

Trends in Local Government

2016/17



Introduction

Welcome to VVW's annual compilation of articles on key trends and issues in local government for 2016/17.

The challenges facing local authorities remain considerable. The main challenge remains austerity, even in light of the government's announcement that some measures will be relaxed.

We know that some authorities are being forced to 'lose' up to 20% of their workforce, with legal teams stretched and stressed and, on occasion, fundamentally undervalued.

We know that 'Brexit' means Brexit (after all, what else could it mean) but we, as lawyers, are still grappling what the implications are. We have advised local authority clients on its implications for procurement law and for data protection, but certainty (whenever it happens) will be welcome.

Over the last year, we have seen an increased demand for advice and support on:

- the use of local authority companies as trading entities
- procurement challenges
- governance issues
- councillor misconduct
- planning/property
- complex employment disputes

I have been continually impressed by the resilience, expertise and good sense of the in house teams I have worked with. But I have also noted that the pressure on colleagues is increasing and increasing.

In these distracted times, it can be difficult to stand back and review. And local authorities lawyers are so busy dealing with crises (and late reports)

that finding time to look at developments and trends can seem a luxury. However, just as time management is essential for effective work (we have all worked with colleagues who haven't got the time to manage their time), ensuring that you make the time to review and to understand is a prerequisite for professional sanity.

This collection of brief and straightforward articles is offered to local authority colleagues to assist and support.

Can we help you?

This introduction also makes an offer:

- If you would like an informal conversation on any of these issues then please do contact the report author. If they can help then they will.
- If you would like a conversation about any other local authority issue, then please contact me. I will either help or put you in contact with someone who will.

(NB: This is not Carbollic Smoke Ball puff.)

Veale Wasbrough Vizards (VVW) is a leading local authority firm. We have worked in this area for over 30 years and have supported in house legal teams on a vast range of issues. We remain absolutely committed to helping and supporting local authorities.

I lead the local government practice and it is my personal commitment to make sure that VVW continues to provide an outstanding service in terms of quality, expertise, client focus and price.



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Allison is a Partner and leads our Local Government and Emergency Services team.

Allison has over 15 years' experience in advising clients on a wide range of issues.

She has a special interest in advising publicly funded bodies on individual employment issues or situations where the organisation is dealing with its workforce from a more strategic standpoint, including wholesale organisational change and industrial relations.



Trends in procurement

Procurement law continues to develop apace. Our national market leading Procurement team highlights two significant cases over the past 12 months.

Illegal direct award on frameworks - a taste of things to come?

The case of *Lightways (Contractors) Limited v Inverclyde Council [2015] CSOH 169* was heard by the Scottish Court of Session in December 2015. The court held that a contract awarded for street lighting services under a framework agreement breached the procurement rules, as it was awarded to a subsidiary company that was not independently named as a party to the framework agreement.

Background

In 2013, Inverclyde Council (the Council) held a mini-competition under a framework agreement for the supply of street lighting services and awarded a contract to Amey Public Services LLP (Amey LLP). This contract was re-procured under the same framework agreement in 2015 and the Council again awarded the contract to Amey LLP.

The suppliers appointed to the street lighting service framework agreement included Amey OW Limited (Amey OW). Amey OW and Amey LLP are sister companies and both members of the same group of companies, but have different management committees and directors as well as different employees, assets and businesses.

Prior to 2013, Lightways (Contractors) Limited (Lightways) had supplied these services to Inverclyde Council. Lightways were not a party to the framework agreement. Lightways challenged the 2015 call off agreement on the basis that Amey LLP was not a party to the framework agreement and claimed the award of a contract amounted to an illegal direct award, made without prior advertisement.

The court's decision

The court held that Lightways were permitted to bring a claim despite not being a party to the framework agreement. The court considered that Lightways had potentially lost an opportunity to tender for the 2015 contract. Lightways has standing to bring a claim as it was an “*economic operator which claimed to have suffered loss and damage in consequence of a breach of the Council's obligations under the procurement rules*”.

“ This case highlights the need for contracting authorities to take care to follow the correct procedures when calling off contracts under a framework agreement. ”

The Council argued that it had made a clerical error and the contract was intended to have been awarded to Amey OW, not Amey LLP. The Council also argued that the contract would have been awarded by the Council on exactly the same terms, and it had clearly intended to offer the contract to a company which was a party to the framework agreement.

