

**CITY OF LONDON LAW SOCIETY
PLANNING AND ENVIRONMENTAL LAW COMMITTEE**

Minutes of meeting at Charles Russell Speechlys LLP on 20 February 2023

1 ATTENDANCES (SOME VIRTUALLY) AND DETAILS OF SUBSTITUTIONS

Stephen Webb Brecher LLP (Chairman)
Helen Hutton Michelmores LLP (Hon Secretary)
Jasmine Ratta (substitute for Jacqueline Backhaus) Trowers & Hamblins LLP
John Bowman FieldFisher LLP
Ashley Damiral CMS Cameron McKenna Nabarro Olswang LLP
Claire Dutch Ashurst LLP
Claire Fallows Charles Russell Speechlys LLP
Duncan Field Town Legal LLP
Valerie Fogleman Stevens & Bolton LLP
Brian Greenwood Clyde & Co LLP
Sara Hanrahan Lewis Silkin LLP
Rupert Jones
Katie Kempthorne (substitute for Nigel Howorth)
Richard Keczkas Slaughter and May
Tim Pugh
Josh Risso-Gill CMS Cameron McKenna Nabarro Olswang LLP
Matthew White Herbert Smith Freehills LLP

2 APOLOGIES FOR ABSENCE

Paul Davies (Vice Chairman) Latham & Watkins
Jacqueline Backhaus Trowers & Hamblins LLP
Rory Bennett Linklaters LLP
Christian Drage Bryan Cave Leighton Paisner LLP
Matthew Evans Forsters LLP
Kevin Hart City of London Law Society
Nigel Howorth Clifford Chance
Louise Samuel Town Legal LLP
Gary Sector Addleshaw Goddard LLP
Robert Share Allen & Overy LLP
Christopher Stanwell Fieldfisher LLP
Ben Stansfield Gowling WLG LLP

3 MINUTES OF THE LAST MEETING

The minutes of the last meeting were approved.

4 PLANNING ISSUES

4.1 Levelling Up and Regeneration Bill

Changes to Section 38(6) – NDM policies

Richard Keczkas stated that this is the most fundamental of the proposed changes in the Bill. It reflects the emphasis on Development Management policies of central Government, at the expense of other considerations in the planning process. The centralisation of powers would result in another legal test for decision making. Currently have no idea as to what the policies will be.

Richard stated that the most important thing we can do in relation to the consultation, is to comment on these NDMs. We need to point out the inherent inconsistencies and that the Government is motivated by the politics of the situation. He speculated that it would be later this year when more detail will be published.

The Committee discussed that the change from EIA to environmental outcomes would also be very important. Until we see the detail, we do not know how significant the removal of 'justified' will be.

No Government direction is currently discernible in the proposed changes.

4.2 New Section 73(B) proposed – to address the Finney v Welsh Ministers [2019] issues

The committee considered that this proposal would be a positive improvement. It would allow the description of development to be changed as part of the section 73 process (without the need for a separate s 96a application to be made too). What however would amount to a 'substantial' change?

The Armstrong High Court decision (Armstrong v Secretary of State for Levelling Up, Housing and Communities [2023]) has (since Finney) confirmed that section 73 applications can be used to remove or vary conditions, provided they do not conflict with the operative part of the permission and that it is just Government guidance which has brought in the minor material amendment label for a section 73 application/permission. This case has therefore opened up the general scope of S.73 applications.

4.3 CIL & IL.

There is uncertainty in the planning world, as to how planning obligations, especially around affordable housing and delivery of infrastructure, will operate in the future. The planning industry is still happy with S.106s and does not want them to be replaced. It was thought that the Government is unlikely to bring in these infrastructure levy changes. We will need to wait to see what happens about these proposals.

4.4 Penalties for developers with slow build out rates

There would be difficulties in trying to treat all planning issues the same. There could be huge (and unwarranted) reputational and procurement issues in this proposed change. Often there are commercial deal issues which are nothing to do with planning. It was considered that the Government should instead focus more on incentives to encourage faster build out. It had looked into the statistics and found that there were no fundamental land banking issues.

