After a break over the summer months, the team at Thirty Nine Essex Street has been hard at work. In addition to being heavily engaged in the Courts and inquiries, the 13th Edition of Shackleton on the Law and Practice of Meetings has been released (edited by John Pugh-Smith with contributions from James Burton, Jonathan Darby and Daniel Stedman-Jones). The team is also celebrating the news that Thirty Nine Essex Street has been named Environmental and Planning Set of the Year in the Chambers UK Bar Awards, with Stephen Tromans QC receiving a nomination for Silk of the Year in the same field.

In this edition, Richard Harwood OBE QC considers three recent cases on whether planning authorities can issue a second decision on one application; Stephen Tromans QC looks at the government’s recent “technical consultation on planning” and proposed changes to EIA screening thresholds; and we have an article by Jonathan Darby on affordable housing and s.106 obligations. We have also included a brief casenote on the Redhill Aerodrome decision in the Court of Appeal on the meaning of “any other harm” in the Green Belt test.

The finality of decisions
Richard Harwood OBE QC

You can wait a long time for a decision to definitively decide a basic point of principle, and then three judgments on the same point come at once.

The Courts have for a long time suggested that local planning authorities were not able to issue a second planning decision on one application: see, e.g. R v Yeovil Borough Council ex p. Trustees of Elim Pentecostal Church, Yeovil 70 L.G.R. 142; (1972) 23 P & C.R. 39 at 44; Heron Corp Ltd v Manchester City Council (1977) 33 P & C.R. 268 at 271–272. Those comments were obiter.

However in two judgments in 2013 the Courts held that local planning authorities could not withdraw and re-issue decision notices to correct errors. The English decision on the point was R(Holder) v Gedling Borough Council [2013] EWHC 1611 (Admin); [2013] J.P.L. 1426 where a council had issued a planning permission omitting large parts of an approved condition. Following a pre-action letter the Council then issued a second (but only partially) corrected notice. After a deal of resistance, it ultimately accepted at trial that it had not had the power to issue a second decision notice (Holder at para 54).

The issue was more fully considered by the Scottish Court of Session (Outer House) in Archid Architecture and Interior Design v Dundee City Council [2013] CSOH 137, [2014] J.P.L. 336. The Council had issued a notice which said it granted planning permission subject to conditions but contained no conditions and under the reason for the decision set out what was plainly a reason for refusal. Six months later the Council said that the decision notice was incorrect and sent out a new notice which stated that planning permission was refused. Lord Glennie reviewed the English and Scottish authorities extensively (although not including Holder) and held that the first notice was valid unless and until the court ruled otherwise.
The Council had no power to issue a further decision until that had been done.

The same approach applies to the Secretary of State, only more so. In *R (Gleeson Developments Limited) v Secretary of State for Communities and Local Government* the Minister had decided to recover jurisdiction over a planning appeal. Later that same day the Inspector's decision allowing the appeal was issued by the Planning Inspectorate. The Minister then purported to withdraw the planning permission and issue a refusal. It is not obvious what was the most astonishing: the decision of the Department that it could simply rip up a planning permission by letter; or the High Court's judgment that this was lawful. The developer, Gleeson, appealed. The Court of Appeal did not feel the need to call on the appellant, Sullivan LJ holding in typically forthright terms that the Secretary of State could not withdraw a planning permission once it had been issued: [2014] EWCA Civ 1118. The judge said:

“22. If a planning permission has been granted, whether on appeal by the Secretary of State or by an appointed person, or on an application for planning permission by a local planning authority, there is no power to “withdraw” that planning permission on the basis that there has been an administrative error at some stage in the decision making process. Once granted, a planning permission may be revoked only under the procedure contained in ss.97–100 of the Act. Although [Leading Counsel for the Secretary of State] criticised the appellant’s reliance on the well known proposition that the Planning Acts form what has been described as “a comprehensive code”, there can no doubt that they comprise a very detailed and highly prescriptive legislative code. The code prescribes how planning permissions, once granted, can be revoked, and in ss.56 and 59 of the Planning and Compulsory Act 2004 it describes the extent to which and the manner in which errors in planning decisions can be corrected under the “slip rule”.

