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Parliamentary Brief

The Law Society

Planning Bill

Committee - House of Commons

Joint Law Society and City of London Law Society

briefing on selected amendments

The City of London Law Society

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Clause 27, Page 13, line 25

Delete the words “or forms part of”.

Purpose

To clarify whether minor additional development works require development consent.

Briefing

Clause 27 states that development consent under the Bill is required for development "to the extent that the development is or forms part of a nationally significant infrastructure project". The drafting raises a practical difficulty. Take for example the operator of one of the activities of businesses listed in Clause 13 as constituting a nationally significant infrastructure project who already has planning permission for an operation that exceeds the threshold. Subsequently the operator wishes to extend that business by say 2 or 3 per cent as would be permitted for ordinary development under the Town and Country Planning (General Permitted Development) Order 1995. However, as drafted the Clause 27 would require the operator to go again through the entire new "development consent" process. Although sub Clause 27(2) does allow the question to be raised with the Infrastructure Planning Commission as to whether particular development does or does not require development consent, that procedure is likely to be lengthy and cumbersome. Indeed if there is no agreement between the Commission and the operator on the question, the matter may only be resolved by an action before the High Court.

Similarly under Clause 27 development consent is required for development which is or forms part of a nationally significant infrastructure project. A statutory undertaker, however, or indeed any party benefiting from the permitted development right classes is able, subject to various conditions, to carry out defined categories of development without the need to obtain specific planning permission. In future that facility will be lost for those developments constituting nationally significant infrastructure projects. Clause 130 states that it is an offence to carry out development without development consent. On a literal interpretation, this means that the Bill removes the permitted development rights from statutory undertakers.

These may be the unintended results of the drafting but, nonetheless, the position needs to be clarified.

Clause 104, Page 48, line 3

Delete the clause.

Purpose

To clarify the purpose of introducing a new procedure for legal challenge against the decision of the Infrastructure Planning Commission on an application for a development consent order.

Briefing

This is a probing amendment to provide the Government with an opportunity to explain why it is relying on judicial review for legal challenges relating to decisions on applications for orders granting development consent instead of the customary statutory challenge under section 288 of the Town and Country Planning Act 1990.

We cannot understand the need to introduce a new process for judicial review rather than relying upon the existing statutory challenge especially as it is unlikely to achieve the Government's objective of expediting any legal challenge. The clause prescribes a short period of only six weeks from the day on which the order or the statement of reasons for making the order are published as the deadline for bringing a judicial review. This compares with the three months allowed under the statutory challenge which is based upon the Civil Procedure Rules. The shorter period allowed to make a legal challenge is likely to encourage far more judicial reviews than at present against the decisions of the Commission as developers (and indeed objectors) hasten to institute proceedings to avoid missing the deadline.

Moreover the Government is likely to be defeated if the object is to provide certainty by closing down the possibility of a legal challenge being brought against the designation of a National Policy Statement after six weeks. *Boddington v British Transport Police 1999,* the smoker who challenged a fine for smoking on the train to Brighton, indicates that validity can be raised several years after a decision has been made by a public authority. An ouster clause such as section 284(1) of the Town and Country Planning Act 1990 is more likely to prevent mischief.

Clause 105, Page 50, line 12

Delete sub sections (6)(a) and (b).

Purpose

To prevent the Infrastructure Planning Commission from acquiring the right to amend legislation in granting development consent for an infrastructure project.

Briefing

Clause 105 stipulates the matters which can be included in an order granting development consent for a nationally significant infrastructure project. The first two paragraphs in sub section (6) would empower the Commission to "apply, modify or exclude a provision of or made under an Act which relates to any matter for which provision may be made in the order" or to "make such amendments, repeals or revocations of provisions of or made under a local Act as appears to the decision-maker to be necessary or expedient in consequence of a provision of the order or in connection with the order".

Any public authority is empowered to interpret the application of the law in exercising its powers. The only body which should be able to change or vary the impact of legislation is Parliament – the legislature not the executive.

Clause 107, Page 51, line 20

Delete sub section (3).

Purpose

To limit the circumstances in which it is reasonable for a promoter to be granted the right to acquire by compulsory purchase the land necessary for an infrastructure project to proceed.

Briefing

Clause 107 empowers the Infrastructure Planning Commission when grating development consent for an infrastructure project to make provision in the consent for the promoter to acquire land by compulsory purchase in certain circumstances. Sub section (3) would enable the Commission to provide the promoter with the right to acquire the land necessary for the infrastructure project by compulsory purchase if "there is a compelling need in the public interest for the land to be acquired compulsorily".

