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PLANNING INSIGHT

The Growth and Infrastructure Act 2013

May 2013

Background

The Growth and Infrastructure Act 2013 ("the 2013 Act") received Royal Assent on 25 April 2013. As a Bill it was not referred to in the Queen's Speech in May 2012 but arose, principally, as a result of the Secretary of State for Communities and Local Government's written ministerial statement of 6 September 2012. The Bill had a somewhat turbulent passage through both Houses of Parliament including the final "ping pong" stage when the Bill was batted backwards and forwards between the two Houses. Agreement was finally reached enabling Royal Assent just before the Parliamentary session ended.

Now that we have the 2013 Act, what does it do?

The 2013 Act is divided into three parts:

- Sections 1-17: *Promoting growth and facilitating provision of infrastructure, and related matters;*
- Sections 18-28: *Other infrastructure provisions;*
- Sections 29-31: *Economic measures.*

There are then consequential provisions and four schedules.

The 2013 Act is a collection of matters rather than a coherent whole in the sense that all the provisions within the 2013 Act amend other acts. Most provisions of the 2013 Act apply to England only. Matters covered include:

- broadening the powers of the Secretary of State to award costs between the parties at planning and compulsory purchase order inquiries;
- permitted development rights (prior approvals) – the controversial home extension provisions;
- changes to enable applications for the stopping up and diversion of highways and footpaths to be combined with planning applications;
- various amendments to the law of town and village greens; and
- limiting the scope of Special Parliamentary Procedure in respect of applications under the Planning Act 2008.

Rather than providing a list of everything within the 2013 Act, this briefing note summarises a few key sections.

Section 1 and Schedule 1: Option to make a planning application directly to the Secretary of State

This section was one of the more controversial provisions of the Bill and led to considerable debate both in and out of Parliament. It amends the Town and Country Planning Act 1990 by inserting new sections 62A to 62C. The new sections will enable an applicant to opt to have its planning application determined by the Secretary of State rather than by the relevant Local Planning Authority ("LPA"). The following criteria must be satisfied in order to enable this option to be available to an applicant:

(i) The LPA must be designated by the Secretary of State (in other words he must consider that there are respects in which the LPA is not adequately performing its function for determining planning applications); and

(ii) The application must be for planning permission (excluding s.73 applications to "vary" a condition) or for reserved matters approval and the development for which the consent is sought must be "major development" in England.

The Secretary of State must bring before Parliament a document setting out the criteria by which LPAs will be "designated". That document is awaited. It must be placed before both Houses of Parliament for 40 sitting days and will only come into effect if neither House votes against it during this period.

Associated applications for listed building consent, conservation area consent and such other applications prescribed by the Secretary of State can also be made directly to the Secretary of State but they must be "connected" to the relevant application. If the Secretary of State determines that the applications are not connected then they will be remitted back to the LPA (or other appropriate body) for determination.

The decision of the Secretary of State (or more usually an Inspector appointed by him) will be final - there is no right of appeal. The ability to challenge the decision in the High Court via s.288 Town and Country Planning Act 1990 is, however, available within the usual 6 week time period.

Section 6: Limits on power to require information with planning applications

This section introduces limits on the powers that LPAs have to require information with planning applications. It introduces a new provision into section 62 of the Town and Country Planning Act 1990 in England. The information requested by the LPA:

- must be reasonable having regard, in particular, to the nature and scale of the proposed development; and
- it must be reasonable to think that the matter will be a material consideration in the determination of the application in question.

Section 7 and Schedule 2: Modification or discharge of affordable housing requirements

Section 7 and Schedule 2 of the 2013 Act enable an application to be made to the relevant LPA in England to vary or remove "*an affordable housing requirement*" contained in a planning obligation.

If the development was granted permission on the basis of a rural exception sites policy then these modification or discharge provisions will not apply.

Section 7 inserts three new sections into the Town and Country Planning Act 1990:

- Section 106BA: Modification or discharge of affordable housing requirements;
- Section 106BB: Duty to notify the Mayor of London of certain applications under section 106BA;
- Section 106BC: Appeals in relation to applications under section 106BA.

The sections will be repealed at the end of 30 April 2016, unless the Secretary of State substitutes a later date.

