

future perfect?

updating you on planning issues

Messrs Pickles and Shapps remain in the headlines for another month, although now they are having to share them with those who have had time to consider all their recent announcements.

Parliament has now decided to hold formal inquiries into Mr Pickles' decision to revoke and abolish regional spatial strategies (looking at the effect on housing development and the proposed "New Homes Bonus" incentive) and the Government's localism agenda more widely, considering inter alia the planning function of the proposed LEPs and what the limit of localism should be. Further, environmental groups and other stakeholders have raised concerns that the lack of a "larger than local" tier risks compromising the green belt and climate change, biodiversity, economic recovery and other such initiatives.

If you wish to make written representations to the RSS inquiry, you must do so by 15 September. The localism inquiry has a deadline for written submissions of 1 October.

On top of all that, a firm of builders has filed an application for Judicial Review at the High Court of the decision to abolish regional strategies. If successful, that challenge could see the reinstatement of the South East Plan.

Elsewhere, both the European Commission and the CLG are consulting on proposed amendments to the EIA Directive and Regulations. Rebecca Carriage comments below on the EU proposals and you will find more information about the CLG's proposals in her blog [here](#).

We are keeping our blog up to date with all this news so do subscribe and check in regularly to find out what's happening and let us have your comments. Otherwise, contact one of the authors below or your usual Mills & Reeve contact if you have any planning queries we can help with.

In this issue:

- [Appeal allowed - R \(on the application of friends of Hethel Limited\) v South Norfolk District Council and Another \(2010\)](#)
- [Appeal allowed - R \(on the application of the Health and Safety Executive\) v Wolverhampton City Council \(2010\)](#)
- [Court of Appeal upholds the High Court's decision: R \(Midcounties Co-Operative Ltd\) v Tesco Stores Ltd & others \(2010\)](#)
- [R \(Morge\) v Hampshire County Council \(2010\)](#)
- [Community Right to Build](#)
- [LEPs](#)
- [Public consultation review of the Environmental Impact Assessment Directive](#)
- [Conundrum: Is enforcement action possible "out of time"?](#)

Editor



Caroline Bywater
01223 222365
caroline.bywater@mills-reeve.com

www.mills-reeve.com

Appeal allowed - *R (on the application of friends of Hethel Limited) v South Norfolk District Council and Another* (2010)

This case, the facts of which were reported in our [December 2009 edition of *FuturePerfect?*](#) has been the subject of an appeal. This time round, the emphasis was not on notification and publicity, but on the legality of the council's delegation arrangements. These arrangements were that a planning application had to go to full committee for determination if an area committee voted against the head of planning's recommendation by less than two thirds of that committee's membership. On this occasion, the recommendation was that planning permission be granted. The area planning committee voted 5-3 against the application. The matter was then referred to the full planning committee as this did not represent a two thirds majority vote. At full committee, members reversed the decision of the area committee and voted 8-7 to approve the application.

The Court of Appeal agreed with the appellants that the Local Government Act 1972 required just a simple majority and the authority's delegation arrangements could not override this. It was therefore not lawful for the council to impose delegation rules which meant that matters had to go to a different committee if a particular vote did not attract a two thirds majority. The planning permission was quashed.

There was a secondary point which involved notification of English Heritage where development proposals affect to the setting of the grade I or II * listed buildings. The court considered that English Heritage's views should have been sought in this application. They had not been and this was a further reason why the planning permission should be quashed.



For further information please contact [Rebecca Carriage](#)

Appeal allowed - *R (on the application of the Health and Safety Executive) v Wolverhampton City Council* (2010)

This is another case reported on in our [December 2009 edition of *FuturePerfect?*](#) when the case was in the High Court. It involved attempts by the HSE to have planning permission, for the construction of flats within 100 metres of a facility used to store liquid petroleum gas, revoked.

The approach of the HSE was driven by guidance issued after the catastrophic, but luckily not fatal, events several years ago at Buncefield fuel storage depot. The HSE had advised the local planning authority during the determination process that consent should not be granted due to the proximity of the site to an LPG facility. Despite this, consent was given. At First Instance the Court held that the HSE had not notified the developer, who had already started the development, nor begun proceedings promptly enough and its application was dismissed.

In the Court of Appeal the HSE concentrated on the LPA's refusal to revoke the planning permission. It argued that by the time that it learned the planning permission had been granted, three out of four blocks of flats had been completed. Although the Court of Appeal upheld the planning authority's decision not to use its powers under section 97 TCPA 1990 to revoke planning permission in respect of the blocks already constructed, it held that the LPA should have considered the exercise of its power to revoke permission for the block that had yet to be built. The Court of Appeal did however agree (on a majority) that the planning authority could take into account, in this consideration, its liability to pay compensation if it revoked planning permission.

