

EDITORIAL COMMENT

The Editorial Board

This month's newsletter looks at some recent and anticipated developments, following the change of government in May 2015. Richard Harwood OBE QC scrutinises the latest planning reforms aimed at encouraging house building, while Victoria Hutton considers the increasing importance of Assets of Community Value in planning terms.

Solar photovoltaic energy is another 'hot' topic and, in this edition, Stephen Tromans QC, Philippa Jackson and Jon Darby examine current government policy on locating solar PV schemes on agricultural land. Meanwhile, John Pugh-Smith analyses a recent High Court decision concerning the application of s.9 Limitation Act 1980 in the context of a compulsory purchase compensation dispute. He also considers the consequences of a change in a Council's five-year housing land supply position in three recent appeal decisions.

Thanks for your interest. We hope you enjoy this month's newsletter.

FIXING THE FOUNDATIONS: THE LATEST PLANNING REFORMS

Richard Harwood OBE QC

Continuing reform of the planning system with the intention of increasing housebuilding was always on the agenda regardless of the outcome of the General Election. At issue was the philosophical direction that change would come from. Apart from recommending a few deregulatory measures which had already been

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Editorial Board

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introduced by Eric Pickles, the Labour Party's Lyons Review focused on increasing state intervention. The Conservative Government's Productivity Plan, entitled *Fixing the foundations: Creating a more prosperous nation* puts a greater emphasis on freeing up builders to build.

Delays to the production of local plans continue to cause concern. Ministers intend to intervene to get more plans written, streamline the length and process of plans and provide further guidance on the duty to cooperate.

Further promotion of brownfield redevelopment had been a major election promise. Where these sites are within urban areas the issue is usually not whether they can be redeveloped but what for, the size of the development, detailed design and the on and off site impacts of the scheme. The Government's intention is to provide a zonal system for brownfield sites. A number of zonal mechanisms are already available, such as special development orders, enterprise zone schemes, local development orders and simplified planning zones. The need for any new mechanism will be to tie it in with Environmental Impact Assessment.

Land assembly is often an issue on urban brownfield sites. A consultation on various compulsory purchase and compensation reforms was carried out from March to June this year and Ministers confirmed that they intended to bring forward legislation on those changes, subject to the outcome of the consultation, in this Parliamentary session. The wider need for reform has been recognised and further proposals will be brought forward in the autumn. Compulsory purchase and compensation needs to be quick, fair and comprehensible to those who are subject to it. The current system meets none of these requirements. The time must now be ripe to replace the Nineteenth Century system with one suited to the Twenty First.

Greater planning powers will be devolved to the Mayors of London and Greater Manchester. Increasing density of development in London is also an interest, but fears that permitted development rights will just let rip seem to be misplaced. *Fixing the foundations* advises:

"The government will therefore work with the Mayor of London to bring forward proposals to remove the need for planning permission for upwards extensions for a limited number of stories up to the height of an adjoining building, where neighbouring residents do not object. In cases where objections are received, the application will be considered in the normal way, focussed on the impact on the amenity to neighbours"

Speeding up the approval of minor development will be the focus of several efforts.

On telecommunications the intention is to reform the Electronic Communications Code and consider extending permitted development rights to taller mobile masts and make permanent the permitted development rights for high speed broadband

THE LOCALISM AGENDA: ASSETS OF COMMUNITY VALUE

Victoria Hutton

Victoria Hutton examines Assets of Community Value legislation and decision making in the First-Tier Tribunal and considers the increasingly important impact which ACV status is taking on in planning terms.

The introduction of the Localism Act 2011 ('LA 2011') was much feted by the coalition government at the time it was enacted. However, it's fair to say that the majority of those in the planning industry (lawyers included) failed to grasp the significance of the 'localism agenda'. Now that the measures included in the LA 2011 have bedded in it is worth examining each one in order to assess their impact and the direction of travel. This article considers assets of community value ('ACVs').