The court held that the Council had breached the procurement rules by awarding a call off contract to a company that was not a party to the framework agreement. The court also considered that the Council intended to award the contract to Amey LLP in the mistaken belief that it was a party to the framework, and therefore this was not a mere clerical error that could be rectified by novation or rectification of the contract. The court determined that the contract was ineffective and cancelled the call off contract.

Comment

This was the first occasion where a UK court applied ineffectiveness to a framework call off. It highlights the need for contracting authorities to take care to follow the correct procedures when calling off contracts under a framework agreement. Since this case, we have seen increased scrutiny and bidder complaints on framework agreements, which is perhaps due in part to this case.

When is a development deal not a public works contract - the latest instalment

In *R (Faraday Development Ltd) v West Berkshire Council*, the High Court dismissed a judicial review application in relation to the award of a development agreement between St Modwen Developments Limited (SMDL) and West Berkshire Council. This case highlights some of the many considerations local authorities face when entering into development agreements on a no procurement basis and is perhaps an encouraging affirmation of the precedents set in recent case law on this subject.

Background

The Council entered into a development agreement with SMDL for the regeneration of an industrial site it owned. Under the deal, the Council would retain the ownership of the site and generate a revenue income through ground rents on the redeveloped site. The freehold interest in the site was held by the Council, but was subject to long leasehold interests. The claimant held various leasehold interests in parts of the site which it had acquired with a view to carrying out its own redevelopment project.

The Council considered proposals (received outside of a regulated procurement process) for the redevelopment of the site, which included proposals from the claimant and SMDL. The Council decided to proceed with SMDL's proposal due to its greater experience in delivering schemes of that nature.

The Development Agreement required SMDL to draw up plans for the proposed development, the initial infrastructure works and valuation appraisals. A

steering group made up of equal members from the Council and SMDL was responsible for the strategic objectives of the development and monitoring the progress of the development.

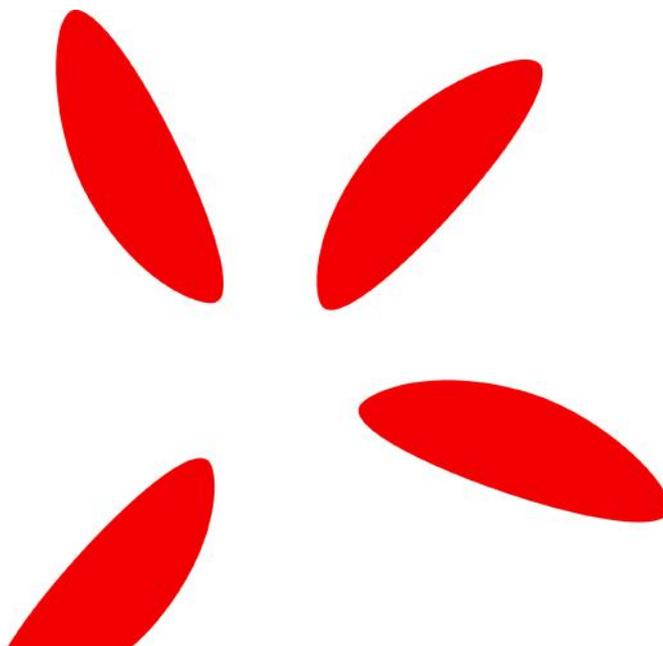
There was no obligation in the Development Agreement for SMDL to carry out any development on the site. SMDL had a considerable commercial incentive to proceed with the development as it had the potential to generate a significant profit for SMDL (aside from the resources it had committed in fulfilling its obligation to draw up plans (etc.) for approval by the steering group and to obtain planning permission).

“ When considering whether the Development Agreement should have been procured under the Public Contracts Regulations 2015, the court must consider the nature of the scheme as a whole, not just the terms and conditions of the agreement. ”

Judicial review

Faraday Development Limited (Faraday) issued Judicial Review proceedings in respect of the Council's decision to enter into the development agreement on the basis that:

- the Council had failed to obtain best consideration for the disposal of the development site and, in addition, the transfer amounted to unlawful State aid (in breach of Article 107 of the Treaty of the Functioning of the European Union)
- the Development Agreement amounted to a public works contract and/or a public services contract that should have been awarded in accordance with the Public Contracts Regulations
- that the Council's decision not to impose an enforceable obligation on SMDL to carry out or procure works in the Development Agreement was irrational, on the basis that the procurement rules encourage competition



The court's decision

In considering each of the grounds, the court came to the following conclusions:

- The fact that the Council's rationale was to seek revenue income, and was not solely driven by receiving the highest capital receipt, was relevant in determining whether best consideration had been obtained. The Council had taken expert advice on the best way to protect and maximise the value achievable for the site and had been advised of the financial aspects of the offers it received. In seeking appropriate advice the Council could not be considered to have acted irrationally when accepting the offer from SMDL, and therefore could not have failed to obtain best consideration for the transfer of the site.

