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Review

Planning

Making Localism Deliver

The British Property Federation (BPF), along with many of the UK's largest property firms, is cautiously positive about the Conservative party's plans to give local authorities greater decision making powers and other plans by the Conservatives to boost localism. The plans include making bonus payments to local authorities for newly built homes and commercial property in their areas. The bonus payments, which would be made by Central Government, would match council tax and business rates collected from new developments for six years. There will be no requirement for the authorities to reserve the bonus payments for any specific purpose and the funds will not be ring-fenced.

Localism is hoped to improve the planning system by incentivising a quicker, more efficient approach to decision making and encouraging development which could alleviate the national housing shortage.

In its new report entitled 'Making Localism Deliver', the BPF concludes that localism could work if the right measures are put in place.

Liz Peace, chief executive of the BPF, said:

"If done properly, localism could mean a smoother planning process, quicker decision-making and better engagement. The property industry is committed to working closely with councils, but they will have to be given significant support to make this work."

"Poorly implemented localism – as a result of inadequate resources – could lead to greater delays, ultimately reducing the attractiveness of the UK as a place to invest. This is of particular concern in relation to smaller councils when faced with the challenge of delivering large one off regeneration schemes."

"The British Property Federation is cautiously positive about the Conservative party's plans to give local authorities greater decision making powers."

THOUSANDS OF LEEDS PLANNING DECISIONS IN DANGER

A planning challenge by a Leeds businessman, Marc Snee, has led to the questioning of the validity of thousands of planning decisions made by planning officers of Leeds City Council between 2004 and 2008. Snee opposed a planning proposal to build 12 new flats in Morley, for which planning permission had been granted by the council's chief planning officer. He asked for details of the delegated powers of the chief officer and it transpired that the council had no information to show that the delegated powers of its planning officers were expressly approved between 2004 and 2008, as required by the council's internal procedures.

Since then, the council has been desperately searching for any evidence to legitimise the assignment of planning powers to its officers during this period. According to the Leeds' rules of procedure, the proper process for delegation involves a "Scheme of Delegation" being approved at annual meetings. Whilst the council's barrister Andrew Arden QC admits that there was no such express approval at the annual meetings between 2004 and 2008, he told the court that the council adopted a rolling and an annual review of the constitution by committee, and amendments were approved by the annual meetings. Although the scheme of delegation was not mentioned at the annual meetings, Mr Arden QC argued that the proper thing for the court to do was to infer that the scheme of delegation was approved in those meetings.

Should the High Court Judge find in favour of Snee, this will render thousands of decisions on planning applications and enforcement actions as being improperly made. Judgment is eagerly awaited this month.

COMMUNITY INFRASTRUCTURE LEVY UPDATE

The Community Infrastructure Levy (CIL) is the optional charge on new developments which local authorities in England and Wales will be permitted to make. The draft regulations, required to implement the CIL, were published in July 2009. Nevertheless, the Government announced that it was delaying the introduction of CIL until 6 April 2010. Once the final regulations are issued, local authorities will be able to begin drafting CIL Development Plan Documents. It is anticipated that this process is likely to take between 12 and 24 months. Therefore the adoption of the CIL by any authority is unlikely to happen before 2012.

RSS PROGRESS REPORT

Communities Secretary John Denham has updated MPs on the progress of the revision process regarding Regional Spatial Strategies (RSSs). So far, 6 regions have published the final amendments to their RSSs. These regions are the East of England, Yorkshire and the Humber, the North East, the North West, the East Midlands and the South East.

The West Midlands is taking a phased approach to the full revision of its RSS. It has so far completed Phase 1, which covers the Black Country. The proposed changes in Phase 2 are expected to be discussed in early 2010. The department aims to publish the South West strategy in 2010. It was due to be published last summer, but further work and consultation needs to be carried out in light of a legal judgment on a sustainability appraisal.

