

PLANNING LAW

SEA offer further opportunity for policy-challenge

Welcome

Welcome to the latest issue of **Planning Law**, our bulletin in which we aim to keep you informed of current issues and news in planning.

For further information on any of the topics covered in this issue of **Planning Law**, please contact **Gary Soloman** on **0117 902 2791** or email: **gary.soloman@burges-salmon.com**

The Strategic Environmental Assessment (SEA) regime requires bodies responsible for preparing certain plans or programmes relating to town and country planning to carry out an assessment of the environmental effects of that plan or programme and reasonable alternatives to it. The responsible body is to undertake the assessment in the course of preparing the plan or programme.

The importance of the regime, in force in the UK since July 2004, was highlighted in recent months in the context of Regional Spatial Strategies. On 20 May, the High Court quashed policies which formed part of the East of England Plan (adopted last year), on the basis that those policies had not been properly considered in light of the SEA rules. (*City and District Council of St Albans v Secretary of State for Communities and Local Government, Hertfordshire County Council v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin))

The policies which were successfully challenged by St Albans and Hertfordshire Councils provided for 22,000 new homes in the Metropolitan Green Belt towns of Hemel Hempstead, Welwyn Garden City and Hatfield. Mr Justice Mitting found that the sustainability assessments, which had been carried out during the preparation of the Plan, had not identified, described or evaluated alternatives to the policies in accordance with the SEA regime.

Local authorities have seen the regime as a means of attacking their housing targets, and challenges were lodged against policies in the South East Plan on similar grounds. A similar approach may well be taken to the South West RSS.



The SEA regime can affect policies at all levels. Earlier this year, it formed a basis of challenge to the government's consultation document on Eco-towns. Last year, it was a ground for a developer challenging a supplementary planning document. The government is currently preparing and consulting on several National Policy Statements and SEAs are being undertaken as part of the policy-making process.

Clearly the opportunities for challenging a planning policy arise if the responsible body – government, regional government or local planning authority, fails to properly adhere to the SEA regime – an undesirable risk for both planning authorities and developers alike.

For more information please contact Sophie Traylen on 0117 307 6966 or email: sophie.traylen@burges-salmon.com

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Planning Unit changes



Julian Boswall – Partner

Joined from Eversheds, Cardiff in March where he led the planning team



Craig Whelton

Joined from the Scottish firm Maclay Murray

Spens in October



Sophie Traylen

Qualified in to the team as a Planning Solicitor

in September

When is a caravan not a caravan?



“...the judgment has potentially wide repercussions for applications for Certificates of Lawfulness.”

A recent County Court case has again considered the issue of what is a caravan. The Judge in *Odina v Mackland Ltd* held that to be within the statutory definition of a caravan (s29(1) *Caravan Sites and Control of Development Act 1960* (the "1960 Act")), a mobile home has to be capable of being moved from one place to another, by being lawfully towed or carried on the public highway in no more than two sections.

Mr Odina's mobile home had a single storey extension bolted onto the original structure, as a result of which it was too wide to be moved as a single structure on the public highway. However, the judge then considered the effect of section 13(1) of the *Caravan Sites Act 1968* (the "1968 Act"), which provides that a caravan can include a structure comprising no more than two sections (designed to be assembled on site) and which is, when disassembled, physically capable of lawfully being moved by road, either by being towed or transported.

By relying on the twin unit provisions in section 13(1) of the 1968 Act, Judge Bailey held that Mr Odina's mobile home was brought within the statutory definition of caravan. Whilst the original caravan and the existing extension were not designed and constructed as a single unit, he

considered the requirements of section 13 were met on the basis that the extension was designed to be connected to the original unit. When the two sections were disassembled, each section could be lawfully moved on the public highway.

However, a second extension for which the Claimants had been granted planning permission would take them outside of the twin unit exception, and would render the home incapable of satisfying the statutory definition of caravan.

If *Odina*, is followed, the judgment has potentially wide repercussions for applications for Certificates of Lawfulness. Under section 171 of the *Town and Country Planning Act 1990*, a change of use of any building to a dwelling house becomes immune from enforcement action after 4 years continuous use can be shown. For ordinary residential caravans, not involving the change of use of a building, 10 years' lawful use must instead be proved in order to gain immunity.

For further information, please contact Laura Whittaker on 0117 902 7232 or email: laura.whittaker@burbges-salmon.com

Changes to the Lands Tribunal

On 1 June 2009 the Lands Tribunal was electively abolished and transferred to the Upper Tribunal.