Assets of community value: a brief overview

One of the most well-used 'local powers' has been the ability of community groups to nominate community land and buildings as ACVs pursuant to part 5, chapter 3 LA 2011 together with the Assets of Community Value Regulations 2012. Briefly, the system works as follows. Local authorities are now required to maintain a list of land in their area which is 'of community value' (s81(1) LA 2011). Land is 'land of community value' if in the opinion of the authority:

- a. *an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and*
- b. *it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community. (s88(1) 2011 Act).*

Or, in the opinion of the authority:

- a. *there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and*
- b. *it is realistic to think there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community. (s.88(2) 2011 Act).*

The definitions are broad. The ACV Regulations state that 'social interests' include cultural interests, recreational interests and sporting interests (reg 88(6)). The decisions of the First-Tier Tribunal (General Regulatory Chamber) have largely confirmed the breadth of the definition including: pubs,¹ fields² and sports stadia³ as community assets. Though note, somewhat surprisingly, a church was held not to fall within the definition.⁴

Land is entered onto a list by 'community nomination' which can be made by a parish council, community council or a voluntary or community body with a local connection which has at least 21 members and does not distribute any surplus to its members (s89(2) LA 2011). The First-tier Tribunal has, thus far, been fairly uninterested in challenges on the basis that the nominating body doesn't meet the requirements of the legislation.⁵

On receiving a community nomination a local authority must consider the nomination and, if it considers the land to be 'of community value', it must be added to the ACV list. There is then an opportunity for the owner of the asset to request a review of the decision by the authority (s92 LA 2011). If a review is unsuccessful in having the land removed from the list the owner has the opportunity to appeal to the First Tier Tribunal (General Regulatory Chamber).

The Impact

Under the LA and ACV Regulations, an owner of land included in an ACV list must not dispose of the freehold estate of the land or grant or assign a leasehold estate of at least 25 years unless:

- a. *they have notified the local authority of the desire to enter into a relevant disposal;*
- b. *the 'interim moratorium period' (6 weeks from notification) has ended without the local authority having received a written request from a community interest group for the group to be treated as a potential bidder for the land or the 'full moratorium period' (6 months from notification) has ended; and*
- c. *the 'protected period' has not ended (18 months from notification).*

The effect is to give a community group the chance to bid for the sale/long lease of the asset. There is no requirement on the seller to sell to the community group, even where they are the highest bidder.

The fact of ACV status may be treated as a material consideration in a planning decision. The guidance document 'Community Right to Bid: Non-statutory advice note for local authorities' (October 2012) states:

'...the fact that a site is listed may affect planning decisions – it is open to the Local Planning Authority to decide whether listing as an asset of community value is a material consideration if an application for change of use is submitted, considering all the circumstances of the case.'

A note from the 'Parliament and Constitution Centre' to members of Parliament dated 9 February 2015 states that it is:

'...for a local planning committee to decide whether the status of an asset of community value is a sufficient

¹ Numerous decisions, see for example T.G. Sawtell v Mid-Devon District Council UKFTT CR_2014_0008 (GRC).

² Banner Homes Limited v St Albans City and District Council [2015] UKFTT CR_2014_0018 (GRC).

³ Firoka (Oxford United Stadium) Ltd v Oxford City Council [2014] UKFTT CR_2013_0010 (GRC).

⁴ The General Conference of the New Church v Bristol City Council [2015] UKFTT CR_2014_0013 (GRC) [This arguably runs contrary to paragraph 28 of the Framework which includes places of worship among a non-exhaustive list of community facilities.]

⁵ See for example: Hawthorn Leisure Acquisitions Ltd v Northumberland County Council [2015] UKFTT CR_2014_0012 (GRC) and St Gabriel Properties Ltd v London Borough of Lewisham [2015] UKFTT CR_2014_0011 (GRC).

material consideration to refuse permission for change of use.' (SN/PC/06366).

In this author's opinion an ACV listing, not being a planning designation per se, ought not to add much to the planning balance. The community value of land or a building is clearly capable of being a material consideration whether it is included on the list or not. Indeed, that was the approach taken by the planning committee and which was upheld in the case of *R(oao East Meon Forge and Cricket Ground Protection Association) v East Ham*.⁶

On the basis of the above, following the enactment of the LA 2011 and the ACV Regulations, a planning professional would have been forgiven for thinking the ACV regime was relatively toothless. Of course, a delay in any sale of possibly over six months will not have a negligible impact for many owners, but in planning terms the addition to an ACV list appeared not to be hugely consequential. The legislation does not: prevent development of an ACV, create a presumption against development or signify that ACV listing ought to be given considerable weight in the planning balance. However, recent legislative changes indicate that ACV status may be a 'hook' which Parliament uses to hang certain planning restrictions upon.