This case shows just how determined the HSE can be when concerned about the safety implications of allowing development to take place relatively close to fuel storage facilities.



For more information please contact [Rebecca Carriage](#)

Court of Appeal upholds the High Court's decision: *R (Midcounties Co-Operative Ltd) v Tesco Stores Ltd & others* (2010)

In our [July 2009 edition of FuturePerfect?](#), Beverley Firth's article gave a summary of the High Court's decision in *R (on the application of Midcounties Co-Operative Ltd) v Wyre Forest District Council* (2009). An appeal was subsequently filed by the claimant against the High Court's decision. This appeal has now been dismissed by the Court of Appeal.

The claimant claimed that in allowing for the local planning authority to agree in writing to amended floor space allocations, one of the conditions in the planning permission was bad in law and uncertain. As a result, the claimant argued, the Environmental Statement did not properly assess the environmental impacts of the development. The Court of Appeal, however, agreed with the High Court's analysis of the disputed condition finding that it did not actually allow for more retail space than was applied for nor was it uncertain.

These decisions provide us with a useful indication of how the courts may deal with conditions which allow for variations to be made to proposed development without following formal application procedures. The High Court was willing to leave the planning permission intact but simply strike out the offending wording. The Court of Appeal made it clear that as long as it was possible to ascribe a sensible and easily identifiable meaning to a condition, the permission would not be void. In this case, the condition combined with the s106 agreement, provided a sufficiently clear and certain form of control on the intended retail space.



For further information please contact [Katy Carson](#)

***R (Morge) v Hampshire County Council* (2010)**

It appears from this case that the courts may now be prepared to adopt a more relaxed and commonsensical approach to the interpretation of the Habitats Directive. The case concerned an appeal by the claimant against a refusal to permit judicial review of the defendant's decision to grant planning permission for a rapid bus route and cycle lane along a disused railway at a site of "vegetation and roosting" for bats.

Lord Justice Ward clarified that the point of Article 12(1)(b) of the Directive was to ensure the conservation of European protected species (as opposed to habitats) as a whole with a focus on protecting the distribution and abundance of the species in the long-term. The loss of a bat or even a couple of bats would not necessarily constitute a danger to the protection of the bat species and protection of an individual member of the species was therefore not necessarily required by the Directive.

The Court further held that Article 12(1)(d) dealt specifically with protecting the actual breeding or resting sites of European protected species, ie sites that were actually in use. There was no scope in the Directive to protect sites that could 'potentially' be used by the European protected species where they had never been used before.



For more information please contact [Katy Carson](#)

Community Right to Build

Last month, we reported on the housing minister, Grant Shapps' speech to the Community Land Trusts conference on proposals for local housing trusts. As is so often the way at the moment, a formal announcement from the Government followed the advance trailer and we now have a new initiative to be called the Community Right to Build. The proposal is another step on the Government's path to shifting power from central government to communities and to quote the accompanying press release "to allow local people to deliver the homes and development that they really want, without being told that their own expansion doesn't fit with their local council's plans and should not go ahead".

Click [here](#) to read our full, updated article on these proposals.



For further information please contact [Christine de Ferrars Green](#)

LEPs

We briefly mentioned local enterprise partnerships (LEPs) last month, the proposed new joint local authority-business bodies to be established to promote economic development in local communities. Doubtless, you will have picked up a range of comments about these, and the roles and responsibilities they might have. It is interesting to note the results of a survey of local authorities which received some publicity at the end of last month indicating that around 70 per cent of councils agree or strongly agree that the oversight of planning and transport policies should be amongst the LEP's core responsibilities.

We held a discussion forum in one of our offices to bring together representatives from local government and other public bodies with representatives of local businesses to discuss the likely aims and purposes for a local LEP. It was felt to be essential that a LEP has real engagement with businesses operating in its region, which should take an active part in setting direction and achieving delivery of a business plan identifying key priorities for the LEP. Given the public spending cuts anticipated in the forthcoming comprehensive spending review, there was strong support for local financing and tax raising powers to be given to local government for use by the LEP, and a real appetite to pilot a tax increment financing (TIF) scheme. The Treasury remain to be convinced that there is any scope for "good" borrowing by the public sector. It was also felt that the LEP should have the ability to co-ordinate community infrastructure levy monies. Given that local businesses will be expected to devote time and energy and possibly financial resources as well, a strong preference was expressed to the hypothecation of locally raised finance and direct applicability to deliver clearly identifiable results, leading to a virtuous cycle of investment - delivery - results - economic growth. The challenge for LEPs is a great one - and so are the opportunities.



