Rollits LLP

Planning Law and Policy

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rollits.com

Welcome

to our first newsletter of 2019 and a Happy New Year to all of our clients and professional contacts

We start the year busier than ever, working with our clients on a broad range of exciting projects in locations across the Country. In order to continue to provide first class service we are delighted to announce growth within our team with the appointment of Elspeth Wrigley as a Solicitor, and Harriet Wheeldon as a Trainee Solicitor.

Jennifer Sewell, a Partner in our Dispute Resolution Department, joins the team to bring her expertise to enforcement proceedings, and JR matters.

We look forward to seeing you at our upcoming events, and continuing to work with you throughout 2019.

Mark Dixon

Planning Workshop

A date to keep in your diary

On 20 March 2019 we will be holding a planning workshop in Hull aimed at junior planning consultants, developers and intermediaries. The structure of the seminar is yet to be confirmed but we are likely to cover topics such as s106 agreements, CIL, drafting land contracts (including conditional contracts and option agreements), and title issues which may prevent development.

We will be sending out invitations shortly however if you would like to register your interest early please contact Pat Coyle at pat.coyle@rollits.com.

Save the date

Wednesday,
20 March 2019
12pm – 2pm

Community infrastructure levy – Some pitfalls to avoid

The community infrastructure levy, otherwise known as CIL, has now been implemented by many local authorities in the area. Over the last year or two cases have started to emerge before the Planning Inspector relating to CIL and it is apparent that a considerable number of the cases relate to procedural errors as opposed to substantive legal issues.

We have set out below a list of lessons to be learnt from the cases, and whilst some of the points may seem obvious, it is surprising how often procedural errors occur!

Some important procedural points to note from cases before the Planning Inspector and through our experience are:

1. We have dealt with a number of cases whereby a planning permission, liability notice and demand notice have all contained different amounts of CIL payable and the local authority has incorrectly calculated CIL. It is critical that the amount of CIL payable is checked upon receipt of the liability notice and is challenged if incorrect as an appeal may only be made before the end of a 60 day period beginning on the date of the issue of the liability notice.

2. It is important to ensure that the local planning authority has the correct address of the applicant to serve the liability notice (if the notice cannot be served on the site address). If the local planning authority serves the liability notice on the site address or the last known address it will be deemed to have validly have served the notice.

3. We would always advise that the commencement notice is sent to the local planning authority by registered post and ordinary post (if the notice cannot be served by hand) and evidence of receipt is retained.

4. As a reminder, the commencement notice must be "submitted" no later than the day before the day on which the chargeable development is commenced. This means the local planning authority must receive the commencement notice at least the day before the date of commencement of development.

5. It is also prudent to check with the local planning authority that they have received the commencement notice prior to the commencement of development.

6. It is fundamental that the commencement notice contains all of the information set out in the CIL Regulations 2010 (as amended) and must identify the liability notice issued in respect of the development and the intended date of commencement of development.

7. Demolition works can trigger the payment of CIL. The commencement notice must therefore be submitted prior to any demolition works being carried out.

8. The CIL payment must be "received" in full by the specified date. The planning inspectorate has held that "received" does not mean that the funds must be "cleared" before the specified date. However, we would always advise that the funds should be cleared by the specified date to avoid the risk of any dispute.

9. CIL cannot be transferred to a new planning permission. This means that a planning permission for a variation to an earlier planning permission should also contain a condition regarding CIL; a liability and demand notice can only relate to the planning permission referred to.

10. As with planning applications, any communications with the local planning authority relating to CIL cannot be relied upon and accordingly it is vital to ensure the correct procedure is followed even if contrary instructions are received from the local planning authority.

11. The Planning Inspector has held that CIL is payable even if the development is unlawfully commenced as CIL is payable upon the commencement of development, whether or not development is commenced lawfully.

