TRAVERS SMITH

All change on the planning front

Planning Act 2008

A new planning regime is now in force for certain developments in England and Wales: -

- There will be a new body, the Infrastructure Planning Commission ("**IPC**") and a new regime for deciding applications for major infrastructure projects ("**MIPs**"), aimed at speeding up the planning decision making process.
- At the same time, new National Policy Statements ("**NPSs**") and changes to compulsory purchase procedures where they arise in connection with a MIP will be introduced.
- A new development charge, the Community Infrastructure Levy ("**CIL**") will be introduced that Councils may adopt through which developers will be required to make financial contributions towards local infrastructure projects.
- There are also a number of changes to the existing development control system.

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1. National Policy Statements for Major Infrastructure Projects

The New Planning Act 2008 ("**PA 2008**") requires the Government to publish NPSs in relation to major infrastructure projects of national significance relating to fossil fuels; renewable energy; electricity networks; gas and downstream oil infrastructure; nuclear power; ports; strategic highway and rail networks; aviation; water supply and waste water treatment; hazardous (excluding nuclear) waste and an overarching energy statement.

These statements are to be subject to public consultation and parliamentary scrutiny in both Houses prior to adoption. An NPS may contain either general or prescriptive detail, and may identify suitable and unsuitable locations for the relevant development, the nature and scale of potential development and even the identify of the statutory undertaker who may undertake the proposals.

The government must demonstrate in NPSs how the proposals seek to mitigate and adapt to climate change and how they demonstrate sustainable development. The IPC is to decide applications for MIPs in accordance with the relevant NPS. It is arguable that this will in fact make it less easy for the IPC to refuse an application, whatever its potential impact, if it is in accordance with the relevant NPS, particularly if that NPS is very detailed and prescriptive.

It is likely that NPSs will start appearing for consultation in Spring 2009.

2. The Infrastructure Planning Commission

The IPC will comprise a panel of experts drawn from a wide range of disciplines including planning, engineering and project management, which will be accountable to Parliament for its overall performance. The Government will set out a timetable for setting up the IPC in early 2009 and will consult on details of the regulations and NPSs.

Under the current adversarial public inquiry system, evidence is cross-examined, and an inspector prepares a report and recommendations to be considered by the Secretary of State. The Secretary need not follow the recommendations in deciding the application. Under the IPC regime:

- MIP applications for development consent will be considered and decided by a panel of three or more members of the IPC.
- The IPC will be required to take decisions on MIPs within nine months from the date of the preliminary pre-application meeting, which should speed up the current public inquiry process considerably.
- There will be a limited opportunity, at the Panel's discretion, for cross-examination of evidence.
- The Secretary of State will only be able to determine an application in very limited circumstances.
- There will be no right of appeal against the decision of the IPC other than by judicial review on points of law and procedure.

3. Development consents for MIPs

Development consents under the PA 2008 provide a single consent mechanism which will replace the need for separate planning permission, listed building and conservation area consents and consents under various utilities, green belts, harbours, transport and other relevant acts.

The new procedure for development consents will mean that more preparatory work shall be required prior to submitting applications, including environmental and economic assessments and consultation with local communities and key stakeholders. The applicant or promoter, rather than the local authority, now has nearly all the responsibility for ensuring pre- and post- submission publicity and consultation requirements are met. Local authorities shall be consulted and can submit a local impact report giving details of the likely impact of the proposals in their area to the IPC.

The IPC will also be able to authorise compulsory purchase orders for land required for approved MIPs. Currently compulsory purchase orders are confirmed by the Secretary of State. This is controversial as it appears to offer less protection to affected landowners than the current system. Also controversial, development consent will provide a defence to an action brought under certain types of nuisance.

Development consents will need to meet obligations under the Environmental Impact Assessment (**"EIA"**) and Habitats Regulations regimes. Whilst the EIA regime does not have the power to require an application to be refused, the Habitats Regulations does have this power and could require the IPC to refuse an application that is otherwise in accordance with the relevant NPS.

