

property

Update: planning

Gregory Jones and Sarah Sackman review the latest planning cases involving commencement of development, and changes brought in by the Planning Act 2008

THE PLANNING ACT 2008 has been passed by both Houses bringing into force a new consent regime for major infrastructure projects including airports, power stations and other projects of national significance. The Act will create the Infrastructure Planning Commission (IPC), which will determine the major projects. It requires the creation of National Policy Statements laying down government planning policy in areas such as nuclear energy, airports and rail expansion.

The Act introduces a number of changes to existing development control and development plan arrangements as well as empowering ministers to establish a new tax in the form of a Community Infrastructure Levy. The government will draw up a timetable for the establishment of the IPC and will begin consultation on the National Policy Statements in the new year.

Construing planning permissions and the status of the application and plans

It is well established that where a planning permission is clear and unambiguous, regard should only be had to the permission itself (see Keane J in *R v Ashford BC ex.p. Shephway DC* [1999] PLCR). Unless the application incorporates the application form by reference or it is necessary to resolve an ambiguity in the permission, reference to the application and accompanying plans is excluded. The rationale for this is that the public are entitled to rely on permission documents without having to look behind them to ascertain whether there are discrepancies between the permission notice and the application. This approach plainly makes sense in respect of letters and other extrinsic documents, but what about the application form and plans? The application is itself a formal document which is publicly available. Moreover a permission document is often difficult to understand without reference to the application and plans on which it was based.

Keith Barnett v Secretary of State for Communities and Local Government and East Hampshire District Council [2008] EWHC 1601 concerned the question of whether a subsequent grant of planning permission had extended the curtilage of an earlier permission. A key issue was whether, in construing an unambiguous 'full' permission for the



erection of a building, regard could be had to the submitted plans and drawings that described the proposed building works.

Sullivan J accepted that when examining a 'full' (as opposed to 'outline') permission it was necessary to have regard to the submitted plans or drawings, whether or not they were expressly referred to in the permission. The statutory framework, contained in the Town and Country Planning (Applications) Regulations 1988, requires that every application for 'full' planning permission be accompanied by a plan identifying the land to which it relates. Therefore, without referring to the application plans, the decision notice for 'full' permission would be meaningless.

Sullivan J said that the inspector's strict application of the *Ashford* principles illustrated "the dangers inherent in a slavish adherence to judicial *dicta*" without having sufficient regard to the factual matrix of the case. He noted that none of the authorities relied on in support of *Ashford* principles concerned 'full' permissions. He emphasised that *Ashford* is still applicable in the context of 'outline' planning permission for a building or change of use, since outline permission is a self-contained document from which the extent of the permission is discernible from the description in the grant itself.

By contrast, 'full' permissions do not purport to be a complete and self-contained description of the permitted development. Any member of the public reading a notice granting full permission would find it meaningless without studying the approved plans

and drawings which are a "vital part of the permission". He added that where a site plan was submitted with outline permission, it might also be necessary to look at the plan to determine the area covered by the permission.

Although Sullivan J found that the inspector had erred in his approach to construing the permissions he found that these flaws did not vitiate the inspector's reasoning. The claimant has been given leave to appeal to the Court of Appeal.

Enforcement: planning control and gypsies

In *O'Brien v South Cambridgeshire DC* [2008] Civ 1159, the Court of Appeal held that the local planning authority, which had applied for an injunction under s.187B of the Town and Country Planning Act 1990 to restrain gypsies from breaching planning control, had not failed in its statutory duties under the Race Relations Act 1976 s.71 and the Code of Practice on the Duty to Promote Race Equality. The appellant gypsies appealed against a decision to grant an injunction that restrained them from establishing residential mobile homes or caravans on a particular stretch of land that they occupied in breach of planning control.

The appellants submitted that the respondent authority had failed properly to take into account its duties under s.71 of the Race Relations Act and in particular the need to carry out a race impact assessment. Had it done so, the harmful impact of the injunction

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would have been minimised. Moreover, it was alleged that the respondent had failed to take into account the Caravan Sites and Control of Development Act 1960 s.24, which empowered local authorities to provide for a caravan site. The failure to consider making another site available should have led the court to refuse the injunction.

The Court of Appeal dismissed the appeal. It held first that s.187B of the 1990 Act conferred a very broad discretion on the local authority and the courts. Applying *South Bucks DC v Porter (No.1)* [2003] UKHL 26, the court found a local planning authority could apply for an injunction where it was considered necessary or expedient to restrain a breach of planning control. Secondly, the power under s.24 of the 1960 Act only concerned the availability of land and the physical provision of sites; it had nothing to do with the identification of sites which were suitable in planning terms for such a use. Even a caravan site provided by the local authority would require planning permission and possibly a public inquiry. Therefore the s.24 power did nothing to resolve the underlying problem which was the nationwide shortage of gypsy sites. Thirdly, the court held that the local planning authority had taken into account all material considerations when deciding to apply for an injunction and had approached the issue in a balanced and proportionate way. As such the judge had been entitled to exercise his discretion and grant the injunction.