The CIL regime is extremely strict and inflexible and so it is important that the correct procedure is followed to the letter otherwise the local planning authority has extensive enforcement powers, including imposing surcharges, charging interest, issuing a CIL stop notice, asset seizure and powers of imprisonment and the surcharges themselves are costly.

If you have any queries regarding any of the above issues or CIL generally it is important to take legal advice as any mistakes could lead to unintended consequences and enforcement action being taken.

Update on recent case law

Over the last six months the majority of case law has related to CIL as set out in this newsletter. However, the following interesting cases have also been decided:

- The Planning Inspectorate has held that the conversion of an outbuilding into a residential annex was not a material change of use in the decision of *PINS: APP/R5510/X/18/3206551*. In this case the proposed development included the creation of a new bedroom, living room, kitchen and bathroom in an outbuilding within the curtilage of the existing dwelling house. The Inspector held that there was no material change of use as the creation of a new planning unit or a separate dwelling house had not occurred. This rationale for this decision was heavily based on the facts of the case, i.e. that the converted outbuilding would be resided in by the applicant of the house (and their daughter, a nurse, would move into the existing dwelling), the daughter would help to care for the applicant in future years, the property would remain in the ownership of the applicant, there was one site access for both properties, there would be no new outside space and the existing space would serve both properties and there would be no separate postal address or address for the supply of services. There have been a number of cases on the conversion of outbuildings in recent years and each case heavily depends on the facts of the case.

- The Planning Inspector has held that Vacant Building Credit is not available for buildings occupying agricultural land in the decision of *PINS: APP/H1840/W/17/3188250*, as land used for agriculture and forestry does not come within the definitions of "brownfield land" or "previously developed land" in the NPPF. This case was decided following the introduction of the NPPF last year and so applies to the latest revision of the NPPF.

- The Planning Inspector decided that a lawful development certificate cannot have a nil use in the decision of *APP/V5570/X/17/3185234*; the land must have an existing use in accordance with section 191(1) Town and Country Planning Act and in this case there was no lawful use which could be allocated to the land.

- In the decision of *APP/B9505/C/17/3187537*, the Planning Inspector found that a finger width gap between a garden room and a dwelling house is not an extension and did not benefit from "Class A" permitted development rights. The Inspector held that the garden room was not physically attached to the dwelling house and did not require support from the house and accordingly was "Class E" development.

- The High Court has reconfirmed that, where works are carried out in breach of planning conditions, then this does not necessarily mean that the planning permission has been unlawfully implemented in the case of *R (Howell) v Waveney District Council*. In this case planning permission was granted to erect a wind turbine on a site next to an airstrip, subject to conditions relating to aviation safety and archaeological work. Details had to be submitted in accordance with the aviation condition 3 months prior to development commencing; whilst the archaeological condition required a programme of archaeological works to be secured before any development could take place. Both conditions were breached. The High Court held that the aviation condition did not go to the heart of the planning permission as it merely required the submission of details and the condition had been remedied before commencement of development. Further the High Court held the archaeological condition did not go to the heart of the planning permission as the scheme had been approved by an archaeologist who had held that works were not required before commencement of development and ongoing monitoring was acceptable. This case is a useful reconfirmation of the Whitley Principle, which provides that a breached planning condition must "go to the heart of" a planning permission in order for its non-compliance to render the implementation of the planning permission unlawful.

What can I do with my land? Permitted development rights on agricultural land

Planning permission is required for the carrying out of any "development" on land, which is defined in the relevant legislation as the "carrying out of building, engineering, mining or other operations in, on, over or under the land or the making of any material change in the use of any buildings or other land".

However, an express application for planning permission is not required if planning permission is deemed to be granted under the permitted development rights, which automatically grant deemed planning permission for specified changes of use and building works. The permitted development rights are set out in various classes in the Town and Country Planning (General permitted Development) (England) Order 2015 (as amended).

As a general rule planning permission is not required for the use of land or buildings for agriculture or forestry (section 52(e) Town and Country Planning Act 1990). However, the definition of agriculture is very specific under section 336 of the Town and Country Planning Act 1990 and we receive many queries regarding what uses and works do amount to agriculture under the Act.

