into account as a reason for granting planning permission if the obligation provides for the funding or provision of a type of infrastructure and five or more separate planning obligations entered into on or after 6 April 2010 provide for that funding or for that type of infrastructure.

In July 2014 Savills were reporting that the majority of LPAs would fail to have a charging schedule in place before today[8]. It is therefore expected that Regulation 123 will prove to be a difficult barrier to the provision of infrastructure in those authorities who continue to be without a CIL schedule.

Developers and local authorities alike would of course be wise to take advice in relation to individual planning obligations which are required to mitigate the impact of any proposed development. For those who have not yet submitted a planning application in a local authority area which does not currently have a CIL schedule in place, it may be worth considering whether elements often contained within a s106 could instead form part of the development's description. For example: if a proposed housing development is large enough to require an entire primary school to mitigate its impact then it may be possible to provide this on site and to include it in the development's description. This may enable a developer to bypass the Regulation 123 problem.

This article was written by Victoria Hutton, who is rated as one of the top ten planning barristers under 35 (Planning Magazine, 2015). She acts in a wide range of planning and environmental law matters and is happy to accept instructions from developers, local authorities or other interested parties.

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT v VENN [2014] EWCA CIV 1539

Jon Darby

- *Application of PCO regime to statutory applications under section 288*
- *CPR 45.41 not compliant with the Aarhus Convention insofar as it is confined to applications for judicial review, and excludes (environmental) statutory appeals and applications*

Previously, in *Venn v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin), Mrs Justice Lang had held that CPR rule 45.43 was limited to judicial review proceedings only. In distinguishing between section 288 applications and judicial review claims, she had noted that although *"applications under section 288 frequently raise the same public law issues as in judicial review claims, the wording of CPR 45.41 refers*

8 Savills, CIL, The Countdown to April 2015, July 2014

to 'claims' not 'issues'". Whilst agreeing that it *"seems inconsistent"* to exclude section 288 claims from costs protection it was nevertheless acknowledged that *"there has been no ruling in the EU or UK courts that their exclusion from CPR 45 is unlawful"*. Notwithstanding, Mrs Justice Lang held that the *"inherent jurisdiction of the court to grant protective costs orders"* and a consequential relaxation of the *Corner House* criteria in relation to environmental claims would enable the court to give effect to the requirements of the Convention. She then adopted the approach in *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 and [2011] EWCA Civ 891), and *"treated the public importance and public interest criteria for making a protective costs order as met"* because the claim raised *"environmental matters within the scope of the Convention"*.

In its recent judgment, the Court of Appeal confirmed that the Convention definition of environmental information is sufficiently broad to catch most planning matters, including section 288 applications. Therefore, such challenges fall within Article 9(3) of the Aarhus Convention and require access to a judicial procedure that is not prohibitively expensive. However, the Court of Appeal also held that CPR 45.41 is clearly worded and specifically confined to claims for judicial review. Further, the court held that it could not exercise its discretion to make a PCO under *Corner House* principles because the exclusion of statutory appeals and applications from CPR 45.41 was a deliberative expression of legislative intent, which it would be inappropriate to circumvent.

In light of the above, the present costs protection regime is flawed in that the identity of the decision-taker is of greater significance than the decision itself. The Court of Appeal indicated that such a system is *"systemically flawed"* in terms of Aarhus compliance. Following the clear steer provided by the Court of Appeal it would be surprising if the government's ongoing review of the costs regime in environmental cases does not explicitly consider whether provision ought properly to be made for statutory challenges.

MOORE AND OTHERS v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2015] EWHC 44

Rose Grogan

This case, decided in January 2015, concerns the legality of the Secretary of State's approach to the recovery of planning appeals for gypsy and traveller pitches within the Green Belt.

From the last part of 2013 until September 2014, the Secretary of State recovered appeals relating to pitches for caravans in the Green Belt for his own determination. This practice was challenged on the basis that it was indirectly discriminatory to ethnic communities (in particular Romany gypsies and Irish Travellers) because it led to a significant delay in determining their appeals compared to those determined by Inspectors.

The statistics relied upon by the Appellants are of some interest. First, there was a considerable disparity between recovery in non-traveller residential Green Belt cases and recovery of traveller residential Green Belt Cases. Second, evidence was produced to show that appeals determined by Inspectors usually had a decision issued within 8 weeks, whereas if a decision is determined by the Secretary of State, the average time is 6 months. In the case of the Claimants, they had been waiting for decisions for over a year.

