INTRODUCTION

Jonathan Darby

Welcome to this week's edition of our Planning, Environment and Property Newsletter. We very much hope that our readers are keeping safe and well, and we wish all of our valued clients and colleagues a very Happy Easter.

In this edition, Ruth Keating looks at measures have been enacted to allow planning committee meetings to be held remotely during the COVID-19 pandemic, which is also a topic covered in depth by Richard Harwood QC in an article available via our website[1]; Stephen Tromans QC brings us up to date with his current thinking on the pandemic and the environment; and Daniel Stedman Jones considers Oval Estates and the Community Infrastructure Levy. We conclude with a summary of Greenpeace's recent success in relation to a Government failure to publicise oil and gas consents, in which both Stephen and Richard appeared.

On a sombre note, it is with profound sadness that we share the news of the untimely death of Sir John Laws this week. He was a pillar of these chambers from 1969 until 1992 when he was

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[1] https://www.39essex.com/virtual-local-authority-meetings/

appointed to the High Court as a judge of the Queen's Bench Division. He is an enormous loss: to learning, to the law and to our lives. We are conscious the loss is not only ours, and chambers intends to celebrate Sir John's life in a number of ways, when public life is back to normal.

To read Chambers' full tribute to Sir John, please visit:
https://www.39essex.com/sir-john-grant-mckenzie-laws-pc/

If you would like to send a message of condolence, the email address is:
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TAKING LOCAL AUTHORITY MEETINGS ONLINE

Ruth Keating

Measures have been enacted to allow planning committee meetings to be held remotely during the COVID-19 pandemic.

On the basis of section 78 of the Coronavirus Act 2020 ("the 2020 Act") the government has published the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ("the Regulations"). The Regulations came into force on 4 April.

Relevant provisions

The Local Government Act 1972 has always been interpreted as meaning that meetings must be in person and that attendees be in the same physical "place". (Public Bodies (Admission to Meetings) Act 1960, section 1(4) and the Local Government Act 1972, Schedule 12, paragraph 39.)

However, in the current COVID-19 crisis meetings clearly cannot go on as they have previously. Section 78(1)(d) of the 2020 Act provides that the relevant national authority may, by regulations, make provision relating to the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings. Section 78(2) continues that this includes "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".

The key points from the Regulations are as follows:

i. The Regulations apply to meetings held, or required to be held, before 7 May 2021.

ii. Regulation 4(1) states that local authorities may hold, move or cancel meetings "without requirement for further notice". This to account for the fact that in the current COVID-19 crisis, may mean that meetings have to be changed very quickly.

iii. Regulation 5(1) provides that a meeting is not limited to a meeting of persons present in the same place. Further "a "place" where a meeting is held includes reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers.

iv. Regulation 5(6)(c) adds that a person, whether a councillor or member of the public, may attend such a meeting 'by remote access'. Remote access is defined as to "to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming".

v. A "member in remote attendance" attends the meeting at any time if all of the conditions in Regulation 5(3) are satisfied. Regulation 5(3) states that the conditions are that the member in remote attendance is able at that time:

(a) to hear, and where practicable see, and be so heard and where practicable, be seen by the other members in attendance.

(b) The member in remote attendance must be able to hear, and where practicable see, be so heard and, where practicable be seen by any members of the public entitled to attend the meeting in order to exercise a right to speak at the meeting.

(c) Finally the member in remote attendance must be able to be heard and, where practicable, be seen by any other members of the public attending the meeting.

vi. Section 100A(1) of the Local Government Act 1972 provides that a meeting shall be open to the public. This is reflected in the Regulations, albeit that this former understanding is adapted to the current difficulties. Regulation 16(2) states: ""open to the public" includes access through remote means including (but not limited to) video conferencing, live webcast, and live interactive streaming and where a meeting is accessible to the public through such remote means the meeting is open to the public whether or not members of the public are able to attend the meeting in person".

vii. In terms of access to documents, Regulation 15(c) and (d) provides that: "(c) a document being "open to inspection" includes being published on the website of the council; (d) the publication, posting or making available of a document at offices of the council include publication on the website of the council".

viii. Regulation 17 adds that a local authority may comply with regulation 8 of the Openness of Local Government Bodies Regulations 2014 by making the written record and any background papers available for inspection through any or all of the following means: (a) publishing the record and any background papers on the authority's website; or (b) by such other means that the authority considers appropriate.