Cases

Historic Buildings and Monuments Commission for England (English Heritage) v Secretary of State for Communities and Local Government (High Court – September 2009)

By way of background, an application for planning permission for a development in Lambeth including a 43-storey tower was made to the local planning authority. The development included the provision of a community sports centre and swimming pool but no affordable housing. The site was not in a conservation area itself but its proximity to nearby conservation areas and Somerset House, a listed building, meant that the visual impact of the development was a key issue for consideration.

The application was refused by the authority and the applicant appealed. The Planning Inspector recommended to the Secretary of State that the refusal of the planning permission should be upheld on the basis that the height of the tower would detract unacceptably from the setting of Somerset House and would also harm the settings of nearby conservation areas. He concluded that this harm would not be outweighed by the benefits of the development.

The Secretary of State disagreed with the Inspector's recommendation and granted permission on the basis that she considered that the benefits of the scheme, including the provision of the sports centre and housing, outweighed the adverse impact on the settings of Somerset House and the conservation areas. English Heritage asked the Court to quash this decision under Section 288 of the Town and Country Planning Act 1990.

The challenge was unsuccessful as it was found that the Secretary of State was entitled to make an overall planning judgment which was contrary to the Inspector's recommendations and had been entitled to find that the impact of the development would not be unacceptable.

This decision is a timely reminder that the courts will not interfere in what they consider to be issues of planning judgement.

Nirah Holdings Ltd v British Agricultural Services Ltd (High Court – September 2009)

The Claimant and the Defendant had entered into an option agreement whereby the Claimant had been granted an option to purchase land to enable it to build a major visitor attraction and science research park.

Clause 2.1 of the agreement set out the parties' aims, which were to maximise the value and amenity of the Claimant's development and to undertake the development of the Defendant's retained land. In accordance with the agreement the Claimant submitted an application for outline planning permission. One of the important issues to be dealt with in the planning process was visitor access. The local planning authority resolved that it would approve the outline planning permission, subject to a number of conditions and section 106 planning obligations including the provision of a shuttle bus service for visitors from a park and ride facility.

The option could not be exercised without satisfactory planning permission being obtained.

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Clause 5.1 of the option agreement provided that if the Defendant was requested by the Claimant to enter into any ancillary agreements in a form to be approved by the Defendant, it should not unreasonably withhold consent or create delay, unless that ancillary agreement would cause an adverse impact on the Defendant. The Claimant believed that the Defendant was obliged under the option agreement to approve section 106 agreement. The Defendant refused to approve the agreement and therefore the Claimant sought a declaration from the Court. The Defendant argued that it had insufficient information to approve or refuse the proposed section 106 agreement.

The Court found in favour of the Claimant on the grounds that the Defendant had been provided with sufficient information about the proposed shuttle bus link road, travel plans, and the proposed highway mitigation measures to enable it to form a view as to whether it should approve the section 106 agreement. The Defendant did not prove that the proposed routes would adversely impact its aims therefore enabling it to rely on clause 2.1 of the option agreement.

It followed that the Claimant was entitled to a declaration that the Defendant was not entitled to refuse to approve or enter into the form of the agreement to specific performance by the Defendant of the option agreement.

This form of option agreement which is conditional on the obtaining of planning permission is common. It is also common for the seller to have a right to reject a planning permission subject to onerous conditions or subject to onerous section 106 obligations. This case is an important albeit rare example of the court dealing with the issue of whether a seller can reasonably refuse to enter into a section 106 agreement, because he considers the obligations within the agreement to be too onerous.

Howells v Secretary of State for Communities and Local Government (High Court –October 2009)

The local planning authority had issued an enforcement notice against Mr Howells for a breach of planning control, namely the unauthorised use of agricultural land for the importation and storage of inert waste materials. The enforcement notice required the land to be restored to its lawful use.