The Claimants were successful in their challenge that the Secretary of State's practice amounted to unlawful indirect discrimination. There was a disproportionate adverse impact on an ethnic group, and the Secretary of State had failed to show that the practice was a proportionate way of achieving a legitimate objective. The Secretary of State had also failed to discharge his duty under s.149 of the Equality Act 2010 (the Public Sector Equality Duty). Although this duty is only a procedural one (to have "due regard"), in this case he had had no regard at all to the need to eliminate discrimination, advance equality of opportunity and foster good relations between persons who share a protected characteristic and those who do not. This was not to say that a policy of recovering a certain class of appeals could never be lawful, but any such policy had to be made and exercised in accordance with the duties

set out in the Human Rights Act 1998 and the Equality Act 2010.

The Claimants were also successful in their challenge under article 6 ECHR, on the basis that the delays in deciding the appeals were not necessary or justified, and they had not been determined within a reasonable time.

10 TIPS FOR FIRST TIME WITNESSES
Jon Darby

A version of this article, written by Jon Darby, was first published in the Spring Edition of the RTPI East of England Newsletter.

For many, giving evidence before Inspectors is second nature. This short article is aimed at those readers who are not so familiar with the inquiry process. Those who are inexperienced, unsure or simply looking for a few practical tips please read on!

1. **Know your evidence.** There is no such thing as knowing your proof too well. You cannot read it enough. Know it inside out and ensure that by the time you are asked to adopt its contents you are entirely happy with the same; comfortable with its associated logic, reasoning and references. Ask colleagues to comment upon draft versions in order to assess the accuracy and cogency of your reasoning.

2. **Identify any weaknesses.** Once you have worked through a number of drafts and had them reviewed by others you should be able identify any residual weaknesses in your reasoning, the evidence or your case. Take the opportunity to address them. Consider issuing a rebuttal proof if the other side has challenged specific points. Furthermore, if your reasoning has weaknesses then consider carefully how you will address them in evidence. Most important of all, be prepared to address them during cross-examination because if you have spotted them it is very likely that the other side has too.

3. **Be reasonable and make appropriate concessions.** Stubbornly sticking to your case notwithstanding any weaknesses that you might have identified does more to damage to your credibility than it does in furthering your case.

4. **Share knowledge and experiences.** Linked to points 1 and 2 above, discuss your written evidence with your colleagues and your advocate. Work through draft versions to refine your arguments and reasoning. Discuss your colleagues' experiences giving evidence prior to your inquiry. Forewarned is forearmed.

5. **Deliver your evidence clearly and logically.** Speak up and look the Inspector in the eye. Speak more slowly than usual, as the Inspector and others will be taking a detailed note of what you are saying. Should Counsel or the Inspector repeat one of your answers back to you make sure that you listen carefully. The accuracy and detail is important.

6. **Familiarise yourself with the documents.** Make sure you are able to take Counsel and the Inspector to any supporting documents, annexes, plans, maps and drawings with confidence and assurance. Check that the Document bundles have been properly divided and labeled before you start giving evidence.

7. **Listen to the question.** If necessary repeat it back. Make sure that you answer the question directly. If you want to qualify your answer ensure that you are given the opportunity to do so. Avoid agreeing with the Inspector or others just for the sake of it. If you disagree be prepared to say so and explain why.

8. **Avoid unnecessary repetition.** Do not ramble; be clear and to the point.

9. **Take your time.** Compose your thoughts before answering. If you need a few moments' thinking time then ask for it. You are entitled to consider your answer or to check your papers and notes.

10. **Do not panic!** With preparation and composure there is no need for even inexperienced witnesses to find the inquiry process as daunting and intimidating as it may at first appear.

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Richard specialises in planning, environment, Parliamentary and public law, appearing in numerous leading cases including *SAVE Britain's Heritage, Mellor v SoS* and *R(Holder) v Gedling BC*. Recent cases include housing, retail, minerals, development consent orders, High Speed 2 and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Enforcement (2nd Edition, 2013) and Historic Environment Law (2012, Supplement 2014). Environment/Planning Junior of the Year in 2011, he is ranked in the top ten Planning Silks in Planning magazine's 2014 survey. To view full CV click here.

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John's principal practice areas are town & country planning and environmental law. He deals with related local government, parliamentary and property work. He is also a practising mediator. In growing recognition of John's wide-ranging planning and mediation experience, he has also been appointed both as a Design Council Cabe Built Environment Expert and as one of the DCLG's "Section 106 brokers". To view full CV click here.

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Rose joined chambers in 2011 following successful completion of her pupillage. Since joining chambers, she has been instructed in a range of planning and compulsory purchases cases including assisting with an appeal to the Supreme Court in a challenge to a compulsory purchase order. She regularly advises on planning matters and has experience of village green inquiries. Rose also practices in the related fields of construction law, environmental law and public law. To view full CV click here.

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