EDITORIAL COMMENT
The Editorial Board

It has been a successful month for chambers, with the set's planning, environment and property team winning 2 prestigious awards at the 2015 Chambers Bar Awards, which were held Old Billingsgate on Tuesday 27th October 2015. Not only did the set win 'Environmental & Planning Set of the Year' for the second year in a row but James Burton also collected the 'Junior of the Year' award. We are collectively delighted in respect of both awards. Whilst on the subject of awards, John Pugh-Smith was recently named 'Planning & Environmental Barrister of the Year' in the 2015 Lawyer Monthly Awards.

Further to the above, it is also worth noting that our colleague, Richard Harwood QC has been appointed to a new group of experts intended to help streamline the local plan-making process. Richard features in this month's newsletter with an article on planning permission 'in principle'.

It has also been a busy month in the world of planning, with the announcement both of the permanent retention of 'office to resi' permitted development rights as well as the extension of related rights to allow office blocks to be demolished and replaced by dwellings. Furthermore, the Housing and Planning Bill appears to signal a further shift in the localism balance, with developments in respect of zoning and 'automatic' permissions. It has also come to light that the government is to allow major infrastructure projects "with an element of housing" to apply for planning permission via the Nationally Significant Infrastructure Project (NSIP) regime. Procedurally, the introduction of a permission stage for statutory challenges promises to change the dynamic of such challenges for both claimant, defendant and interested parties alike, with strategic advice likely to be required at a much earlier stage. Such changes ensure that there is much to be debated and discussed over the coming months as further detail is announced and digested.

Contents

Editorial Board

We hope that this month's newsletter will provide some fuel for those debates and discussions. First, Stephen Tromans QC considers the "Role of Judges in Natural Resources Developments" in a paper that was given by Stephen at the recent IBA Annual Conference in Vienna. Second, Victoria Hutton examines the developing body of case law on Neighbourhood Plans and considers the questions which have been asked of the Courts and the answers received thus far. Richard Harwood QC then considers planning permissions 'in principle' before Jonathan Darby concludes with a brief consideration of the East Sussex case from the CJEU.

As ever, thanks for your interest. We hope you enjoy this month's newsletter.

ROLE OF JUDGES IN NATURAL RESOURCES DEVELOPMENTS

Stephen Tromans QC

Paper given by Stephen Tromans QC at the IBA Annual Conference, Vienna, October 2015.

Shale gas in the UK

Given the decline of coal mining in the UK since the 1960s and similarly the decline in North Sea oil and gas production, attention has turned to onshore oil and gas and in particular unconventional (shale) gas. This has attracted both strong political support and vehement public opposition in some quarters.

The House of Lords Economic Affairs Committee in its report in 2014 suggested that the Government needed to be more forceful in public advocacy of the economic benefits of well-regulated shale gas development and as part of this should explicitly address the safety issues.

The response, in England and Wales (as opposed to Scotland, where the Scottish Government announced a moratorium on 28 January 2015 pending research and public consultation) has been to enact the Infrastructure Act 2015, which aims to provide a regime which will enable the exploitation of shale gas while taking account of public concerns.[1] Reforms made by this Act include:

- A statutory property right of access to allow fracking under private land at depths of more than 300m ("deep level land".[2]

- A ban on fracking in (but not under) National Parks, Sites of Special Scientific Interest and Areas of Outstanding Natural Beauty.

- A new requirement of a Hydraulic Fracturing Consent (HFC) to be given by the Secretary of State before fracking can take place, and after all other necessary consents are in place. Prerequisites of the HFC will include that environmental impacts including cumulative effects have been assessed, arrangements for independent inspection of the well have been satisfied, necessary approval to substances used has been obtained, and restoration has been properly addressed.

In addition, the Government has become concerned by the reluctance of some local authorities to grant planning permission (in the face of strong local opposition) for shale gas exploration or production. It took Lancashire County Council a year to refuse applications by Cuadrilla for permission for exploratory drilling of 12 boreholes. The Government announced in August 2015 that it would "call in" planning applications from local authorities which repeatedly fail to determine oil and gas applications within 16 weeks, and determine them itself.

The Government is also considering the design of a possible new sovereign wealth fund to enable local communities to share in revenues from shale gas exploitation.

Environmental impact assessment

There will undoubtedly remain strong objections to fracking and the courts will no doubt have to consider these provisions at some point. The requirements of environmental impact assessment (EIA) will certainly figure large in such challenges.