4.5 Nutrient Neutrality

Sewage treatment improvement requirements are still delaying development. Pilot schemes for Nutrient Neutrality have been set up. Section 106s are being negotiated for those pilot schemes (in which members of the Committee had been involved).

4.6 Tall residential buildings –

- i. Fire Safety Act 2021 – assessments, remediation & enforcement
- ii. DMO & London Plan Policy D12B – fire statements
- iii. Fire Safety (England) Regulations 2022 & Building Regs Approved Document B
- iv. Building Safety Act 2022 – gateways, remediation liabilities, liability orders, retrospective effect

The Committee noted that the rules on the above fire safety measures are not clear at moment. The current thresholds for tall building fire safety obligations are changing to 18 or 13 or 11m. The transition period until the changes are brought in, is a huge issue for consented schemes which have not yet been implemented. For schemes which are not yet on site, it is not clear at which stage they will be caught by the obligations. When will those schemes need to obtain a new planning consent?

In February 2023, the GLA said that it would no longer approve applications unless there are two staircases in buildings above 30m. The Government is still consulting on the proposed changes to the above (first published in the consultation from 23 December 2022), but the GLA has effectively brought in the Government's proposals with immediate effect. The National Fire Chiefs Council had been pressing since last December for the Government to mandate a second staircase for all new

towers above 18m. It currently looks as if a 30m not an 18m rule for a second staircase is likely to be brought in.

Building pledge – the 49 largest developer companies pledged to carry out remediation of fire safety defects in residential buildings which are 11m or more in height. The contract is relevant here. If all 49 of the largest developer companies do not sign the remediation contract within six weeks, the Government may stop them implementing their consents. If consents are to be amended, will this be by way of a Section 73 application or a new planning permission?

Even if a consent has been implemented and it complied with Building Regulations at the time, if it has one staircase, then would not be deemed safe under the new Regulations. But it is deemed to be safe still under the old rules. Would have a huge impact on the viability of developments.

4.7 First Homes

Some Local Authorities are still pushing back on bringing in this form of housing, such as Camden.

4.8 Section 106 agreements

i. The Committee discussed various local authorities bringing in lengthy section 278/38 highways wording into section 106 agreements, not requiring the separate highways agreement to be finalised before implementation of the development. This is causing issues about the obligations running with the land, the layout of roads potentially changing when the actual developer comes into place later (as the promoter or landowner will not know the scope of the Highways Works) and upfront time and costs.

ii. The Committee also discussed the refusal of some authorities to agree what the industry sees as standard liability carve-outs for utility companies, individual residential flat owners etc. It was acknowledged that this was a real issue in some transactions.

4.9 Biodiversity Net Gain (BNG)

Experience to date of BNG is generally in local authorities out of London. Some of those authorities have brought in an obligation already in their local plans for BNG in developments in their area or are justifying it with the NPPF requirements, but often they do not have sufficient staff to bring in the obligations efficiently.

The Committee discussed how drafting is emerging in the section 106s already bringing in the BNG requirements.

There is a target of 20% BNG in some areas, whereas the requirement under the Environment Act (which is currently due to be brought in in November 2023) is that it should be a minimum of 10%. If it is on-site, it may affect the red line of the application plan. The developer will put in a separate application, if it needs to do so for the BNG credit site.

Prices for BNG credits vary massively - £100,000 London, £15,000 Darlington and £12,000 as the generally used base value.

4.10 Net zero/embodied carbon

In the M&S Marble Arch inquiry, embodied carbon and so refurbishment against rebuild has been one of the central issues (alongside the heritage grounds). The M&S decision is awaited. May have massive implications for future development. Sequential test – may need to prove in the future that cannot refurbish, before can then demolish.

4.11 For noting - Hillside ruling and Finch appeal

Finch - EIA – (Court of Appeal ruling) do not have to assess impacts to the final degree. In the case of an oil field, do not have to assess its use by all of the potential users of oil. But if it is related to use of a development, it could be caught. This case has been appealed up to the Supreme Court (hearing is in June). This hydrocarbon case spans both planning and environmental considerations and it was therefore discussed in both the planning and environmental parts of our meeting.

