Landmark CHAMBERS

Bristol Planning Law and Policy Conference

2017 Legal Update

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The 2017 EIA Regulations – Main Changes (1)

- Applicable where ES submitted, or request for scoping opinion made, after 16 May 2017
- Power to exempt national defence developments in Scotland, Wales and Northern Ireland (**regs 60. 61 and 62**)
- EIA to be co-ordinated with assessments under the Habitats Directive or the Wild Birds Directive (**reg. 27**)

The 2017 EIA Regulations – Main Changes (2)

- Changes to the list of environmental factors to be considered as part of the EIA process.
  - "human beings" now "population and human health"
  - "fauna and flora" now "biodiversity" (**reg 4(2)(a) and (b)**)
- New requirement to consider (where relevant) effects deriving from vulnerability to the risks of major accidents and disasters, including climate change (**reg 4(4)**, **Sch 3 para 1**)

The 2017 EIA Regulations – Main Changes (3)

Screening decisions

- Greater "front-loading" of the information required in request for screening, including details of mitigation measures proposed to avoid significant effects (**reg 6(2))**

- 3 week timescale for receiving a Screening Opinion retained, but the ability to extend now limited to 90 days, subject to exceptional circumstances (**reg 6(6) and (7))**

- Most screening criteria unchanged, but threshold for industrial projects reduced from 5h to 0.5ha. Query whether intended?

The 2017 EIA Regulations – Main Changes (4)

Information to be provided within an ES and Presentation

- the ES must be accompanied by a statement setting out the relevant qualifications of the experts used (**reg 18(5))**

- the ES must be based upon the most recent scoping opinion where one has been obtained (**reg 18(4)(a)**)

- requirements for considering alternatives: the ES must now include an "indication of the main reasons for choosing the selected option, including a comparison of the environmental effects" (**reg 18(3)(d)** and **Schedule 3 para 2**)

The 2017 EIA Regulations – Main Changes (5)

- consultation period extended from 21 to 30 days (**reg 19(6), 20(2)(e)**)

- authorities are required to determine the procedures for monitoring significant adverse effects (**reg 26(1)(d), 26(3)**)

- statutory requirement for decision-makers to avoid conflicts of interest, and (where relevant) to ensure functional separation between the persons within the authority responsible for bringing forward a proposal and those responsible for determining it (**reg 64**)

Section 106 and Pooling Arrangements: *Aberdeen City & Shire SDPA v. Elsick (1)*

The <u>validity</u> of planning obligations

- does not depend on their relationship to a particular permission, but on whether it:
  - "restricts or regulates the use of land."
  - is for a planning purpose,
  - is not *Wednesbury* unreasonable.

Section 106 and Pooling Arrangements: *Aberdeen City & Shire SDPA v. Elsick (2)*

The validity of an obligation

- An obligation to pay a sum of money not tied to the commencement of development is not lawful.

- An obligation requiring a contribution for a purpose not related to the burdened land is unlawful, because it amounts to the buying and selling of planning permission

> "an ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice"

Section 106 and Pooling Arrangements: *Aberdeen City & Shire SDPA v. Elsick (3)*

The <u>materiality</u> of an obligation is different to its legality

- ***Tesco Stores v. SoSE***

  "an offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration"

- ***Aberdeen***

  "The inclusion of a policy in the development plan, that the planning authority will seek such a planning obligation … would not make relevant what would otherwise be irrelevant."