"Neighbours" of proposed development which presents potential risks to them cannot be deprived by national law of their rights to be informed of and participate in permitting decisions and must be able to challenge, for

1 For a useful summary, see Shale Gas and Its Development in the UK, Kevin Gibbs and Claire Brook [2015] IELR 82. For a more general discussion of the pragmatic issues of regulating unconventional extraction activities for tar sands and shale gas, see Hydrocarbon Hysteria, John Pearson [2015] JPL 3.

2 Dealing with the problem that under common law, surface landowners own the substrata and their consent would be required or the cumbersome procedures of the Mines (Working Facilities and Support) Act 1966 would have to be invoked: see Bocardo SA v. Star Energy Limited [2010] UKSC 35.

example, whether EIA should have been undertaken: See Case C-570/13 Grüber.

Whilst exploratory drilling is not Annex I development under the EIA Directive for which EIA is mandatory (it is "commercial" but at that stage it is not known how much, if any, gas will be extracted) it is a form of "deep drilling" falling within Annex II so that EIA is required if it may have significant effects. In considering if EIA is required, cumulative effects with other projects (not simply other fracking projects) must be considered: See Case C-531/13 Marktgemeinde Straßwalchen v Bundesminister für Wirtschaft.

Broadly there are three types of case:

1. Where no EIA has been carried out when it should have been.
2. Where the EIA which has been carried out is allegedly defective.
3. Where there has been some procedural error.

The approach of the UK courts is somewhat different to each of these. In case 1, this will be regarded as a serious defect which makes the subsequent grant of permission unlawful. In case 2, the adequacy or otherwise of the environmental statement is regarded as a question of judgment for the decision maker, and a pragmatic approach is taken that an ES does not have to achieve perfection in covering every conceivable effect – moreover, what it can cover will be limited by what information is available at the time.[3] This may be particularly relevant if dealing with cumulative impacts by possible later projects.[4] In case 3 the Court is likely to look at what effect the procedural failure had.

This has given rise to quite heated debate on what remedy the Court should give. Should it quash the permission, or simply declare there has been a breach of requirements, or order that the procedural flaw be rectified (e.g. by publication or by providing reasons)?

For many years, it was thought that the power of the UK courts to decline to quash was very limited in cases where a breach of EU law was involved. However, in recent years the Supreme Court has seriously questioned that orthodoxy: See Walton v Scottish Ministers [2012] UKSC 44 and R (Champion) v North Norfolk District Council [2015] UKSC 52. Despite this however, it remains the position that cases where there is a substantive defect, as opposed to a formal or "technical" one are likely to result in a quashing order.[6]

It may be observed that there are factors here pulling in different directions. The UK Government is frustrated with delays to major energy and other infrastructure projects caused by judicial review challenges, the large majority of which fail. It has sought to curtail such challenges by stricter time limits and most recently by the Criminal Justice and Courts Act 2015, s.84 it has required that the High Court must refuse to grant relief if it appears to be "highly likely" that the outcome would not have been substantively different if the conduct complained of had not occurred.[7]

On the other hand, EU law requires that in cases involving EIA, the UK should comply with the UNECE Aarhus Convention on access to justice. Among the requirements of the Convention are that access to the courts in such matters should not be "prohibitively expensive" (Article 9(4)). The Government has been forced to bring in cost capping rules in appropriate cases to respect this. It may also be noted that Article 9(4) also requires that these procedures must provide "adequate and effective remedies".

3 The same approach can be seen in the US in cases such as Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal App 4th, 351, 368 – "technical perfection is not required"; the courts look "not for an exhaustive analysis, but for adequacy, completeness and a good faith attempt at full disclosure". It may be particularly important in considering projects such as fracking where there may be a lack of information on likely effects.

4 See R (Larkfleet Limited) v. South Kesteven District Council [2015] EWC Civ 887; and also R (Forest of Dean Friends of the Earth) v. Forest of Dean District Council [2015] EWCA Civ. 683 (considering a related issue in the context of assessing effects on European protected habitats).

5 In Champion it was found that there were risks which had not been resolved by proposed mitigation measures which meant that EIA should have been required. This defect was not rectified by mitigation measures later put forward. However, this was classified as a procedural defect and one which would have made no difference to the outcome, if the investigations and consultations which happened prior to the grant of planning permission had taken place within the framework of EIA. It did not prevent "the fullest possible investigation … and the involvement of the public" (paras. 59, 60, 62).