For further information please contact [Christine de Ferrars Green](#)

Public consultation review of the Environmental Impact Assessment Directive

The EIA Directive has come up for review by the European Commission. The consultation period ends on 24 September. Click [here](#) for the consultation paper.

One approach is that the existing Directive be replaced with one set of more wide-ranging rules covering strategic environmental assessments and also assessments needed under the Birds, Habitats and Water Framework Directives. Transposition of the EIA Directive in Member States has always been contentious; our own experience shows that it took several attempts, and significant litigation, to get to a position where our national legislation more or less reflects the requirements of the Directive. One particular problem identified by the Commission is the breaking down of larger projects into smaller "slices" which then come within indicative thresholds when proposals are screened. European case law has attempted to put an end to this (such as in the case of *Ecologistas en Accion - CODA v Ayuntamiento de Madrid* (July 2008)) but the desire now seems to be to legislate to prevent this.

The new Environment Commissioner Janez Potonik is quoted as suggesting that the approach may be toughened: "After more than 20 years of implementation, we have identified the areas where improvements are needed and reached the conclusion that the EIA Directive should be reviewed. My objective is to present a new text which will further improve environmental protection, take on board the challenges in the areas of climate change, energy and biodiversity, integrate the ECJ case-law and harmonise and simplify, to the extent possible, existing procedures. In this context, the overall quality of the environmental assessments will be a central issue, and there is certainly room for improvement. On the one hand, the quality control of the EIA documentation submitted by the developer could be improved. On the other hand, the quality of the EIA process itself



For more information please contact [Rebecca Carriage](#)

could be reinforced."

In the meantime, the Department for Communities and Local Government is also consulting on some "updating" and "tidying up" amendments to the EIA Regulations. Click [here](#) for the Department's consultation paper. The end date of this consultation is 25 October.

Read our [blog](#) for more information about the CLG consultation.

Conundrum: Is enforcement action possible "out of time"?

We have recently been considering what would happen if an over-zealous council were to issue an enforcement notice even when its time limits for doing so, as stated in the TCPA, have expired. If nobody were to successfully appeal the enforcement notice or judicially review the decision to issue such a notice out of time, s285 TCPA would seem to prevent any challenge to the validity of the notice once it came into effect.

Therefore, landowners/occupiers must not make the assumption that an enforcement notice served by a LPA out of time is invalid - if they don't get it quashed by way of appeal or judicial review, they will be left with no further right of appeal once the enforcement notice comes in to effect - even where the notice is issued for a use or development which might genuinely be lawful - and if they don't comply with it they risk prosecution.

While this may appear to be a bizarre state of affairs, it appears the courts are willing to accept the LPA's entitlement to serve the notices out of time (see for example the High Court's decision in *Vale of the White Horse District Council v Treble-Parker* (1996)).

We would be very interested to hear your thoughts and any experience you may have had of this!



Get in touch at www.plan-it-law.com

www.mills-reeve.com

Offices: Birmingham, Cambridge, Leeds, London, Manchester, Norwich

Mills & Reeve LLP is a limited liability partnership registered in England and Wales with registered number OC326165 and VAT number GB 104 8345 88. Its registered office is at Fountain House, 130 Fenchurch Street, London, EC3M 5DJ, which is the London office of Mills & Reeve LLP. A list of members (with details of each member's professional qualification) may be inspected at any of the LLP's offices or on our website. The term "partner" is used to refer to a member of Mills & Reeve LLP. Mills & Reeve LLP is regulated by the Solicitors Regulation Authority and is subject to the Solicitors' Code of Conduct 2007, which can be viewed at: www.sra.org.uk/code-of-conduct page

The articles featured in this newsletter have been selected and prepared with a view to disseminating key information and may not deal with individual concerns. No liability can be accepted in relation to particular cases. However, the authors would be pleased to respond to individual queries, and before taking action you should seek specific legal advice, particularly as the legal position is liable to change over time. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites. Extracts may be copied with our prior permission provided that their source is acknowledged. Some/all images are copyright © Microsoft Corporation, and these may be distributed solely as part of this newsletter

If this email has been forwarded to you and you would like to receive future updates from us, please email newsletter@mills-reeve.com with your request and details. If you wish to unsubscribe from this email list, please email newsletter@mills-reeve.com. Should you wish to stop receiving all emails and other marketing communications from Mills & Reeve LLP please email sharon.malan@mills-reeve.com or contact our marketing department on +44 (0)1223 222460.

© 2010 Mills & Reeve LLP. All rights reserved. Site by www.shorthose-russell.co.uk