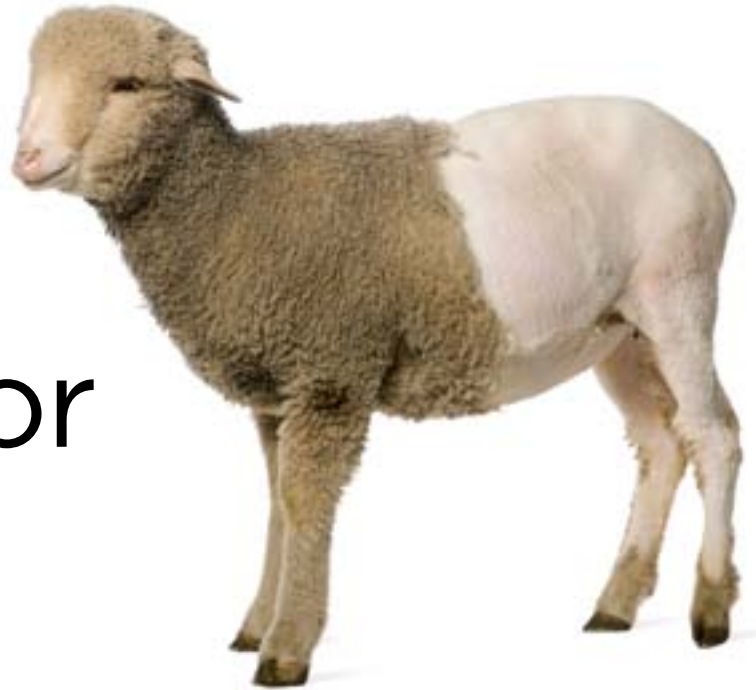




Localism: planning for change



In the autumn 2011 newsletter, our head of planning, John Holmes, discussed the Localism Bill. John now brings us up-to-date and considers the implications for the planning system of what is now the Localism Act 2011.

After an arduous - and sometimes acrimonious - almost twelve months passage through Parliament, the Localism Act finally received Royal Assent on 15 November 2011.

It may be true to say that during the final days of debate attention was elsewhere in the sphere of planning, with the furore over the consultation draft of the National Planning Policy Framework (NPPF), a debate which has still to be settled and one which managed to align the Daily Telegraph, the Daily Mail, the National Trust and the Morning Star all on the same side in condemnation of the proposals.

If, as the Government claims, the Localism Act is the greatest change to the planning system since 1947, planning practitioners still have the challenges of the NPPF, the proposed reform of the appeals system, the introduction of the Community Infrastructure Levy and, tucked away in the Coalition Agreement, proposed third party rights of appeal. It is little wonder then that a member of the Department for Communities and Local Government (DCLG) select committee on the NPPF asked: 'Are these changes a planning lawyer's charter?'

What does the Act do? And when will it do it?

Some Parts of the Act are already in effect (see inset box on page 2), whilst others will take effect over the coming months. The aim is to have the entire Act in force from April 2012.

Planning provisions

The planning provisions are set out in Part 6 of the Act, Chapters 1 to 7, Sections 109 to 144 inclusive and Schedules 8 to 13 inclusive.

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Welcome

Welcome to the winter edition of Hill Dickinson's commercial property newsletter, which we hope you will find of interest.

Looking back, 2011 was another difficult year for everybody, in whatever sector or region you operate. I would, however, like to take this opportunity to thank our clients for involving us in some fantastic transactions and projects during the year, and for enabling us to be named once again North West Property Law Firm of the Year.

I have no doubt that 2012 will bring similar challenges, but we look forward to working with our clients and their other professional advisers to achieve the best possible outcomes. On behalf of all at Hill Dickinson, I wish you all a happy new year.

If you have any comments on the newsletter in general, please contact our editor, Bill Chandler, at: bill.chandler@hilldickinson.com.

Best wishes,
David Chinn
Head of Business Services
david.chinn@hilldickinson.com

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The chapters deal with the following:

- Chapter 1: Plans and strategies, Sections 109 to 113
- Chapter 2: Community Infrastructure Levy, Sections 114 and 115
- Chapter 3: Neighbourhood planning, Sections 116 to 121
- Chapter 4: Consultation, Section 122
- Chapter 5: Enforcement, Sections 123 to 127
- Chapter 6: Nationally significant infrastructure projects
- Chapter 7: Other planning matters, Sections 143 and 144

Key issues

1. The abolition of Regional Strategies

Section 109 outlines the abolition of Regional Strategies. In practice, Regional Strategies will continue on life support for some time, given the consultation (ending on 20 January 2012) as a consequence of the decision in the *Cala (1)* High Court challenge in 2010: *Cala Homes (South) Limited -v- Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin).