6 For recent examples see Gerber v. Wiltshire County Council [2015] EWHC 524; R (Davies) v. Carmarthenshire County Council [2015] EWHC 230.

7 It may only disregard this if it considers it appropriate by reasons of "exceptional public interest".

Further, whilst the Court of Justice of the EU has accepted that judicial discretion applies in the granting of remedies, the burden of proving that the defect made a difference to the decision should not rest on the claimant, and that the court should look at the seriousness of the defect and whether it has deprived the public of the benefits of participation: See Case C-72/12 Gemeinde Altrip v Land Rheinland-Pfalz, paras. 52-54.

We can expect future battles on these issues in the courts, and natural resources cases such as energy, oil and gas are likely to find themselves on the front line.

THE LOCALISM AGENDA: NEIGHBOURHOOD PLANS

Victoria Hutton

It's fair to say that neighbourhood plans ('NP') have been a hot topic across the industry over the past 18 months or so. On 26 August 2015 'Planning Resource' reported that 57 neighbourhood plans have been adopted in England with 1450 applications having been made to local planning authorities by community bodies who wish to take on neighbourhood planning powers.[8]

The increase in neighbourhood plan activity has led to a concurrent rise in High Court challenges to neighbourhood plans or decisions which have taken emerging NPs into account as a material consideration. This article looks at some of the broad issues which have been raised before the High Court and Court of Appeal and the jurisprudence which has developed thus far.

Can a neighbourhood plan be 'made' prior to the adoption of a local plan?

The making of NPs tends to be most controversial when they come forward ahead of an adopted local plan ('LP') as a few of the cases have demonstrated.

In the case of *R(oao) Gladman Developments Ltd) v Aylesbury Vale DC* [2014] EWHC 4323 (Admin) the Claimant brought a challenge to the Winslow Neighbourhood Plan in Buckinghamshire. The NP contained a policy which established a settlement boundary and provided that development outside of that boundary would only be permitted in exceptional circumstances. The Claimant had interests in three sites outside of the settlement boundary.

The Winslow NP came forward in advance of a local plan setting out strategic policies for meeting the objectively assessed housing needs ('OAN') for the district. The main issue in the case was whether it was permissible for the NP to come forward before the LP. Given the fact that a significant number of local authorities remain without an up to date local plan the issue is of relevance across the country.

Paragraph 8(1)(a) of Schedule 4B to the Planning and Compulsory Purchase Act 2004 states that when examining the plan the examiner must consider whether the NP meets the basic conditions. Among the basic conditions in paragraph 8(2) is the requirement that making the NP would be 'in general conformity with the strategic policies contained in the development plan for the area of the authority'. The requirement for NPs to be in general conformity with an LP is also set out at paragraph 184 of the Framework. The Claimant argued that for an NP to decide housing need and allocate housing sites would be contrary to these legislative and policy provisions. The Claimant also argued that the Framework presupposes that housing policies would be based upon an OAN and NP policies not based upon an OAN would therefore be contrary to the Framework.

Mr Justice Lewis rejected the Claimant's arguments. In doing so he stated:

> *'58. In my judgement, a neighbourhood development plan may include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, even where there is at present no development plan document setting out strategic policies for housing.'*

The main reason for reaching this conclusion was there was no legislative or policy provision providing that an NP cannot include policies dealing with the development of land for housing in the absence of a development plan document which contains strategic policies on housing issues.[9]

8 Planning Resource, 'Map: neighbourhood plan applications' (26 August 2015) http://www.planningresource.co.uk/article/1212813/map-neighbourhood-plan-applications (last accessed 29 September 2015).

9 See paras 58-79 of the Judgement.

The reasoning in Gladman has recently been followed by the High Court in the case of *R(oao DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311 (Admin)[10]. In his judgement, Foskett J took the matter a stage further and analysed how a site which sits in a local authority area lacking an LP but has 'general planning merit' and meets the requirements of the Framework but not an NP might be unlocked for development. He stated:

> *'138. In the broadest sense, the fact that in a particular area there is no up-to-date Local Plan with which a "made" NDP can be "in general conformity" (because the latter has been made in advance of the former) may, as it seems to me, arguably be a material consideration in determining a planning application which conflicts with the made NDP. The weight to be attached to it will, of course, be a matter of planning judgment when the issue arises and will doubtless depend, at least in part, on the likely prospect of the emerging Local Plan being adopted and the extent to which there is a divergence between the made NDP and the emerging Local Plan. But this, in my view, offers some, albeit perhaps limited, prospect of unlocking for development a site that has general planning merit and otherwise meets the requirements of the NPPF, but which is currently not allocated for housing within the NDP.'*

That paragraph may provide some limited succour to those with development interests on sites which conflict with NP policies.