As of 15 April 2015⁷ permitted development rights under schedule 2, part 3, paragraphs A and B to change a building within a class A4 use (drinking establishment) to an A1 (shop), A2 (financial and professional services) or A3 (restaurants and cafes) do not apply to buildings on an ACV list or those nominated for listing. The measure had been announced by the coalition government on 26 January 2015 and may well have proved a vote-winner in local communities across the country. A DCLG press release at the time stated: *'[T]his action will stop valued community pubs from being demolished or converted into different uses against the will of local people.'*⁸ The effect is that those wishing to convert a pub into say, a supermarket, will now not benefit from permitted development rights and will have to apply for planning

permission from the local planning authority even where the asset is merely nominated rather than on the list itself.

Although this measure applies only to drinking establishments, the sudden nature of the announcement, and the speed with which the legislation was brought into force, indicates that the ACV regime may be a useful system through which Parliament seeks to further the localism agenda. This may be through future primary legislation or indeed amendments to the Planning Practice Guidance ('PPG'). It is currently unclear what the new government has in mind however, the appointment of Greg Clark, a proponent of localism, to minister for DCLG is unlikely to lead to any reduction in the significance of ACVs.

Concluding remarks

ACVs are one element of the Localism Agenda which are 'bedding in' to the planning system. The changes to permitted development rights this April signify that what at first appeared a rather toothless regime in planning terms is becoming more significant for developers and decision makers. The speed at which those changes came into force having been announced in January and enacted in April demonstrate the potential for further sudden increases in the importance of ACVs for planning, whether through primary legislation or through an amendment to the PPG, say. It is currently unclear whether there are further changes afoot, however, one can safely conclude with the election of a Conservative government and the appointment of Greg Clark to minister for DCLG, that ACVs are unlikely to be going anywhere anytime soon.

SOLAR FARMS ON AGRICULTURAL LAND – LIGHT AT THE END OF THE TUNNEL? Stephen Tromans QC, Philippa Jackson and Jon Darby

The government has repeatedly emphasised its commitment to increasing the supply of renewable energy. In accordance with European Union Directive 2008/28/EC, published in April 2009, the UK's target is

6 [2014] EWCA 3543 (Admin). However, given that the weight to be given to any material consideration is a matter for the decision maker which can only be challenged on a Wednesbury basis there is clearly scope for decision makers giving more than negligible weight to ACV status so long as that weight is rational in the circumstances.

7 First enacted by the Town and Country Planning (General Permitted Development)(Amendment) (England) Order 2015 and now repealed and subsumed into the Town and Country Planning (General Permitted Development) Order 2015.

8 'Coalition ministers change the law to protect the Great British pub', DCLG, 26 January 2015.

for 15% of all energy consumed to be from renewable energy sources by 2020. The UK's published solar PV strategy (October 2013 and April 2014) makes it clear that there is a considerable need for more generating capacity, if targets for renewable energy and, specifically, solar photovoltaic energy are to be met, that cost-effective solar PV projects which deliver genuine carbon reductions are to be supported and that all local planning authorities have responsibility for assisting in achieving these objectives.

However, following the publication of the online Planning Practice Guidance and certain Ministerial Statements, the government's stance towards locating PV projects on agricultural land is perhaps rather less clear. Particularly in rural areas, large swathes of which may be classified as best and most versatile agricultural land (i.e. land which is Grade 1, 2 and 3a on the Agricultural Land Classification) ("BMVAL"), there is arguably a degree of tension between national and local policies which seek to preserve the agricultural use of such land and policies which encourage the production of renewable energy, including solar PV schemes.

In terms of agricultural land, paragraph 112 of the NPPF states that the economic benefits of BMVAL should be taken into account, with preference being given to areas of poorer quality land. The NPPF defines BMV land as being classified as grades 1, 2 and 3a. The PPG identifies a number of factors which should be taken into account by Local Planning Authorities when determining applications for large-scale PV solar farms, including encouraging the effective use of land by focussing large scale solar farms on previously developed and non-agricultural land, provided that it is not of high environmental value and, where a proposal involves greenfield land, considering whether:

- the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land;
- the proposal allows for continued agricultural use where applicable and/ or encourages biodiversity improvements around arrays.

This has led some Local Planning Authorities to argue that applicants are required to undertake a sequential

assessment, similar in kind to those undertaken in support of applications for retail development, to demonstrate that no land of lower agricultural value (or indeed non-agricultural land) is available on which to locate a proposed large-scale solar PV scheme. It is, however, notable that to require an applicant to demonstrate compliance with an undefined sequential test would often be merely to set them up to fail. Furthermore, whilst recognising that large scale solar farms can have a negative impact on the rural environment, particularly in undulating landscapes, the PPG notes that not only can the visual impact of a well-planned and well screened solar farm be properly addressed within the landscape if planned sensitively but also that many proposals allow for continued agricultural use and/or biodiversity improvements around arrays. Indeed, there is often significant potential to mitigate landscape and visual impacts through, for example, screening with native hedges.

