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planning news

planning law news – March 2012

In this issue, Blake Lapthorn's Planning team looks at:

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Government publishes its long awaited National Planning Policy Framework (NPPF)

On 27 March the Government published its long awaited National Planning Policy Framework (NPPF) with the aim of empowering communities, facilitating economic prosperity and protecting the countryside and other places of recognised importance. The NPPF replaces 44 existing planning policy documents, which according to the Government significantly simplifies the planning system and should deter the economic brake that the system has fostered.

The NPPF has immediate effect from the 27 March 2012 but only time will tell if the Government's claims are well founded. As things stand the planning policy landscape has been widely deforested with the repeal of so much national planning policy and the imminent abolition of Regional Strategies.

The NPPF will be the subject of a special Blake Lapthorn Planning eBulletin in the next few days.

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new Neighbourhood Planning Regulations

On 6 April 2012 new Neighbourhood Planning Regulations, supplementing the provisions of the Localism Act 2011, will come into force. The new Regulations set out further procedure for the designation of Neighbourhood Areas, Neighbourhood Forums, Neighbourhood Development Plans and Orders as well as Community Right to Build Orders

There are however significant gaps in the detail of some sections. For example, the designation of Neighbourhood Areas and Forums deals with the content of applications, publicising applications and publicising the designation of an area or forum by a local planning authority. Information about how applications are to be considered, how representations are dealt with and appeal mechanisms (if there is to be any) is omitted. A separate instrument is expected to be published to deal with referendums related to Neighbourhood Development Plans and Orders.

The popularity of the new neighbourhood planning regime remains up for debate with many of the pilot projects, that have been running for almost two years, highlighting the issues that will be faced. Amongst those are the level of resources, both financial and knowledge that communities will have, and the amount of community 'buy-in' that can be established. It will also be interesting to see how competing local tensions play out between groups with differing objectives.

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changes to Development Management Procedure Order

From 6 April 2012 there will also be further change to development management procedure. Amongst the changes is another nail in the coffin of regional planning, namely the removal of Regional Development Agencies as a statutory consultee, reflecting their abolition.

Further, local authorities will be required to keep more information on local planning registers including matters relating to Neighbourhood Development Orders. Authorities will also be required to maintain information relating to Planning Enforcement Orders which they may apply for from a magistrates' court for an apparent breach of planning control where it is considered that there has been deliberate concealment and the court is satisfied it would be just to make the order on the facts.

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planning law and private nuisance

The Court of Appeal has ruled in *Coventry (trading as RDC Promotions) v Lawrence & Shields* that the grant of planning permission does not authorise the commission of a nuisance but a decision to grant and any subsequent lawful implementation of that permission is capable of changing the character of an area and may establish new characteristics to a locality. Consequently, potential purchasers of property in the area must take account of those established area characteristics.

The case concerned owners who bought a house near a motor racing stadium and race track which generated noise from those authorised activities. The Court refused an injunction or to grant damages for nuisance. The Court in particular considered that whether activities constituted a nuisance "*must be decided against the background of its changed character*" and therefore *"otherwise offensive activities in that locality cease to be a nuisance*".

At first instance the judgment would appear to place a burden on local planning authorities to ensure that decisions to grant do not cause a nuisance. However, the Court pointed to three factors of importance in the case.

Firstly, the planning consents were on the public record and were available to the owners and their advisors prior to purchase. Secondly, the activities had been authorised since 1975 by the Council through a combination of planning consents and certificates of lawful use. Thirdly, in granting the consents the Council had carefully weighed up private interests against public benefit.

It is clear that every case will be determined on its own facts and that local planning authorities in arriving at robust decisions based on established principles in the determination of planning applications will have no greater burden placed upon them. Also see *Lawrence v Fen Tigers Ltd.*

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injunctive relief for contemplated tree root damage

The Court of Appeal in *London Borough of Islington v Elliott* considered how imminent and likely it has to be for physical damage to occur from tree roots before the courts should grant injunctive relief on an anticipatory basis.

The claimants had complained for eight years about the risk of tree roots on Council property damaging their land. Eventually the Council resolved to remove the offending trees but did not subsequently notify the claimants. Before the trees were cut down the claimants had commenced action for damages and an injunction. Despite the trees having been removed by the time the case reached court Council had to pay the claimant's costs.

However, the court did rule that an injunction would have been inappropriate in any event. Applications for such relief were to be limited to where the risk of damage was extremely imminent and the defendant was particularly uncompromising.

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definition of contaminated land amended

The contaminated land regime is principally set out under Part IIA of the Environmental Protection Act 1990 and DEFRA Circular 01/2006.

Contaminated land is defined as land which, because of substances in, on or under it, appears to be in such a condition that either:

- Significant harm to the environment or human health is being caused, or there is a significant possibility of such harm being caused, or
- Pollution of controlled waters is being, or is likely to be, caused.

From 6 April 2012 the second limb of the definition of contaminated land will be amended to read; "*significant pollution of controlled waters or significant possibility of significant pollution of controlled waters*".

This is a higher threshold test and it will no longer be technically possible to argue that any water pollution is sufficient to satisfy the second limb of the definition. In reality however local authorities and the Environment Agency have concentrated on high risk sites and this will continue to be the case. Nonetheless the uncertainty of the superseded wide drafting will fall away.

Revised contaminated land guidance will explain how the new definition should be interpreted and should be available contemporaneously with the legislative changes. The existing guidance remains in force until the new guidance is issued.

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more village green cases

The Court of Appeal has upheld a decision that a 42-acre site was wrongly registered by Dorset County Council as a village green in 2001. Four years later new owners, who were developers, purchased the land and applied to the High Court to have it struck from the register. The courts agreed on the basis that the use by the public of the land over a 20-year period was not "as of right". The previous owners had put up ‘Private’ and ‘Keep Out’ signs. Additionally, some users had accessed the land by creating gaps in the fences and hedges, had committed vandalism and worried cattle. Local campaigners are seeking leave to the Supreme Court.

A second Court of Appeal decision however went in favour of campaigners in Birkby, Huddersfield allowing a 6.5 acre sloping, partly-wooded, green space which was first registered in 1997 to maintain its entry on the register.

And finally, a third decision in East Sussex ruled that a private beach at Newhaven could not be listed as a village green. The judgment accepted that a tidal beach was capable of being a village green within the statutory definition subject to all tests being met. However the beach formed part of operational port land and as such the judge considered recreational public use to be incompatible with the statutory functions of the port authority as set out in the Harbour Docks and Pier Clauses Act.

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For further information on any of the issues raised above, please contact Keith Lancaster in our **Planning law** team in **Oxford** on 01865 253 295 or email **keith.lancaster@bllaw.co.uk**.

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