



EDITORIAL COMMENT

The Editorial Board

In this February edition of our Planning, Environmental and Property newsletter, five members of chambers have contributed with articles on a range of subject matters, namely: contaminated land, EIA screening, State aid and the prior approval of details.

Stephen Tromans QC and Victoria Hutton have provided an overview of a Part 2A Inquiry in which they represented the appellant who had been served with a remediation notice by Walsall District Council. The appeal has been called in by the Secretary of State and being only the second Inquiry of its kind, the decision will certainly be one to watch out for.

John Pugh-Smith's article sets out a review of the case of *R(oao Silke Roskilly) v Cornwall Council & Shire Oak Quarries Limited* [2015] EWHC 3711 (Admin) in which he represented the claimant in a challenge to a grant of planning permission for buildings and facilities to enable the re-opening of a dormant gabbro quarry within the Lizard Peninsula's AONB. The case serves as a warning to local planning authorities who grant permission without waiting for a screening direction which has been requested from the Secretary of State.

Kelly Stricklin-Coutinho provides a summary of the European Commission's State aid investigation into the UK's plan to support Drax in converting part of a power plant from coal into biomass. No doubt the investigation, and its outcome, will have wide ranging repercussions for the government's future approach to energy policy.

Contents

1. **EDITORIAL COMMENT**
The Editorial Board
2. **CONTAMINATED LAND – ONE TO WATCH**
Stephen Tromans QC and Victoria Hutton
3. **EIA TRUMPING**
John Pugh-Smith
4. **STATE AID INVESTIGATION ANNOUNCED INTO DRAX'S CONVERSION OF A UNIT FROM COAL TO BIOMASS**
Kelly Stricklin-Coutinho
5. **AN INTRODUCTION TO PRIOR APPROVAL OF DETAILS**
Richard Harwood OBE QC
7. **EDITORIAL BOARD**
8. **CONTRIBUTORS**

Editorial Board

JONATHAN DARBY PHILIPPA JACKSON
VICTORIA HUTTON DANIEL STEDMAN JONES

Finally, Richard Harwood QC gives an overview of the law surrounding prior approval of details. It is taken from his new book '*Planning Permission*'. We are pleased to announce that the book is due to be published early March. The book covers the need for planning permission, permitted development, planning applications, appeals and call-ins along with High Court

challenges to those decisions. The book also covers other means of obtaining planning permission, such as Local Development Orders, and discusses the relevant proposals in the Housing and Planning Bill.

It is a thorough work on the law and a useful guide to practice in England and Wales, at 1200 pages including appendices. The appendices are the relevant parts of the Town and Country Planning Act 1990, the Development Management Procedure Order 2015, General Permitted Development Order 2015 and the Use Classes Order, along with the appeal rules and regulations.

The book is published by Bloomsbury Professional <http://www.bloomsburyprofessional.com/uk/planning-permission-9781780434919/> and priced at £130. For details of discounts available please contact Richard: richard.harwood@39essex.com

CONTAMINATED LAND – ONE TO WATCH **Stephen Tromans QC and Victoria Hutton**

Between 8-18 December 2015 Stephen Tromans QC and Victoria Hutton appeared on behalf of the Appellant, Jim 2 Ltd, in an Inquiry into their appeal against a Remediation Notice. The appeal has been called in by the Secretary of State and is only the second of its kind

The appeal site is a residential development comprising 69 houses in Willenhall, Walsall. The site was formerly a gasworks operated initially by the Willenhall Gas Company and later by the West Midlands Gas Board. It was during the time of its operation that the site came to be contaminated with polyaromatic hydrocarbons (PAHs). The PAH in issue at the appeal was benzo-a-pyrene which is often used as a marker for PAHs and is a carcinogen.

The site had been purchased by Wallsall District Council's forbear (the Urban District Council of Willenhall) under Part V of the Housing Act 1957 for the purposes of redeveloping the site for housing and was owned by them between 1965 and 1972. The Council granted itself outline planning permission for residential development.

Jim 2 (at that point named MacLean Homes) bought the site from the Council and were themselves granted detailed planning permission for residential development. They then sold part of the site to another housebuilder,

E Fletcher, who were also granted detailed planning permission for their part of the site. The houses were built out in the early 1970s. Although it was not entirely clear who built the houses, the Inquiry proceeded on the basis that they were built by both Jim 2 and E Fletcher.