Notwithstanding the 'high-water mark' of an appeal decision in Suffolk (APP/D3505/A/13/2204846) in which it was suggested that there was "a clear sequential test in national policy", a number of subsequent appeal decisions have confirmed that neither the NPPF nor the PPG imposes any requirement to undertake a formal sequential assessment. Thus, in an appeal at Westerfield Farm, Carterton, Oxfordshire (APPD3125/A/14/2214281) the Inspector observed, at para. 43, that: "It is not local or national policy for a developer to be required to prove that there is no better alternative location for a development before planning permission may be granted." Similar comments were made by an Inspector in appeals at Land at Priors Byne Farm, Bines Road, Partridge Green, West Sussex RH13 8NX (APP//3825/A/14/2219843) and Hacheston, Suffolk (APP/J3530/A/13/2193911).

On 25 March 2015 the former Secretary of State, Eric Pickles MP, published a ministerial statement on solar farms, in which he emphasised that proposals for a solar farm involving best and most valuable agricultural land ("BMVAL") would need to be justified by "the most compelling evidence" albeit that each application must be considered on its merits, in the light of material considerations.

What, then, is likely to satisfy the threshold of "the most

compelling evidence”? Some guidance can be found in recent appeal decisions. Firstly, there is no prohibition on developing greenfield land. Secondly, this evidence does not have to take the form of a sequential assessment, although in practice it may be difficult for applicants to demonstrate that the use of BMVAL is justified, unless they can also show that they have considered and discounted other sites within a proportionate search area on the grounds of land quality or unsuitability. While a detailed analysis of such assessments is outside the scope of this article, the starting point is always likely to be the availability of a grid connection, as this is clearly a prerequisite for any PV scheme. Given the highly constrained capacity of the grid in many areas of the country and the need for connection costs to be viable for a commercial scheme, this requirement may narrow the scope of an applicant’s search considerably. Furthermore, there will also be a number of elements to an energy company’s site search that are influenced by their business model, the fiscal environment and the nature of the financial package that they may put together for landowners. As such, provided that the company’s response to such elements, and how they are fed into any site search that may be conducted, can be shown to be rational and not a typical for the industry as a whole then it is likely that they will be found to be reasonable factors properly influencing the selection of a proposal site. The same will also probably be true in relation to the question of disaggregation and whether it would be feasible for the proposal to be broken down into smaller, constituent, elements in order that it could be made to fit onto a number of small sites, perhaps on brownfield land or in the form of rooftop arrays. However, again, it is likely that grid connectivity will be a powerful influencing factor in terms of whether such an option would be realistic and financially viable alternative in any given circumstance.

Thirdly, there are other positive and/or mitigating factors, which may be relevant when considering whether the loss of agricultural land is justified. For example, as noted above, it is common practice for some form of agricultural use to continue alongside such schemes, usually in the form of sheep grazing. The lifetime of solar PV sites is inherently limited as the arrays deteriorate over time and typically permission is granted for around 25-30 years. Removing the land from intensive agricultural use for such a period of time will

give the land an opportunity to regenerate and is likely to lead to an improvement in its quality over time, when coupled with suitable conditions to ensure restoration. Renewable schemes, such as solar PV, can also assist with the diversification of agricultural holdings, in accordance with the economic objectives set out in paragraph 28 of the NPPF. Moreover, in our experience, solar PV schemes usually attract less local opposition in terms of visual impact, noise and other amenity issues, than wind turbines generating equivalent levels of renewable energy.

Ultimately, the impact on BMVAL is an important material consideration in the determination of any planning application for a large-scale solar PV scheme but it is not a trump card. Each application must be considered on its merits and, in every case, the contribution towards increasing the supply of renewable energy and meeting national targets must also command significant weight.

Stephen Tromans QC and Philippa Jackson represented Elgin Energy (instructed by Phillips Planning Services) on an appeal against refusal for a 30 MW solar PV proposal in West Norfolk. Stephen and Jon Darby are representing Good Energy (instructed by Norton Rose Fulbright LLP) on an appeal relating to a 12.8 MW scheme in Cornwall. Both involve effect on BVMAL as the main issue.

DOWN BUT NOT OUT!

John Pugh-Smith

In this article John Pugh-Smith explains how a change in the five-year housing land supply position within South Somerset led to the dismissal of three major housing appeals and how the Inspectors’ decisions are, perhaps, worthy of wider consideration and reflection.