Section 106 and Pooling Arrangements: *Aberdeen City & Shire SDPA v. Elsick (4)*

A scheme which required pooled contributions

- towards the funding of specified infrastructure where no one developer was liable for the cost of any of the specified interventions
- in addition to the requirement that each developer mitigate the specific impacts of their scheme
- fixed at a sum per unit which was not tied to the impact of a particular development on the transport network

was **unlawful** because it entailed the use of contributions on infrastructure with which the development had no more than a "trivial connection", and was thus not for a purpose in relation to the development and use of the burdened site

Section 106 and Pooling Arrangements: *Aberdeen City & Shire SDPA v. Elsick (4)*

Practical Implications of *Aberdeen*:

- "across the board tariffs" will be more difficult to justify

- pooling schemes covering a large number of different infrastructure projects may have to be broken down into smaller pools, to ensure developers are only required to contribute projects where their scheme has impacts

- LPAs will need to be able to demonstrate that money collected within a particular pool is used for projects which for which that pool was created

Section 106 Agreements and Community Benefit

R (Wright) v. Forest of Dean District Council

- HC quashed a planning permission where the Council took account of promised annual "community donations" from the operator of the wind turbine

- Community benefits did not meet the test for materiality because they could be used for anything, provided that it benefitted the local community in some way

- Court of Appeal has heard argument, judgment awaited

Air Quality (1)

ClientEarth

- Government's AQ Plan defective because based on cost rather than efficacy
- Also based on unrealistically optimistic forecasts

Shirley v. SSCLG

- Challenge to refusal to call in application dismissed
- Article 3 AQ Directive imposes no additional obligation on SS

Air Quality (2): *Gladman Developments*

- Challenge to appeal decision refusing permission dismissed

- Inspector properly understood that:
  - The effect of ***ClientEarth*** was that the Government had to achieve compliance by the earliest possible date
  - The duty to produce and implement an AQP did not mean the inspector could presume the UK would become compliant with the AQD
  - There were no other regulatory controls which could be relied upon to address the AQ impacts of the development
- Inspector not required to consider a Grampian condition requiring mitigation which had not been suggested to him.

Air Quality (3): Cheshire East

"Cheshire East council is reviewing planning applications amid fears falsified data may have affected decisions in at least five towns"

- Guardian, 02.08.17

Neighbourhood Planning (1)

DLA Delivery v. Lewes

- 'general conformity' is flexible and does not require absolute conformity with an out-of-date plan
- no conformity needed with policies which specifically planned for a previous time period that is not covered by the NDP

- no requirement to wait for the adoption of an up-to-date local plan

Neighbourhood Planning (2)

Hoare v. Vale of White Horse

- conflict between one policy in NP and one strategic policy in the development plan did not mean that the NP policies collectively were not in general conformity

Bewley Homes,

- NP can allocate sites beyond settlement boundary of out-of-date Local Plan

- NP Examiner not required to give reasons to same standard as Inspector on a planning appeal

Neighbourhood Planning (3)

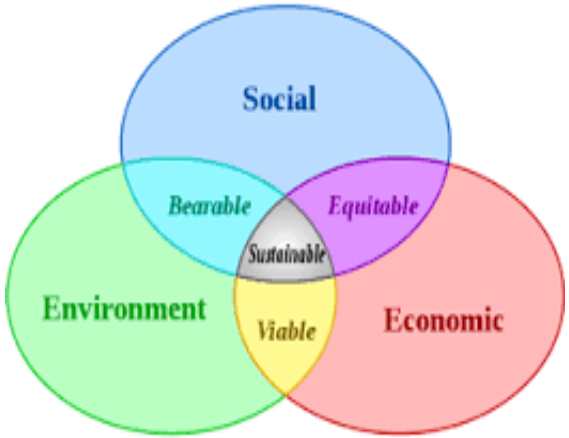
Richborough Estates

- Challenge to the Dec 2016 WMS on neighbourhood planning
- Alleged failure to consult over what is essentially an amendment to para 49 of the NPPF, and irrationality
- Judgment expected before the end of term.

The Presumption in Favour of Sustainable Development (1)

Questions left after *Hopkins Homes*

- When para 14 says the presumption does not apply if "specific policies in this Framework indicate development should be restricted", does the "specific policy" mean you can <u>never</u> take advantage of the presumption?



- Is there are "presumption in favour of sustainable development" <u>outside</u> the paragraph 14 tests?