Mr Howells appealed against the enforcement notice and the Planning Inspector dismissed his appeal and amended the plan attached to the enforcement notice so as to slightly increase the land to which it referred to. The Planning Inspector concluded that the land had been used for a mixed use in the period of ten years preceding service of the enforcement notice and that the use of the land for the storage of inert waste materials was therefore not lawful. The Inspector also decided that it was appropriate to alter the plan as it differed from the actual development existing on the site and the modification would not cause Mr Howells any injustice.

Mr Howells appealed the Planning Inspector's decision under s. 285 of the Town and Country Planning Act 1990, contending that:

1. extending the plan constituted a breach of the Planning Inspector's powers;

2. modifying the plan without giving Mr Howells the opportunity to make representations constituted a breach of the principles of natural justice and fairness; and

3. the Inspector had mistakenly found that there was no lawful use of the land for the storage of inert waste materials which could be preserved.

Mr Howells' appeal was dismissed on the grounds that a planning inspector had the power to extend the requirements of an enforcement notice according to case law and the wording of s.176 TCPA. In addition, the extension of the plan did not cause Mr Howells any injustice. On the evidence before him the Planning Inspector was entitled to find that there was no lawful use of the land for the storage of inert waste materials which could be preserved.

This decision demonstrates the wide powers that a planning inspector under s. 176 TCPA which includes the ability to extend or enlarge the area of land to which an enforcement notice applies.

R. (on the application of Connolly) v Havering LBC (Court of Appeal – October 2009)

The developer and neighbour of the Connollys, had applied for planning permission to Havering LBC to carry out alterations to the north and south sides of his home. The Connollys were not notified of the application and therefore did not object to it. The local planning authority was not opposed to the proposal concerning the north side of the property but refused the application as they considered the proposed change to the south side was unacceptable.

The neighbour re-applied but only for alterations to the north of his property. The Connollys were notified of this application, objected and the planning permission was refused. The developer appealed this second decision. The Planning Inspector presiding over the appeal was however

only provided with information in relation to the first application. The Inspector granted planning permission in respect of the north side proposas.

The Connollys challenged the Inspector's decision and the High Court Judge quashed the decision on the basis that the Inspector should have been informed of the second planning permission application; if that information had been provided, the Inspector may have refused the application.

The issue was that the authority had refused the second application, for the north extension, which the Connollys contended was, "in part identical, and in part strikingly similar," to the north part of the first application, which was before the Inspector. The Connollys felt that all the information should have been before the Inspector. The Judge agreed with the Connollys stating that while the Inspector did carry out her own judgment of the proposal (the first application), her approach might have been different if she knew that the Council had in fact raised very substantial objections to a materially identical proposal for the same property.

The Secretary of State appealed the Judge's decision claiming that it was wrong for the Judge to consider the second application which, through no fault of her own, was not before the Inspector and accusing the Judge of straying into areas of planning merit (which according to planning law should be reserved for the Local Authority and Inspector only). The Secretary of State introduced, quite late in the proceedings before the Appeal Court, the argument that the north side extension in the first and second applications were not in fact materially identical and the authority had deliberately chosen not to inform the Inspector of the second application because it, and their reason for refusing it, was of no relevance to the appeal before the Inspector. The Court was not convinced of the second submission and thought that in asking the Court to decide that the first (north side only) and second applications were not materially identical, the Secretary of State was asking the Court to stray into considering the planning merits of the appeal.

The appeal was dismissed on the basis of the authority's failure to provide to the Inspector the full planning history of the site. The Inspector believed that she possessed that history and made her decision under this mistaken belief. This mistake was important as it affected her decision and there was the chance of her coming to a different decision had she had the accurate planning history before her.

This case demonstrates the difference between deciding whether certain information is material and ought to be before a planning inspector, which is a matter in which the courts can interfere, and determining the planning merits in accordance with the information provided, which is a matter solely for a planning inspector. In this case, it was clear to the Appeal Courts that that the Inspector ought to be fully appraised of the planning history of the site.

FURTHER INFORMATION

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