Concluding remarks

The Explanatory Notes to the Regulations state at paragraph 7.4 that:

"Being able to hold all meetings flexibly, including annual meetings, executive meetings, and committee meetings, allows local authority business to continue while adhering to official public health guidance."

The Regulations reflect this purpose – they provide some much needed clarity in this time of uncertainty, while also allowing local authorities some flexibility in how they conduct meetings. As outlined above these Regulations only apply to meetings required to be held, or held, before 7 May 2021. Any further extension would therefore require legislation. However, given there has previously been consultation on introducing some flexibility to the local authority meeting process, the coming weeks and months might provide the basis for providing future flexibility even beyond COVID-19.

CORONAVIRUS AND THE ENVIRONMENT

Stephen Tromans QC

At the time of writing, as with my first piece a fortnight ago, much remains uncertain as to the implications of the Covid-19 pandemic for the UK's and the global environment. As predicted in the first issue of this newsletter the climate change meeting COP26, due to be held in Glasgow in November, has been postponed to sometime in 2021. This seems inevitable in the circumstances, as adequate preparations could not have been made.

Another casualty of coronavirus has of course been talks between the UK and EU on any ongoing relationship after withdrawal. At present, the options seem to be that within a very short period (in time for agreement to be reached by the end of June) the government must seek an extension of the transitional period, or the UK will leave with no agreement in place on 31 December, which would no doubt be "Getting Brexit done", but probably in a disastrous manner for the UK. Plainly, in the post-virus world we can all look forward to, whatever it is, there may be very serious pressures which will test any desire to conform to existing EU standards, let alone adapt to future ones. The disruptive effects of the crisis mean that there is much less prospect of the UK being prepared for a no-deal departure in critical areas such as chemicals policy.

For the present, we can note that the Supreme Court has recently held in *Zipvit Limited v Commissioners for HM Revenue and Customs* [2020] UKSC 15 that it is clear that at this stage in the process of the UK's withdrawal from the EU, in a case involving an issue of EU law which is unclear, the Supreme Court is obliged to refer that issue to the CJEU to obtain its advice on the point. It however does not appear that any cases currently pending before the Court will raise such issues in the environmental context – though there are pending hearings on village greens and listed buildings.

One would need a crystal ball of immense power to predict at present what the implications of the present crisis will be for global environmental law and policy, but what about matters closer to home, in the domestic sphere?

The restrictions on movement are of course having an impact not only on the activities of professionals such as planning and environmental consultants, but on regulators, with less inspections, site surveys, and compliance activity. Most Environment Agency offices are closed and staff are working from home, with visits only to the most environmentally high risk sites. No doubt many operators will be unable to comply with legislative requirements such as some permit conditions for entirely understandable reasons, but equally there will probably be those who will try to take advantage of the situation. While the crisis has resulted in a drop in volumes of commercial and industrial waste, the closure of local authority waste recycling centres and other waste facilities will increase the temptation for fly-tipping and other illegal forms of waste disposal. It will be interesting to see, as the crisis drags on, how the national regulators prioritise their enforcement efforts and what policies they adopt. HMRC has already introduced a degree of flexibility into its rules on landfill tax.

In terms of UK legislation and policy, the timetable for the Environment Bill is now obviously uncertain, and new ways of achieving effective Parliamentary scrutiny will have to be found. If the Bill passes into law, the post-virus world will present a serious test of the resilience of environmental principles, perhaps in particular the integration of environmental considerations into decision making by the Treasury. With mind-boggling amounts of public money being disbursed in ways unimaginable a month ago, how can we ensure that such sums are channelled into activities which are sustainable in the long term, and not simply those which will provide a crutch to an almost-destroyed economy?

As pointed out in the first issue, this situation does offer an opportunity to achieve a radical re-orientation of the UK's economy. This may have been grasped by Sir Keir Starmer as the new Labour leader, that remains to be seen, but whether the Parliamentary situation is such as to allow him to exercise any real influence is at present doubtful. A clear strategic approach would direct public money into establishing and consolidating much needed industries in renewable energy, energy efficient buildings, sustainable transport, remote working, flood protection and climate change resilience. That is the challenge as the immediate crisis passes and the UK begins to get back to normal.