The Presumption in Favour of Sustainable Development (2)

***East Staffordshire*: Specific Policies**

- Endorses ***Forest of Dean DC v. SSCLG***
- If, after the application of a "restrictive" policy, the outcome is in favour of development, then the para 14 presumption "resurfaces and can be applied."

***East Staffordshire*: Presumption outside para 14?**

- Neither the 'golden thread' nor the policy presumption in favour of sustainable development has any application outside the confines of paragraph 14

The Presumption in Favour of Sustainable Development (3): The Effect of *East Staffordshire*

- Paragraph 14 alone defines the circumstances in which the presumption applies. Development that is 'sustainable' by reference to other parts of the NPPF only benefits from the presumption if paragraph 14 is triggered.
- Development only needs to meet the relevant tests in paragraph 14 in order to benefit from the presumption. There is no additional requirement for development to be sustainable first by reference to other policies in the NPPF

NB: this does not mean that "sustainability" is not still a material consideration in the normal planning balance: ***Mansell v. Tonbridge & Malling BC***

"A Supply of Deliverable Housing Sites"

St Modwen Developments

- "Deliverability is not the same thing as delivery. The fact that a particular site is capable of being delivered within five years does not mean that it necessarily will be."

- "paragraphs 47 and 49 .. are consistently worded to refer to a supply of housing sites that can be regarded as 'deliverable', not sites that are regarded as certain to be delivered."

- "had the Government's intention been to frame the policy … in terms of a test more demanding than deliverability, this would have been done".

Housing: The 2017 Consultation

Standardised approach to housing need.

- For all plans submitted after 31 March 2018
- LPAs will have to justify using a different approach, which will be "tested rigorously" at the EiP
- LPAs using the standard approach can rely on the evidence base for up to 2 years from submission

Housing Consultation: Other Proposals (1)

- **Duty to co-operate**
  - LPAs required to produce a statement of common ground detailing how they have worked together under the DtC
  - test of soundness amended to require plans to be based on effective joint working and a strategy informed by agreements over the wider area, evidenced by the SCG;
- **Neighbourhood plans**
  - LPAs to set out housing figures for designated NPAs and parishes

Housing Consultation: Other Proposals (2)

- **Viability**
  - improvements to the way plans are tested for viability
  - amendments to NPPF to make it clear that, where viability has been tested at the plan stage, it should not need to be tested again at the planning application stage
  - making viability assessment simpler and more transparent
- **Fees**
  - LPAs “who are delivering the homes their communities need” to be able to increase their planning fees by 20%.

Alternative Proposals: Lisle-Mainwaring v. Carroll

Mount Cook principles reaffirmed

- If a proposed development is acceptable in its own right, alternative proposals are normally irrelevant.
- Alternative proposals only material in “exceptional circumstances”
- Even then, must not be “inchoate or vague” and have a “real possibility” of being implemented in the foreseeable future.

Conditions on s.73 Permissions (1)

Background

- s.73 creates freestanding consent
- s. 73(5): can't extend time for commencement or RMA

Lambeth v. SSCLG

- Original consent for retail, with condition on range of goods
- s.73 application to relax, but still non-food
- Permission fails to impose new condition
- Imposes standard time limit on commencement

Conditions on s.73 Permissions (2)

Lambeth v. SSCLG

- LDC upheld

- ***Trump*** allows imposition of new conditions as well as correction of "incomplete conditions"

- But must be necessary to give efficacy to the document
  - not enough that it reflects the LPA's purpose
  - or that would be fair

- Fresh section 91 commencement condition invalid

Conditions on s. 73 permissions (3)

