January 2010

Review

Planning

New PPS4 - Planning for Sustainable Economic Growth

The new PPS 4, which replaces PPS 6 (town centres) and PPG 4 (industrial and commercial development), was issued by the Government on 29 December 2009. It sets out the Government's national planning policies for England on economic development including retail, leisure and entertainment and is applicable to licensed establishments, offices, factories, warehouses and other Class B uses, art and culture and tourism development.

Although PPS4 does not represent a radical change to the planning policy framework for town centre uses, it is more structured and refocuses the statement on policy which remains directed towards town centre use and consumer choice.

Guidance on town centre uses can also be found in the document entitled "Planning for Town Centres" which was also issued by the Government on 29 December and will be especially useful to developers. The guidance provides detail on how need, impact and sequential approaches are to be considered. The previous PPS6 approach to sequential tests and retail impact are retained and unchanged in that the most central sites will be considered preferentially to more peripheral ones.

All schemes will be assessed against certain factors including climate change, impact on the high street, consumer choice and spending and the creation of jobs. Any development exhibiting "significant adverse impacts" will result in a refusal of planning permission unless other positive impacts can be taken into account as well as any other material considerations.

Contrary to many planning decisions over recent years, the developer no longer has to satisfy the "need" test. The need for the development is now assessed earlier in the planning process when local and regional policies are being produced. Rather than introducing significant changes, the new PPS4 streamlines and strengthens many of the previous policies in this area.

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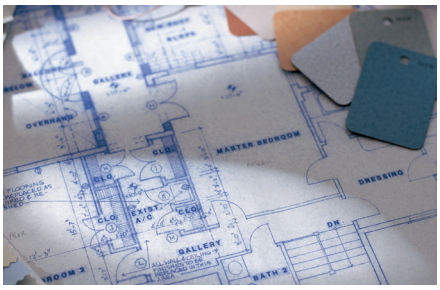
FREEZE ON PLANNING APPLICATION FEES

Planning Minister John Healey has, on the 20 January 2010, announced a freeze on planning application fees and has confirmed that fees for planning appeals will not be introduced this year. The reasons for this are to help developers through the economic recovery, maintain activity on construction sites, help companies create jobs and help owners to be able to afford improvements to their homes and to generally avoid placing further financial burdens on businesses during the current economic climate. This complements the government's intention to increase funding for the provision of free, independent planning advice to individuals and community groups as funding for Planning Aid rises to £4.5m this year from £4.1m.

CONSULTATION: IMPROVING THE USE AND DISCHARGE OF PLANNING CONDITIONS

On the 21 December 2009, the Government issued a consultation paper aimed at improving the planning conditions system in England. This was in response to the Killian Pretty recommendations that the approach to planning conditions should be comprehensively improved to ensure that (1) conditions are only imposed when justified and (2) the processes for discharging conditions are made clearer and faster. The deadline for responding to the consultation is 19 March 2010

The consultation paper also suggests practical ways to overcome difficulties that can arise with section 106 obligations. Consultees are asked whether in exceptional circumstances, the Local Planning Authority ('LPA') should have the ability to impose planning conditions that require a developer to enter into a section 106 agreement prior to the commencement of development – the normal process is for the section 106 agreement to be completed prior to the grant of permission.



However, the guidance did not mention agreements under section 278 of the Highways Act 1980, which are usually entered into after the grant of planning permission, pursuant to a condition to carry out highway works. The updated draft guidance states that LPAs should not impede major development just because all parties with an interest in the development land are not available to sign the section 106 agreement.

The consultation contains:

1) updated policy on the use of conditions: The guidance re-emphasised and retained the 6 tests for imposing conditions (necessary, relevant to planning, relevant to the development, enforceable, precise and reasonable in all other respects), sets out which conditions to avoid and which conditions to use with caution and the ability to charge fees for approving conditions

2) a package of measures to improve the discharge of conditions: The suggestions include an increased importance on pre-application discussions, routine issue of draft decision notices for major applications, structured decision notices, reduction of time limits for LPAs to discharge conditions and a fast track condition application service. The consultation also suggests that planning services key performance indicators should take into account the use and discharge of conditions

3) replacement policy text on fees for discharging conditions

4) an updated list of model conditions

The consultation is part of a package of draft measures announced to build on reforms recommended by the Killian Pretty Review. Other recently announced measures cover pre-application discussions and the regime for consultations.

R (ON THE APPLICATION OF LOUISA BAKER) (CLAIMANT) V BATH & NORTH EAST SOMERSET COUNCIL (DEFENDANT) & (1) HINTON ORGANICS (WESSEX) LTD (2) HINTON ORGANICS LTD (15/12/2009)

In 1999, the LPA granted the First Interested Party a ten-year permission to use a field as a waste composting site. To enable the LPA to review the impact of the development and to maintain the openness of the Green Belt, the permission was granted on a temporary basis. Various other planning permissions were granted but these were subsequently quashed by the Court on the basis that the LPA had failed to comply with the environmental impact assessment ('EIA') regime; in particular, in failing to carry out a screening process for these schemes.