Can neighbourhood plans allocate sites for development?

The next pressing issue which has been resolved by the Courts is whether an NP can allocate sites for development or whether that is solely the role of Local Development Documents.

The Court of Appeal has thus far only given one judgement on a challenge to a neighbourhood plan. The case of *R(oao Larkfleet Homes Ltd) v Rutland CC* [2015] EWCA Civ 597 concerned the Uppingham Neighbourhood Plan. The main issue for the Court was whether it was lawful for a neighbourhood plan to include site allocation policies within it. The Uppingham NP allocated three sites for housing development but did not include the Claimant's site among them. The appellants argued that the effect of section 17 Planning and Compulsory Purchase Act 2004 was that site allocation policies could only be contained in a document adopted under that section (i.e. a Local Development Document).

The Court of Appeal agreed with the judge below. It stated that section 17 'has nothing to do with neighbourhood development plans' (para.19) which are governed by a separate statutory regime in a different part of the 2004 Act. The Court stated:

> *'21. The provisions relating specifically to neighbourhood development plans are plainly wide enough, as Mr Elvin accepted, to allow site allocation policies to be included in such plans. It would indeed be very surprising if site allocation policies could not be included in them, since the location of housing likely to be the single most important planning issue for a neighbourhood….In short, the statutory regime governing neighbourhood development plans clearly allows such plans to include site allocation policies.'*

The answer to the question is therefore an unequivocal 'yes' from the Court of Appeal. This is likely to focus the attention of developers towards co-operation with those preparing NPs in order to encourage the inclusion of their sites within the NPs.

What is the role of the examiner and the standard of review?

Many practitioners have been concerned about the 'light touch' nature of the NP examiner's role. This was picked up in the early challenge of *BDW Trading v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin) (judgement 9 May 2014) where Supperstone J highlighted the 'limited role of the Examiner which was to assess whether the Basic Conditions had been met' [81]. This was stated to be in contrast to the 'more investigative scrutiny of a local plan Inspector charged with determining whether the Local Plan as a whole is or is not "sound".' [83]

In the most recent judgement of the High Court *(DLA Delivery Ltd supra)* an argument was raised by the Claimants that the choice of examiner to the Newick NP lead to an appearance of bias. The ground was an attack on the system under which inspectors are chosen and rested on the fact that there was a strong incentive for

10 NB the case of DLA Delivery is currently on appeal to the Court of Appeal.

an NP steering group to choose an examiner with a proven track record for approving NPs.

Mr Justice Foskett stated that an attack on the 'system' could not be advanced without the Secretary of State being a party to the proceedings. However, he went out to say that in any event the points were unarguable. In doing so he stated:

> *'I cannot see how "the system" could be assisted by the involvement of examiners who, without discrimination, simply approve draft NDPs. Their role, of course, is only to decide whether the basic conditions have been met … and to that extent, the role is comparatively superficial…, but the process of judicial review (with all the delays to which it can give rise) is available to quash an NDP that has simply been "nodded through" by an examiner without addressing the issues properly and conscientiously. Such a process does not serve a local community well and, for my part, I am unable to see how a fair-minded observer, applying his or her mind to the issue with that factor in play, would see the fact that the choice of examiner is left to the LPA (in consultation with the Parish Council) as producing an unfair or non-independent result. It is in the interests of the local community to see its NDP in place without the risk of successful legal challenge.'*[148]

The judge went on to state that merely because a particular examiner has approved all (or most) of the draft NPs they have examined is not of any relevance. An examiner is likely to be presented with a prepared draft which has undergone a lengthy consultation process and therefore:

> *'[I]n that situation there is a good prospect that, even if not meeting entirely with the approval of the examiner (again, as occurred in this case), it is a document that will require only some modest modifications before it is capable of approval. It is not, therefore, difficult to see why many draft NDPs are approved, but equally the evidence indicates that some are not.'*[149]

When should a neighbourhood plan be the subject of a strategic environmental assessment and what should it include?

A number of the challenges to NPs have included a ground criticising the lack of a strategic environmental assessment ('SEA').