R (THE CLAIMANT) V BATH AND NORTH-EAST SOMERSET COUNCIL [2020] EWHC 457 (ADMIN)

Daniel Stedman Jones

The rarity with which reported judgments on the application of the Community Infrastructure Levy (CIL) come along perhaps reflect both the complexity and the strictness of CIL. In large part this complexity, for developers and collecting authorities alike, arises from the clash between the often discretionary nature of the broader TCPA 1990 planning system with the specific character of the Planning Act 2008 CIL regime as a tax. Misunderstanding commonly stems from the parallel nature of planning and CIL and the confusion caused by similar terms having definitions which are importantly distinct and specific to each regime. In Oval Estates, the issue was the meaning of "phased planning permission" for CIL purposes and, in particular, the precise point at which liability crystallised for "chargeable development" (ie: development in respect of which CIL must be paid), and when such liability fell due for payment.

The Facts

The Claimant had obtained outline planning permission on 2 March 2016 (the outline permission) for residential development. There was no express reference on the face of the planning permission to phasing although there was an informative which explained that the permission was accompanied by a s. 106 agreement of the same date. In the s. 106, there was reference to a phased affordable housing scheme which was to be agreed between the parties. Subsequently, reserved matters approval was granted in on 6 April 2017, which included a "Proposed Phasing Plan", in which three potential phases were identified.

Following the grant of reserved matters approval, on 25 April 2017, the Claimant submitted an assumption of liability notice for CIL. This started a long correspondence in which The Claimant asserted that the scheme was to be phased for CIL Purposes and the collecting authority disagreed. In October 2018, the Claimant then did two things. Firstly, on 12 October 2018, it applied for a non-material amendment (NMA) to the outline permission under section 96A TCPA 1990 to include an updated phasing plan. Secondly, the Claimant commenced work on site. (There was some debate about when exactly this had taken place but it was common ground that works had commenced by 15 October 2018 at the latest.) Notwithstanding that works had commenced on site some four months prior, the NMA was not granted by the collecting authority until 8 February 2019. Following further protracted correspondence, liability and demand notices were subsequently issued in May and August 2019 seeking payment for the chargeable development, calculated as being the scheme in full. The Claimant contested this position, arguing that the original permission was a "phased planning permission" for CIL purposes and therefore CIL was only payable in respect of the first phase of development.

The Issue

The issue for the court was therefore whether the original permission was a "phased planning permission" for CIL purposes. In particular, regulation 2 (1) of the CIL Regulations 2010 provides, following amendments in 2015, that a "phased planning permission" is "a planning permission which expressly provides for development to be carried out in phases."

The Claimant made three alternative submissions. Firstly, it argued that the original permissions should be construed as a "phased planning permission" by reference to the informative, the s. 106 agreement references to phasing and the reserved matters "proposed phasing plan". It argued that the NMA merely clarified that the outline permission had always been phased. Secondly, by analogy with s. 73 TCPA permissions, The Claimant submitted that the extent of the CIL payable for the "chargeable development" for which it would be liable should be set by the NMA. Effectively, this amounted to a submission that the NMA should operate retrospectively to alter

the meaning of the outline permission. Finally, The Claimant suggested that the trigger for liability and therefore, ultimately, payment should be the moment when the collecting authority issues a liability notice. In this case, that did not occur until after the NMA had been granted and so, the Claimant argued, liability should be calculated at that point so as to encompass the now-included phasing of the scheme.

The collecting authority's position was straightforward. It submitted that the outline permission was not expressed to be a "phased planning permission". On usual principles of interpretation of planning permissions – derived from the line of authority beginning with Keene J's (as he then was) famous comments in *R v Ashford BC, ex p. Shepway DC* (1999) PLCR 12 – there was no justification for examining extraneous materials in the absence, as here, of any ambiguity. The collecting authority further submitted that liability crystallised, and payment became due on commencement of the development in accordance with regulation 31 (3) of the CIL Regulations 2010, which provides that:

"(3) A person who assumes liability in accordance with this regulation is liable on commencement of the chargeable development to pay an amount of CIL equal to the chargeable amount less the amount of any relief granted in respect of the chargeable development."

As commencement had occurred on any view by 15 October 2018, by regulation 71 (payment in full) of the CIL Regulations 2010, The Claimant owed CIL in respect of the "chargeable development" which, in this case, was for the whole scheme.