As the duty to obtain best consideration was considered to be met, the court considered there could be no unlawful state aid present in the transfer of the site to SMDL.

- When considering whether the Development Agreement should have been procured under the Public Contracts Regulations 2015, the court must consider the nature of the scheme as a whole, not just the terms and conditions of the agreement.

The court did not consider that the Council did exert a 'decisive influence' over the development works. Additionally, due to the absence of an enforceable obligation in the development agreement, any works would be undertaken at SMDL's autonomous initiative. These factors contributed to the court determining that the development agreement should not be considered to be a public works contract under the Public Contracts Regulations and so a fully regulated procurement process was not necessary.

Further, the services provided under the agreement were incidental to the main purpose of the agreement, and their purpose was to facilitate the Council's regeneration and financial objectives. The court concluded that the agreement did not amount to a public services contract that is subject to the procurement rules.

- Given the court's decision that the Development Agreement was not subject to the Public Contracts Regulations 2015, the court dismissed the claim that the Council acted irrationally when making its decision not to follow a regulated procurement process before entering into the agreement.

Comment

This case perhaps highlights the court's willingness to apply the precedent established in previous case law including, most recently, *R (on the application of Midlands Co-operative Society Ltd) v Birmingham City Council*. This approach will not be appropriate in all cases and careful consideration should be given on a case by case basis for the appropriate structure for the development agreement.

Whether the authority wishes to have a decisive influence over the development and impose an enforceable obligation on the developer to proceed with the development, those agreements do generally amount to public works contracts rules and a fully regulated procurement process would be required.



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Trends in employment law

Employment law is fast moving and we know it can be hard to keep up to date. What are the trends which we think will have the most impact on local government? How can you prepare for them?

Falling employment in local government

In June 2016, employment in local government was just under 2.2 million, which represents a fall of 13,000 (0.6%) on the previous quarter and 73,000 (3.2%) on the previous year.

Academy conversions are in part responsible for this as employees move from local government to central government employment. However, according to the Office for National Statistics, this only accounts for 9,000 of the 13,000 fall over the last quarter. It seems the government's further budget cuts are continuing to impact on local government. Will a new Prime Minister signify a change in approach? Time will tell.

Reforms to public sector exit payments

Having now received Royal Assent, the Enterprise Act 2016 has inserted the Regulations into a new section within the Small Business, Enterprise and Employment Act 2015, and introduces a cap of £95,000 on exit payments made within the public sector.

The cap will include the employer's cost of funding early access to unreduced pensions, which is likely to have a significant impact on how any additional termination payments negotiated under settlement arrangements are determined.

The Enterprise Act will be brought into force in stages by secondary legislation, though the dates have not yet been confirmed.

In addition, the government is proposing to make wider reforms to public sector exit payments to bring practices more in line with the private sector.

Recognising that it would be difficult to achieve a 'one size fits all approach' across all areas of the public sector, local government is now expected to

try to agree reform to their current arrangements in line with the government's proposed framework by June 2017. If this cannot be achieved, then the government will consider primary legislation to achieve reform. These reforms will have far greater impact than the £95,000 cap as only 3% of payments were thought to be over this figure in 2014/15.

Trade Union Act

On 4 May 2016, the Trade Union Bill received Royal Assent and became the Trade Union Act 2016. It requires:

- a ballot turnout of at least 50% before any industrial action can proceed
- 40% of those eligible to vote, to vote in favour before industrial action in 'important public services' can proceed

'Important public services' include health services, education of those aged under 17, fire services, transport services, border security and decommissioning of nuclear installations and management of radioactive waste and spent fuel.

The Act will be brought into force by a subsequent statutory instrument, though it is not yet clear when.

Are you vulnerable to holiday back pay claims?

We are continuing to see case law developments in this area and the position is becoming clearer. As a reminder, the central question the courts are being asked to consider is which elements of a worker's remuneration should be included in their holiday pay?

We have known for a while that commission should be included (*Locke v British Gas*) and that compulsory

overtime should also be included (Bear Scotland). However, there has been ongoing challenge in respect of other types of payments and allowances.