If you would like to develop your agricultural land to a use other than agriculture, then you may be able to do so under permitted development rights.

Part 6 of Schedule 2 of the Order gives permitted development rights for the following three Classes of Development for agricultural land and buildings:

1. Class A – development of an agricultural unit of five hectares or more.

2. Class B – development of an agricultural unit of between 0.4 and five hectares.

3. Class C – mineral working for agricultural purposes.

Under these provisions, the development allowed on agricultural land is divided. In particular, in Class A, the permitted development is restricted to agricultural units of 5 hectares or more, subject to a minimum size of one hectare where the development would be carried out on a separate parcel of land within and forming part of the larger unit.

The development rights permitted under class A of Part 6 to Schedule 2 apply only to building operations 'reasonably necessary for agriculture within that unit'. In *Clarke v Secretary of State for the Environment* (1992) 65 P & CR 85 (CA) it was held that to qualify as permitted development, the building did not have to be reasonably necessary for the particular agricultural enterprise being undertaken on that unit at the time the building was erected; they simply had to be reasonably necessary for, and designed for, the purposes of agriculture within that unit. It is essentially a question of fact and degree, to be decided with regard to the circumstances prevailing at the date when the building was erected, and relating to the particular building on the particular unit. It seems that this assessment can refer to the future intended agricultural use of the land since there is no requirement that the building should be intended to accommodate only an existing use.

Class B permitted development is restricted to agricultural land comprised in an agricultural unit with an area of 0.4 hectares or more, but less than 5 hectares. It should be noted that under both Class A and B it may be necessary, before exercising permitted development rights, to first apply to the local planning authority for a determination as to whether the LPA's prior approval is required for certain details of the development proposed. In particular, the provisions for prior notification apply where it is proposed to erect, extend, or alter an agricultural building. If the authority gives notice that prior approval is needed for such development, the applicant is required by the Schedule to display a site notice on or near the land on which the proposed development is to be carried out, leaving the notice in position for not less than 21 days in the 28 days from the date on which the local planning authority gave notice to the applicant.

For a building to be permitted development, it has to be designed for the purposes of agriculture. According to *Belmont Farms Ltd* (1962) 13P & C 417, this relates to its physical appearance and layout. In *Harding v Secretary of State for the Environment* [1984] JPL 503, it was said that design related to appearance rather than function, to ensure that buildings in the countryside should look like farm buildings and not dwelling houses.

Another provision should also be noted. Development under Classes A and B is not permitted by the Order if it involves the provision of accommodation for livestock or the storage of slurry and sewage sludge within 400m of the curtilage of a 'protected building' (e.g. residential accommodation).

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What can I do with my land? Permitted development rights on agricultural land (continued)

Part 3 of Schedule 2 of the Order grants permitted development rights for the following three Classes of Development for commercial development:

4. Class Q – change of use of an agricultural building and any land within its curtilage to dwelling house(s). This class also permits any building works reasonably necessary to convert the building into a dwelling house(s). Note there are restrictions on the number of dwelling houses which can be built and the floor space of such dwellings. Further, prior to exercising the rights an application must be made to the local planning authority for a determination as to whether their prior approval is required for transport and highway impacts, noise impacts, contamination, flood risks, design and appearance and whether the location or siting of the building makes it impractical or undesirable for the building to change from agricultural to a dwelling house.

5. Class R – change of use of an agricultural building and any land within its curtil age to various commercial uses, including shops, financial and professional services, restaurants and cafes, business, storage and distribution, hotels and assembly and leisure. There are floorspace restrictions of 500 sq. metres for any development under Class R.

6. Class S – change of use of an agricultural building and any land within its curtilage to a state-funded school or registered nursery.