In *Larkfleet Homes* the Local Authority had issued a screening report which stated that an SEA was not required as the NP was not likely to have significant environmental effects. In that case the High Court (with whom the Court of Appeal agreed) stated that the screening report was 'badly expressed'. However the Court of Appeal stressed that *'documents of this kind are to be read as a whole and with a degree of benevolence.'* Therefore, the High Court was correct to conclude that the report had considered both the positive and negative environmental effects of the NP and that the screening report was lawful.

Other challenges have criticised the contents of SEAs. The Tattenhall Neighbourhood Plan which was the subject of the *BDW Trading* case was submitted for examination together with an SEA. The SEA was criticised by the claimants for not considering the effect of constraining delivery of housing in the district or whether an alternative policy approach would have been more sustainable. The High Court highlighted that article 5(2) of the SEA Directive:

> *'requires the "environmental report" to include information which "may reasonably be required" taking into account, inter alia, the content and level of detail of the plan, the stage in the decision-making process, and the extent to which certain matters are more appropriately assessed at different levels in the decision-making process…'* [73]

The High Court confirmed that whether or not an NP is compatible with EU obligations was a matter of planning judgement for the examiner. The court went on to conclude that no other options testing was reasonably required and therefore the Claimant's challenge on this ground failed.

Similar conclusions were reached by the High Court in *Gladman v Aylesbury* where the court stated:

> *'The claimant may be critical of the level of detail and may wish for more detail… The examiner was entitled to conclude, however, that this Neighbourhood Plan, dealing with the allocation of 455 new houses, did include a sufficient level of detail explaining that the allocation was based on the current form of the town whereas an alternative strategy, based on expansion in other directions, would have greater environmental impact.'* (per Lewis J [92])

These conclusions are unsurprising and follow the significant body of case law dealing with SEAs in relation to other development plan documents.

Summary and where next?

The questions posed above have been answered by the High Court and Court of Appeal in a manner which is disappointing to those seeking to challenge the making of NPs. The decisions highlight the wide ambit which NPs may have and also the lack of 'rigour' provided by the examination process. No doubt these decisions will encourage those with development interests to work with any relevant qualifying bodies in an attempt to ensure that their proposal finds favour with any emerging NP.

There remain a number of challenges in the pipeline which practitioners may wish to follow. These include the appeal of the decision in the *DLA Delivery* case. Permission has been granted by the High Court on one ground however the appellants have requested permission from the Court of Appeal to appeal on all other grounds.

Further, at present, the High Court is due to hear the case of *R(oao Crownhall Estates Limited) v Chichester District Council* on 18 November. Richard Harwood QC and Daniel Stedman-Jones of 39 Essex Chambers represent the Claimant.

PLANNING PERMISSION IN PRINCIPLE UNDER THE HOUSING AND PLANNING BILL 2015

Richard Harwood QC

The Housing and Planning Bill 2015 proposes to introduce 'planning permission in principle' granted either automatically upon the inclusion of proposals in particular planning documents or by an application to the local planning authority in respect of particular sites and uses identified in planning policy. The proposals apply to England only.

Much of the detail of the regime would follow in secondary legislation. The general concepts are though set out in the Bill.

Permission in principle would be followed by a 'technical details consent' which together would be the equivalent of a full planning permission. Planning conditions would be imposed at the technical details consent stage.

Permission in principle could derive from two routes: grant by a development order or grant on application to the local planning authority.

Grant of planning permission in principle by development order

The first route is for permission in principle to be granted by a development order in relation to land which is allocated for development in a qualifying document. A 'qualifying document'[11] would be a 'plan, register or other document … made, maintained or adopted' by a local planning authority, of a prescribed description, which 'indicates that the land in question is allocated for development for the purposes of this section' and which contains 'prescribed particulars in relation to the land allocated and the kind of development for which it is allocated'.[12] 'Adopted' can encompass a local plan, whilst neighbourhood development plans are 'made' by the local planning authority. 'Maintained' is envisaged for registers of land which could be required under a proposed section 14A of the Planning and Compulsory Purchase Act 2004.[13]

11 See proposed Town and Country Planning Act 1990, s 59A(1)(a), inserted by Housing and Planning Bill 2015, cl 102(2). References are to the Bill as introduced into the House of Commons.

12 Proposed Town and Country Planning Act 1990, s 59A(2).

13 Inserted by Housing and Planning Bill 2015, cl 103(1).

Under proposed section 14A, local planning authorities would be required to prepare, maintain and publish a register of land which is of a prescribed description or which satisfies prescribed criteria.[14] Regulations would prescribe when land has to be included and also where local planning authorities have a discretion whether to include it, or indeed any power to exclude land which would otherwise be included.[15] In compiling the register, the local planning authority are required to have regard to the development plan and national policies and advice.[16]

It is envisaged that the registration duty would require the creation of a brownfield register of previously developed land which is suitable for housing development.[17] As presently drafted, the register provisions do not include any mechanism for independent examination, appeal or Ministerial intervention.

