EDITORIAL COMMENT

Jonathan Darby

Welcome to the first edition of our new newsletter, which we hope to use as a means of connecting with our valued clients and colleagues during these unprecedented times, as well as in order to prompt thought and discussion. We will be sharing legal and policy updates, case summaries and even some 'blue sky' thinking in relation to developing issues, as well as sharing our experiences as Councils, courts, tribunals and the Planning Inspectorate attempt to embrace remote meetings / hearings and the (socially) distant management of applications, appeals and cases.

This edition provides an update on PD rights from Rachel Sullivan, Stephen Tromans QC's initial thoughts on COVID and the environment, as well as a CIL update from one of chambers' newest members – Celina Colquhoun. Finally, John Pugh-Smith provides some thoughts as to how the current situation may impact upon Council meetings.

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PERMITTED DEVELOPMENT: TAKEAWAYS

Rachel Sullivan

As part of the response to the Covid-19 outbreak, pubs and restaurants will be permitted to operate as takeaways without the need for a planning application.

The Government has introduced a new permitted development right inserting a new 'class DA' into the Town and Country Planning (General Permitted Development) (England) Order 2015. The measure (SI 2020/330) came into effect at 10am on 24 March 2020 and allows restaurants and drinking establishments to provide takeaway food at any time in the period to 23 March 2021.

Although the new permitted development right means no planning application is necessary, businesses are still required to notify the local planning authority if the building (or its curtilage) is to be used in this way. As the new PD right is a temporary measure, the land will revert to its previous use class at the end of the relevant period, or if it stops being used to provide takeaway food before that.

It is hoped that this will help support businesses in the pub and restaurant industry in these challenging times, as well as providing options for those who may not be able to get out to shops due to self-isolation.

COVID-19 AND THE ENVIRONMENT: SOME INITIAL REFLECTIONS

Stephen Tromans QC

At the end of what has been collectively the most extraordinary week (so far anyway) of our lives, it is worth reflecting on the implications of the Coronavirus pandemic for the environment of the UK, and of the world. It is of course possible to see it, and many do, as the earth taking timely action against a species which is threating its ecosystem. Whether you look at it that way or not, it is plain that our current way of life, with global movement of people and goods, has both made the spread of the virus easier, and has intensified its economic impacts. Increased urbanisation and increasing population seem likely to make the occurrence of future viruses probable.

Little is known of the links between the virus and climate, though scientists are beginning to explore this. It seems to be the case that the most serious outbreaks have shared the same latitudinal conditions. It is also striking that the two epicentres, in China and the Po Valley in Italy, normally have some of the worst air quality in the world. Certainly one might expect that those exposed to such air quality would be among the most vulnerable to the effects of the virus. The European Space Agency images of rapidly declining concentrations of nitrogen dioxide in China and Italy are very striking, and certainly the restrictions on vehicle movements have given citizens in London and other urban centres a respite from dangerous air pollution. It is however salutary to see that such levels have equally rapidly risen once again in China as restrictions have been relaxed. Urban air pollution undoubtedly has been killing more people than the coronavirus is likely to. The problem is of course that they tend to die unnoticed, not on the daily news channel. Climate change, unless addressed within the next couple of decades, has the potential to make the coronavirus look like a walk in the park for humanity – but again its effects will not be so obvious, at least immediately.

The pandemic must surely be seen as a very big wake up call, but will it be heeded? The situation it seems to me could play out in one of two ways. One is that lessons are learned in terms of the need to change patterns of working, travel, tourism and global supply chains, in a way that reduces greenhouse gas emissions. The other, which would be disastrous, is that world leaders will find their economies so devastated that they are determined to rebuild them as quickly as possible regardless of the environmental cost. We already see the perceived need by leaders to protect and support their national aviation industry. Also, when people are free to travel again, will they think twice about it, or will they be desperate to resume their old, unsustainable, ways?