Of particular note for local government is the case of *Wood and others v Hertel (UK) Ltd and another*. Employees received daily travel allowances and pay for travelling to sites more than eight miles away. Part of the payment was reimbursement for expenses and part was taxable remuneration. The Employment Appeal Tribunal held that the taxable element formed part of the employees' normal pay for the purposes of calculating holiday pay.

We have also recently had a tribunal decision in the case of *Brettle v Dudley Metropolitan Borough Council* dealing with voluntary overtime. Voluntary overtime is where there is no obligation on the employer to offer overtime and no obligation on the employee to undertake overtime if offered. The tribunal held that where this overtime was regularly worked, it should be included in a holiday pay calculation. Please note, this is only a first instance decision and may be appealed.

“ The tribunal held that where this overtime was regularly worked, it should be included in a holiday pay calculation. ”

Remember, these decisions only relate to the less generous 4 weeks' annual leave entitlement required under the European directive and not the additional 1.6 weeks' permitted under the UK legislation.

The decisions in these cases could leave local government employers vulnerable to claims for back pay from employees. Now would be a good time to review the provisions you have in place and take remedial action if necessary.

Introducing the apprenticeship levy - use it or lose it

The government wants to encourage more and better quality apprenticeships with a view to boosting the skills of the workforce and economic productivity.

To this end, from April 2017, government funding of apprenticeships in England will change, with the introduction of the apprenticeship levy.

The key points of the new system include:

- An apprenticeship is formal training where an apprentice works towards achieving an approved standard or framework (with at least 20% of their time spent on 'off-the-job' training) whilst employed. The training is partially funded by the government.
- Under the new scheme, employers will be required to pay an 'apprenticeship levy', whether or not they have any apprentices. The levy is charged at 0.5% of the annual pay bill and is paid to HMRC through the PAYE system. However, all employers are allocated a £15,000 'levy allowance' which is offset against their liability

to pay the levy. This means that only employers with a pay bill of more than £3m each year will actually be required to pay the apprenticeship levy (£3m X 0.5% = £15,000).

- All earnings subject to Class 1 secondary NICs are relevant for the purpose of calculating the 'pay bill'. Earnings include any remuneration or profit coming from the employment (eg. bonuses, commissions, pensions contributions).
- The funds which are collected from each employer will then be available to that employer via a new 'digital apprenticeship service account' to use for apprenticeship training. The funds are only available for 18 months after entering the account, thereafter they are lost to the employer.

Employers who are required to pay the levy might as well make use of the available funds for apprenticeship training, or the net result will be that they pay the levy and don't get anything in return.

Guidance is available on the gov.uk website, with more expected towards the end of the year. In the meantime, the government is still consulting on some aspects of the scheme.

Preparing for publishing gender pay information

Whilst the final regulations are yet to be published, mandatory gender pay gap reporting for large private and public sector employers is expected to be brought into effect by April 2017.

Contents of the gender pay gap report

The draft regulations would require affected employers to publish:

- Overall gender pay gap figures calculated using both the mean and median average hourly pay. The median, which is used by the ONS, is thought to be the best representation of the typical difference between the genders as it is not distorted by the small number of very high earners.
- The numbers of men and women in each of four pay bands (quartiles), based on the employer's overall pay range. This will show how the gender pay gap differs across the organisation, at different levels of seniority.
- Information on the employer's gender bonus gap, that is the difference between men and women's mean bonus pay over a 12 month period.
- The proportion of male and female employees who received a bonus in the same 12 month period.

Employers will have the option to include a narrative explaining any pay gaps and setting out what action they plan to take to close them. The provision of a narrative will be strongly encouraged in the guidance accompanying the regulations, but it will not be mandatory.

Timing and publication

Affected employers must analyse their gender pay gap each April, and publish their gender pay gap report within 12 months. Thereafter, they must produce and publish an annual report. The report must be published on their own website and it must be kept online and publicly available for three years. They must also upload the information to a government website.

Enforcement

The draft regulations do not contain any enforcement provisions or sanctions for non-compliance. However, the government has stated that it will run checks to assess for non-compliance and publish tables, by sector, of employers' reported gender pay gaps. It will also consider the option of publicly identifying those employers who have not complied.

Shared Parental Leave to be extended to grandparents

The Shared Parental Leave regulations have been in place now since April 2015. To recap, Shared Parental Leave (SPL) is a more flexible system of leave that enables both parents to take leave in the first year of a child's life.