In addition to the brownfield register, it is anticipated that automatic planning permission in principle would be granted to allocations within particular categories in local plans or neighbourhood plans. The document would have to allocate the land for the purposes of permission in principle,[18] so existing allocations will not have that effect.

A number of consequences flow for the preparation of the brownfield register, local plans and neighbourhood development plans.

Consultation and publicity requirements will need to apply to the immediate locality of a proposed allocation as well as across the plan area. At present the local plan and neighbourhood plan processes require area-wide publicity but not notification to individual properties. The owners of allocated sites have no right to be consulted, although they are in practice in plan making to judge the availability of the land. More importantly in practice, plan making does not presently involve neighbour notification or the display of site notices. That would need to be changed.

The automatic grant of planning permission by reason of the status of land in a document means that the document itself is a development consent under the Environmental Impact Assessment Directive. It authorises the developer to proceed, as part of a multi-stage consent process.[19] Consequently the document must contain sufficient detail to enable a decision to be taken as to whether EIA is required and, if so, to carry it out sufficiently for the details approved at the planning permission in principle stage.[20] This will involve consideration of the mitigation proposed, even though that will not be secured until the technical details stage. Most local and neighbourhood plans are though presently subject to Strategic Environmental Assessment.

As well as what is proposed, a decision whether to permit a development may require regard to what is lost. Careful consideration is required as to whether the permission in principle will authorise demolition, whether certain existing uses are protected and regard to designated heritage assets, such as listed buildings and conservation areas, and undesignated assets such as locally listed buildings and assets of community value.

Grant of planning permission in principle on application

The second route is for a grant on application to the local planning authority for permission in principle for development of a prescribed description.[21] Such applications will be determined having regard

14 Proposed Planning and Compulsory Purchase Act 2004, s 14A(1).

15 Proposed Planning and Compulsory Purchase Act 2004, s 14A(4).

16 Proposed Planning and Compulsory Purchase Act 2004, s 14A(7).

17 Explanatory Notes to Housing and Planning Bill 2015, First Reading, House of Commons, para 262.

18 Proposed Town and Country Planning Act 1990, s 59A(2).

19 Environmental Impact Assessment Directive, Article 1(2).

20 See the requirements of the EIA Directive, Annex 4.

21 Proposed Town and Country Planning Act 1990, s 59A(1)(b), inserted by Housing and Planning Bill 2015, cl 102(2).

to the development plan and any other material considerations,[22] and so applying the presumption in favour of the development plan.[23] Applications would be determined under proposed section 70(1A) of the Town and Country Planning Act 1990:[24]

> "Where an application is made to a local planning authority for permission in principle –
> (a) they may grant permission in principle; or
> (b) they may refuse permission in principle."

Unlike section 70(1) this does not permit the imposition of conditions. These are to be left to the technical details consent. Applications for permission in principle will be subject to the usual rules on notice being given to landowners, powers to decline to determine repeat applications, call ins and appeals as apply to planning applications.[25]

The government's current intention to allow this to be used to approve the creation of fewer than 10 homes.[26]

Technical details consent

If planning permission in principle is granted, whether automatically or following an application, then a full planning permission is achieved by the approval of a technical details consent. Any application for technical details consent must be within the matters approved by the permission in principle and contain sufficient details to be a full, but not outline, planning application, see proposed section 70(2ZB):

> "An application for technical details consent is an application for planning permission that –
> (a) relates to land in respect of which permission in principle is in force,
> (b) proposes development all of which falls within the terms of the permission in principle, and
> (c) particularises all matters necessary to enable planning permission to be granted without any reservations of the kind referred to in section 92."

Unless the permission in principle is out of date, the local planning authority should have to determine the application in accordance with the permission in principle, see proposed section 70(2ZA):

> "The authority must determine an application for technical details consent in accordance with the relevant permission in principle."

A permission would be out of date if it has been in force for longer than a prescribed period and there has been a material change in circumstances since it came into force.[27]

The requirements that the technical details application accords with the permission in principle and that the authority cannot go back on the principle which has been established when determining it reflect the caselaw on reserved matters and the approval of details under conditions. A technical details application could relate to only part of the site of a permission in principle, although it could be refused if a more comprehensive application was considered necessary or it would prejudice the development of the remainder of the site.