24. A planning permission confers a substantive right, often a very valuable substantive right, and it is therefore by its very nature irrevocable, save under the procedure which is contained in ss.79–100 of the Act which make provision for compensation.”

Lord Justice Sullivan had also held that the Inspector had still had the power to issue the decision, since the direction to recover jurisdiction had to contain the reasons it was being made and be served on the Inspector (see schedule 6, para 3(2), Town and Country Planning Act 1990). What had happened prior to the Inspector's decision being issued was that a Communities and Local Government employee had informed the Planning Inspectorate’s casework unit of the Minister's desire to recover the appeal and asked PINS to arrange the necessary letters. The recovery letter was sent out, by the Inspectorate, two days later. So, the Court of Appeal concluded, the Inspector still had the power to determine the appeal when his decision was issued. There was an administrative error in that the decision was issued as the Minister had decided to recover the case – obviously the issue of the decision should have been stopped whilst the recovery letter was prepared.

The Court of Appeal's conclusion that the Inspector still had the power to act fed into its analysis that there was no power to withdraw the permission. They distinguished an Australian decision, relied upon by the High Court, on the ability of their Immigration Review Tribunal to reopen a decision taken when it was unaware of an application for an adjournment: *Minister for Immigration v Bhardwaj* (2002) High Court of Australia 11. Sullivan LJ said:

“25. In the present case there was no error on the part of the decision taker. In the absence of any direction under para.3 prior to the issue of his decision, the inspector, as the appointed person, had authority to issue his decision. He intended to allow the appeal and to grant planning permission, and he did so. While an administrative error did occur elsewhere within the Planning Inspectorate, to confer on the Secretary of State a power to “withdraw” a planning permission that has been lawfully granted, on the basis of some administrative error at some stage in the process by a person other than the decision taker cannot, by any stretch of the imagination, be described as “an implicit auxiliary power”
which facilitates the exercise of any of the powers that are expressly conferred by the Act.”

The Court did not therefore have to go further into any claimed withdrawal of an unlawfully granted decision, but given the approach in the local authority cases and section 284 of the Town and Country Planning Act 1990 which prevents a challenge to the validity of planning appeal decision except by application to the High Court, an unlawful decision cannot simply be withdrawn. It can of course be challenged by a section 288 application. There may be occasions when a decision is so obviously defective on its face as to not be a decision: pages may be clearly missing, or it may fail to identify the application or say whether it is granted or refused.

“Technical” changes to EIA

Stephen Tromans QC

There is a perfectly natural tendency when faced with a 98-page document from the Department for Communities and Local Government, enticingly entitled “Technical Consultation on Planning”, to file it at the bottom of a very high “to read” pile. The consultation paper contains some important and quite far-reaching proposals on issues such as neighbourhood planning, permitted development rights, planning conditions and their discharge, statutory consultation procedures, major infrastructure projects and – last but not least – environmental impact assessment. As the Foreword by the new Minister of State, Brandon Lewis MP, makes clear, it is all about unlocking economic and housing growth while maintaining environmental protection, in a planning system perceived as “convoluted, confusing, expensive and in many cases ineffective”, and as such sorely in need of reform.

Section 5 deals with EIA Thresholds. It proposes to raise the size thresholds for some project categories listed in Schedule 2 to the Town and Country Planning (EIA) Regulations 2011, so reducing the number of projects which would be subject to (it is said, unnecessary) screening. EIA procedures are described as going beyond those normally required for planning applications, increasing the workload of planning authorities and developers, and adding significantly to the cost of making an application.

The Government believes – probably not unreasonably – that some local authorities have required EIA for some projects which are not likely to give rise to significant effects because of their concern as to possible legal challenge. Equally, it notes that some developers undertake assessments voluntarily to avoid the risks of legal challenge, and that “developers are carrying out increasingly large and overly complex environmental assessments”. It is difficult to argue with that last conclusion, certainly. The Government finds support for its argument that the Directive is being “over-implemented” by reference to requests for screening directions made to the Secretary of State between 2011 and 2014, where of 160 “urban development projects” screened by the Secretary of State, only 20% were determined to require EIA; of those that were, many were within “sensitive areas” and so required EIA.