After investigations which began in around 2008, the Council determined the site as contaminated land for the purposes of s78A(2) of the Environmental Protection Act 1990 and identified both Jim 2 and E Fletcher as potential Class A persons under Part 2A of the 1990 Act. E Fletcher was subsequently dissolved on 21 October 2014. It therefore became a company which could not be 'found' for the purposes of the 1990 Act.

The Council served Jim 2 with a Remediation Notice on 17 March 2015 on the basis that it had either caused or knowingly permitted contamination present on the site. Jim 2 appealed the Remediation Notice on a number of statutory grounds. The Secretary of State called in the appeal for her own decision, in view of its general importance.

The main issues at the appeal concerned: whether the Council had unreasonably determined the land as contaminated, whether the Council had failed to have regard to the 2012 Statutory Guidance, whether the Council had unreasonably determined that the Appellant was the appropriate person to bear responsibility under the 1990 Act, whether the Council ought to have discounted itself as an appropriate person and whether the remediation requirements were reasonable or not.

Given that this appeal was only the second of its kind, it necessarily raised a number of important legal matters, not least the meanings of the terms 'caused' or 'knowingly permit' and how one should evaluate whether there is a significant possibility of significant harm ('SPOSH').

Quite apart from an extremely interesting legal case, the appeal was personally significant for the residents of the 69 houses. The impact of the investigations, determination and service of the Remediation Notice on them in terms of loss of value or unsaleability of their homes, was abundantly clear at the appeal. Indeed, as the Appellant's stated in opening their closing submissions, *'There can be few more important decisions that a local authority is called upon to make in*

its environmental functions than the identification of land as contaminated land under Part 2A of the Environmental Protection Act 1990. This is not least due to the impact upon all those affected by the process. It is therefore imperative that Councils proceed on a proper legal basis informed by up-to-date and robust scientific evidence in making determinations and serving remediation notices. Whether that was the case at this appeal is now a matter for the Secretary of State.

The only other appeal of this kind is the decision in *St Leonard's Court*, the decision which was published over two years after the Inquiry. Given the importance of this issue for all involved, it is very much hoped that a decision from the Secretary of State will be forthcoming rather sooner.

EIA TRUMPING

John Pugh-Smith

In this article John Pugh-Smith looks at the consequences when a planning decision was made while the Secretary of State's EIA screening direction process was still pending.

In *R (on the application of Silke Roskilly) v Cornwall Council & Shire Oak Quarries Limited* [2015] EWHC 3711 (Admin) Mr Justice Dove was faced with the submission that an impugned decision could not be rendered unlawful as a result of a subsequent act; but such is the hard-edged nature of regn 3(4) of the Town and Country Planning (Environment Impact Assessment) Regulations 2011, the prohibition on granting permission for EIA development without environmental information, that that public law principle was not engaged. The background to the case was re-opening of a dormant, gabbro quarry within the Lizard Peninsula's Area of Outstanding Natural Beauty on the Lizard peninsular following a successful ROMPS review. The quarry's new owner, the interested party, had applied for permission to erect buildings and facilities to provide the necessary infrastructure for the quarry operations to recommence. The claimant, a local resident and proprietor of a nearby organic farm and business, had registered objections to the planning application, including the need for it to be screened for EIA purposes, as it was proposed development within an AONB. The Council issued a negative screening opinion the following day and then took the application to committee shortly thereafter. On the same day as the meeting, the claimant, through her solicitors, urgently

requested a screening direction from the Secretary of State and notified the Council to such effect. The members were advised that such a request had been made but nonetheless resolved to grant consent. The Decision Notice was issued the following day. Nearly two months later the Secretary of State published a positive screening direction stating that the proposal would be likely to have significant effects on the environment and that the risk of significant harm justified an EIA. Judicial review proceedings were then issued two weeks later but well outside the required period. The essence of the challenge was that, in the light of the Secretary of State's screening direction that the proposal was EIA development, the grant of consent was unlawful under regn.3(4) of the EIA Regulations 2011 because it was not accompanied by environmental information. Secondly, it had been irrational for the Council to have proceeded to grant planning permission without awaiting the outcome of the screening direction process.

