

Update: planning and environmental law

Gregory Jones examines recent developments including time scales for filing evidence, core strategy challenges and strategic environmental assessments

Guidance on time scales for filing evidence

An anomaly of the procedure for planning appeals to the High Court is that until now the respondent – in most cases the secretary of state – has not been obliged to file a defence, even of its summary grounds of resistance to the claim.

The result has been that very often the first that the claimant knows of the case advanced by the secretary of state is when the latter's skeleton argument is filed 14 days (sometimes less) before the date for the hearing. Furthermore, evidence (usually in the form of witness statements from the planning inspector) on behalf of the secretary of state is often filed long outside the prescribed time period.

Although judges of the Administrative Court have expressed frustration at the failure of the secretary of state to comply with the rules appertaining the filing of evidence, it is has only been rarely that they have ruled such late evidence to be inadmissible (see *Surrey Heath v Secretary of State for Transport Local Government and the Regions* [2002] EWHC 58 (Admin)). However, the recent written statement by the president of the Administrative Court, Mr Justice Collins, to the Planning and Environment Bar Association suggests a change: "Claimants in Town and Country Planning Act 1990 s.287 and s.288 claims should, in appropriate cases, apply in their claim for directions as to exchange of evidence and/or summary grounds of defence so as to ensure that the ambit of the dispute is known in advance, so that full evidence is exchanged in good time and so that claimants are aware of the defence in advance of filing skeletons".

This statement was reinforced in *Dinedor Hill Action Association v Herefordshire CC* [2008] EWHC 1741 (Admin) in which Collins J set down the general rule to be as follows at [34]: "I am aware that the Treasury Solicitor needs some time to consider a decision letter (which may be lengthy and complicated) and must seek instructions from the inspector before advising the secretary of state whether the claim should be conceded or resisted. Equally, no doubt, planning author-



ities will have to go through the same process with their legal advisors. Accordingly, the general rule will be if directions are sought that evidence and at least summary grounds of defence should be lodged within 10 weeks.

If a shorter period is sought, it must be requested specifically and good reasons given for the shorter time. Equally, if the defendant or interested party wants a longer time, they should make a specific request, again giving good reasons for it."

At present, the Treasury Solicitor appears reluctant to file summary grounds of defence. It will be interesting to see how the judges of the Administrative Court apply this guidance in the vent of directions being sought.

Challenges to core strategies

There have been two important judgments concerning the operation of the new planning regime brought about by the Planning and Compulsory Purchase Act 2004 ('the 2004 Act'). In *ABP v Hampshire County Council* [2008] EWHC 1540 (Admin) a claim was brought by Associated British Ports, the operators of the port of Southampton and owners of Dibden Bay. They claimed that the joint minerals and waste core strategy

adopted by the defendant local planning authorities did not satisfy the requirements of the 2004 Act s.19 and s.24 and was not sound, and was not within Part 2 of the Act for that reason. The court held that the core strategy, having identified a need for crushed rock, did not then set out any guidance as to how that need should be met in the daughter development plan documents and failed to comply with Planning Policy Statement 12 (PPS 12), which required the core strategy,

and not some subsequent document, to set out the strategy for ensuring that Hampshire's anticipated demand for crushed rock would be met. Furthermore, it also ignored the requirement in PPS 12 for the core strategy to set out its long-term strategy over at least the next 10 years.

The judgment is also of wider significance for two reasons. The first point concerns the date upon which the statutory time period for challenge starts to run. This is very important because the period for appeal is prescribed by statute with no possibility for an extension of time (see for example, *R v Secretary of State ex parte Kent* [1990] JPL 124 and *R v Cornwall County Council ex parte Huntington* [1992] 3 All ER 566). Section 113(4) of the 2004 Act requires an application to be made

“not later than the end of the period of six weeks starting with the relevant date”, and s.113(11)(c) provides that the relevant date in relation to a core strategy is the date when it was “adopted” by the local planning authority. In the present case, Keith J stated at [47]:

“Since more than six weeks had elapsed between 18 July 2007, which was the latest of the dates on which each of the first four defendants adopted the core strategy, and 30 October 2007 when the claim was lodged, the claim was at first blush out of time. However, it all depends on what the word “adopted” in s.113(11)(c) means. In my view, the process of adoption is not perfected or completed by a resolution of adoption by the local planning authority. It is only completed when the requirements of Reg.36 of the 2004 Regulations have been complied with. Since those requirements have only to be carried out “[a]s soon as reasonably practicable after the local planning authority” has adopted the core strategy, potential claimants would be deprived of the whole of the six weeks’ period to decide whether to mount a challenge in the High Court if the word “adopted” in s.113(11)(c) referred only to the formal resolution of adoption by the local planning authority.”