Commencement of development

Where a developer claims to have commenced development within the time limit laid down in a permission it is necessary to consider whether what has been done is sufficient to satisfy s.56(4) of the Town and Country Planning Act 1990, such as whether a "material operation" has begun? This is a question of fact, which will vary from case to case, however some illustrative guidance may be found in *R (on the application of Brent LBC) v Secretary of State for Communities and Local Government and Ashia Centur Limited* [2008] EWHC 1991 Admin. The interested party obtained planning permission for the construction of an Asian centre comprising a hotel, community and leisure facilities with parking and service roads in 1993. The question before the court was whether development had been begun by, what was agreed to be the relevant date, 12 January 2004. The only work that had been carried out was in relation to the construction of an access road by a process called "Perma Zyne". This involved adding chemicals to soil to create a bonded layer of material which is capable of

forming the basis for a road surface. This new surface overlapped, but was not wholly consistent with, the permitted road. Nevertheless, the inspector's decision, upheld by the Administrative Court, was that the works carried out were sufficient to keep the permission alive.

Change of use and Certificates of Lawful Use

In *Cocktails Ltd v Secretary of State for Communities and Local Government* [2008] All ER (D) 102 (Nov), the Court of Appeal dismissed an appeal against the secretary of state's decision to dismiss the appeal of the local authority's refusal to grant the appellant a certificate of lawful use or development. The site in question had been used as a car dealership and workshop until the appellant began retailing as a registered sex shop. The original permission authorised a mixed-use vehicle sales and workshop. The issue was whether the change of use was a permitted development within Class A1 use.

The court held that a planning inspector was entitled to conclude that franchised motor dealership which comprised the sale of vehicles and a workshop constituted a mixed use. Whether or not the workshop was ancillary to the sale of vehicles was a question of fact. There was no error of law in his decision therefore the retailer was not entitled to a certificate of lawful use. Of perhaps wider interest is the acceptance by Mummery LJ at the earlier permission hearing ([2008] EWCA Civ 718) that s.288 applications under the Town and Country Planning Act 1990 are not second appeals for the purposes of CPR 52.

Delay

In *R (Andrew Finn-Kelcey) v Milton Keynes Council and MK Windfarm Ltd* [2008] EWCA Civ 1067 the Court of Appeal dismissed an appeal against the decision to refuse permission for judicial review on the ground of delay. The claim was made just inside the three-month period and the applicant gave no explanation as to why the claim was not made promptly. The fact that the claimant had sent a pre-action protocol letter did not remove the obligation to act promptly. It is no coincidence that the claim in *Andrew Finn-Kelcey* was, in any event, considered unmeritorious.

Enabling development and discretion

In *Enodis v Secretary of State for Communities and Local Government* [2008] EWHC 2591 (Admin), Enodis applied to quash a decision of the first respondent secretary of state confirming the dismissal by a planning inspector of its appeal against a refusal of planning permission for residential development.

Enodis had obtained planning permission from the second respondent local authority for residential and related development on a brownfield site. The permission required the development to be carried out in accordance with a masterplan approved by the local authority. The plan did not allow any housing development within a cordon sanitaire around a sewage plant near the brownfield site.

Enodis had entered into negotiations with the owner of the sewage plant to purchase it and relocate it. It was subsequently granted planning permission for the construction of an additional 160 houses within the original cordon sanitaire provided that the development accorded with a revised masterplan. That revised plan envisaged the sewage plant and thus the cordon sanitaire as having been moved. Enodis subsequently made representations that it was no longer economical for them to relocate the sewage plant and that it could not give effect to the later grant of permission. Enodis proposed to build some of the additional houses within the cordon sanitaire and the remaining houses on a greenfield site as enabling development.

Following refusal of a planning application by the local planning authority, on appeal the inspector found that there were no special reasons to allow the development, and that Enodis should have taken the cost of moving the sewage plant into account in its original proposal and that it could not be said that its proposed scheme was the only viable one. Enodis contended that the planning inspector had erred in concluding that there were no special reasons.

The High Court held that the inspector's conclusions about the viability of the proposed scheme were speculative and not based on any evidence; it was impossible to see what the alternative scheme for the construction of the houses was or might have been. The inspector's finding that Enodis should have spread the cost of moving the scheme through the development as a whole was unsustainable because when the original permission was granted it did not involve the cost of moving the sewage plant. However, Mitting J held in exercise of his discretion that those flaws in the inspector's reasoning did not vitiate his decision that no special reasons existed to allow the development scheme proposed by Enodis. The scheme did not accord with the revised masterplan as required by the permission granted and it could not be said that it would be of public benefit.

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