

Update: planning & environment

- *Barker*
- Bias and predetermination
- Completion notices
- Section 187A injunctions
- Enforcement time limits for single dwelling houses
- Continuing use
- CLEUDs and abandonment of use
- Caravans and polytunnels

by Gregory Jones

FOLLOWING THE DETERMINATION OF THE

European Court of Justice (ECJ) in *R (Barker) v Bromley LBC* and the associated infraction proceedings brought against the UK by the EC Commission, the House of Lords has finally determined *Barker*. In truth, following the rulings of the ECJ, it was evident that there was little left for the House of Lords to determine in so far as the outcome of *Barker* itself was concerned. However, the opinions provided by the House of Lords in *R (Barker) v Bromley LBC* [2006] UKHL 52 proved to be of interest in clarifying the wider position.

The ECJ had ruled that Arts 2(1) and 4(2) of the Environmental Impact Assessment (EIA) Directive were to be interpreted as requiring an EIA to be carried out if, in the case of a grant of permission comprising more than one stage, it became apparent, in the course of the second stage, that the project was likely to have significant effects on the environment by virtue, among other things, of its size, nature or location. The 1988 EIA Regulations (even as subsequently amended) overlooked the fact that the relevant development consent might be a multi-stage process. However, the House of Lords made clear that it did not mean that where planning permission consent for a development took this form, consideration had to be given to the need for an EIA at each stage in the multi-consent process. Rather, the need for an EIA at the reserved matters stage would depend on the extent to which the environmental effects had been identified at the earlier stage. If sufficient information was given at the outset, it ought to be possible for the authority to determine whether an EIA

that was obtained at that stage would take account of all the potential environmental effects that were likely to follow as consideration of the application proceeded through the multi-stage process. The House of Lords held that conditions designed to ensure that the project remained strictly within the scope of the assessment would minimise the risk that those effects would not be identifiable until the stage when approval was sought for reserved matters. In such cases it would normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development. However, as the ECJ had held the competent authority might be obliged in some circumstances to carry out an EIA even after outline planning permission had been granted. The reason for this was because it was not possible to eliminate entirely the possibility that it would not become apparent until a later stage in the multi-stage consent process that the project was likely to have significant effects on the environment. In those circumstances, account would have to be taken of all the aspects of the project that had not yet been assessed or that had been identified for the first time as requiring an assessment. The error in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances. It is of particular interest to note that the House of Lords commented that the observations of Sullivan J in *R v Rochdale MBC Exp Tew* [2000] Env LR 1 to the effect that, if significant adverse impacts on the environment were identified at the reserved matters stage and it

was then realised that mitigation measures would be inadequate, the planning authority was powerless to prevent the development from proceeding, were now unsound.

Bias and predetermination

Following the report in 'Planning Law Update' (2006) 150 SJ 1247, 29.09.06 on *Condron v National Assembly for Wales* [2005] EWHC 3007 (Admin) in the High Court, the case has now been determined by the Court of Appeal. The background concerned a "called-in" application for a quarry near Methyr Tydfil which had been approved by the Planning Decision Committee of the Assembly. A day before the committee met to consider the planning application, the Committee chair Carwyn Jones (the Minister for Environment, Planning and Countryside in the Welsh Assembly Government), in a brief conversation with a member of the local protest group objecting to the proposed quarry, said that he was "going to go with the Inspector's report". A complaint was made to the Assembly's independent Commissioner for Standards on the ground that Jones had breached the Code of Conduct for members of the committee by discussing a case with an interested party. The Commissioner concluded that the complaint was inadmissible. Subsequently, an objector successfully challenged the decision to grant planning permission in the High Court under s288 of the Town and Country Planning Act.

The Court of Appeal overturned the decision of Lindsay J. In a judgment dated 27 November 2006, Richards LJ held that the judge had incorrectly applied the test for bias

which set out by the House of Lords in *Porter v Magill* [2002] 2 AC 357. The Court of Appeal considered that the words "I'm going to go with the Inspector's report" viewed objectively and in their context appeared to be consistent with the speaker having a pre-disposition to follow the inspector's report without necessarily having a closed mind on the subject. It cited examples of legitimate predisposition, such as a manifesto commitment of a ruling party or some other policy statement, and illegitimate predetermination, for example, a decision already reached or a determination to reach a particular decision. In doing so, it characterised the distinction as "the former [predisposition] is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter [predetermination] involves a mind that is closed to the consideration and weighing of relevant factors" [per Richards LJ] at 43. Richards LJ at 50 clarified what the test of the fair-minded observer involved: on the facts of the case, the Court of Appeal held that a fair-minded and informed observer, having considered all the facts as they are now known, would not conclude that there was a real possibility that Jones was biased when reaching the decision to grant planning permission.

More recently, and of some practical assistance for those concerned with the issue of predetermination is the decision of the adjudication panel in *Ethical Standard Officer v Councillor Woodrow* (16 December 2006) (http://www.adjudicationpanel.co.uk/documents/ape_0352_final_full_decision.pdf).