When an application is made to the relevant LPA for the first time then the LPA has two options:

(i) if the affordable housing requirement in the s.106 obligation means that the development is not economically viable then the authority must deal with it so as to ensure that the development becomes economically viable. This means that the LPA must modify, replace, remove or discharge the obligation but it must not make the revised obligation more onerous than the original.

(ii) if the applicant fails to demonstrate that the affordable housing requirement in the s.106 obligation renders the development economically unviable then the original obligation must continue to have effect without modification or replacement.

On a second or subsequent application, the authority has more flexibility in amending the affordable housing requirement.

Unless a prescribed period for determining the application is set out by the Secretary of State (and none is currently proposed), the determination period for an application is 28 days beginning with the day on which the application is received. The applicant and the LPA can, in writing, agree to extend this period.

On 26 April 2013, the Department for Communities and Local Government issued Guidance on Section 106 affordable housing requirements (review and appeal). The guidance document can be accessed via this link:

https://www.gov.uk/government/publications/section-106-affordable-housing-requirements-review-and-appeal

The Guidance provides an overview of the evidence that is likely to be required to support applications and appeals to vary s.106 affordable housing requirements. An open book approach from the Developer is advocated in terms of providing evidence on viability although the Guidance notes that:

"*At appeal, if the developer is unwilling to proceed on an open book basis, general evidence of changes in costs and values since permission was granted can be submitted; however developers must consider whether this approach will provide sufficient evidence for the Planning Inspectorate to make a robust, impartial decision on viability.*"

Annex B of the Guidance confirms that there is no prescribed form for an application to be made under section 106BA but it sets out the matters that should be addressed in an application to the LPA.

A consultation is proposed on legislative procedures for section 106BC appeals however, until that consultation has taken place, interim procedures to be followed by the Planning Inspectorate are set out in Annex B of the Guidance. Five principles for appeals under section 106BC are set out in paragraph 9 of Annex B. The appeal procedure mechanism is covered in paragraphs 10-19 (inclusive).

Section 20: Variation of consents under the Electricity Act 1989

This section enables an application to be made to the Secretary of State, the Scottish Ministers or the Marine Management Organisation (as appropriate) to vary an existing consent issued under section 36 of the Electricity Act 1989 for the construction, extension or operation of a generating station. Regulations are awaited from the Secretary of State and Scottish Ministers governing the format, fees, publicity requirements etc. associated with such applications.

Section 21: Consents under Electricity Act 1989: deemed planning permission

Corresponding amendments are made to section 90 of the Town and Country Planning Act 1990 (deemed planning permission) to take account of variations to section 36 consents as noted above.

Section 26: Bringing business and commercial projects within Planning Act 2008 regime

Section 14 of the Planning Act 2008 defines the term "Nationally Significant Infrastructure Project". It includes 16 categories of project in the areas of energy, transport, water, waste water and waste such as:

- "the construction or alteration of a generating station"; and
- "the installation of an electric line above ground".

Thresholds are then applied.

Section 26 of the 2013 Act substitutes new sections 35 and 35ZA into the Planning Act 2008. It enables the Secretary of State to give a direction for development to be treated as development for which development consent is required (i.e. an NSIP). The development must be a project (or proposed project) that is in the field of energy, transport, water, waste water or waste (the original NSIP categories). Alternatively, the development could fall into the newly designated category of business or commercial projects in England (excluding developments comprising one or more dwellings).

The relevant project must be considered by the Secretary of State to be of national significance on its own or when considered together with other projects in the same field or another business or commercial project (as appropriate).

It is not mandatory to apply to the Secretary of State for development consent for a business or commercial project as the usual planning application route could be adopted. The Government estimates that 10-20 projects may apply per year.

Comments

The 2013 Act introduces changes in a number of areas including planning, highways, village greens and infrastructure consents. As is usually the case when new legislation is introduced, a number of regulations and guidance documents are awaited to provide further details in respect of key proposals.

The purpose of this briefing has been to focus on a few sections of the 2013 Act and to provide a short summary of the main elements of the changes introduced by those sections. The briefing is not intended as a comprehensive review of the 2013 Act or those sections. If you have any queries in relation to the 2013 Act then please contact Julia Dixon or your usual contact in the Squire Sanders planning team.

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