The Government’s focus for change to thresholds is on two types of development – “urban development projects” and “industrial estate development”, which collectively represent the most common project type subject to EIA in England. These fall within Annex II of the Directive. The consultation paper recognises that whilst Member States have some discretion in determining whether Annex II projects should or should not be subject to EIA, there are a number of overriding principles which arise from case-law of the European Court. In deference to those principles, no change is proposed to projects located in defined “sensitive areas”, which require screening in all cases, irrespective of size. Further, the new and higher screening thresholds have been set so as to remain significantly lower than existing indicative thresholds provided as guidance for use in screening, and account has been taken of the possible cumulative effects of a number of similar sized projects coming forward at the same time.

For industrial estate projects, the threshold is proposed to be raised from 0.5 hectares to 5 hectares, as compared with an indicative threshold of 20 hectares. For urban development projects, an extremely diverse category, the current threshold is 0.5 hectares. The current guidance for use in screening for sites which have not previously been developed refers to a site area of more than 5 hectares, or providing more than 10,000 square metres of new commercial floorspace, or having “significant urbanising effects”, e.g. a new development of more than 1,000 dwellings. It is proposed to raise the screening threshold for
development of dwelling houses of up the five hectares, including up to one hectare of non-residential development to cater for mixed use developments. This equates to schemes of around 150 units, allowing for the average housing density of 30 dwellings per hectare. The Government’s view is that housing schemes of this scale, outside of sensitive areas, are not likely to give rise to significant environmental effects. It hopes this will reduce the number of screening decisions for residential development from around 1,600 a year to 300. Ideally the Government would like a threshold closer to the 1,000 dwellings (about 30 hectares) indicative threshold, but is not currently sure enough that this would be consistent with the requirements of the Directive.

The Government did consider raising thresholds for other types of Annex II projects such as quarries and wind energy projects, but concluded wisely that, given the potential for significant environmental effects from even relatively small sites, the existing thresholds should be retained.

As matters stand, whilst the proposal to raise the threshold, especially for residential development, will be popular with developers, it is undoubtedly likely to give rise to controversy in practice. It takes very little imagination to see how the residents of a rural community could be very much opposed to a 150 unit housing development, which they would see as having very significant effects on their local environment. Even outside a sensitive area, there could be significant visual effects, effects on highways and local services, etc. So, whilst the proposals may indeed result in a reduction in screening and in projects being held to require EIA, it may also lead to challenges, potentially on incompatibility with EU law. Also, a footprint of five hectares could allow high-rise residential development, which could potentially have significant effects.

The consultation has now closed. The government is yet to publish its response on EIA thresholds, but has responded on the issues of planning conditions and changes to development consent orders. The consultation document and responses can be found here: https://www.gov.uk/government/consultations/technical-consultation-on-planning

Affordable housing: evidence and bad bargains

Jonathan Darby

Now that the dust has settled on the Growth and Infrastructure Act 2013 (“GIA”) and its amendments to the Town and Country Planning Act 1990 it seems a fitting moment to assess whether such provisions are fit for purpose.

As most involved with planning will know, sections 106BA and 106BC introduce an opportunity for developers to apply for viability reviews in relation to section 106 affordable housing obligations. According to section 106BA(2), a person against whom the affordable housing requirement is enforceable may apply to the appropriate authority:

a) For the requirement to have effect subject to modifications;

b) For the requirement to be replaced with a different affordable housing requirement;

c) For the requirement to be removed from the planning obligation; or

d) In a case where the planning obligation consists solely of one or more affordable housing requirements, for the planning obligation to be discharged.

There is no minimum period before an application can be made and the application must contain a revised affordable housing proposal based on prevailing viability and supported by relevant evidence. Landowners and developers should include as part of their application an affordable housing provision that delivers the maximum level consistent with both viability and also the optimum mix of provision. The DCLG states that the proposal may consider whether adjustments should be made to the affordable housing tenure and mix and, where relevant, phasing may be considered. The timing of provision and the level of off-site affordable housing contributions may also be considered, as may any other aspect of the affordable housing requirement.

If it is established that the affordable housing requirement on an extant section 106 agreement makes development of the site economically unviable, the authority must modify or remove it so as to make the site viable. The authority cannot modify the obligation to make it more onerous than the original obligation.
The section 106BA power was introduced following a DCLG consultation paper on the renegotiation of planning obligations that was issued in August 2012, and which explained that:

“The intent of this change is to assist in bringing forward stalled development. ...