Dealing with the main point, the Judge held that the regn.3(4) prohibition was a matter for the court's determination on the basis of the material available when it considered that question. Here, the material before the court included an unchallenged decision of the Secretary of State to issue a direction that the proposal was EIA development. The Regulations did not suggest that the question whether a development was EIA development, and the Secretary of State's jurisdiction under regn.4(3) to so direct came to an end on the grant of planning permission. Whilst the local authority was not precluded from granting planning permission in such circumstances it ran the risk that if that direction was positive it would then have granted a planning consent which was infected with illegality, as was the case here. The Judge also remarked that he would also have been minded to conclude that no reasonable planning authority, knowing when they formed a resolution to grant planning permission that there was an outstanding request of the Secretary of State to make a determination on a screening direction, would proceed to grant planning permission without knowing the outcome of that screening direction process. Accordingly, the permission was quashed.

While the facts are a little unusual, it is now clear that where both a third party and the Secretary of State become involved prior to a planning determination,

it is advisable always to allow EIA procedures to run their full course, however desirous it may be to secure an early planning permission. Given that the Secretary of State is under no timing restrictions, unlike a local authority, that could be many months. So, the *Roskilly* case now sits as another and telling reminder amongst EIA jurisprudence that screening considerations should never be treated lightly, and, that unreasonableness can still be a successful ground to challenge that process.

John Pugh-Smith, instructed by Stephens Scown LLP, acted on behalf of the claimant, Mrs Silke Roskilly.

STATE AID INVESTIGATION ANNOUNCED INTO DRAX'S CONVERSION OF A UNIT FROM COAL TO BIOMASS

Kelly Stricklin-Coutinho

On 5th January 2016, the European Commission opened a State aid investigation into the UK's plans to support Drax in converting its power plant from coal to biomass. The test for whether a measure is a breach of State aid rules is set out in Article 107 TFEU and in broad terms provides that there must be:

- Aid granted by a Member State or through State resources in any form
- Which distorts or threatens to distort competition
- Which favours certain undertakings or the production of goods; and
- Which affects trade between Member States.

The European Commission reports (in press release IP/16/2) that it was concerned as to whether the proposed funding in relation to Drax's power plant is limited to what is necessary and does not amount to overcompensation. The European Commission announced that its preliminary view is that the project is likely to give rise to overcompensation because the Government's estimates of the rate of the return of the project are too conservative.

The project is designed to work in the following way. One of the units of the power plant is to be converted to operate only on biomass, rather than coal. A strike price is to be set, which is a fixed price for the electricity generated. The possible State aid arises because if the average wholesale price of electricity falls below the strike price, Drax would be paid the shortfall by the

Government. The particular concern of the European Commission is that the actual rate of return for the power plant may be higher than that estimated.

In addition, the European Commission is concerned as to the possibility of distorting competition within the Internal Market, as the source of the biomass is wood pellets which are to be sourced from the USA and South America. As the volume of wood pellets is likely to be substantial in relation to the global market for wood pellets (2.4 million tonnes annually, and the project is to run until 2027), the Commission notes its concern that "on balance the measure's negative effects on competition outweigh its positive effect on achieving EU 2020 targets for renewable energy".

Drax has recently noted that the European Commission's report notes that the strike price for the biomass was set at GBP100 per kilowatt per hour, in line with market expectations.

As with similar measures (such as RWE's similar project), Drax's project was notified to the European Commission, in April 2015. In December 2015 the European Commission approved similar plans for RWE to convert its Lynemouth plant, although Drax has noted that the technical and economic assumptions of the two projects differed. At the time it was widely thought that the approval of RWE's project was encouraging for Drax's project.

The European Commission notes that interested parties will have an opportunity to express their views before the investigation is concluded.

AN INTRODUCTION TO PRIOR APPROVAL OF DETAILS

Richard Harwood OBE QC

Prior approval is concerned with whether approval is required for specific details or on specific issues before development can take place under certain permitted development rights. Forms of prior approval apply under the Town and Country Planning (General Permitted Development) (England) Order 2015 to particular permitted development rights for householders (Part 1), changes of use (Part 3), film-making (Part 4), agriculture (Part 6), non-domestic alterations (Part 7), tolls (Part 9), demolition (Part 11), communications (Part 16), mining (Part 17) and local or private Acts (Part 18). The GPDO 2015 sought to give greater consistency to the time periods for these approvals in England but unfortunately the subject matter and the detailed procedures for prior approval mechanisms all vary. As explained below, the procedure for any prior approval application requires careful consideration of the individual Part and greater standardisation would be welcome.