Even then, a potential legal challenge based on the findings of the strategic environmental assessments cannot be ruled out and indeed *Cala (3)* has recently been lodged against the Secretary of State's continued refusal of their housing application in Winchester.

Is it in force?

The following sections are in full effect already:

- Section 110 (duty to co-operate in relation to planning of sustainable development);
- Sections 117 to 120 (charges, collection, enforcement, financial assistance for neighbourhood planning); and
- Section 144 (application of Part 6 (Planning) to the Crown).

The following are in effect in part:

- paragraphs 57 and 58 of Schedule 4, and part of Section 26 (amendments to existing standards provisions);
- part of Section 109 (abolition of regional strategies) and part of Schedule 8;
- the provisions inserted by Section 122 (consultation before applying for planning permission); and
- Part 15 of Schedule 25, and the corresponding part of Section 237 (repeals and revocations).

2. 'Duty to co-operate'

Section 110 contains the replacement approach to strategic planning, with local authorities and public bodies working together to 'engage constructively and actively' in putting together development plan documents.

If they have not done so already, planning authorities revising their plans should be contacting their neighbours. However, as is common in these situations, political concerns and decisions are more likely to be involved in the resolution of cross-boundary and border development than solely planning issues.

3. Neighbourhood plans

A cornerstone of the Government's 'Big Society' agenda and part of the push towards local involvement in planning decision-making, Section 116 of the Act provides the power for local communities to prepare neighbourhood plans, which must be in accordance with local planning policies.

Much will rely - as is the case for most of the planning provisions - on the detail of the orders and regulations to be laid before Parliament, but we can envisage a few problems and a risk of parochialism.

Two issues immediately spring to mind: firstly, what is to be taken as a 'neighbourhood'? Practitioners in the area of town and village greens will shudder at the thought of how this concept was continually defined by the courts. Secondly, there is the risk of prematurity if neighbourhood plans are in the course of being drafted to frustrate development.

A concern of their Lordships' throughout the passage of the Bill was that of parochialism by better prepared/better funded community groups. As one peer commented, if they were a resident of a village that wanted no changes they would 'recruit like-minded neighbours and make sure that we had no additional housing in the neighbourhood and would shift the issue onto other villages that were not so quick off the starting blocks'.

4. Community Infrastructure Levy (CIL)

Although before the last general election, Conservative Party policy was to abolish CIL, it has been saved and amended to allow monies raised to be used locally - including a 'meaningful proportion to be paid to parish councils for local use'. This ties in with the proposed changes set out in the draft Community Infrastructure Levy (Amendment) Regulations 2012, currently out for consultation, and due to come into force on 6 April 2012.

The Act also extends the meaning of 'provision of infrastructure' to allow for payment towards future maintenance costs of that infrastructure.

An inspector's report recommending approval of a charging schedule will no longer be binding on the charging authority; which again puts the final decision on whether to adopt the charging schedule back in the hands of the charging authority itself.

The big debate on CIL, however, is yet to be had.

5. Consultation

Given that detailed pre-application consultations are now a major part of the modern planning process - and many savvy developers are increasingly using social media as part of the consultation process - the new statutory duty under Section 122 is unlikely to hold many surprises for applicants, but may have a resource impact on local planning authorities.

6. Pre-determination

Tied into the consultation process, however, is the question of predetermination by members of the council.

Although not strictly a planning process change, the provision (Part 1, Chapter 6, Section 25) will effectively allow members, including those of the planning committee, to take part in discussions and - presumably - express views for or against development prior to formal debate at planning committee, without fettering their right to vote on the application.

Given that pre-determination and bias has long been an almost staple feature of judicial review actions, it will be interesting to see whether the courts seek to impose limitations on the scope of this power; particularly on controversial or public interest applications.

7. Enforcement

The changes to the enforcement regime have almost slipped under the radar unnoticed.

These include:

- the ability to refuse to determine retrospective planning applications (Section 123);
- amending the time limits for enforcing against concealed breaches

of planning control and making planning enforcement orders (Section 124);

- amending the penalties for planning offences (Section 126); and
- new powers in respect of unauthorised advertisements (Section 127).