The test will be whether in the AC (after Corona) era, it will be business as usual, or whether we will be smart enough to rebuild economies in quite a different way. There is doubt over whether the COP-26 conference of parties to the UN Framework Convention on Climate Change will go ahead in Glasgow in November, which would of course be after the US Presidential Election. Climate scientists are urging that it must, but the UK Foreign Secretary is expressing doubts, which there must be. Even if it went ahead it is difficult to envisage that states would be in a position to offer firm commitments on emissions reduction amid the current economic turmoil. Certainly, if re-elected, one could not conceive of Donald Trump participating in anything but a destructive way.

Is the fight against catastrophic climate change a luxury to be dropped when economic times are – to put in mildly – tough? Or is it a necessity? We are probably about to find out.

CIL UPDATE

Celina Colquhoun

As with many CIL liability reviews and then appeals under CIL Reg 113 there are usually any number of moments to step back and ask some really fundamental questions along the lines 'How on earth is it that certain conclusions have been drawn about the nature of the chargeable development?' and 'How on earth did the Charging Authority arrive at that figure?'.

There are a number of lessons learned from a recent CIL Reg 113 appeal, but this piece will highlight two – the first from the CAs conclusions and actions and the other from the VOAs conclusions which are of interest. The first is that the CA seemed to ignore that the Chargeable Development involved an existing dwelling house but also that when challenged about how the Gross Internal Area figure had been reached in calculating the CIL declared that a large proposed greenhouse which had been recognised as being such in the planning application and on the face of the permission should for CIL purposes be treated as a 'conservatory.' In accordance with the RICS guidance this would mean that it should be counted as part of the GIA. On appeal the VOA agreed with the appellant saying that as there were 'no references to using the space as living accommodation' and therefore it should be excluded from the GIA. The second point was one which had been a matter of agreement between the CA and the appellant in that the PPG confirms that in interpreting and applying CIL Reg 42 and 42 A "Residential extensions under 100 square metres are already exempt from the levy under the minor development exemption" under Reg 42. The VOA however whilst agreeing with the appellant that the GIA of new build is less than 100m² concluded that the chargeable development comprised a dwelling and "therefore minor development exemption cannot apply" [sic].

The take away points therefore are make sure it is agreed at planning permission stage that a proposed greenhouse is properly so called and beware the interpretation of Reg 42 and 42A and make sure you can apply for an exemption.

CORONAVIRUS AND LOCAL AUTHORITY MEETINGS

John Pugh-Smith

This article provides a brief overview of the current known position, watch points and continuing uncertainties as at 26th March 2020 now that the Coronavirus Act 2020 ("the CVA") is in force. Its focus is upon the implications for English and Welsh local authority meetings, and, particularly the discharge of continuing development management functions

As a matter of bare law, Section 78(1), together with sub-section (11), of the CVA grants the powers to the relevant national authority (the Secretary of State; the Welsh Ministers), by regulations, to make provision for:

(a) requirements to hold local authority meetings;

(b) the times at or by which, periods within which, or frequency with which, local authority meetings are to be held;

(c) the places at which local authority meetings are to be held;

(d) the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings;

(e) public admission and access to local authority meetings;

(f) the places at which, and manner in which, documents relating to local authority meetings are to be open to inspection by, or otherwise available to, members of the public.

Given the potential for breaches of natural justice, Section 78(2) states that for the purposes of Section 78(1)(d) includes "in particular provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place".

It should also be noted that Section 78(4) includes the power:

(a) to disapply or modify any provision of an enactment or subordinate legislation;

(b) to make different provision for different purposes;

(c) to make consequential, supplementary, incidental, transitional or saving provision.

Section 78(3) states that the regulations may make provision only in relation to local authority meetings required to be held, or held, before 7 May 2021.

According to MHCLG's Guidance https://www.gov.uk/guidance/coronavirus-covid-19-guidance-for-local-government (last updated on 25th March 2020) in respect of "Planning" the reader is simply cross-referred to the related Planning Inspectorate guidance. However, in his last pre-retirement advisory letter circulating last Friday, 20th March, Steve Quartermain, the MHCLG's Chief Planner advised as follows:

Decision Making

We understand that some councils are concerned about the implications of COVID-19 for their capacity to process planning applications within statutory timescales. It is important that authorities continue to provide the best service possible in these stretching times and prioritise decision-making to ensure the planning system continues to function, especially where this will support the local economy.