The government intention is that whether permission in principle has been granted automatically or on application, conditions may be imposed in the technical details consent.[28] However the Bill does not at present include such provision (there being no equivalent of section 70(1) or 72 for technical details consent). Whilst it might be intended to include this in the development order, the better approach would be to provide for the imposition of conditions on the face of the Act. Such

22 Proposed Town and Country Planning Act 1990, s 70(2), as to be amended by Housing and Planning Bill 2015, Schedule 6, para 11(2).

23 In Planning and Compulsory Purchase Act 2004, s 38(6).

24 To be inserted by Housing and Planning Bill 2015, cl 102(3)(a).

25 See amendments in Housing and Planning Bill 2015, Schedule 6.

26 Explanatory Notes, para 254.

27 Proposed Town and Country Planning Act 1990, s 70(2ZC).

28 Explanatory Notes, para 259.

conditions could not derogate from the permission in principle but otherwise would be subject to the normal principles for planning conditions.

This article is an extract from Richard Harwood's new book 'Planning Permission' which is to be published shortly by Bloomsbury Professional.

CASE NOTE: EAST SUSSEX AND THE ENVIRONMENTAL INFORMATION REGULATIONS

Jonathan Darby

The Environmental Information Regulations 2004 ("EIR") give rights of public access to information held by public authorities. Regulation 8 of the EIR provides that where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available. Following an appeal to the First Tier Tribunal in the case of *East Sussex County Council v ICO & Property Search Group* (EA/2013/0037), two questions were referred to the Court of Justice of the European Union ("CJEU") concerning what a public authority may charge for supplying environmental information – in this case charges for property searches – and, in particular, what constitutes a "reasonable amount".

The referral was set against a background of East Sussex levying a fixed charge for providing information in relation to property searches, such charge having been calculated on the basis of disbursement costs, staff time, overheads, and the maintenance of information systems (which, it should be noted were also used for the retention and provision of other – non property search-related – information).

The two questions that were referred to the CJEU were as follows:

> "(1) What is the meaning to be attributed to Article 5(2) of Directive 2003/4 and in particular can a charge of a reasonable amount for supplying a particular type of environmental information include:
> (a) Part of the cost of maintaining a database used by the public authority to answer requests for information of that type;
> (b) Overhead costs attributable to staff time properly taken into account in fixing the charge?
>
> (2) Is it consistent with Articles 5(2) and 6 of Directive 2003/4 for a Member State to provide in its regulations that a public authority may charge an amount for supplying environmental information which does '…not exceed an amount which the public authority is satisfied is a reasonable amount' if the decision of the public authority as to what is a 'reasonable amount' is subject to administrative and judicial review as provided under English law?"

As to the first question, the CJEU considered that:

- In principle, it is only the costs that do not arise from the establishment and maintenance of those registers, lists and facilities for examination that are attributable to the 'supplying' of environmental information and are costs for which the national authorities are entitled to charge under Article 5(2) of Directive 2003/4 (at [36]);
- The costs of maintaining a database used by the public authority for answering requests for environmental information may not be taken into consideration when calculating a charge for 'supplying' environmental information (at [37]);
- The costs of 'supplying' environmental information which may be charged under Article 5(2) of Directive 2003/4 encompass not only postal and photocopying costs but also the costs attributable to the time spent by the staff of the public authority concerned on answering an individual request for information, which includes the time spent on searching for the information and putting it in the form required. Such costs do not arise from the establishment and maintenance of registers and lists of environmental information held and facilities for the examination of that information (at [39]);
- Any interpretation of the expression 'reasonable amount' that may have a deterrent effect on persons wishing to obtain information or that may restrict their right of access to information must be rejected (at [42]);
- An assessment of 'deterrent effect' cannot relate solely to the requester's economic situation, but must also be based on an objective analysis of the charge; the charge must not exceed the financial capacity of the person concerned, nor in any event appear objectively unreasonable (at [43]).

In light of the above, the CJEU answered the first question thus (at [45]):

> "Article 5(2) of Directive 2003/4 must be interpreted as meaning that the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database, such as that at issue in the main proceedings, used for that purpose by the public authority, but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount."