In addition to some of the restrictions mentioned above, each of the permitted development rights has exceptions, whereby the permitted development right will not apply, and conditions which must be complied with when exercising the right. These conditions may include making an application to the local planning authority to determine whether their prior approval is required for various issues including flood risk and design and appearance.

It is important to check whether the property in question is listed, as if so the permitted development rights will not apply.

When seeking to rely on a permitted development right, it is also important to check that the permitted development right in question has not been withdrawn by the local planning authority by an Article 4 Direction. If an Article 4 Direction is in place, then deemed planning permission is no longer granted and an express planning application must be made.

Further, any historical planning consent(s) must be considered to ensure that the permitted development rights have not been restricted by way of a planning condition.

If planning permission is not required, building regulations approval will still be required for any building works and it is vital to check whether any other consent is required for any works, such as the consent of a lender.

Every year, the permitted development rights are changed, and new permitted development rights are added and the exceptions and limitations of existing rights are altered. The amendments for 2019 are expected to be announced in March and it will be interesting to see whether any new rights are added for agricultural buildings.

Class A Permitted Development Rights – One to keep an eye on!

In 2016, Class A of Schedule 2, Part I of The Town and Country Planning (General Permitted Development) (England) Order 2015, was amended to widen the permitted development rights available for an extension to a dwelling house, which until 30 May 2019, permit single storey extensions to the rear of a property of up to 8 metres in the case of a detached house, or 6 metres in the case of any other dwelling house, with a maximum height of 4 metres. These permitted development rights are, as with all other permitted development rights, granted subject to a number of exception and conditions which must be considered before the permitted development right is exercised.

As the 30th May is fast approaching, it will be interesting to see whether the Government retains this permitted development right and if so, whether the right will be in substantially the same form or altered in any way.

As one of the Government's key objectives is increasing the supply of housing, we would expect that this permitted development right is extended but it is certainly one to keep an eye on.

How do you remove an ag tag?

"Ag tags", also known as agricultural occupancy conditions and agricultural ties, are conditions imposed within planning permissions which prevent a dwelling being occupied by a person unless they are employed, or were last employed, in agriculture.

Ag tags are not popular as they limit who can buy a dwelling in the event of a sale and as a consequence this may reduce the market value of the property and/or affect the availability of a mortgage or the amount a lender is willing to lend.

Ag tags are also notoriously difficult to remove as they are often imposed in planning permissions for the construction of a farmhouse in a green belt where planning permission would have been refused but for the condition. The three potential ways in which an ag tag can be removed are as follows:

1. Apply for a Certificate of Lawful Development

Where an agricultural occupancy condition has been breached for over ten years, i.e. where the owner (and/or any occupier(s)) of the dwelling has not been employed (or last employed) solely or mainly in agriculture for over ten years, the owner can apply to their local planning authority for a Certificate of Lawful Development. A Certificate of Lawfulness of Existing Use or Development is a certificate issued by the local planning authority which provides that the use of the property in breach of the ag tag is lawful, and once issued, enforcement action cannot be taken by the local planning authority in relation to the breach.

In order to make a successful application the owner must evidence they have continually occupied the dwelling in breach the ag tag (i.e. without being employed in agriculture) for over ten years and that the breach is continuing at the time the application is made, on the balance of probabilities. Unlike a planning application, the local planning authority must only consider the facts of the case when deciding whether to grant the Certificate and cannot consider the planning merits of the case or any planning considerations.

Depending on the wording of the ag tag, an agricultural tenancy of land at the property will not preclude a Certificate being granted by the local planning authority, provided that it can be proven that the rental income received is nominal and that the alternative non-agricultural employment income is the main source of income.

Applying for a Certificate of Lawful Development is the most straightforward way to remove an ag tag, as if it can be proven that the ag tag has been breached for over ten years on the balance of probabilities, the local planning authority must grant the Certificate.

2. Apply for the restriction to be removed

The second option is to make an application to the local planning authority or the Upper Tribunal (Lands Chamber) to lift the ag tag, if it can be demonstrated that the dwelling is no longer necessary for agricultural purposes within the community.