There is always a delicate balance between the rights of the individual property owner and the rights of the wider community when the issue of compulsory purchase arises. We consider that this criterion goes too far in potentially overriding the rights of the property owner. Once the Commission has determined that there is a compelling need in the public interest and has granted the promoter with the right to acquire land by compulsory purchase, the individual is deprived of any further rights over his property other than to negotiate reasonable compensation for the loss of the land. He cannot oppose the right of the promoter to compulsorily purchase his land in principle. He cannot object that the exercise the right of compulsory purchase would not be in the public interest – that decision has been pre-judged by the decision of the Commission.

We regard this provision as draconian in depriving the owners of land of their rights in a compulsory purchase situation. We fear that it will give rise to legal challenges against the decision of the Commission, not least under Article 8 under the Human Rights Act. That risk is all the greater in the absence of Parliamentary approval to the National Policy Statements. If Parliament does approve the Statements it would be more reasonable to justify a development consent and consequential compulsory acquisition on the grounds of the broader public interest.

Clause 132, Page 61, line 28

Delete sub clause (3)(a).

Purpose

To ensure that there is an effective time limit for the new criminal offences introduced by the Bill.

Briefing

Clause 132 places a four year time limit for bringing charges for committing the new offences of carrying out development for which development consent is required without that consent or of breaching the terms of an order granting development consent. However a person could be charged with one of the offences after the expiry of that four year limit under Clause 132(3) if the local planning authority has applied for an injunction under Clause 141 or if the local planning authority has served an information notice on a person under Clause 137.

An information notice would require the person to provide information about any operations they are undertaking to enable the authority to determine whether one of the new criminal offences has been committed. Whether or not the information process is proceeding the threat of a criminal offence will continue to hang over the person. A local authority which is strongly opposed to the development of a major infrastructure project could use these powers to pursue the developer or operator over a considerably longer period than the statutory four year limit. It is rare to be unable to find some minor infringement during the course of a development project.

The result of the qualification to the four year time limit could mean that a person is served with an information notice or injunction shortly before the expiry of the four year time limit and be faced by the uncertainty of the threat of legal proceedings under one of the new criminal proceedings indefinitely. The continuing uncertainty facing a person in that position cannot have been intended. In our view the enforcement provisions in respect of development consent orders should more closely follow the existing enforcement regime contained in section 171B of the Town and Country Planning Act 1990.

Clause 143, Page 66, line 8

Insert new sub section –
"( ) in subsection (1) delete the words "interested in land in the area of a local planning authority".

Purpose

To facilitate those undertaking nationally significant infrastructure projects to enter into planning obligations

Briefing

As presently framed the Town and Country Planning Act only allows a person to enter into a planning obligation if they hold an interest in the land which is the subject of the development. While we support the proposed amendments to Section 106 of the 1990 Act, we do not consider them to go far enough and recommend that further amendments be added to the Bill. They will not enable every promoter of an infrastructure project to enter into a planning obligation.

The following examples indicate the difficulties created by the absence of the wider powers which we propose. If an application for a development consent includes power for the promoter of the infrastructure project to acquire land by means of compulsory purchase, for example the site for the construction of a power station, then the promoter could only enter into a planning obligation after the compulsory purchase process has been completed and the promoter holds an interest in the land and not at the time when the development consent is granted. If the promoter is proposing to install overhead power cables or an underground pipeline, he will have no interest in the land at the time of the application for development consent. Again the promoter will only have an interest in the land after the development consent has been obtained and the promoter has exercised the compulsory acquisition powers available to him to acquire rights over the land. The promoter cannot enter into a planning obligation at the time when the development consent is granted.

Clause 150, Page 73, line 31

Delete the new Section 75C to be inserted into the Town and Country Planning Act 1990.

Similar amendments should be made to the new Section 193C in Clause 151 and the new Section 19C of the Listed Buildings Act in Clause 153.

Purpose

To remove the provision for the review of officers' decisions on certain planning applications by local councillors.

Briefing

Clause 150 contains amendments to the Town and Country Planning Act 1990. New Section 75A will enable a local planning authority to delegate the determination of defined minor categories of planning application to officers. The Secretary of State will prescribe those types of application in secondary legislation. We support that provision as it will reduce the volume of applications that have to be submitted to authorities' planning committees for determination and, hopefully, should speed up the processing of such minor applications.

However, new Section 75C would provide for an appeal against the refusal of an application or against a condition attached to a permission to be dealt with by the local authority itself. The Secretary of State will make regulations setting out how this review process will operate but it is understood that the reviews are to be undertaken by panels of council members. Review by council members inevitably raises the issues of independence and integrity whatever steps are taken in the regulations to ensure that such claims cannot be merited (for example, not allowing a councillor whose constituency includes the site to be involved or precluding members of the planning committee from adjudicating on these review cases).