For the beleaguered local planning authority with less than a proven deliverable and viable five-years’ housing land supply, life has been tough since the provisions of paras. 47 and 49 of the NPPF truly began to bite from March 2013. However, by way of example, three recent appeal decisions concerning significant housing sites within two of South Somerset’s market towns, Crewkerne and Chard, may bring some hope and perspective. They are also a reminder to the housebuilding industry of the importance of ensuring that a proposed scheme is demonstrably of sufficient merit and with a deliverable and bespoke travel plan to warrant the grant of outline

consent, and, that context and timing can be the keys to success or failure.

The policy context for South Somerset in early 2014 had been an emerging Local Plan, the examination of which had been suspended by Inspector David Hogger for further work to be undertaken on the housing delivery of a number of major contributing allocations, particularly the proposed urban extensions around the principal settlement, Yeovil. However, the suspension and requirement for further work did not engage the specific emerging policies or their context for the Crewkerne and Chard appeal schemes.

At the initial inquiry just after Easter 2014 in respect of Land at Goldwell Farm, Yeovil Road Crewkerne, a residential proposal by Gleeson Developments Ltd for 110 dwellings, it was common ground that the Council did not have a deliverable 5-years' supply. Accordingly the inquiry, conducted by Inspector Anthony Lyman, focussed upon the landscape impacts of the scheme, which required considerable land remodelling, and whether the development would be truly accessible, given the location of the appeal site effectively on top of a hill away from the town centre and local schools yet across the road from a large, committed but unbuilt housing site. The three-day inquiry closed on 25th April with a costs application by Gleeson on the accessibility reason for refusal, which had been defended by a local Councillor due to the County Highway Authority having accepted the adequacy of the proposed Travel Plan.

Within a month the Council was, again, at inquiry fighting one of two large housing schemes at Chard. The first that reached its initial hearing on 20th May before Inspector Paul Griffiths was for a mixed development comprising 450 homes, a new football pitch (promoted to relocate Chard Town FC), and related sports and neighbourhood facilities in a location called Mount Hindrance. Again, it was accepted as common ground that the Council could not yet demonstrate a five-year housing land supply; and the Inquiry focussed upon the impacts of the scheme by MacTaggart & Mickel Homes Ltd upon the Regeneration Strategy for Chard being promoted through the Emerging Local Plan, and the accessibility and traffic impacts of the proposals. The inquiry also closed after three days. However, within a few weeks, as part of the preparations for the resumption of the Local Plan hearings before

Inspector David Hogger, the Council's Forward Planners took a report to Members to explain that a 5-year supply could, just, now be demonstrated. Accordingly, after representations to PINS, both appeal inquiries were re-opened.

The first, the Mount Hindrance scheme, was re-opened in conjunction with an appeal scheme for 110 dwellings on adjoining land being promoted by David Wilson Homes Ltd in late August. Ironically, the inquiry for the smaller Crimchard scheme had been postponed from February 2014 as a result of an EIA point taken by the Mount Hindrance promoters. Inspector Griffiths proceeded to hear the planning merits of the Crimchard scheme over two days. Matters resumed the following week with, in effect, a joint round table hearing on housing and supply issues before both inquiries were closed on 4th September. Later that month, Inspector Lyman re-opened the Goldwell Farm inquiry for one day to hear arguments, presented in a similar less formal manner, on housing land-supply issues. However, Gleeson did not pursue a separate costs application for the inquiry re-opening.

On 4th November 2014 Inspector Lyman published his decision letter (APP/R3325/A/13/2210545). He accepted that the Council had a deliverable five-year housing supply and dismissed the appeals on the grounds of landscape impact and lack of accessibility due to the topography, ease of walking into the centre (within 1.25 and 2.5kms of most of the town's main facilities) and limited bus service. On the latter point, the Inspector first noted that the view of the Council's transport consultant (who had not attended the inquiry) that the *"measures (in the travel plan) are about as good as can be reasonably achieved"* was not a resounding endorsement, nor did it mean that the measures would actually be achieved. He then went on to remark that he was *"not convinced that future residents of the new development would have a real choice about how they would travel as advocated by the Framework. The travel plan has a built-in monitoring and review mechanism to get objectives 'back on track' if the anticipated modal shift is not being achieved. However, given the specific circumstances relating to Crewkerne and the appeal site, it is not clear on the evidence before me, how the travel plan could be altered or what new incentives could be introduced to make the required percentage change more achievable. I conclude that, in reality, future*

residents of this site would be likely to be reliant on the use of private motor cars and that therefore the development would fail to satisfy the sustainable transport objectives of the Framework and Policy ST5 of the Local Plan". He also dismissed Gleeson's costs application.