The second point of wider interest concerns the guidance given in PPS 12 on the meaning of the term “sound”. The term is not defined in the 2004 Act but para.4.24 of PPS 12 lists a series of nine tests, which it says if met will mean that a development plan document will be sound. Keith J however doubted at [29]: “... whether Parliament can really have intended the first five of the tests of soundness set out in paragraph 4.24 of PPS 12 to be tests of soundness. Tests (i) – (v) appear to summarise sections 19(1), 19(3), 19(5), 24(1) and 19(2)(f) of the 2004 Act respectively. Since s.20(5)(a) requires development plan documents (and therefore core strategies) to satisfy the requirements of s.19 and s.24, the requirement in s.20(5)(b) for development plan documents to be sound must refer to something else, because Parliament is unlikely to have been repeating the requirements of s.20(5)(a).”

The 2004 version of PPS 12 was also the subject of further judicial scrutiny in *Blyth Valley v Persimmon (NE) Ltd* [2008] EWCA Civ 861. In para.4.24 of the 2004 version of PPS 12 the nine tests were introduced by the following passage: “The presumption will be that the development plan document is sound unless it is shown to be otherwise as a result of evidence considered at the examination”. The Court of Appeal held that the so-called “presumption of soundness” as contained in

PPS 12 (2004), which had been interpreted as placing an onus on objectors to bring evidence to show that the local development document was “unsound”, was misleading and contrary to the provisions of s.20(5) of the 2004 Act.

The court rejected submissions made on behalf of the secretary of state for Communities and Local Government that PPS 12 (2004) had the same meaning on this point as PPS 12 (June 2008), which states as para.4.49: “The starting point for the examination is the assumption that the local authority has submitted what it considers to be a sound plan.” The Court of Appeal also upheld the judgment of Collins J that the core strategy was not supported by a robust and credible evidence base in respect of the affordable housing policy and was therefore not sound.

Strategic environmental assessment

The judgment of Weatherup J in *Seaport Investments* [2007] NIQB 62 was reported in Planning Law Update (*Solicitors Journal* 152/26). The secretary of state appealed the High Court findings that the Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 did not adequately implement the requirements of Directive 2001/42/EEC on the Assessment of the Effects of Certain Plans and Programmes on the Environment (the SEA Directive).

In particular, the secretary of state challenged the findings that the regulations, which designated only one environmental consultation body, the department of the Environment, did not properly implement the SEA Directive where the department was the plan-making authority itself and further that the failure to specify actual time period for consultation also failed properly to transpose the directive.

The Court of Appeal of Northern Ireland, having heard argument for two days, indicated that it will refer these issues for preliminary reference under Art.234 of the EC Treaty to the European Court of Justice. Leave has also been granted by the High Court in Northern Ireland for Seaport Investments to challenge the decision by the secretary of state made following the handing down of Weatherup J’s judgment that it was no longer “feasible” for the plan in question to comply with the SEA Directive.

Officer’s reports to committee

R (on the application of Cathcow) v Cygnor Gwynedd [2008] EWHC 1462 (Admin) concerned a challenge by way of judicial review relating to the correct application of retail policy. Collins J provided some further

useful guidance on the role of an officer’s report to committee. Having considered Sullivan J’s judgment in *R v Mendip DC Ex p Fabre* (2000) 80 P & CR 500, which referred to the purpose of the report as being to inform committee members, he referred to the statutory requirement for reports to be made available to the public in advance of the committee meeting.

Collins J added: “The whole purpose of advance disclosure is to enable objectors or those interested to have that opportunity and so, as it seems to me, albeit Sullivan J is correct and the officer’s report is designed to give advice to knowing members of a committee and need not and should not extend beyond such as is necessary for that purpose, nevertheless it is important to remember that there is this further consideration so that the basis upon which relevant advice is given is at least made clear in a sentence or two.”

Minerals planning

In *R (on the application of Bleaklow Industries Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 606 (Admin) enforcement action was taken in respect of an alleged breach of planning control which consisted of “the winning and working of limestone other than in accordance with Planning Permission 1898/9/69”.

The quarry was subject to a 1952 permission, which allowed “the winning and working of fluorspar and barytes and for the working of lead and any other minerals which are won in the course of working these minerals, by turning over old spoil dumps, by open-cast working and by underground mining”.

Sullivan J allowed an appeal against a planning inspector’s decision to uphold an enforcement notice affecting a quarry at Longstone Edge, near Bakewell, in the Peak District National Park. Sullivan J rejected the inspector’s and the National Park Authority’s interpretation of the planning permission. The inspector had interpreted the permission as limiting the ratio of limestone to fluorspar ore extracted. The case is of widespread importance both in terms of the correct approach to the interpretation of planning permissions and, in particular, in respect of old mineral planning permissions. The Court of Appeal has granted permission to appeal the judgment and ordered an expedited hearing ([2008] EWCA Civ 947).

Gregory Jones is a member of Francis Taylor Building he appeared in the *Seaport*, *ABP* and *Cathcow* cases. For further details of the cases referred to this update contact Gregory.Jones@ftb.eu.com