We strongly recommend that appeals relating to applications which have been determined by planning officers under the new powers of delegation should continue to be handled by the Planning Inspectorate. The Inspectorate has the proper professional expertise to deal with appeals. It currently deals with those appeals arising from applications that have been determined by planning officers. The number of appeals arising from these new categories of delegated planning applications should not be a disproportionate burden on the Inspectorate. Most would be dealt with by means of the written representations procedure. Moreover with the removal of the bigger and most time consuming cases to the Infrastructure Planning Commission, there is no reason to believe that the Inspectorate would lack the resources to deal with these appeal cases. We fear that the procedure for member review panels will constitute an erosion of the status and role of the Inspectorate.

As the new Section 75C is to be an addition to the Town and Country Planning Act, it will be subject to the scope for statutory challenge to decisions in the courts under that Act. We would suggest that appeals dealt with by member review panels could have the unintended result of increasing the number of challenges against planning decisions reaching the courts as the last resort of an applicant.

Clause 156, Page 83, line 41

Delete new Sub Section 96A(3)(a).

Purpose

To confine the new power for a local planning authority to make minor changes to a planning permission to non-material changes.

Briefing

This power to make what are stated to be non-material changes to a planning permission has been framed in the Bill in a manner which goes well beyond the non-material. It enables a local planning authority not only to remove or alter existing conditions (96A(3)(b)) but also "to impose new conditions" (96A(3)(a)). There is no indication in the Clause as to how a local planning authority is to determine whether or not a change to a permission would be material. In our view any new condition would constitute a material change to a planning permission. Conditions are only imposed in the first place for matters which are material. This sub section would go beyond what was envisaged in the White Paper last year and what the heading to the Clause states as its purpose.

Quite separate from the question of materiality, we fear that the power could be open to abuse. An objector to an application a refreshments outlet could continue their objection after the grant of permission. They could lobby the local authority to impose a new condition on the permission, for example, to reduce the hours when the outlet may operate. Conversely a developer who feels that their planning permission is too restrictive could persuade the local authority to drop an existing and substitute a new less onerous condition. This tactic could potentially entail the evasion of the normal requirement to provide an environmental impact assessment in conjunction with certain applications. A local councillor with a particular bee in their bonnet or one who has been subjected to lobbying by constituents could press their authority "to impose new conditions" in order to restrict the original permission. In our view this power would enable a local planning authority to avoid having to go through the procedure already provided for the modification of a planning permission in Section 97 of the Town and Country Planning Act.

Perhaps the overriding point, however, is that a planning permission is meant to be a document one can rely upon. Banks lend on them. Compensation is payable if they are varied or revoked. Allowing amendment will undermine that protection.

In our view the power to make non-material changes to planning permission is too wide. If local planning authorities are to be granted the power "to impose new conditions", then this power should only be exercised at the instigation of a person who would be entitled otherwise to compensation and the consent of all those entitled to compensation.

Clause 160, Page 88, line 6

Delete whole clause.

Purpose

To protect the right of appellants to choose the procedure for the handling of their cases by the Planning Inspectorate which they consider to be most appropriate.

Briefing

The Law Society and other professionals involved in the planning system having been fighting a rearguard action to prevent the Planning Inspectorate deciding the procedure whereby an appeal is to be processed. At present the choice between written representations, hearings and inquiries remains with the applicant. The Inspectorate does encourage applicants to use the routes which are less demanding on its resources both in the information it provides to the public and by reviewing the choices indicated by applicants when submitting their appeals to the Inspectorate. We regard that freedom of choice as fundamental to the planning system. It enables the ordinary citizen to exercise the right to be heard in the way which he believes most appropriate for his case and not the way in which the state would prefer for the sake of administrative convenience.

We do not believe that the current right for the applicant to choose causes an unnecessary burden. We understand that not that many cases are changed to, for example, written representations, as a result of advice to an applicant form the Inspectorate. We fear that, if the right to choose is removed, then there are likely to be a rash of judicial review challenges to the decisions of the Inspectorate. We would also draw attention to the introduction for the first time of a fee for appellants pursuing cases at the Inspectorate. We do not object to the principle of the citizen being required to pay a small sum for their appeal to be processed. However, if charges are being introduced for the appeal service then surely the right to choose the process by which his appeal must remain with the appellant.

Clause 162, Page 91, line 40

Insert at the start “Except for an appeal under section 78 of this Act or section20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 against the failure of a local planning authority to take a planning decision”.

Purpose

To preclude from the scope of the new fees for appeals those appeals which arise as a result of the non determination of an application by a local planning authority.

Briefing

We accept the principle of paying a fee for making an appeal to cover part of the cost to the Planning Inspectorate of handling that appeal. However, we cannot support charging an appellant for the failure of a local authority to decide an application. In all too many instances non determination is a positive decision by the local authority. It enables the authority to evade the local political difficulty of making an unpopular decision and shifts that burden on to the Inspectorate. In the present environment of control over local authorities driven by targets, many local planning authorities resort to avoiding making decisions on more complicated applications so as to ensure that they are able to meet the target for processing applications within eight weeks of receipt of an application. It would be unfair to levy fees for appeals arising from the inaction of the local authority.