Unsurprisingly, the Council drew the Goldwell Farm decision letter to the attention of Inspector Griffiths who, after accepting a further round of representations, indicated that he would hold the publication of his appeal decisions until after the outcome of his colleague's deliberations in respect of the Emerging Local Plan were known. There was also a 'hiatus' to wait to see whether the Chard appeals were going to be called-in and determined by the Secretary of State. Eventually, the decision was made that the appeals would remain within the Inspector's jurisdiction. On 8th January 2015 the Local Plan Inspector's Report was published, and, after an opportunity for further comments from the appeal parties, the Local Plan was formally adopted on 5th March. Further comments were sought concerning the s.106 contributions following the ending of the transitional period for their pooling under CIL Regulation 123(3)(b) on 6th April. The appeal decision and costs letters were finally published on 3rd June 2015 (APP/R3325/A/13/2209680 & APP/R3325/A/13/2203867).

In dismissing both Chard appeals, Inspector Griffiths determined that, on the evidence presented to him, and despite the conclusions of Inspector Lyman and Inspector Hogger, he could not conclude that the Council had demonstrated a five-year supply of deliverable housing sites. He also concluded that both sites were sufficiently accessible even though the travel distances were, in most cases, well beyond the 800 metres seen as acceptable to walk in Manual for Streets, and on a gradient. Inspector Griffiths remarked:

"However, the analysis of accessibility cannot be so reliant on suggested distances because it is largely a behavioural matter. Some people will be motivated to walk much further than 800 metres to school, or work, or the shops. Others will prefer to use the car for even shorter distances. The essential question, it seems to me, is whether the proposals would offer residents a reasonable opportunity to use more environmentally-friendly modes of transport than the private car ... I walked the likely routes ... and I did not find them

particularly onerous ... It must [also] be borne in mind that a significant amount of housing development is planned for Chard, some of which is relatively remote from the town centre. Notwithstanding associated infrastructure improvements that might come about, that is inevitably going to lead to increased car use. In that context, I see nothing inherently difficult about the appeal sites in terms of accessibility by means of travel other than the private car, and both schemes include measures that would go some way to reduce dependence on that mode".

However, the Inspector found, as his primary ground for dismissal, that both schemes would prejudice the Local Plan strategy for Chard:

"Viewed separately, or together, the provision of this many dwellings [335 on one site and 110 on the other] on sites seemingly unencumbered by the restraints of others envisaged by LP Policy PMT2, would be very likely, in my view, to blow the LP strategy off-course. I cannot see why, given the capacity of the market in Chard [noted by the Inspector to be a 'soft' one], developers would seek to provide housing on more difficult regeneration sites, when relatively significant numbers of dwellings might have already been delivered, or be in the process of coming forward simultaneously, on edge of settlement sites, much less constrained, and therefore more profitable, to develop".

However, success comes at a price, and, as some sort of 'rough justice', Inspector Griffiths allowed MacTaggart & Mickel's costs applications on the basis that the new material could have been produced sooner and for the additional time spent dealing with housing land supply issues. Such an approach on so crucial an issue was, in the view of this commentator, unfair given the prevailing circumstances and outcome, and the timing of publication of the judgment - on 20th May 2015 - in *Wiltshire Council v SSCLG* [2015] EWHC 1261 (Admin). There, after the close of an appeal inquiry but before the decision letter had been published the LPA sent its Core Strategy Inspector's report to PINS which questioned the required housing figure and recommending lower one. However, the Inspector's report was not received by the appeal Inspector, who in consequence issued his decision letter on the basis of a higher requirement. Mrs Justice Patterson found that the Inspector's report

was an important material consideration and that there was a real possibility that the resolution of the housing numbers might have affected the outcome. Accordingly, she quashed the appeal decision letter. More telling, she also commented that there had to be some administrative mechanism for notifying an inspector and enabling a decision letter to be recalled, supplemented or amended; that the current PINS administrative procedures in place were, in the circumstances, not fit for purpose, and, that until a decision letter had been issued, the responsibility for it remained with the inspector. Given the foregoing, Inspector Griffith's costs determinations seem all the more 'rough', at least to this commentator. It was also inconsistent because on 8th June 2015, the same Inspector, albeit in a written representations decision, accepted the five-year supply position without demur. Whilst dismissing a scheme at Tintinhull (APP/R3325/W/14/3002063) for a single dwelling due to its impact on the settings of two Grade II listed buildings, and the character and appearance of the area, Inspector Griffiths remarked:

"there is no suggestion that the Council cannot currently demonstrate a five-year supply of deliverable housing sites".

