

Review

Planning



Conservative ‘Decentralised Green Paper’

In the Conservative’s Green Paper, published on 17 February 2009, a series of proposals were announced aiming to devolve the power of planning decisions away from central government to local communities.

The Planning Act 2008 (the Act) was introduced by the current government in an attempt to speed up the planning process. The Act established the Infrastructure Planning Commission, a central body responsible for the approval of major infrastructure projects. The Conservative’s view is that the IPC will slow down the planning process as its lack of accountability and susceptibility to judicial review will lead to legal challenges and thus delay.

The Act also introduced a new concept of National Policy Statements, providing guidance on development. The Conservatives have questioned the lack of consultation on these statements, which are not ratified by Parliament, yet will be followed by the IPC.

The Conservatives intend to abolish the IPC and focus instead on speeding up planning inquiries through “a greater emphasis on material planning considerations instead of questioning the appropriateness of the project in principal. As part of achieving this goal, we accept the principle of National Policy Statements”. The Conservatives also intend to ensure such statements are subject to Parliamentary approval.

The ultimate effect of the abolition of the Infrastructure Planning Commission would, the Conservatives claim, “remove the possibility of projects like a third runway at Heathrow being imposed on local communities by an unaccountable quango”. They suggest instead a correct method of achieving consent for proposals of real national significance would be by way of Private or Hybrid Act of Parliament “that gives the opportunity for open national debate on a sensible timescale”.

THE TOWN AND COUNTRY PLANNING (CONSULTATION) (ENGLAND) DIRECTION 2009 COMES INTO FORCE

On 20 April 2009, the above direction came into force and shall apply to applications for planning permission relating to England, received on or after that date.

Under section 77 of the Town and Country Planning Act, the Secretary of State may give directions requiring applications for planning permission to be referred to her instead of being dealt with by the local planning authorities. The Direction requires local planning authorities in England to consult the Secretary of State before granting planning permission for certain types of development. This will provide the Secretary of State with an opportunity to consider whether to exercise her call-in powers under section 77. It also simplifies the process, consolidating all requirements into a new single direction.

The developments to which the Direction will apply are applications which relate to developments in the green belt, outside town centres, world heritage sites, playing fields or flood risk areas. The Direction clarifies the definition of each of these types of development.

The effect of the Direction therefore requires local planning authorities to refer any application to the appropriate regional office for the Secretary of State for planning permission to which the Direction applies and where the authority does not propose to refuse permission. The Direction does not affect the ultimate power of the Secretary of State, under section 77 to direct that any particular planning application should be called for her own determination, irrespective of whether it falls within the terms of the new Direction.

The Conservatives intend to abolish the IPC and focus instead on speeding up planning inquiries through “a greater emphasis on material planning considerations instead of questioning the appropriateness of the project in principal”.



PLANNING LEGISLATION

Legislation which came into force on 6 April includes:

- **The Town and Country Planning (Local Development) (England) Amendment Regulations 2009.** These Regulations implement the changes the Planning Act 2008 (the Act) introduced relating to local development schemes and local development documents (LDDs). Among other things, the regulations add the Homes and Communities Agency as a specific consultation body; and they remove certain duties in respect of LDDs which are not development plan documents (essentially supplemental planning documents) including the duty to include them in local development schemes and to provide a sustainability appraisal report for them. The regulations also remove the duty to consult the Secretary of State for Transport in relation to statements of community involvement.
- **The Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009.** The Secretary of State now has the power, to determine the procedure to be used to determine an appeal under section 78. These Regulations lay down the procedure and time limits for appeals dealt with by written representations. They revoke and replace, the previous 2000 regulations for written representations. The main changes made by the Regulations are the introduction of a new, expedited procedure. This applies where the Secretary of State has determined under the Act that a householder appeal should be dealt with on the basis of representations in writing. The Secretary of State may, transfer an appeal from Part 1 procedures and continue to deal with it under the regular written representations procedure in Part 2 or determine that the appeal is at a local inquiry or at a hearing. There are minor changes to the procedures in the 2000 Regulations, which are now replaced by Part 2 of the Regulations.
- **The Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2009.** The regulations amend various aspects of the 1995 General Development Order including introducing new definitions for “householder application” and “householder appeal”
- **The Town and Country Planning (Hearings and Inquiries Procedures) (England) (Amendment) Rules 2009.** The regulations introduce various changes to the hearings and inquiries procedure including those for Major Infrastructure Project Inquires.
- **The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Amendment) (England) Regulations 2009.** These regulations complete the ability to transfer all appeals under the Planning Acts for determination by Inspectors with its inclusion of appeals by statutory undertakers and appeals relating to old mining permissions.
- **The Planning and Compulsory Purchase Act 2004 (Commencement No.11) Order 2009.** Brings into force the power for an LPA to refuse to determine a so-called “twin tracked” application, ie, an application for planning permission for the development of any land which is made on the same day as a similar application or in circumstances where a similar application is being determined by the LPA or is the subject of an appeal or the appeal period has not expired.

NEW COSTS CIRCULAR

Costs circular 3 of 2009 was published on the 6th April 2009. As well as updating the costs circular, it sets out the guidance in relation to costs in an appeal dealt with by written representations. Parties using the written representation procedure can now claim costs, as of right, if there is unreasonable behaviour or other grounds for claiming costs exhibited by other parties.