The future (well, the next six months)

The exact implications of the new Act will not become clear for some time, as regulations and guidelines will be issued over the coming months. There will also be the new NPPF and the transitional arrangements promised by the Government with regard to the development plan process.

It also remains to be seen how many neighbourhood forums are set up and how many of them choose to make local development plans and/or local development orders, which would potentially alter the local development plan policy framework.

Given that the main planning changes affect England only, there is also the question of what is happening in Wales.

John Holmes
john.holmes@hilldickinson.com



Put your ecards on the table

Our head of property litigation, Ralph Bullivant, considers the disclosure of emails and other items of electronically stored information (ESI) during court proceedings.

Electronic information

In April 2010 it was calculated that on any one day, approximately 294 billion emails are sent and received around the world. We all know how even a few minutes away from the desk can mean that any number of emails will have arrived in our inbox. As well as emails, we are continually dealing with other items of ESI, be it text messages, voicemail, photographs, Word documents or spreadsheets, which we either create or amend.

Each of these items of information is then stored on a device, which may be the hard drive of the PC that sits on our desk or something more portable: mobile phones, memory sticks, flash drives, CDs, etc.

ESI includes metadata and other embedded data, which is not immediately visible on the screen and print-out, the various versions of an amended document, and deleted items whose traces can still be located with the right equipment and expertise.

Disclosure

All forms of civil litigation are governed by the Civil Procedure Rules (CPR), and at some point during the litigation process, the parties will have to deal with disclosure. The rules around disclosure are set out within CPR Part 31. In short, they require both parties to disclose to the other copies of all the documents in their possession or control which may be relevant to the matters at issue. The

Emails that come back to haunt you

You can never tell when a particular property may become the subject of litigation. Once it does, then your emails, the documents that you have created and amended, the text messages and voicemails left for you may become the subject of disclosure.

If litigation is ongoing, then the parties may be more careful about what they are saying in emails. However, if litigation is not anticipated, an unguarded email can create difficulties further down the line. The ease and speed of modern communication can lead to us feeling more relaxed and less guarded in what we say.

Most of us have, at some point, regretted pressing the send button on an email; either because it might have been sent to someone that perhaps should not have seen it, or perhaps because more thought could have gone into what has been said. An exchange of emails can become more like an informal conversation, with the use of swear words and slang, rather than a thought out statement of your position.

Some protection may be provided if a communication is privileged. Legal advice privilege covers communications between the client and his lawyer. Documents created for the dominant purpose of use in litigation may also be privileged.

Particular difficulties arise if legal advice is obtained and then disseminated by way of email to a larger group. Privilege can be lost if an email is copied to a party outside of the litigation or if legal advice is disseminated within the client organisation either by being included within internal reports or being copy and pasted into other documents.

It is always sensible to bear in mind that emails being sent and documents being created may one day have to be disclosed as part of court proceedings. Ensure that clear lines of communication exist and that everyone involved is aware of who their 'client' is in relation to the matter. Avoid and resist the careless dissemination of information, particularly of advice from lawyers. If possible, avoid discussion of legal advice internally by way of email.

However innocuous a matter may be, one day the electronic document being created or the email being sent could form part of the disclosure process, and you may find yourself having to answer questions as to what was meant by the contents of an email or document.

obligation with regard to disclosure extends to those documents which support a party's case and, more problematically, to those which adversely affect a party's case or support the other party's case.

So if you are a party to proceedings and you have an email or other document in your possession which could potentially prejudice your case, you are under an obligation to disclose a copy of that email to the other side, notwithstanding the difficulties that email may cause to your case.

The obligation is to make a reasonable search for documents. What is reasonable depends on the nature of the case, the amount at issue, the nature of the documents that need to be searched for and where they are located.

Difficulties

Perhaps not surprisingly, the process of disclosure is one of the most difficult aspects of litigation. It is time consuming and expensive. In large cases it is not unusual for a list of documents to run to many hundreds of pages.

Disclosure can give rise to potential conflicts between a party and its lawyer. If a party has a document in their possession prejudicial to their case, they may say to their lawyer: "Why do I have to disclose this if this document is going to cause me such difficulty?" The lawyer will have to explain that there are obligations to the court with regard to disclosure. Ultimately, if a lawyer is aware of a document which is in the possession of their client, but which the client is refusing to disclose, then that may lead to the lawyer having to tell their client that he can no longer act.

The process used to be relatively straight-forward when all we had to deal with was pieces of paper. The lawyer would collate all of the files that his client had in their possession. He might also ask for the files held by third parties, such as the client's surveyor, architects and other advisors. The lawyer would go through the files and identify the documents relevant to the issue in dispute and prepare a list of those documents. A copy of all those

documents would then be provided to the other side.