4. The Community Infrastructure Levy

The PA 2008 also enables the basis of planning contributions to be restructured by introducing the CIL which local authorities can opt to use to raise funds for specific regional infrastructure projects. Infrastructure includes roads, flood defences, educational, medical and sporting facilities and open space. As originally drafted, the rate of CIL was to be based on the increase in land value with the benefit of planning consent. This has been changed, and the rate of CIL is now to be based on a calculation of the local infrastructure needs and economic viability of development in the area. This is a welcome amendment, particularly in the current economic climate where punitive taxes on land value could significantly affect the potential for bringing forward development. The

objective is to simplify and speed up the process.

The CIL will apply to all development, residential and commercial, above a *de minimis* threshold (development by householders is excluded). The levy will be charged at the time that development consent is granted, but not payable until the commencement of development. There is likely to be a 28 day payment period. It is envisaged that it can be paid in instalments, or in phases where development is phased. It may be possible to pay "in kind" (as permitted under s.106 agreements) but the government's concern is that this would reintroduce uncertainty and raise technical and fairness issues.

Details of the CIL and draft regulations are likely to be published in spring 2009. The charging authority (the relevant local council, National Park or Broads Authority or the Greater London Authority) must produce a charging schedule setting out the proposed infrastructure needs and costs, the potential for development in the area and the rate of CIL per unit of development (e.g. per dwelling or per square metre of development). The charging schedule will not formally be part of the development plan but is likely to evolve with the development plan and to be subject to the same degree of scrutiny, including a public inquiry, and testing as development plans prior to adoption.

Whilst the CIL will be optional, the government is intending to maintain both certainty and flexibility by setting some aspects (the unit of development, exemptions, inflation indices) at national level, but facilitating differential rates for different regions and other flexibilities to reflect local circumstances. With levels of development adversely impacted by the recession, it remains to be seen whether local authorities will use the CIL (or not as the case may be) in order to compete with one another to attract development.

5. Enforcement of CIL

The CIL will be registered as a local land charge so subsequent purchasers will be aware of its existence. Charging authorities will be able to add interest and surcharges to late payments and will have the power to stop development in the event of non-payment.

It is not clear how developers will be able either to force the charging authority to deliver the relevant infrastructure, or whether they will be able to reclaim sums that have not been utilised after a certain period of time.

6. CIL is not the end of the s.106 agreement

CIL will replace some of the contributions, primarily those of a purely financial nature, that are currently collected under the s.106 agreement regime. The existing s.106 regime remains in place, however, and will address matters that are required to mitigate the specific impact of proposed developments but which fall outside the scope of the published infrastructure requirements of the local authority. Restrictions may be imposed on the use of the s.106 obligations mechanism in the future once the CIL is implemented. Some authorities may prefer to opt out of the CIL which is likely to be possible.

The most obvious matter that will continue to be governed by s.106 agreements is the delivery of affordable housing. Government policy is for this to be delivered in kind and on site as part of the permitted development which is arguably more appropriate and fair than using a formulaic CIL approach. In other circumstances the use of the s.106 mechanism allows contributions to be closely tailored to the proposed development on the site.

7. Other Changes to the Development Control Regime

The PA 2008 has introduced a number of other changes to the existing planning regime with a view to speeding up the process. The main changes are:

- Applications for minor developments, certificates of lawful use and listed building applications are to be determined by a planning officer, rather than a planning committee; Review of the planning officers' determinations will be by way of appeal to a panel of local councillors rather than by appeal to the Secretary of State; although there will also be a right of appeal in the High Court;
- Changes are to be introduced to appeal procedures – the Secretary of State will determine the appropriate method for certain appeals and whether there will be an oral hearing;
- New provisions regarding the payment of fees for planning applications and to enforcement bodies directly to those bodies (e.g. to the Local Authority Environment Agency etc.), and for payment of fees in respect of planning and listed building appeals proceedings;
- Local authorities will be entitled to make minor changes to planning permissions;
- Tree Preservation Orders are to be replaced by new regulations; and
- New powers are given to local authorities to override easements and other rights restricting the use of land which it has acquired or appropriated for planning purposes.

Expertise - Environment and Planning

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