In order to establish that there is no demand for the use of the dwelling for agricultural purposes, the owner must carry out an involved market testing exercise. This exercise involves putting the dwelling on the market at a price, being the value of the dwelling with the ag tag, for both sale and to rent and then providing evidence that no genuine offers were received. This exercise must be carried out for a lengthy period – usually 12 months or more. Evidence will also need to be supplied showing how the valuation was calculated by the agents together with evidence of the marketing process. A record of any interest received will also need to be supplied.

This method of removing an ag tag is the most time-consuming and costly with no guarantee that the ag tag will be removed once the marketing exercise has been completed (especially if viable offers are actually received). There are a number of cases where the local planning authority or Tribunal have refused to lift an ag tag as they have held that the applicant has been unable to satisfy that there is no demand for the ag tag, or they have held that the market testing exercise was not carried out correctly.

3. Argue the planning permission was not implemented

The final route to remove an ag tag is to argue that the planning permission containing the condition was never implemented and consequently the ag tag does not apply to the dwelling.

This argument can be made where a planning permission contains a pre-commencement condition which was not discharged. The general rule is that if a pre-commencement condition has not been discharged, any subsequent works carried out will not implement the permission. The planning permission would then lapse on the date specified in the permission and consequently the planning permission, and the ag tag contained therein, would not bind the property. This would also mean however that any works carried out, or any change of use, granted by the planning permission would be carried out without planning permission and in breach of planning control.

This route is therefore the most dangerous as there is a risk that the local planning authority could bring enforcement action for not only a breach of the pre-commencement condition but for the carrying out of the works or the change of use (where relevant) without planning permission. It would therefore need to be established that any change of use had taken place, or any works had been completed, over ten years ago so the owner had immunity from enforcement action.

The ethics of this method have also been called into question, as it has been argued that it is unfair for an owner to breach a planning permission and then benefit from the removal of an ag tag following the breach. The local planning authority is therefore likely to use their best endeavours to prevent an application to remove an ag tag on this basis from succeeding.

Rollits have recently submitted a number of applications for Certificates of Lawful Development which have successfully been granted by the local planning authority. This accordingly still represents the most common method of overcoming an ag tag that we certainly deal with. The benefits of the ag tags removal are clear with a likely increase in land value being a prime example.

Planning policy update

In 2018 we reported on a number of changes in planning law, with further developments expected in 2019. Below we outline some of the areas to watch.

Guidance and methodologies published

Publication of the Housing Delivery Test

The Housing Delivery Test ("HDT") policy document was published in July 2018 along with the revised National Planning Policy Framework ("NPPF"). This is intended to provide an annual measurement of housing delivery in the local authority areas, with the NPPF setting out the consequences for failing to meet these targets. The intention, set out in the July 2018 document, was that the HDT results will be published annually, beginning in November 2018. This did not take place. No date has been provided for publication; however it is expected some time in early 2019.

Alongside the HDT, a range of further updates to the guidance accompanying the NPPF are expected throughout 2019, in areas such as design.

Consultations (open)

Water Resources NPS

On 29th November 2018, the Department for Environment, Food and Rural Affairs ("Defra") published a consultation on a draft National Policy Statement ("NPS") for water resources infrastructure. This third consultation on the NPS seeks view on whether the draft provides an appropriate framework for the decision making on development consent orders for water resources infrastructure; as well as on other matters. Such as the impact on European protected sites. Alongside publishing the draft for consultation, the government has also laid the draft NPS in Parliament for scrutiny (until 16 May 2019) and approval, with the intention of designating and consulting on the final NPS in 2019. The consultation closes on 31st January 2019.