The Judge agreed with the collecting authority, holding that the trigger for liability and therefore payment was commencement of the development. At [2Swift J held that, having assumed liability in April 2017, "the effect of regulation 31 was that when on 15 October 2018, work on the Development commenced Oval became liable to pay CIL in respect of the whole development." At that point, the operative permission was the outline permission which, as the collecting authority had submitted, was not a "phased planning permission". In particular, the NMA "did not alter the position."

Conclusion

At least three critical practical points emerge from the judgment. First, as some of the Planning Court's previous decisions on CIL emphasise, most recently in *R. (on the application of Shropshire Council) v Secretary of State for Communities and Local Government* [2019] PTSR 828, the CIL regime is a strict one. Liability will attach somewhere and payment will fall due. It is therefore essential to understand that, except for exceptional circumstances, there is very little discretion to work with and the parties will need to prioritise the CIL timetable (and vocabulary) separately and well in advance to avoid problems before they become insuperable.

Second, the court has given clear guidance that, notwithstanding the crucial differences between the CIL regime and the parallel TCPA 1990 system, especially in terms of timings, it is unlikely to depart from the usual principles of the construction of planning permissions even where subsequent amendments may alter the scope of a scheme. The court is not likely to develop special interpretive categories for CIL even in circumstances where it finds on balance that it would have been practicable for a collecting authority to issue a liability notice at an earlier date.

Third, in the concluding section of the judgment, Swift J reminded developers that the CIL regime contains review and appeal mechanisms that must be properly used and exhausted before judicial review is considered. Such applications would only be entertained as a genuine last resort.

Daniel was instructed by David Robert Browne on behalf of the collecting authority, Bath & North-East Somerset Council.

GREENPEACE SUCCESS OVER GOVERNMENT FAILURE TO PUBLICISE OIL AND GAS CONSENTS

Richard Harwood OBE QC and Stephen Tromans QC

Greenpeace have won judicial review proceedings brought against the UK government's failure to publicise authorisation for oil and gas exploitation in the Vorlich offshore field. BP and Ithaca Energy sought consent from the Oil and Gas Authority ("the OGA") for the drilling of wells and oil and gas production. The consent was subject to Environmental Impact Assessment carried out by the Secretary of State for Business, Energy and Industrial Strategy under the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999.

In August 2018 the Secretary of State agreed to the issue of the OGA consent, which the OGA then issued in September that year. A challenge to these approvals can be made by an application under regulation 16 of the 1999 Regulations, but only within a six week period from the publication of details of the OGA consent in the government newspaper, the London, Edinburgh and Belfast Gazettes.

The Minister thought that he was required to publish notice of his agreement under the EIA regime, rather than the OGA consent. Due to an oversight the Ministerial agreement was not publicised until July 2019, but the OGA consent was not published in the Gazettes at all. Bringing judicial review proceedings, Greenpeace sought an order that notice of the OGA consent be given in the Gazettes, allowing an application to be made under regulation 16. In October 2019 in the separate case of *R(Garrick-Maidment) v Secretary of State* (concerning drilling in Poole Bay which might affect seahorses), the government conceded that the 1999 Regulations were defective and there was a failure to transpose the requirements of EIA Directive to publish decisions and provide access to justice. A review of the regulations and working practices in BEIS has been instituted.

Mrs Justice Lang granted permission to apply for judicial review in the Greenpeace case at a hearing. The government has subsequently conceded the case to the extent of the failure to publicise the decision in the Gazettes. Notice has now been given and any regulation 16 application will be made to the Court of Session. This will then address the substantive issues raised, including publicity of the application and amended EIA material.

Richard Harwood QC acted for Greenpeace whilst Stephen Tromans QC acted for BP and Ithaca.

Press coverage includes Energy Voice and upstreamonline.

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Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. 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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Ruth is developing a broad environmental, public and planning law practice. She has gained experience, during pupillage and thereafter, on a variety of planning and environmental matters including a judicial review challenge to the third runway at Heathrow, protected species, development and land use classes, enforcement notices and environmental offences. Last year Ruth was a Judicial Assistant at the Supreme Court and worked on several environmental, planning and property cases including R (on the application of Lancashire County Council); R (on the application of NHS Property Services Ltd) (UKSC 2018/0094/UKSC 2018/0109), the Manchester Ship Canal Company Ltd (UKSC 2018/0116) and London Borough of Lambeth [2019] UKSC 33. She is an editor of the Sweet & Maxwell Environmental Law Bulletins. To view full CV click here.

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