The First Interested Party continued to operate the site despite the fact there was no existing planning permission other than the original 1999 permission. The Applicant submitted that there had been a delay in carrying out a screening process to decide whether an EIA was necessary and, consequently, enforcement action against the waste composting company was necessary. The Applicant made an application for a mandatory order requiring the Defendant to take enforcement action against the First Interested Party or, alternatively, for a declaration that its failure to take effective enforcement action was unlawful.

The application was refused on the basis that site had not yet been found to require an EIA. The screening process had not taken place but it was likely to do so in the near future and this was acceptable. Until this process had been undertaken, it would not be possible for the LPA or the Court to say that it was an EIA development. The delays that had occurred in the granting of planning permission for the extension of the site were understandable and there was no justification for the granting of a mandatory order or a stop notice requiring the LPA to take enforcement action.

BARRATT DEVELOPMENTS PLC V (1) WAKEFIELD METROPOLITAN DISTRICT COUNCIL (2) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (10/12/2009)

The First Respondent LPA adopted a policy entitled “Housing Mix, Affordability & Quality” which formed part of its core strategy and provided for a target whereby 30 per cent of new dwellings, in two categories of development, should comprise affordable housing. These two categories were:

- developments of 15 or more dwellings, or sites of 0.5 hectares or more, located within an urban area or local service centre; and
- developments of six or more dwellings, or sites of 0.2 hectares or more, located within a village.

The Applicant developer applied to quash the adoption of the policy.

Before its adoption, the policy had been submitted to a Planning Inspector for independent examination, who recommended the adoption of the policy on the grounds that the composite strategic housing market assessment documents “represented robust and credible evidence of the nature of the strategic housing markets affecting Wakefield, the level of need for affordable housing, the economic viability of the submitted thresholds, and percentages for affordable housing delivery that met the requirements of PPS 3 and PPS 12”. The Applicant argued that the policy imposed an unrealistic target for affordable housing and that it did not comply with national policy or the relevant regional spatial strategy.

The case raised the question of what approach local authorities and inspectors formulating local development plans were expected to take when national policy for the provision of affordable housing was temporarily altered by the current economic climate. The application was refused on the grounds that, although the policy was confusing and clumsily drafted, it was not ”undeliverable and inflexible”, as argued by the Applicant.

It was held that the policy did not contravene national policy or the relevant regional spatial strategy because it set a justifiable target for sites above a specified threshold, recognising that the target was achievable only in certain economic conditions. The alternative would have been to provide stepped percentages based on variable economic conditions; however, it would have been too difficult to make accurate predictions and would have thus proved unworkable. With regard to the need for affordable housing, this approach was the best because the Inspector could take into account the unusual and unstable economic times.

R (ON THE APPLICATION OF WYE VALLEY ACTION ASSOCIATION LTD) (CLAIMANT) V HEREFORDSHIRE COUNCIL (DEFENDANT) & EC DRUMMOND & SON (INTERESTED PARTY) (18/12/2009)

The Defendant LPA granted planning permission for the erection, removal and re-erection of polytunnels in an Area of Outstanding Natural Beauty (AONB) and adjacent to a Special Conservation Area (SAC). The Claimant applied for judicial review of the LPA’s decision.

In reaching its decision the LPA had found that the polytunnel development did not require an EIA for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (the ‘Regulations’). That was because the development did not fall within Schedule 2 of the Regulations, as the development involved land that was already cultivated – this assessment was challenged by the Claimant.

It was held that in determining whether a development required an EIA before a grant of planning permission, an LPA had to carry out a two-stage test:

1. a determination of whether the development fell within Schedule 2 of the Regulations and, if so;

2. a determination of whether the development was likely to have significant environmental effects.

As the site was cultivated land, the only possible category into which it could fall was under was under Schedule 2 para.1 (a) of the Regulations namely, "Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes". Whilst there is no definition of "semi-natural area" in the Regulations, guidance published by the European Commission provided that the term had a wide scope and could include landscapes where there had been some human interference, but where the landscape's natural qualities continued alongside that interference and remained clearly visible.

In the instant case, the Court decided that the development site clearly came within the definition of a "semi- natural area", as it was apparent that it was located within a high quality natural environment due to its proximity to an SAC and its location within an AONB. Consequently, the LPA had mistakenly found that an EIA was not required before granting planning permission for the development.

TECHNOPRINT PLC (Claimant) and ANOTHER v (Defendant) (9/12/2009)

In what has been one of the most eagerly anticipated cases of 2009, the fate of thousands of Leeds City Council's planning decisions made since 2004 has been decided in the High Court. The Claimant argued that Leeds had failed, over a period of three years, to formally approve the delegated powers necessary to enable its officers to make planning decisions on the Council's behalf.

In his judgement, Mr Justice Wyn Williams said that it was "unthinkable" that decisions taken on the Council's behalf by its officers were of no legal effect. The Judge stated that Leeds adopted a sensible means of amending its constitution as and when necessary implying that, by default, anything not amended was formally approved for the forthcoming year.

The Judge did however state that it had taken Leeds an unacceptably long time to compile such an argument to put forward in its defence. Although Leeds City Council welcomed the news and affirmed that the constitution was amended as and when necessary, it remains to be seen whether a more formal delegation is now adopted on an annual basis.

FURTHER INFORMATION

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