Hillside v Snowdonia case (Supreme Court ruling has been issued) is mainly being experienced as a transactional issue – ie developers are to prove that the matter in question does not give rise to Hillside issues, including that subsequent variations to the original permission do not prevent the original consent from being completed. There is a pool of sites which would be caught by this judgment. Some banks are insisting on step-in rights and controls for subsequent phases even when only lending for phase 1 now.

4.12 CPO – Law Commission review and non-confirmation of Vicarage Fields CPO and Nicholsons Shopping Centre CPO

CPO – two non-confirmations, due to not providing viability details and a lack of adequate consultation/negotiation with the affected parties having taken place. The failure to negotiate sufficiently in order to try to reach an agreed settlement and the human rights issues therefore involved are surprising, even though it is clear policy that this negotiation happens.

4.13 EIA judgment (Court of Appeal) in the Tewkesbury case on the meaning of “project” - <https://www.bailii.org/ew/cases/EWCA/Civ/2023/101.html>

Case confirmed that salami slicing is not allowed. Road bridge over the motorway – there was no other reason for it but that it was connected with the development of future housing on both sides of the M5. The Council had considered the future benefits of the bridge being delivered, but had not applied a multistage EIA process. This case has confirmed that the Bavarian Roads case still applies. EIA Screening – must be carried out for the whole project, whereas scoping is to be in relation to the part of the project coming forward now.

4.14 NPPF consultation

The Committee decided not to comment formally on the NPPF consultation. Where a consultation relates to the creation or modification of planning policy, the Committee's view was that we should only respond to the extent that legal or practice issues are raised.

5 ENVIRONMENTAL ISSUES

Valerie Fogleman kindly stepped in to update the Committee on environmental issues, in Paul Davies' absence.

5.1 Brexit Freedoms Bill

Brexit Freedoms Bill is aiming to remove certain laws from statute books by December 2023 (can extend in some circumstances to 2026). Over 3,000 pieces of legislation are to go. Most are EU employment and environmental laws, which currently apply in UK. There will be potentially material impacts on water.

The Government has pledged that this is

1. Not to weaken environmental policy which currently applies in the UK;
2. But it is not going to step back from carrying this out.

There is a big issue here, partly due to the enormity of the task involved in cancelling this many laws and checking for the potential impacts of doing so.

5.2 COP15

At the December 2022 COP15 Biodiversity Conference, the post 2020 Global Biodiversity Framework was adopted (ratified by 196 countries), with the aim of addressing ongoing biodiversity loss.

Threatened species are to be protected, including by the focus on increasing natural ecosystems. Nature's contributions to people are to be valued and enhanced. Sustainable approach to biodiversity. Small island statements – larger countries are to help smaller ones.

"30 by 30" commitment to protect against nature loss by protecting and managing at least 30% of the world's lands, inland waters, coastal areas and oceans, with emphasis on areas of importance for biodiversity by 2030.

Finance – a special fund is being set up to support developing countries to implement the Global Biodiversity Framework. £3bn is due to be spent by the UK to protect biodiversity between 2021 and 2026.

5.3 Law Society Draft Climate Guidance

Highly debated topic at the moment. The proposal is for there to be guidance to solicitors which is compatible with solicitors' duties and principles of justice generally. Draft guidance was published in 2022, but it was only circulated confidentially. CLLS was consulted, including the environmental law sub-group. A working party was formed to consider it, which liaised with other parties. One of the key issues is the ongoing concern regarding timings of the process and the confidentiality involved in drafting the guidance. There have been attempts to open it up, but they have so far not been successful. Does the Law Society have the power to make guidance? Or should it be made by SRA? The roles are blurred to a certain extent.

6 MATTERS ARISING

Matthew White was appointed as the new chairman of our Committee (subject to ratification by the CLLS board). Paul Davies is to continue as the vice chair.

Stephen Webb was thanked for chairing the Committee for over 8 years and especially for developing the Committee's relationship with what is now the Department for Levelling Up, Housing and Communities (DLUHC).

For potential future speakers at our CLLS PELC meetings, it was suggested that the Committee may wish to invite:

1. Joanna Averley, Chief Planner at DLUHC,
2. Mike Kiely, Chairman of the Planning Officers' Society and
3. Jon Wachter, GLA (to discuss viability).

**Helen Hutton
Hon Sec CLLS PELC**