As to the second question, the CJEU considered that:

- In the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (at [52]);
- Such rules must respect the principle of equivalence and effectiveness (also at [52]);
- The wording of regulation 8(3) of the EIR, interpreted in accordance with the principles of English administrative law, limits the extent of administrative and judicial review to the question whether the decision taken by the public authority concerned was irrational, illegal or unfair, with very limited scope for reviewing the relevant factual considerations reached by that authority (at [57]);
- Such judicial review – that is limited as regards the assessment of certain questions of fact – is compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (at [58]).

In light of the above, the CJEU answered the second question thus (at [61]):

> "Article 6 of Directive 2003/4 must be interpreted as not precluding national legislation under which the reasonableness of a charge for supplying a particular type of environmental information is the subject only of limited administrative and judicial review as provided for in English law, provided that the review is carried out on the basis of objective elements and, in accordance with the principles of equivalence and effectiveness, relates to the question whether the public authority making the charge has complied with the conditions in Article 5(2) of that directive, which is for the referring tribunal to ascertain."

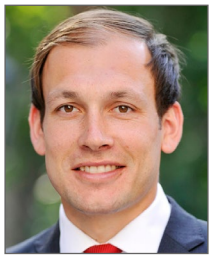
Comment

It has long been recognised that local authorities are entitled to charge for the supply of environmental information under the EIR provided, of course, that charge is reasonable and – further – such charge does not have a deterrent effect. The East Sussex case confirmed that an assessment of 'deterrent effect' involves both subjective and objective analysis in order to retain appropriate checks and balances. The CJEU also provided clear guidance as to what such charges may be comprised of and, in particular, that charges cannot be imposed for the costs or overheads of maintaining a database.

However, and whilst the clarity provided in relation to the first question is to be welcomed, to some extent the CJEU did little more than to state the obvious in relation to the second question. It remains to be seen whether a similar referral as to the nature of the review process under the EIR – and regulation 8(3) in particular – will follow in the future.

Before the First Tier Tribunal, Nigel Pleming QC represented the Local Government Authority and Eleanor Grey QC represented East Sussex County Council. Nigel appeared for both before the CJEU. Nigel was recently voted Public Law Silk of the Year at The Legal 500 UK 2015 Awards.

EDITORIAL BOARD



Jonathan Darby

jon.darby@39essex.com

Jonathan's broad practice encompasses all aspects of public and administrative law. His planning, environmental and property practice encompasses inquiries, statutory appeals, judicial review, enforcement proceedings and advisory work. Jonathan is instructed by a wide variety of domestic and international clients, including developers, consultants, local authorities and the Treasury Solicitor. He is listed as one of the top junior planning barristers under 35 in the Planning Magazine Guide to Planning Lawyers. Before coming to the Bar, Jonathan taught at Cambridge University whilst completing a PhD at Queens' College. To view full CV click here.

Victoria Hutton

victoria.hutton@39essex.com

Victoria's main areas of practice are planning, environmental and administrative law. Victoria acts in a wide range of planning and environmental law matters for developers, local authorities and other interested parties. She is also a qualified mediator and is able to mediate between parties on any planning/environmental dispute. Victoria is rated as one of the top planning barristers under 35 (Planning Magazine 2015). To view full CV click here.

Philippa Jackson

philippa.jackson@39essex.com

Philippa 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 acts for developers, local authorities, individuals and interest groups, and she has been listed for the past three years as one of the top planning juniors under 35 by Planning Magazine (2013, 2014 and 2015). Examples of recent cases include an appeal relating to an enabling development scheme for the restoration of a nationally important collection of historic buildings and a judicial review challenge to a local authority's decision to designate a sports stadium as a conservation area. To view full CV click here.

Daniel Stedman Jones

daniel.stedmanjones@39essex.com

Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. He was ranked amongst best junior planning barristers under 35 nationwide in the Planning Magazine Guide to Planning Lawyers 2013-2014. To view full CV click here.

CONTRIBUTORS

Stephen Tromans QC

stephen.tromans@39essex.com

Stephen 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

richard.harwood@39essex.com

Richard specialises in planning, environment and public law, acting for developers, landowners, central and local government, individuals and interest groups. He appears in the courts, inquiries, examinations and hearings, including frequently in the Planning Court and appellate courts. Voted as one of the top ten Planning Silks in Planning magazine's 2014 and 2015 surveys, he has appeared in many of the leading cases of recent years. Richard is also a leading commentator, a case editor of the Journal of Planning and Environment Law and the author of books including Planning Enforcement, Historic Environment Law and the forthcoming Planning Permission. To view full CV click here.