However, the increased availability of emails and other ESI has made the whole process a great deal more complicated, time consuming and expensive.

Practice Direction

Practice Direction 31B, 'Disclosure of electronic documents', was published in October 2010 and is designed to assist parties to litigation who are having to get to grips with the electronic disclosure requirements.

It is particularly important that a client is made aware of the need to preserve all potentially disclosable ESI at an early stage - as soon as litigation is contemplated. The client may need to put systems in place to ensure that electronic documents are preserved. If documents have not been preserved, even before the commencement of proceedings, then this can lead to adverse costs consequences in the litigation.

In large cases, an individual will be appointed who will have specific responsibility for electronic disclosure. That person may need to attend hearings at court in order to be able to explain what they are doing to deal with it.

A key component of the Practice Direction is the 'Electronic Documents Questionnaire', which must be completed by the parties to explain to the court, and each other, how they are going to deal with electronic disclosure. It requires the parties to explain the extent and location of relevant ESI and the techniques they are going to use to disclose it. So far as possible, the parties are required to agree on how they are going to approach the issue. If they cannot agree, the court can be asked to make the appropriate orders.

It will not be sufficient for a party to turn up at court and state that they are not going to search for ESI because the sheer volume of material available means that it will not physically be possible.

Software tools and techniques are available to interrogate computer systems and other locations of ESI with a view to specific items being

identified and found. The parties can agree upon keywords and categories of documents to be looked for and the court will intervene if the parties cannot agree.

This may simply be a question of identifying the key individuals involved and perhaps the address of the property around which the dispute relates, then asking the computer to undertake a search of all the documents that may fit into these categories, perhaps within a particular date range.

The parties should also consider how the documents should be presented to the other side. The old way of doing it was to produce a list of all the relevant documents and then to photocopy all the documents and produce boxes of those documents to the other side.

The courts are anxious to reduce the amount of paper involved, and parties will be encouraged to use storage devices so that documents can be easily disclosed to another party. So, for example, a list of documents that contains some 3,000 items and runs to 250 pages can be contained on one CD. If documents can be stored electronically then this assists in searching for particular documents by way of specific search terms.

Conclusion

Disclosure can make or break a case. It is rare to find a 'smoking gun', but an accumulation of email conversations may go a long way towards showing what a party's thinking was on a particular issue. Given the extent to which we all now use and rely on email, and how dependent we are on electronic devices for storing information, it is likely that electronic disclosure will be an issue, to one degree or other, in most cases.

Ralph Bullivant
ralph.bullivant@hilldickinson.com

An earlier version of this article appeared in the Estates Gazette on 24 September 2011

A league of their own

When the first 'green' league table under the recently-introduced CRC scheme was published in November 2011, Bill Chandler, legal director in our property team, was quoted on its implications for various sectors and regions in publications ranging from *The Grocer to Place North West*. Bill also wrote the following article for *Local Government Lawyer* which, whilst focussing on the public sector, will resonate with all organisations affected by CRC.

So, how did local authorities fare when the Environment Agency published the first 'performance league table' in November 2011, ranking over 2,000 participants in the CRC (Carbon Reduction Commitment) Energy Efficiency Scheme?

CRC and the league table

Many readers will be painfully aware that the CRC scheme commenced in April 2010, affecting medium and large sized private sector and public sector organisations, including approximately 200 local authorities.

Since the Comprehensive Spending Review in October 2010 abandoned 'recycling payments' - under which the £1 billion received each year from the sale of carbon allowances under the scheme would have been refunded to participants on a sliding scale depending on their position in the annual performance league table - CRC has effectively become a tax on carbon emissions.

The performance league table has however survived the abolition of recycling payments. Stripped of its financial implications for participants, the league table still represents a key reputational driver for CRC, naming

and shaming those participants who fail to improve their environmental performance whilst presenting PR opportunities to those who perform well.

But because the CRC scheme as a whole - and the performance league table in particular - does not differentiate between organisations of differing sizes operating in different sectors in different parts of the country, there has been concern from the outset as to how public sector participants would perform when compared with their private sector counterparts.

Indeed, the Government's own Committee on Climate Change (CCC), in its September 2010 Advice to Government, identified 'clear differences between public and private sector organisations, particularly in the context of budget cuts', and also noted the public sector's 'limited' potential to reduce emissions. The CCC suspected that public sector participants would almost inevitably appear towards the bottom of the league table, and feared that 'this would result in the transfer of funds from public to private sectors through the revenue recycling mechanism'.