The Government is concerned about the high number of stalled schemes and the lost economic benefit they represent. Some planning obligations negotiated in different economic conditions now make sites economically unfeasible – resulting in no development, no regeneration or community benefits.”

At the Second Reading of the Bill in the House of Lords, the Minister stated that (emphasis added):

“Turning to clause 6, the need for housing – particularly, affordable housing – remains high. The Government are committed to unlocking stalled sites where previously negotiated affordable housing obligations are unviable because they are currently economically unrealistic. Clause 6 presents an opportunity to stimulate housing growth and will be a vital component in the drive to get more affordable housing built. Stalled sites mean that there is no local growth, community benefit, or new or affordable housing. ...

It presents a real opportunity to ensure that consents are viable and realistic. Furthermore, it addresses the reluctance of some local authorities to renegotiate currently unrealistic affordable housing requirements, agreed in different market conditions...”

Whilst much of the discussion during the passage of the GIA related to “kick-starting development” and “getting developers building new homes”, at no stage was a definition of “stalled” provided. That begs the question: can completed developments be categorised as “stalled sites” if some units remain unsold? If so, what prevents developers from using section 106BA in order to escape less profitable outcomes should the market continue to improve?

In principle, “stalled” may encompass completed development where units remain unsold. Indeed, section 106BA simply introduces the relevant power in relation to the “economic viability” of developments. Further, “the development” is defined in subsection (13) as being “the development authorised by the planning permission to which the obligation relates”. Again, there is no mention of “stalled” development or any restriction that prevents section 106BA from applying to completed development.

The only Parliamentary discussion of the application of the power to development that has already commenced was made by reference to circumstances where such application could make it impossible to fulfil the obligation. Logically, such a limitation can only really be seen from the perspective having been intended to protect developers from local authorities subsequently seeking to increase affordable housing requirements rather than local authorities seeking to protect themselves from developers (it being highly unlikely that a renegotiation of affordable housing requirements resulting in a reduction of the requirement would render that obligation impossible to fulfil).

Whilst the intention may have been to deal with cases where local authorities are holding back the building of houses because of “an insistence on numbers in documents, targets and aspirations”\(^1\), pragmatism dictates that the same flexibility should apply in relation to the holding back of the sale of houses because of the same insistence.

In light of the above, an objective interpretation of section 106BA permits renegotiation for many reasons or at any stage of the development process. The criteria for the section’s applicability are merely, first, the presence of an affordable

---

\(^1\) As most clearly stated by the Minister during the passage of the Bill when he commented that: “We want homes built. We want them built now, and if that means fewer of them can be affordable, because more of them have to be market, because market values have decreased and the potential for cross-subsidy has therefore declined, so be it. Let us get them built. We can always go back to those higher percentages and higher targets when values return in a few years’ time.”
housing requirement and, second, evidence of a change in economic viability.

Whilst this may prompt critics to suggest that less affordable housing will be built, or developers to attempt to increasingly merge the concept of viability into that of profitability, these are issues separate from the interpretation that the plain words of section 106BA permit. Indeed, of more immediate concern may be the potential lack of safeguards that enable local authorities to resist attempts from developers to chance their arm in seeking greater profit margins on recently completed development. Nevertheless, renegotiation remains essentially a matter for local discretion, depending on particular site circumstances.

Further to the above, the importance of site-specific evidence was emphasised in the Committee of the Whole House on the Bill for the Act in the House of Lords, when the Minister said as follows (emphasis added):

“It is important to understand that we are not proposing that developers can somehow avoid their obligations... We are simply allowing a review to be made to ensure a viable and deliverable scheme as agreed. Furthermore, we are not proposing that developers can ensure blanket removal of affordable housing requirements for their schemes. We are requiring an evidence-based approach that will adjust the affordable housing requirement by only the amount necessary to bring the scheme into viability. This would not be wholesale removal except in the most extreme cases.

... Evidence will be key to this process. Developers will have to submit revised evidence to the local authority to justify why their current planning obligation is not viable. The local authority will be free to respond to this proposal and be able to collect its own evidence if it wishes. Concerns are often expressed about the quality of viability evidence. However, robust evidence must be the best basis on which to make a judgment on the viability.”