Completion notices

In *Cardiff County Council v National Assembly for Wales* [2006] EWHC 1412 (Admin), Davis J held that where works were partially completed prior to the expiration of a completion notice, that part of the development remained authorised by the planning permission pursuant to s 95(5) the Town and Country Planning Act (TCPA) 1990. The court held that s 95(5) had to be given its literal interpretation. The works carried out prior to the expiry of the completion notice remained development authorised by the permission. Section 95(4) excluded building works that had been carried out under the permission: permission for those works had not been affected by the expiry of the completion notice. Moreover, the words "so far as... is concerned", as stated in the statute, conveyed a notion of extensiveness.

Section 187A injunctions

In application for injunctions under s 187b TCPA 1990, it is very common for defendants

to put in last-minute planning applications or otherwise claim that planning permission might be granted for the unlawful activity. In such cases, the court will ask whether there are "realistic prospect" of succeeding in a fresh application or appeal *South Cambridgeshire DC v Flynn* [2006] EWHC 1320. Applying that test in *Bath & North East Somerset Council v Connors* [2006] EWHC 1595, the High Court held that a gypsy community that had stationed caravans in an area of outstanding beauty had "no realistic prospect" of succeeding in a fresh appeal for temporary planning permission, notwithstanding the new Circular 01/06 that imposed duties on the local authority to assess the accommodation needs of the gypsies and identify suitable land to cater for their needs.

Enforcement time limits for single dwelling houses

In *First Secretary of State v Arun District Council* [2006] EWCA Civ 1172, the Court of Appeal, having considered *Camden LBC v Backer and Aird* [1982] JPL 516, confirmed that a breach of planning control consisting of the change of use of any building to use as a single dwelling house within s 171B(2) could occur as a result of a failure to comply with a condition attached to a permission and whether or not that failure resulted in a material change of use constituting development, (approving *King's Lynn and West Norfolk BC v Secretary of State for the Environment* [1995] JPL 730). The Secretary of State had appealed against the High Court decision [2005] EWHC 2520 (Admin); [2006] 1 WLR 365), holding that the time limit governing enforcement action for failure to comply with a condition of planning permission restricting change of use to use as a single dwelling house was 10 years from the date of breach. The Court of Appeal held that the clear legislative intention was that, unlike other changes of use, householders who changed the use of a building to that of a single dwelling house should only be vulnerable to enforcement action if it was instituted within four years.

Continuing use

Miles v National Assembly for Wales [2006] EWHC 10 (Admin) concerned an application for a certificate of lawfulness of existing use or development (CLEUD) in relation to the use of land for recreational motorcycling activities and farming. Having been refused by the local authority, on appeal to the assembly, the appellant needed to show that the user had been in breach of planning control for more than 10 years so that under s 171B(3)

no enforcement action could be taken and, accordingly, under s 191 he would be entitled to a CLEUD. The High Court confirmed that the assembly had been correct to refuse the appeal on two grounds. First under para B2, Sched 2 of the Town and Country Planning (General Permitted Development) Order 1995, the use of land for motorcycle racing and practising was specifically related to a particular event, and it was not permissible to include individual use when calculating whether the limitations on permitted temporary events use had been exceeded so as to establish immunity from enforcement action for the purposes of obtaining a certificate of lawful development. Secondly, although s 171B(3) did not expressly require that the unlawful use should have been continuous, that was the clear intention of the provision. The unlawful use must have continued throughout the period for the immunity to accrue. In this case, during the period of the foot and mouth outbreak, there could have been no question of enforcement action and so that period could not count towards the 10-year period: *Thurrock BC v Secretary of State for the Environment Transport and the Regions* [2002] EWCA Civ 226; [2002] JPL 1278.

CLEUDs and abandonment of use

In *M & M (Land) Ltd v Secretary of State for Communities & Local Government* (2007) QBD (Admin), HH Judge Mole QC confirmed that a use of land that had received a certificate of lawful existing use under s 191 TCPA 1990 could be abandoned. Judge Mole held that s 191(6) did no more than declare that at a particular point in time a use referred to by the certificate was lawful. It could not be said that a use was subject to a certificate of lawful existing use and accordingly such a use could be abandoned.

Caravans and polytunnels

Mr Justice Sullivan held that a planning inspector had not erred in law in concluding that the stationing of 45 caravans on a farm for the accommodation of seasonal workers had constituted a change of use and that the erection of many hectares of large, linked, walk-in polytunnels for growing soft fruit on the farm had constituted development within the meaning of s 55(1) of the TCPA 1990: *R (Hall Hunter Partnership) v First Secretary of State* [2006] EWHC 3482 (Admin).

Gregory Jones is a barrister practising from the Chambers of Robin Purchas QC which has just moved from 2 Harcourt Buildings to Frances Taylor Building. He appeared in *Barker* before the ECJ