Nonetheless, as is so often said, context and timing are everything, as are the facts of the particular appeal!

John Pugh-Smith acted on behalf of South Somerset District Council in respect of the Crewkerne appeal (assisted by Victoria Hutton in respect of the April inquiry) and both Chard appeals. He regularly acts for national housebuilders as well as for local planning authorities and parish councils on residential development schemes within England and Wales.

WHEN IS "ENOUGH" LEGALLY ENOUGH?

John Pugh-Smith

In this article John Pugh-Smith looks at the application of s.9 of the Limitation Act 1980 to a belated High Court claim to force a local authority to refer a compulsory purchase compensation dispute to the Upper Tribunal (Lands Chamber) and its wider implications.

For any landowner whose land is compulsorily purchased, let alone a Welsh hill farmer, it is not just his human rights but also his need for adequate and

timely compensation that are engaged. Equally, for the acquiring authority, budgetary certainty and closure are important considerations. The recent decision in *Saunders v Caerphilly County Borough Council [2015] EWHC 1632 (Ch)* raises all these considerations but also leaves the application of established limitation principles to this area of the law without sufficient clarity for now.

The, perhaps, bizarre facts begin in November 1991 when Caerphilly County Borough Council's predecessor authority, Mid-Glamorgan County Council, served a notice to treat upon Mr John Saunders, a local farmer, in respect of a strip of his farmland to facilitate the construction of the A469 Lower Rhymney Valley Relief Road. Shortly thereafter the Authority entered the strip and built the road which has been used as part of the highway network ever since. The new road had the effect of severing the main access to the west of the farmhouse and farm buildings; and access is now obtained from the west through an underpass under the road. The road also severed the drainage system from the farmhouse and farm buildings, the former now being dealt with by means of a discharge into a tank but with no effective drainage from the buildings. Mr Saunders instructed a solicitor, a surveyor and eventually counsel to deal with his claim. On his behalf a reference was also made to the Lands Tribunal but later withdrawn in the expectation, by both parties, that a settlement had been reached. The Authority also made a substantial advanced payment. However, terms were never finalised, and, by July 2012 the Authority indicated that it reserved the right to raise the issue of whether the claim was now statute-barred. However, at no stage did the parties call upon help from an independent mediator or evaluative surveyor. By October 2014, as it had still not been possible to reach a settlement Mr Saunders issued High Court proceedings requiring the Authority to refer the assessment of compensation to the Upper Tribunal. At the hearing in early June 2015 the principal preliminary issues were whether the Limitation Act 1980 s.9(1) was applicable to Mr Saunders' claim, and, if so whether the Council was prevented from raising a defence based on limitation.

In his recent judgment His Honour Judge Milwyn Jarman QC, sitting in Cardiff as an additional Chancery Division judge, supported the Council, initially, by holding that the expressions "action" and "cause of action" in s.9 of the 1980 Act were extremely wide and so were

applicable to Mr Saunders' claim. Furthermore, the Act's policy of preventing stale claims was equally applicable to claims against public authorities for sums payable by them pursuant to statute; that a cause of action might accrue for the purposes of s.9 even though a constituent element of it might have to be determined by someone other than a court of law; and that an action could be for a "sum recoverable by virtue of [an] enactment" even though the liability in question was not and could not be quantified when the action was commenced. As the right to compensation for compulsory purchase was an immediate right arising upon entry, that was an action to recover a sum of money, namely, the amount of compensation to be determined by the Tribunal.

Such an approach, unsurprisingly, reflects the reasoning of the Court of Appeal in the leading CPO limitation case of *Hillingdon LBC v ARC Ltd (No.1)* [1999] Ch. 139 which has since been applied in the Tribunal and in the courts, including the Court of Appeal, for example, *Bridgestart Properties Limited v London Underground Limited* [2005] EWCA Civ 793. It also rejected the approach taken by Mr Saunders' counsel, based on what he termed 'Victorian' authorities, decided under the Lands Clauses Consolidation Act 1845, that the nature of Mr Saunders' claim was for prerogative relief to require the Authority to comply with its statutory obligation to refer the question of the disputed compensation to the Tribunal and was being made with a view to seeking the private law remedy of specific performance of the obligation to purchase the strip.