The CCC therefore concluded that there should be separate league tables for public and private sector participants. This proposal has not been implemented, although the abolition of recycling payments at least removes the spectre of the public sector effectively subsidising the private sector.

Local authority rankings

So, did the local authorities perform as badly in the first league table as the CCC had feared?

Whilst it is true that no local authorities featured among the 22 organisations who shared joint first place among over 2,100 organisations listed, there were still some impressive performances for which congratulations are most definitely in order.

The Greater London Authority was the highest ranked local authority, achieving joint 34th place (tied with the London Fire and Emergency Planning Authority and the University of Essex), with Preston City Council not far behind in joint 41st place.

Other local authorities inside the top 100 - and therefore within the top 5% of all participants - were Blackpool

Borough Council in joint 61st place, whilst Manchester City Council and its near neighbour Salford City Council tied for a very creditable 88th place. Just outside the top 100, but still deserving of recognition, were Suffolk County Council (joint 103rd place) and Liverpool City Council (joint 109th place).

Wrexham County Borough Council (joint 129th place with North Somerset Council) was the top-ranked Welsh authority, whilst Falkirk Council and South Ayrshire Council (shortly behind in joint 134th place) shared the honours as the leading Scottish authorities.

At the other end of the table, however, there were no fewer than 24 local authorities among the 803 organisations who shared joint last place, having scored 'nul points' for early action.

Conclusions

Despite a number of positive performances, for local authorities overall it was a case of 'could do better'.

But don't read too much into this first league table. It is potentially misleading since the first year's rankings take no account of the actual level of emissions

produced by the participants, nor any reductions in emissions. The first year's rankings are based entirely on 'early action', which comprises being certified under one of the seven accredited carbon management schemes (such as Carbon Trust) and measuring electricity and gas supplies through voluntarily installed automatic meter reading devices, dynamic un-metered supply and daily read gas meters.

The first year's emissions figures do however set the baseline against which participants will be judged in future years. And, even though this first league table may not indicate who is actually the 'greenest', one might anticipate that organisations who have taken 'early action' are perhaps also those most likely to take serious action to improve their environmental performance and reduce emissions going forward.

From next year the league table will be more meaningful, reflecting actual emissions and percentage change. And that is when the real challenge begins for cash-strapped local authorities.

Good luck!

Bill Chandler
bill.chandler@hilldickinson.com

Ask Hill Dickinson

Q Is it compulsory to comply with the Dilapidations Protocol when dealing with dilapidations claims under commercial leases?

A On 14 October 2011, the Civil Procedure Rule Committee agreed that the draft Dilapidations Protocol produced by the Property Litigation Association (PLA) was to be adopted as a formal Pre-Action Protocol under the Civil Procedure Rules (CPR). The formal Dilapidations Protocol came into force on 1 January 2012.

Pre-Action Protocols are an increasingly important part of the CPR. In each case, they are intended to concentrate the party's mind on adopting best practice to increase the possibility of settlement and limit unnecessary costs in litigation.

The PLA introduced the first draft of the Dilapidations Protocol in 2002 and this was quickly endorsed as 'best practice' by the Royal Institution of Chartered Surveyors (RICS). Since that time, the PLA has worked closely with the Government to adapt the Protocol for adoption as part of the CPR.

Although landlords and their advisers will have been familiar with the terms of the Dilapidations Protocol for a number of years, there is now a need to be more focused upon its provisions and to ensure compliance wherever possible. The key timings within the Protocol are unchanged and, for example, the period for a tenant to provide a substantive response to a Schedule of Dilapidations remains at 56 days.

There are a number of new provisions, and most important amongst those relates to the requirement for both a landlord and tenant endorsement.

Being a formal CPR Protocol increases the likelihood of a trial judge imposing sanctions for non-compliance. Whilst the issue will remain at their discretion, all those involved in dilapidations claims would be well advised to ensure compliance and avoid being made an example of in 2012.

Matthew Forrest
matthew.forrest@hilldickinson.com

If you have any queries about matters raised, please contact:

Bill Chandler
Editorial contact
bill.chandler@hilldickinson.com

David Chinn
Head of Business Services
david.chinn@hilldickinson.com

Martyn Smith
Business Development Manager
martyn.smith@hilldickinson.com

About Hill Dickinson

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CarbonZero