Until 2014 it could be said that prior approval governed certain details of permitted development where the principle of the operations or use had been determined by the existence of the permitted development right itself. Amendments made by the Growth and Infrastructure Act 2013 allowed the prior approval regime in change of use cases to consider specified matters that go to the principle of the development.¹ The permitted development rights to change agricultural buildings to state-funded schools, registered nurseries or dwellings in England are subject to the potential to require prior approval as to the sustainability of the location.² New rights to change from shop uses to food and drink or assembly and leisure uses are subject to prior approval in respect of the loss of services and effects on key shopping areas.³ This ability to consider the principle of development in specified prior approvals may be extended further under Housing and Planning Bill 2015

amendments to s 60. These propose that prior approval may be required for building operations on specified issues.⁴ These forms of prior approval are therefore changing from a permission with details to be approved, to a type of planning application lite.

Otherwise, the concept that prior approval is concerned with details rather than principle holds good. That said, the extent of the details depends upon the terms of the particular class and the legislative context of that form of development. For example, the siting of mobile phone masts and antennae can be a subject for prior approval of siting and design, but since electronic communications operators' powers to site apparatus is so wide, including on the highway, the decision may consider alternatives hundreds of metres away.⁵

A prior approval is concerned with the details which are reserved for that approval and cannot be used to reopen the principle of development: *Murrell v Secretary of State for Communities and Local Government*.⁶ The order's description of the details which may be subject to prior approval has to be considered with care to determine whether an issue is relevant to the decision. A local planning authority or Minister may not decide the approval on any matter other than the merits of the details which have to be approved.

Prior approval usually comprises two elements:

- (i) an application to, and a decision by, the local planning authority whether prior approval is required;
- (ii) the decision of the local planning authority whether to grant prior approval.

Those are formally separate decisions, although the procedures may allow them to be taken at the same time. It is not uncommon, although it is unhelpful, for the local planning authority's analysis to fail to distinguish between a decision that prior approval is not required, and the grant of prior approval.

¹ Town and Country Planning Act, s 60(2A), inserted by Growth and Infrastructure Act 2013, s 4(1).

² GPDO 2015 Sch 2, Part 3, Classes Q and S.

³ GPDO 2015, Sch 2, Part 3, Classes C and J.

⁴ Housing and Planning Bill 2015, cl 104 proposing to insert s 60(1A) in the Town and Country Planning Act 1990.

⁵ See *Phillips v First Secretary of State* [2004] EWHC 2415 (Admin), [2004] JPL 613.

⁶ [2010] EWCA Civ 1367, [2011] JPL 739 at paras 45, 47. This reflects the approach to the approval of reserved matters or other details under conditions attached to a planning permission granted following an application.

Some permitted development rights require prior approval to be granted, rather than allowing an express or deemed decision that prior approval is not required.⁷

No application form is prescribed, but standard forms are available and it is most convenient to use these. Fees are payable with each application. In England these are currently £80 for changes of use, £172 for changes of use and connected building operations under Part 3, £80 for agricultural, forestry or demolition applications and £385 for electronic communications.⁸ In Wales the only fees are £80 for agricultural, forestry or demolition applications and £380 for electronic communications applications.⁹

Publicity requirements and practices vary. Some permitted development rights require the applicant to display a site notice (Part 6, agriculture; Part 11, demolition) or notify the owner of the land (Part 16, communications) whilst publicity and consultation requirements may be placed on the local planning authority (Part 3, change of use; Part 4, Class E temporary filming, Part 16). The timing of the publicity will also vary: a site notice is only displayed under agricultural permitted development if the authority has decided that prior approval is required,¹⁰ whilst notices are displayed under other rights when the initial application is made.

A form of prior approval applies to larger single storey rear extensions to dwellinghouses in England.¹¹ The applicant must serve notice on the local planning authority, who then notify each adjoining owner or occupier. If any of those notified object then the prior approval of the local planning authority is required as to 'the impact of the proposed development on the amenity of any adjoining premises'.¹²

The prior approval process must be taken to a successful conclusion before the development is carried out. It does not operate retrospectively.¹³

*This article is taken from Richard Harwood's new book *Planning Permission*, to be published by Bloomsbury Publishing in February 2016.*

7 For example, GPDO 2015, Sch 2, Part 17, Class B developments ancillary to mining operations.

8 Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012, reg 14.