The Lands Chambers and the Upper Tribunal, which sits within the two-tier tribunal structure was established by the *Tribunal Courts and Enforcement Act 2007*. It is an independent and specialist judicial body set up to resolve certain disputes concerning land, particularly in respect of valuation. It has power to hear appeals from tribunals such as Residential Property Tribunals and determine disputed compensation in compulsory purchase and certain other types of land compensation cases. Its jurisdiction is over England and Wales and its permanent offices and courtrooms are in London.

Its functions have not changed therefore, for the time being, the Lands Chamber of the Upper Tribunal is still informally known as the Lands Tribunal. The *Lands Tribunal Rules 1996* which govern the way cases are dealt with, continue in force in an amended form. These rules operate together with the *Interim Practice Directions and Guidance* which corresponded in the main to the former *Lands Tribunal Practice Directions*. More extensively amended rules are expected for consultation late that year which are anticipated to come into force at the beginning of 2010.

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Extending the life of existing planning permissions

A new procedure introduced to extend the life of some existing planning permissions may not be the panacea it might at first seem to be.

From 1 October 2009 developers can apply to the Local Planning Authority ("LPA") to extend the life of either full or outline permission, for any size of development, provided that:

- it was granted on or before 1 October 2009
- in the case of full permission, development has not yet commenced or, in the case of an outline permission, it has not yet expired.

If an extension of time is granted, this will be a new permission with the same description of the development as the original permission but with a new time limit and potentially with different conditions.

With many developments on hold in the current economic climate, and following

- the reduction of the default time limit for implementation of planning permissions (from 5 to 3 years for full planning permissions); and
- the removal of the ability to use section 73 of the Town and Country Planning Act 1990 to extend the life of planning permissions (except in Wales where this is still available),

the new procedure is intended to save many planning permissions from expiring before they can be implemented.

Planning issues

Importantly, applications for extensions of time will be determined on planning merits. Where there have been changes of policy, or other material changes in circumstances, an application for an extension may be refused. As always, pre-application discussions with the LPA could be helpful in identifying any potential problems and professional advice should be sought where necessary.

If there are material changes in circumstances which would necessitate additional or different planning conditions, recent guidance from DCLG has clarified that LPAs will be able to impose those different conditions.

A new section 106 agreement (or a variation to the previous one) may be required in appropriate circumstances.

Permission granted for extensions of time involving EIA development will be a Development Consent under the EIA Regulations, so LPAs should give screening opinions and require EIA if necessary. The LPA is also required to consult the statutory consultees.



Although plans, drawings and access statements are not required with applications, notification of owners and publicity requirements remain the same as for ordinary planning applications.

How soon should an application be made?

Merely making an application does not stop time running so plenty of time should be allowed for the application to be processed before the permission expires. However, it may be possible for the LPA to determine applications for permissions which expire whilst the application is being processed.

Fees

Due to changes in the nature of the proposal following consultation, the Government has been unable to co-ordinate introduction of this new procedure with changes to the Fees Order, so in the short term fees for these applications are as if it is a new planning application. DCLG have indicated that a new fee scheme will be introduced in late December at around £50 for householder applications, £500 for major developments and £170 for other developments.

Further guidance

Further guidance was published in November and is available from the DCLG website.

For more information please contact Jim Ryan on 0117 902 6689 or email: jim.ryan@burges-salmon.com or Sophie Traylen on 0117 307 6966 or email: sophie.traylen@burges-salmon.com

"Where there have been changes of policy, or other material changes in circumstances, an application for an extension application may be refused."

Planning consent and private nuisance

It is a long-established principle that planning consent cannot authorise a nuisance. A local planning authority may authorise an activity, but a court may still impose restrictions (or even a complete ban) if it upholds a claim by aggrieved neighbours for nuisance caused by that activity.

However, the grant of planning consent and its subsequent implementation can change the character of a location, which is one of the considerations a court must take into account when deciding whether a nuisance is occurring in the first place. Therefore, an activity that would have been an actionable nuisance prior to the planning consent may no longer be a nuisance once development has commenced.

The interaction of these principles can cause grey areas for developers and landowners. The recent Court of Appeal decision in *Watson v Croft Promo-Sport* [2009] EWCA Civ 15 illustrates this. The Defendant was a motor racing operator with planning permission to race on 210 days of the year. The residents of neighbouring properties considered that the noise was excessive, and brought a civil claim in private nuisance.

The High Court considered that the planning consent had not altered the character of the (predominantly rural) area

and found that the noise from the motor racing was a nuisance. However, the High Court also considered that the neighbours could be adequately compensated in monetary terms and refused an injunction. Both parties appealed.

The Court of Appeal upheld the High Court's finding that a nuisance was being committed, but, holding that the lower Court was wrong to refuse an injunction, it imposed an injunction limiting the racing to 40 days of the year.