The central point is, therefore, that section 106BA is not intended to affect those affordable housing contributions that are planned on viable sites: developers must clearly demonstrate through evidence why an existing scheme is no longer viable. While the new regime insulates developers from increased build costs or lower sales values, it will not do so where they overpay for sites. Where the figures add up, developers cannot come back and suggest that they contribute less affordable housing. Nor do the section 106BA application and appeal procedures replace existing powers to renegotiate section 106 agreements on a voluntary basis; the procedure will assess the viability of affordable housing requirements only, and will not re-open any other planning policy considerations or review the merits of permitted schemes.
**Casenote: Redhill Aerodrome and The Green Belt Test**

**Rose Grogan**

When considering whether Very Special Circumstances exist to justify inappropriate development in the Green Belt, paragraph 88 of the NPPF states that:

“Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.”

The courts have recently considered what “any other harm” may include: is it simply other harm to the Green Belt (in contrast to harm by reason of inappropriateness) or can it encompass wider issues?

The High Court (Frances Patterson QC sitting as Deputy) had previously held in the context of PPG2 that any other harm should be given its natural and ordinary meaning, and must therefore refer to harm other than that which is caused through inappropriateness (see *R (on the application of River Club) v Secretary of State for Communities and Local Government* [2009] EWHC 2674 (Admin)).

The issue came before her again in the case of *R (Redhill Aerodrome Ltd) v Secretary of State for Communities and Local Government and others* [2014] EWHC 2476. In that case an Inspector had dismissed an appeal in relation to the proposed construction of a tarmac runway at an aerodrome in the Metropolitan Green Belt. In *Redhill* Mrs Justice Patterson (as she now is) held that there had been a change in policy between PPG2 and the NPPF. In particular, the NPPF sets out the threshold level of harm for refusal on certain grounds for example: biodiversity, noise and heritage. She considered that if the approach in *River Club* were to apply now, an applicant would be deprived of the policy in the NPPF which, for example, provides that developments to be refused on the grounds of noise only where there is significant harm. She quashed the decision of the Inspector on the basis that she had taken into account non-green belt harm in considering whether there were very special circumstances.

The Secretary of State appealed to the Court of Appeal [2014] EWCA Civ 1386 where Sullivan LJ found that there had been no radical shift in policy. The Inspector had not erred by considering non-green belt harm in the balancing exercise. The NPPF requires “all other considerations” to be taken into account on the other side of the balance, therefore it would be wrong to exclude other harms from the weighing exercise. An applicant is not deprived of the benefit of other policies in the NPPF. The “other harms” cannot be ignored. If, for example, the development would cause some noise or transport impact, the proposed development is not being refused on noise or transport grounds but because, taken with the harm by reason of inappropriateness, it fails to pass the test in paragraph 88.

Rose Grogan acted on behalf of two Parish Councils who were rule 6 parties at the Redhill Aerodrome inquiry in January 2014.
Stephen Tromans QC 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 Trafalgarca case. To view full CV click here.


Rose Grogan has a varied planning and environmental practice, encompassing inquiry work and high court challenges. She has a particular interest in enforcement cases and regularly appears for local authorities in enforcement appeal cases. She also has experience of prosecution and defence work in the criminal planning and environmental matters. Her recent cases include appearing for rule 6 parties in the Redhill Aerodrome inquiry, R (on the application of SAVE Britain's Heritage and the Victorian Society) v Sheffield City Council and the University of Sheffield [2013] EWHC 2456, and appearing in the called-in inquiry in respect of the Grade II* listed Former Granada Cinema in Walthamstow. Rose also practices in the related fields of construction law and public law. To view full CV click here.

Jonathan Darby’s broad practice encompasses all aspects of public and administrative law. His planning, environmental and property practice encompasses inquiries, statutory appeals, judicial review, enforcement proceedings and advisory work. Jonathan is instructed by a wide variety of domestic and international clients, including developers, consultants, local authorities and the Treasury Solicitor. He is listed as one of the top junior planning barristers under 35 in the Planning Magazine Guide to Planning Lawyers. Before coming to the Bar, Jonathan taught at Cambridge University whilst completing a PhD at Queens’ College. To view full CV click here.

For further details on Chambers please visit our website: www.39essex.com