We ask you to take an innovative approach, using all options available to you to continue your service. We recognise that face-to-face events and meetings may have to be cancelled but we encourage you to explore every opportunity to use technology to ensure that discussions and consultations can go ahead. We also encourage you to consider delegating committee decisions where appropriate. The Government has confirmed that it will introduce legislation to allow council committee meetings to be held virtually

for a temporary period, which we expect will allow planning committees to continue.

We encourage you to be pragmatic and continue, as much as possible, to work proactively with applicants and others, where necessary agreeing extended periods for making decisions.

This aspirational advice, while reassuring, raises the following concerns:

1. While existing decision-making arrangements could be significantly amended, including digital meetings as a result of Section 78(2), how quickly will "interested parties" be notified or become aware?
2. If "digital meetings" are to take place, how can they sensibly operate, given 'social distancing' and the current visual limitations of current on-line video conference facilities to visually identify participants?
3. If, as has already occurred, convened Meetings are interrupted by technical errors, suspended or adjourned, for how long and in what form should they then be reconvened?
4. While a number of local authorities have already delegated , or are in the course of seeking to delegate, planning decisions to senior members of the paid service (such as CEOs), to what extent have such extensions of delegated powers been considered by elected Members or, indeed, are even permissible under that authority's constitution without wider public consultation?.
5. Similarly and procedurally, if there is inability for third parties either to be heard at Planning Committee and/or to make written representations to what extent are these planning decisions lawful and/or susceptible to judicial review?
6. Finally, if so, given the challenges of remote working for "planning professionals", the strict time and procedural requirements of CPR Part 54 and the logistical challenges faced by the Administrative Court is now operating on a strict e-filing system and trying to introduce appropriate remote hearing procedures how long is the overall determination process going to take or be free of legal challenge?

While it would be glib to say that only time will tell, as we all know even 24 hours is a long time period in the current Crisis.

John Pugh-Smith is the Joint General Editor of "Shackleton on the Law of Meetings" (Sweet & Maxwell). Assisted by his colleagues James Burton, Jonathan Darby, Nicholas Higgs and Gethin Thomas, at 39 Essex Chambers, it is hoped that the 15th Edition will still meet its scheduled publication date for Autumn 2020.

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Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

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John's principal practice area is town and country planning with related environmental, real estate, local government and parliamentary work. He is also an experienced alternative dispute resolver and facilitator. As an active promoter of conflict resolution, particularly in the public sector, he is one of the specialist advisers to the All-Party Parliamentary Group on Alternative Dispute Resolution and a member of the Design Council's Highways England Design Review Panel. He is a Fellow of the Chartered Institute of Arbitrators. He also receives appointments from the RICS President in respect of arbitration, expert determination and mediation on all non-rent review matters. To view full CV click here.

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Celina regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. She also regularly appears in the High Court and Court of Appeal in respect of statutory challenges and judicial review. She undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown Courts. She specialises in all aspects of compulsory purchase and compensation, acting for and advising acquiring authorities seeking to promote such Order or objectors and affected landowners. Her career had a significant grounding in national infrastructure planning and highways projects and she has continued that specialism throughout. *"She has a track record of infrastructure matters"* Legal 500 2019-20. To view full CV click here.

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Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way.Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

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Rachel has substantial advisory experience in planning and environmental matters on behalf of both prospective claimants and LPAs, including: Matters relating to the Land Classes and Use of Land Orders; Hazardous Substance Consents; Variations to planning conditions and viability in the context of carbon neutral policy (with Andrew Tabachnik QC); Challenges to the grant of planning permission on environmental, landscape, heritage and flooding grounds; Instructed by a community action group in a judicial review on environmental and highways grounds.Rachel undertakes pro bono work in this area, often through the Environmental Law Foundation (ELF). During pupillage Rachel gained experience of a variety of planning and environmental matters including assisting with advice, and preparation for and attendance at planning inquiries. To view full CV click here.