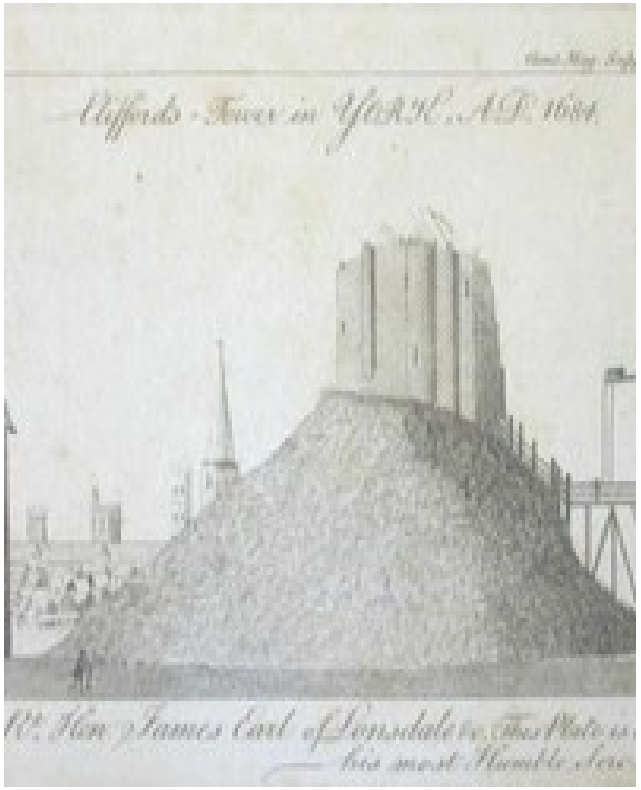
R (Wet Finishing Works Ltd) v. Taunton Deane BC

- Planning permission for 84 units
- S.73 application to increase to 90
- Grant of permission found lawful:
  - Applied ***Arrowcroft***: does the change amount to a *fundamental alteration* of the proposal put forward in the original application
- Query whether correct, since s. 73 can only change conditions …

Heritage (1)

NPPF para 141:

"The ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted"



Hayes v. City of York

"The recording of evidence of the past was not the sole justification for the development. It was treated as part of the public benefit flowing from the project, but that was not unlawful."

Heritage (2): Setting

Williams v. Powys **(CA)**

- impact on setting requires a distinct visual relationship between the asset and the development "that was more than remote or ephemeral and which … bore on one's experience of the listed building in its surrounding landscape or townscape".
- physical proximity was not always essential

Steer v. SSCLG **(HC)**

- Inspector wrong to conclude that a physical or visual connection is necessary
- decision quashed for failure to consider whether the existence of a historical, social and economic connection could bring its agricultural estate within the setting of Kedleston Hall

Green Belt (1): Inappropriate

NPPF paras 89 and 90:

- Developments which are not inappropriate provided they preserve openness

R (Boot) v. Elmbridge

- *Any* harm to openness or to the purposes means that the development is *not* appropriate

Green Belt (2): Openness

Turner

- Visual impact can be an aspect of impact on openness

R (Samuel Smith Old Brewery) v. North Yorkshire CC

- But depends on circumstances. No requirement in every case to take into account visual impact when assessing openness

Smith v. Secretary of State for Communities and Local Government

- Openness is an "open textured" concept, not limited to the impact of new buildings

Goodman Logistics v. SSCLG

- Visual impact was "obviously relevant". Failure to consider it was error of law

Habitats (1)

Wealden District Council v. SSCLG

- Lewes and SDNPA JCS quashed
- NE advice on impact of traffic ignored cumulative impact of growth in adjoining areas. This was “obviously wrong”
- Consequent failure to carry our appropriate assessment rendered plan unlawful

Habitats (2)

New Conservation of Habitats and Species Regs 2017

- from 30 November 2017
- few substantive changes

Duty to Give Reasons

R (CPRE) v. Dover

- failed to give adequate reasons for the grant of permission for major development in an AONB contrary to officer recommendation

Oakley v. South Cambs DC

- merit in a general duty to give reasons
- but decided on narrower basis that application contrary to development plan and grant was against officer's recommendation

For further information ….

Copies of the written text for this paper will be available online.

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