Initial studies have suggested that take up of SPL by male employees has been low but obtaining an accurate picture has been challenging.

The government has plans to extend Shared Parental Leave and pay to working grandparents by 2018.

A consultation on this proposal was initially proposed for May 2016 on how to implement its commitment to extend Shared Parental Leave and Pay to working grandparents but this has been delayed due to the EU referendum. When it happens, the consultation is expected to also cover options for streamlining the Shared Parental Leave and Pay system, including simplifying the eligibility requirements and notification system.

Brexit

We now know that Theresa May intends to trigger Article 50 by March 2017. Mrs May has also promised a 'Great Repeal Bill' to remove the European Communities Act 1972 from the statute book and enshrine all existing EU law into British law.

The Great Repeal Bill will end the jurisdiction of the European Court of Justice in the UK. It is thought that it will also enable Parliament to amend and cancel any unwanted legislation although the detail of how this will work is unclear. So, what could this mean for employment law?

The Secretary of State for Exiting the EU, David Davis, has indicated that existing employment law in the UK will not be overhauled.

Writing about ways to make Britain a better place to do business, Mr Davis confirmed that "*Britain has a relatively flexible workforce, and so long as*



the employment law environment stays reasonably stable it should not be a problem for business". Acknowledging the broad range of working people who voted for Brexit, Mr Davis confirmed that he was not in favour of "rewarding them by cutting their rights".

More recently however, the Business Minister Margot James declined to give a direct answer to the question of whether she could "guarantee that all employment protections currently enjoyed by British workers will be maintained post-Brexit", instead stating that "employment protections are an absolute priority for this government".



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She provides support on managing disciplinary, grievance and performance concerns, regularly advises on the employment aspects of corporate transactions and has advised on numerous litigation matters.





3 top tips to stay ahead of key data protection trends

It has been a busy year for anyone looking to stay on top of data protection and privacy law. What are the key risks and developments that public authorities should be keeping in mind going forward?

Keep personal data safe

Information security continues to occupy first place in any sensible list of data protection risks. Fines for Data Protection Act infringements are almost exclusively reserved for information security breaches.

New technology brings new threats and the media is full of stories of organisations which have been the victim of complex cyber-attacks resulting in personal data about their customers or employees being stolen. Organisations are therefore well advised to keep abreast of the latest developments to ensure that their systems are secure.

Whilst there has been a lot of focus on some of the more sophisticated attacks, in our experience most breaches come about as a result of staff failing to get the basics right.

In this regard it is worth remembering that the Data Protection Act requires organisations to have in place both 'technical' and 'organisational' measures to keep personal data safe. In other words compliance is as much about data protection awareness, as it is about having clever technology.

What should you be doing now?

Local authorities should therefore ensure that staff are given training on the information security basics and that this training is backed up with appropriate policies, procedures and written guidance. One of the trends we have seen recently is staff falling victim to 'phishing' emails (ie. where an email is made to appear as if it has come from a trusted source). These are being used to trick staff into

releasing confidential information about individuals and staff should therefore be trained on how to spot such threats.

Ensure staff are given guidance on handling subject access requests

If cyber security remains one of the areas of greatest financial risk then, as any data protection officer will tell you, dealing with subject access requests (SARs) arguably takes up the most time and effort.

“ Disclose too little and you could end up breaching the requester's rights to their information, disclose too much and there is a risk of infringing the rights of third parties. ”

That individuals have a right to request a copy of the information an organisation holds about them remains one of the cornerstones of the Data Protection Act. A request might be made by a member of the public concerned that Council members have been making unprofessional comments about him in emails or a Council employee looking for that 'smoking gun' email to support her constructive dismissal claim.

Most organisations are anxious to ensure that they disclose everything that the requester is entitled to. However, there are a number of exemptions from disclosure and so it is often possible to lawfully withhold information which could be damaging to the local authority if disclosed.

Furthermore, disclosing too much can also result in regulatory action. The Information Commissioner's Office (ICO, the data protection regulator) recently fined a GP surgery in Hertfordshire £40,000 for disclosing too much information when responding to a SAR. The issues faced by this particular GP surgery highlight similarities with what local authorities have to contend with when dealing with SARs.

The surgery, under pressure from the estranged partner of a female patient, released information which should have been withheld. The 62 page bundle that was released included the woman's contact details and information about an older child that the estranged partner was not blood related to. The bundle also included correspondence with social services and child protection reports. In this case, there had been explicit requests from the patient to take particular care to protect her details.