Moreover, unlike in the *ARC* litigation against *Hillingdon LBC*, no estoppel arguments (by conduct or convention) were raised by Mr Saunders. Nor was any substantive point taken under the European Convention of Human Rights that the Authority's limitation defence would deny Mr Saunders' right to a fair hearing under article 6 or to the proper protection of property under article 1 of the First Protocol. Indeed, the Cardiff judgment is entirely silent on the ECHR aspect. Rather, it was argued that Mr Saunders had a substantive legitimate expectation argument that the question of compensation will be referred to the Tribunal notwithstanding the expiry of the time limit; that a court must prevent a public authority relying on its strict rights to defeat a legitimate expectation where to do so would be an abuse of power or an affront to the public conscience, and, that where

the public interest has to be balanced against a private interest, then if the public interest is to be preferred the response must be proportionate.

In response, the Authority submitted that the proper test was whether the Authority was estopped from denying that s.9 applied (by convention or conduct), which was how the language was used by the Court of Appeal in *Hillingdon (No 2)* [2003] 3 EGLR 97. Attention was drawn to the fact that there had been no promise or representation which would debar the Authority from now relying on s.9; that Mr Saunders had, throughout, been represented by experienced solicitors and at one stage by counsel and that he had readily accepted, in cross-examination, that he had been kept fully informed. There was also no indication why the matter had not been referred back to the Tribunal in 1996, as it could have been under the rules then in force, and no explanation had been given for the delay between 2012, when the issue of whether the claim was time barred was first raised, and 2014, when the present claim was issued.

Nevertheless, the Judge took the view that it would be unconscionable in all the circumstances for the Authority now to take the limitation defence. He relied upon a letter from the Authority's Head of Legal Services in 2008 which, in his judgement, amounted to clear communication that if matters were not agreed, then they would be referred to the Tribunal. Implicit in that indication, he found, was that no limitation point would be taken. Not only that, but the Authority had suggested that the parties should continue to negotiate and that commencing proceedings at that stage would serve no productive purpose, which was the basis upon which negotiations continued until July 2012, when the Authority for the first time raised the limitation point and reserved its rights in respect of it. Thereafter, the Judge found, despite a lapse of nearly two more years, that Mr Saunders had been entitled to a reasonable time to consider his position; that it was perhaps not surprising that he should in those circumstances wish to instruct new solicitors, who would need some time to come to a view as to what had gone on during a period of almost 20 years; and that it had not been unreasonable for the High Court proceedings not to have been commenced until early October 2014.

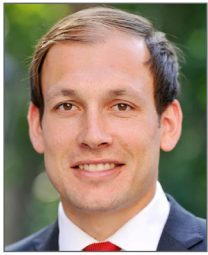
Whilst the outcome may appear just, such a benevolent

approach still runs counter to the basic principles of limitation and glosses over the emphasis within the Civil Procedure Rules to act promptly and proportionately. It skates over the fact that, while only one reference may be made to the Upper Tribunal, that remedy is the primary course of redress laid down by statute for the disaffected landowner. It also discounts the fact that, where a prospective claimant has been given a clear warning that his claim for compensation is liable to be defeated by limitation, and, still no corrective action is taken promptly, it cannot be “unconscionable” for the acquiring authority to take advantage of the limitation defence available to it under the general law. Certainly, that was the more robust approach taken, recently, by the Deputy President of the Lands Chamber, Mr Martin Rodger QC, in *Khan v Tyne & Wear Passenger Transport Executive* [2015] UKUT 43 (LC) where, over a shorter time period and even allowing for an unrepresented claimant, the Tribunal still rejected his reference as being too late.

So, whilst it can be argued that the *Saunders* case turns on

its own particular facts and does not make new law, the judgment is instructive in three particular respects. First, acquiring authorities should now be seen to “take the lead” over compensation matters including giving early and regular warnings about the expiration of time limits, and even making the Tribunal reference themselves. Otherwise, their conduct could be characterised as being “unconscionable”. Secondly, despite the application of the ECHR (since the enactment of the Human Rights Act 1998) to CPO matters the judiciary remain reluctant to rely upon the provisions and application of Convention rights. Thirdly, the use of ADR techniques, including independent evaluative mediation, probably remains key to preventing compensation disputes from becoming so protracted. With the Government’s announcement in the recent Budget that it intends to reform the land compensation system, perhaps this is another area which could be usefully reviewed and clarified.

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