The Secretary of State now has the power, to determine the procedure to be used to determine an appeal under section 78.



VATTENFALL WIND POWER LIMITED v A DECISION OF THE SCOTTISH MINISTERS

Strict time limits for non-determination of appeals

In April 2003, Vattenfall applied for planning permission for the erection of twelve wind turbines to Scottish Borders Council. The Council did not determine the application within the determination period (4 months for an Environmental Impact Assessment (EIA) development in Scotland). However, it was not until 2007 that the Council and Vattenfall agreed to extend the determination period to 31 December 2007, upon the expectation that the extension, would in turn, extend the time limit to appeal for non determination by a further six months to 20 June 2008. When no such determination was made, on the 6 June 2008 Vattenfall appealed to the Scottish Ministers against the failure of the Council to determine the application. The Scottish Ministers declared that the appeal was out of time.

The key question was when the six-month period in which to lodge the appeal began. Vattenfall argued that the six-month ran from the expiry of the agreed extended period. The Scottish Ministers believed this ran from the initial determination period in 2003. The Inner House of the Court of Session upheld this view. The appeal was out of time.

Although this is a Scottish decision, the concern is that the Courts of England and Wales may hold the same view. Accordingly, it is necessary to ensure that an extension to the time for determination is agreed within the initial determination period, in writing. Should this period expire without being extended, this case would suggest that the six-month appeal period for non-determination applies automatically, with no opportunity to extend this.

R (ON THE APPLICATION OF LOUISE BAKER) v BATH & NORTH EAST SOMERSET COUNCIL, SSSLG HINTON ORGANICS

EIA development?

The case concerned the grant of three planning permissions for further development of a waste disposal facility. No Environmental Impact Assessment (EIA) was made before the grant of the permissions. The Claimant complained that contrary to European Council Directive 85/337, the LPA had failed to consider the effect of granting the planning permissions on the environment, in that there was no environmental screening. The Directive requires developments, including alterations to existing developments, which are likely to have a significant effect on the environment to be subject to an EIA.

The LPA responded that the grant of the permissions were for modifications to existing development and the modifications did not cross the threshold for the requirement of an EIA in the domestic UK regulations. The LPA also contended that there was sufficient protection for the environment and the public since under the UK regulations, the Secretary of State had powers to direct, either as a result of an application from a member of the public or on his own initiative, that any development was development that required an EIA before approval.

The High Court held that the UK domestic regulations had failed to adequately implement the European Directive because (1) In relation to the assessment of changes to existing development, the UK regulations limited the requirement to assess environmental impact to the further development rather than considering the cumulative effect of the whole development, including the original scheme and the proposed further development and (2) there was no requirement or obligation for members of the public to be informed of the right to ask the Secretary of State to consider whether it was appropriate for there to be an EIA before development was approved. The Judge said that in this case, it was clear that no consideration had been given to the effect of the intensification of the development upon the environment.

Assuming this case is not successfully appealed, the consequence of this decision is that the EC directive can be relied on directly. Amendments to the domestic regulations in line with the decision, can also be expected.

The key question was when the six-month period in which to lodge the appeal began.

PALM DEVELOPMENTS LTD v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

What is a tree?

A Tree Preservation Order (TPO) in Kent has provoked the question of what falls within the definition of a tree. Under the 1990 Act, Section 198 provides for a TPO to preserve trees, groups of trees and woodlands. Medway Council in Kent refused planning permission for a development proposed on vegetation that had colonised Trenchmann's Wharf since lime and cement works ceased following the Second World War.

Palm Developments Ltd bought the site in 2001 and applied for permission to use the land as a commercial wharf. Certain surveying works would involve the removal of scrub, shrubs and saplings (which it claimed were not trees) as well as removing certain trees for vehicular access. The Council rejected the application and took steps to protect the trees on the site.

Mr Justice Cranston explained, "there is no statutory definition of a tree. I conclude that with tree preservation orders there are no limitations in terms of size for what is to be treated as a tree. In other words, saplings are trees. Moreover, a tree preservation order for a woodland extends to all trees in the woodland, even if not in existence at the time the order is made".

The position now appears that a TPO for a woodland covers saplings and trees at all stages of their lives, even those not germinated yet!

FURTHER INFORMATION

For more information relating to this article, please contact:

David Goodman

Partner and National Head of Planning and Consents Team

T: +44 (0)113 284 7039

E: david.goodman@hammonds.com

Richard Glover

Partner

T: +44 (0)113 284 7023

E: richard.glover@hammonds.com

Philip Maude

Director of Compulsory Purchase

T: +44 (0)113 284 7038

E: philip.maunder@hammonds.com

Martin Walker

Senior Associate

T: +44 (0)121 200 3445

E: martin.walker@hammonds.com

WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com.

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. © Hammonds LLP 2009.

Hammonds LLP is a limited liability partnership registered in England and Wales with registered number OC 335584 and is regulated by the Solicitors Regulation Authority of England and Wales. A list of the members of Hammonds LLP and their professional qualifications is open to inspection at the registered office of Hammonds LLP, 7 Devonshire Square, London EC2M 4YH. Use of the word "Partner" by Hammonds LLP refers to a member of Hammonds LLP or an employee or consultant with equivalent standing and qualification.