The ICO did not just hold one individual responsible, but identified the lack of proper procedure, guidance and training within the surgery as the real cause.

The ICO explained that the fine would have been greater but for the fact that the partners were personally liable to pay the fine (ie. on the basis that the surgery is a partnership). It would be likely that other organisations (such as companies, charities and public bodies) would have been issued with a much larger fine in the circumstances. Especially as the ICO has the power to fine up to £500,000.

This case demonstrates that, disclosing too little and local authorities could end up breaching the requester's rights to their information, disclose too much and there is a risk of infringing the rights of third parties.

This is a particular problem for local authorities because much of the information they hold will be mixed in the sense that it will be about a number of different individuals. For example, a record of a safeguarding concern might contain personal data about a pupil, mother, father and possibly also members of staff. If the father makes a SAR for the data then the organisation will have to carefully balance the father's right to the personal data against protecting the rights of the pupil, the mother and possibly staff as well.



In the case of the GP surgery, the ICO found that staff had not been given sufficient guidance and supervision. This demonstrates the importance of ensuring that those individuals who deal with these requests are given sufficient training on the issues. This will likely include giving those staff responsible for SARs guidance on how to strike the appropriate balance when dealing with difficult cases (such as the safeguarding example above).

Brexit - get ready for the GDPR now

Much has been written about the possible legal ramifications of Brexit but the position with regards to data protection law is particularly precarious.

This is because the new EU General Data Protection Regulation (GDPR) is due to replace the Data Protection Act in May 2018 but this might not now happen in light of the decision to leave the EU.

Nevertheless, our view is that UK organisations will be caught by the GDPR one way or another. First, the GDPR is due to come into effect before we leave the EU, so it should become law, at least for a while.

In any event, the GDPR might be here to stay as it may well be that compliance with the GDPR will be one of the conditions of the UK continuing to have access to the single market. Even if we leave the single market, then UK organisations which handle data of EU citizens must still comply with the GDPR.

In any event, it seems that regardless of our relationship with the EU post Brexit, there is an inextricable drive towards harmonisation of data protection laws and therefore the UK would be well advised to ensure that its own data protection laws offer equivalent protection to those of the EU.



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Andrew has acted on a number of high profile data protection matters.



Top 3 trends in planning law - how do they affect you?

In this article we review the continued evolution of the planning system over the course of 2016, and consider how the optimism of local government planners will continue to be tested through 2017 as pressure mounts to build new houses.

“It was the best of times, it was the worst of times...”

These opening words of Charles Dickens’ *A Tale of Two Cities* might seem an odd way to start an article on planning law. Perhaps fortunately for Dickens, Veale Wasbrough Vizards’ (then Tweedie & Prideaux’s) most famous legal clerk, the modern approach to town and country planning only took shape around 100 years after he penned these words.

But the sentiment of social contrast between those living in despair and those viewing rapid political change with joy and optimism has become more relevant than ever in this new post-Brexit reality.

Permitted development rights

The UK government has introduced a new statutory instrument which came into force on 6 April 2016 and extends current permitted development rights across England. These rights have been instrumental in maintaining rates of house building since 2010.

Permitted development rights are a national scheme for planning permission which allows certain works and changes of building use to be carried out without the need to apply for planning permission (or with prior approval of the local authority only). Since 2010 there have been regular changes to the rules.

In 2013, the government added a temporary clause into the rules relating to permitted development rights, to run until May 2016, which allowed conversion of office space into residential use subject to an application for prior approval covering aspects such as highways and noise.

What’s changing?

The ‘office-to-resi’ scheme has proved highly popular and has made such an impact on government targets for provision of new housing that under the May 2016 changes this provision has been made permanent.

The other changes include:

- a stipulation that development from office to residential use must be completed within three years from the prior approval date
- allowing residential conversion of premises which have been in light industrial use (the rights will run for an initial 3 year period from 1 October 2017)
- adding launderettes to the types of building which can be converted to residential use under permitted development rights

The new changes still do not permit demolition and rebuilding and therefore this is strictly in relation to refurbishment of existing buildings.

What next?

Overall the most recent round of changes to permitted development rights is intended to give developers greater certainty regarding the viability of re-developing sites. Owners of vacant office space (and after 30 September 2017, light industrial stock) will continue to market property for the purposes of redevelopment using the permitted development rights, and local government planners should expect the boom in these applications to continue through 2017.