9 Town and Country Planning (Fees for Applications, Deemed Applications and Site Visits) (Wales) Regulations 2015, reg 13(1).

10 GPDO 2015 and GPDO 1995, Sch 2, Part 6, Class A, condition A.2(2)(iv).

11 Those more than 4 metres and up to 8 metres from the rear wall of the original detached dwellinghouse, or more than 3 metres and up to 6 metres for terraced houses outside art 2(3) land: GPDO 2015, Sch 2, Part 1, Class A, conditions A1(f) and (g), condition A4.

12 GPDO 2015, Sch 2, Part 1, Class A, condition A4(7).

13 *Airwave mm02 Ltd v First Secretary of State* [2005] EWHC 1701 (Admin), [2006] JPL 362 at para 32 per Judge Gilbert QC.

EDITORIAL BOARD



Jonathan Darby

jon.darby@39essex.com

Jonathan'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](#).



Victoria Hutton

victoria.hutton@39essex.com

Victoria's main areas of practice are planning, environmental and administrative law. Victoria acts in a wide range of planning and environmental law matters for developers, local authorities and other interested parties. She is also a qualified mediator and is able to mediate between parties on any planning/environmental dispute. Victoria is rated as one of the top planning barristers under 35 (Planning Magazine 2015). To view full CV [click here](#).



Philippa Jackson

philippa.jackson@39essex.com

Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents and challenges in the High Court. She acts for developers, local authorities, individuals and interest groups, and she has been listed for the past three years as one of the top planning juniors under 35 by Planning Magazine (2013, 2014 and 2015). Examples of recent cases include an appeal relating to an enabling development scheme for the restoration of a nationally important collection of historic buildings and a judicial review challenge to a local authority's decision to designate a sports stadium as a conservation area. To view full CV [click here](#).



Daniel Stedman Jones

daniel.stedmanjones@39essex.com

Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. He was ranked amongst best junior planning barristers under 35 nationwide in the Planning Magazine Guide to Planning Lawyers 2013-2014. To view full CV [click here](#).

CONTRIBUTORS



Stephen Tromans QC

stephen.tromans@39essex.com

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](#).



Richard Harwood OBE QC

richard.harwood@39essex.com

Richard specialises in planning, environment and public law, acting for developers, landowners, central and local government, individuals and interest groups. He appears in the courts, inquiries, examinations and hearings, including frequently in the Planning Court and appellate courts. Voted as one of the top ten Planning Silks in Planning magazine's 2014 and 2015 surveys, he has appeared in many of the leading cases of recent years. Richard is also a leading commentator, a case editor of the Journal of Planning and Environment Law and the author of books including Planning Enforcement, Historic Environment Law and the forthcoming Planning Permission. To view full CV click [here](#).



John Pugh-Smith

john.pugh-smith@39essex.com

John Pugh-Smith, MA, FSA, CEDR Accredited Mediator, practises in the fields of planning and environmental law with related local government and parliamentary work for both the private and public sectors. Much of his work is project and appeal related with a particular workload at present in strategic and retirement housing developments. John also practises as a mediator in a wider range of areas. He is a committee member of the Bar Council's ADRC and a founding member of the Planning Mediation Group of the RICS. He has been and remains extensively involved in various initiatives to use mediation to resolve a wider range of public law issues including as one of the mediator on the DCLG/HCA's joint panel of "Section 106 brokers". He is also one of the Design Council/Cabe's Built Environment Experts. To view full CV click [here](#).



Kelly Stricklin-Coutinho

kelly.stricklin-coutinho@39essex.com

Kelly Stricklin-Coutinho specialises in tax and public law and has experience in the environmental taxes, particularly the Aggregates Levy, Landfill Tax, Climate Change Levy and Carbon Price Support. She has been involved in advisory work as well as public and EU law challenges in the environmental taxes. She was previously a solicitor and has experience of advising large multinationals (including the major landfill site operators and some of the energy big 6). To view full CV click [here](#).

Chief Executive and Director of Clerking: **David Barnes**

Senior Clerks: **Alastair Davidson and Michael Kaplan**

Practice Manager: **Andrew Poyser**

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085

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