Biodiversity net gain

A consultation on a new scheme to introduce a mandatory biodiversity net-gain for most development was published on 2nd December 2018 by Defra and the Ministry of Housing, Communities and Local Government ("MHCLG"). Under the system all new developments that would otherwise result in a loss or degradation of habitat will need to demonstrate that wildlife habitats have been enhanced and left in a measurably better state post-development (with limited exceptions). The consultation suggests a 10% improvement. If this is not possible, a tariff would be applied. The consultation closes on 10 February 2019.

Consultations (awaiting findings)

Publication of the planning appeal process review

Back in March 2018, the (then) Secretary of State for Housing, Communities and Local Government announced an independent review of the planning appeal inquiries process. Bridget Rosewell OBE was appointed as Chair of the Review on 22 June and the "Independent review of planning appeal inquiries: call for evidence" was published in July 2018. This sought evidence on the operation of the planning appeal inquiries process and how it could be improved,

so that decisions can be made sooner, but without compromising the quality of the decisions. The consultation closed on 18 September 2018. A report was due to the housing secretary by the end of December, but nothing has yet been made public. It is hoped that this will be published in early 2019.

Changes to the standard method for assessing local housing need

On 20 September 2018 the Office for National Statistics published the new household projections. These showed a significant and unexpected reduction in the overall numbers generated by the standard method for assessing local housing need. In order to ensure their methodology was bringing forward the expected number of houses, the Government subsequently consulted on proposals to update planning practice guidance on housing need assessment to be consistent with increasing the housing supply. The consultation ran from 26th October 2018 to 7th December 2018. The results have not yet been published, but are expected shortly.

Changes to permitted development rights

On 29th October 2018, the Government published a consultation paper outlining proposals to introduce a variety of changes to permitted development rights. The proposals, which echo changes to the revised NPPF (July 2018), are intended to allow for greater change of use to support high streets to adapt and diversify. They also provide new support for extending existing buildings upwards to create additional residential space, as well as measures to speed up the delivery of new houses. The consultation closed on 14 January 2019 and the results are expected later in the spring.

Application of the NPPF

Revised NPPF and Local Plans

The revised NPPF has been a material consideration in planning decisions since it was published in July 2018. However, under paragraph 214, from 24 January 2019 it will also apply for the purpose of examining plans. Where such plans are withdrawn or otherwise do not proceed to become part of the development plan, the policies contained in the revised NPPF will also now apply to any subsequent plan produced for the area concerned.

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Planning policy update (continued)

Judicial Review of the NPPF

On 18th December 2018, Friends of the Earth ("FoE") submitted a legal challenge in the High Court against the revised NPPF on the grounds that it was not accompanied by a strategic environment assessment (SEA). This is the first time the NPPF as a whole has been challenged (notwithstanding that the original NPPF was not subject to an SEA when published in 2012). The focus of FoE's challenge is climate change. They are concerned by the inclusion of a more positive backing for oil and gas extraction (fracking) in paragraph 209(a), along with the failure to provide a more robust support for wind power projects, or ban coal extraction. A decision is expected late January.

Legal challenge to the DfT airports national policy

Five legal challenges against the Government's plans to expand Heathrow Airport will be heard by way of Judicial review in the High Court over ten days in March 2019, following a hearing in front of Justice Holgate on 4th October 2018. Due to the size of the cases and the public interest it has attracted, it will be heard by two judges in the largest courtroom at the Royal Courts of Justice. The outcome of these challenges could have significant impacts on government aviation policy and will be watched with interest by a range of stakeholders.

New legislation

The Brexit process continues to dominate the House of Commons. However, one piece of planning legislation may be brought forward in January 2019. The Planning Appeals Bill, a private members' bill put forward by John Howell MP, is due to begin a second reading in the Commons on 25 January 2019. The bill proposes to limit the right of appeal in certain circumstances, such as where an application has been determined as being inconsistent with a neighbourhood plan. Whether sufficient time is made available for this bill to be heard remains to be seen.

Information

If you have any queries on any issues raised in this newsletter, or any planning matters in general please contact:

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The law is stated as at 25 January 2019.

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