Case law – disputes over plans for housing delivery continue

Housing policy - interpreting the National Planning Policy Framework

A controversial Court of Appeal decision setting out the meaning of 'relevant policies for the supply of housing' in the government's National Planning Policy Framework (NPPF) is set to be appealed before the Supreme Court in 2017.

Suffolk Coastal District Council and Cheshire East Council are to challenge the Court of Appeal's decision in *Suffolk Coastal District Council v Hopkins Homes Ltd & another*. This will be an important appeal not only because of the clarification needed on housing policy (in the context of a continuing housing shortage) but also because the NPPF has not been subject to Supreme Court scrutiny since it was introduced in 2012.

The Court of Appeal previously considered Paragraph 49 of the NPPF which states that "*relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites*". This has been widely interpreted to mean that the presumption in favour of granting permission for sustainable development takes over, even if relevant housing policies indicate that permission should not be granted.

Clearly the question which follows is: what is a relevant policy for the supply of housing? The Court of Appeal opted for a wide interpretation, covering policies which promote supply of housing and those which aim to restrict it, such as policies to protect the Green Belt which although not specific to housing do have an impact.

The Court of Appeal's wide interpretation of the NPPF wording has been welcomed by developers who have seen it as an opportunity for material policy considerations, which might otherwise be a barrier to development, to fall away for being out-of-date. The Supreme Court's view on this will be keenly awaited.

Green Belt - what constitutes inappropriate development?

The 2016 case of *R (Lee Valley Regional Park Authority) v Epping Forest District Council* dealt with the issue of how the construction of agricultural buildings in the Green Belt sits with the government's wider Green Belt policies.

“ Construction of agricultural buildings will not in itself be inappropriate development, regardless of the harm it might cause to the Green Belt. ”

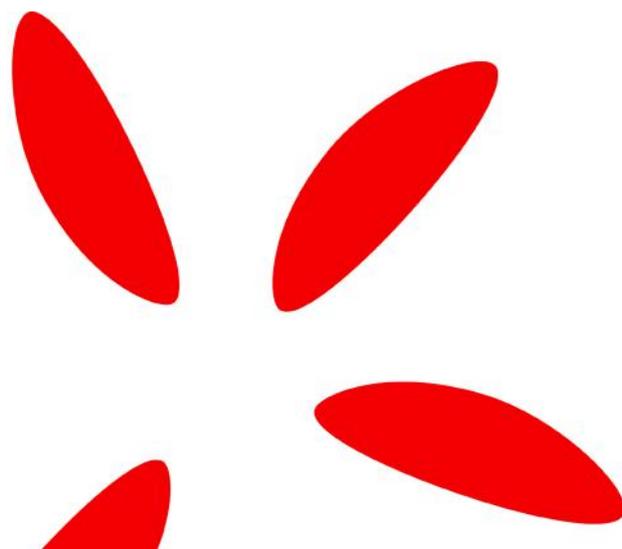
The case involved a planning application for the construction of a 92,000 square metre glasshouse extension on a site in the Green Belt and the consent by Epping Forest District Council. At the heart of the case was the question of what constitutes 'inappropriate development' in the Green Belt, the answer to which is of particular interest to local planning authorities and rural landowners alike.

What does the law say?

The NPPF's national policies on 'Protecting Green Belt land' include a recognition that the essential characteristics of Green Belts are their openness and permanence. Applications for 'inappropriate development' in the Green Belt should only be approved in very exceptional circumstances (paragraph 87) and substantial weight should be given to any harm to the Green Belt when considering applications (paragraph 88).

Aside from this strong protection of the Green Belt, the NPPF provides some exceptions to inappropriate development when it comes to new buildings. These include:

- buildings for agricultural use
- extensions to existing buildings provided it is not disproportionate to the size of the existing building



The court's decision

The park authority argued against the council's decision on several grounds, including that the NPPF policies giving protection to the Green Belt were relevant to decision-making for agricultural buildings, even though they are not classed as inappropriate development. It argued that harm to openness of the Green Belt, when considered under paragraph 88, is stated to be relevant when considering 'any planning application' including those not classed as inappropriate.

The Court of Appeal disagreed and dismissed the park authority's appeal. Reference to 'any planning application' in paragraph 88 had to be read in light of the exceptions in paragraph 89. Therefore construction of agricultural buildings will not in itself be inappropriate development, regardless of the harm it might cause to the Green Belt.

The court also considered it relevant that other exceptions to inappropriate development in the Green Belt, such as facilities for outdoor recreation and those listed in paragraph 90, are specifically caveated in the NPPF as being not inappropriate "provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt".