The case is a useful reminder of the interaction between the planning regime and the tort of private nuisance. All developers should be aware that planning permission does not provide absolute certainty when interference (such as noise or odour) from a development may affect the local community. Developers should actively engage with stakeholders at an early stage in the planning process to reduce the chances of private claims by disgruntled neighbours once the development is in operation.

For more information on this case or the law of nuisance in general please contact Michael Barlow on 0117 902 7708 or email: michael.barlow@burges-salmon.com or Simon Tilling on 0117 902 7794 or email: simon.tilling@burges-salmon.com

"This case is a useful reminder of the interaction between the planning regime and the tort of private nuisance."



Householder appeals service

The Planning Inspectorate's new streamlined householder appeals service (HAS) has been introduced to deal with householder applications. The new procedure applies to applications made on or after 6 April 2009, for development to existing dwellinghouses or within the curtilage of existing dwellinghouses.

The reduced deadline for submitting appeals to the HAS is 12 weeks from either the date of the decision notice, or 8 weeks from registration of the application by the LPA in the case of deemed refusals. Appeals will usually be determined by the written representations procedure and the HAS aims to reach decisions within 8 weeks.

Key to the streamlined process is the limit on the evidence submitted, so that LPAs will have to rely on their decision notice and on internal reports produced in relation to the original application.

However, although comments made by third parties at the application stage will be considered in the appeal, no further comments may be lodged by those parties. This limitation on further evidence at the appeal stage is certainly in the interests of quick decision-making, but it risks being unlawful if an Inspector in reaching a decision fails to take into account all material considerations, including those which may have only become apparent once the appeal has been made. Although few householders are likely to have either the appetite or the funds for Judicial Review, it is certain that some will, so keep an eye out for this issue being litigated at some point in the future.

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Important changes to planning your inquiry



Appealing none determination based on retrospective agreements to extend determination deadlines

There have been two recent developments which impact upon the inquiry timescales, one being the Vattenfall case the other being the bespoke timetable issued by the Planning Inspectorate.

Vattenfall Wind Power Limited v Decision of the Scottish Ministers [2009] Scot CS CS1H 27

In April 2003 Vattenfall applied for planning permission for the erection of 12 wind turbines in the Scottish Borders. The application was not determined within the timescale and by August 2007, some four years late, the Applicants and the local Council entered into a retrospective formal agreement to extend the determination period to the end of 2007. The application was appealed within six months of the end of the agreed extension period, however the Scottish Minister declined to entertain the appeal for the reason that it was out of time.

The Scottish courts therefore rejected the ability of Applicants using retrospective agreements to extend decision periods for the right to appeal. We have yet to see whether Vattenfall will be used as an authority in the English courts in similar circumstances.

Bespoke inquiry timetable

The second factor that can affect the inquiry timescale is the guidance issued by the Planning Inspectorate earlier this year.

With the objective of providing a more flexible and responsive process for more complex appeals the bespoke timetable process seeks to get the parties to agree a timetable for the inquiry early in the appeal process so that all parties are clear of what is expected of them and so that inquiries run more smoothly without the need for delay, adjournment or overruns.

The bespoke timetable applies to inquiries of 8 days or

longer and to all called-in inquiries. The timetables, to be agreed between the Appellant, the planning authority, the Planning Inspectorate and any Rule 6 parties will require close liaison at all stages but especially immediately prior to appeals being lodged, particularly where the appeal is against refusal of permission. In out of time deemed refusal situations evidence of 'without prejudice' discussions between the parties is recognised as being helpful. Once a bespoke timetable has been agreed and fixed PINS will expect it to be maintained unless exceptional circumstances can be demonstrated, and will expect the appeal to be conducted to its conclusion (i.e. not withdrawn) except for unforeseeable reasons.

Failure to adhere to any stage of a bespoke timetable may be considered to amount to unreasonable behaviour depending on the particular circumstances of the case. Where the appeal is for non-determination there may be limited opportunity for liaison prior to the submission of the appeal. Appellants are nonetheless encouraged to contact the local planning authority and PINS immediately prior to appealing to discuss dates, to advise that they intending to appeal against non-determination.

The key inquiry dates the parties would be seeking to agree will be such dates at the inquiry start date, duration, the date for settling the Statement of Common Ground, the submission of Proofs and the date of the pre-inquiry meeting.

Whilst the aims of the bespoke timetable are welcomed, it does throw up some issues which need to be strategically considered prior to commencing an appeal not least the need to enter into dialogue with the planning authority at a very early stage. However, if it works all parties ought to benefit from the more refined scope of the inquiry as issues are more fully defined earlier in the inquiry process.

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