If the government had intended construction of agricultural buildings to be subject to the same caveats it would have been made clear in the NPPF.

Best practice

The case is important for local authorities in both their plan making and decision taking functions. As more Green Belt applications come forward, with the possibility of court challenges, it will be interesting to see how many local plans are found to be inconsistent with this interpretation of NPPF Green Belt policy.

Local authorities would be advised at the very least to consider the implications of this case in any local plan review.

Affordable housing

In the case of *R (on the application of West Berkshire DC and Reading BC) v Secretary of State for Communities and Local Government*, the councils had sought to challenge the government's use of a Written Ministerial Statement (WMS) to alter affordable housing policy, exempting sites of 10 homes or fewer from contributions, on 28 November 2014. The WMS also brought about changes to national planning guidance.

The High Court found in favour of the councils but, on 11 May 2016, the Court of Appeal reversed the High Court's decision.

Following the Court of Appeal decision the policy is now reinstated, as are the amendments to national planning guidance. This means that sites of 10 units or fewer may be exempt from affordable housing contributions, provided the combined gross floorspace is no more than 1000sqm. Furthermore, in some rural areas including National Parks and Areas of Outstanding National Beauty, the threshold is lowered to five homes (with the same floorspace caveat).



The Housing and Planning Act 2016 - what changes for housing development?

The early part of 2016 saw the House of Commons and House of Lords embroiled in a game of 'ping-pong' with the Housing and Planning Bill, until finally its drafting was agreed and the Bill received Royal Assent (and became an Act) on 12 May 2016.

The Act is wide-ranging so here we focus on the changes it introduces in relation to housing development, and those addressing the planning system as a whole.

Starter Homes

Part 1 of the Act has been eagerly awaited as it addresses the provision of new homes in England. It provides the legislative foundations for 'Starter Homes' which are to be made available only to first-time buyers who must be between 23 and 40 years old, with a planned 200,000 to be built by 2020. They are to be sold at 20% below market value and for no more than £250,000 outside London (£450,000 in Greater London).

Starter Homes will be 'affordable housing' under the NPPF, meaning they will count towards a local authority's affordable housing targets and, from the perspective of developers, their obligations to provide or fund affordable housing under section 106 agreements.

Questions do still remain regarding Starter Homes, and the detail will be introduced by further regulations. For instance, how market prices will be assessed, and how onward sales will be dealt with – the discount period will be the first five years (during which the house cannot be sold) but a tapered approach may be introduced to have a reducing discount period of up to eight years if sold to another qualifying purchaser.

At the time of writing, the new Planning Minister, Gavin Barwell, used his first major speech to water down these new Starter Homes provisions. He gave a strong indication that the 200,000 Starter Homes

target should instead be comprised of a range of tenures. This apparent shift towards renewed support for the rental sector will be keenly monitored as Theresa May's government seeks to implement its own planning vision throughout 2017.

Permission in principle

The new Act introduces the concept of 'permission in principle' (PiP). This is again a measure to boost housing development, and allows 'housing-led development' to be given special planning treatment. Developers can gain 'in principle' planning approval for specific parts of their application prior to sorting the full technical approval, giving them greater investment certainty.

Applications for PiP can be made to the local planning authority, the Secretary of State in some instances, or through 'qualifying documents'. These are documents including the local development plan but applications can also be brought under a 'brownfield register' of land suitable for housing, also introduced by the Act (though pending regulations as to the detail).

How will it impact local authorities?

The practical impacts of the Housing and Planning Act will continue to emerge throughout 2017, but it is clear that it will increasingly go to the heart of local plan making.

Local planning authorities which fail to produce updated local plans were already vulnerable to central government intervention, and the new Act increases this pressure. Now the Secretary of State can give directions to the local planning authority to prepare or revise the document, submit it for examination, and consider its adoption.

Local government planners should not underestimate the government's willingness to use these powers – on 26 May 2016, the day the new powers came into force, they were used to prevent the adoption of the Birmingham City Local Plan.



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9 practical steps to successfully manage your property development

Making effective use of assets is a key obligation for local authorities. The trick is ensuring how to deliver best value in development projects, especially where local authorities are taking the lead with other bodies. It's not just at a macro level where this is important but individual projects too.

We have all seen the wow factor that accompanies a brand new building: staff enjoy the environment created by a state of the art facility, accolades can be won and there is generally the positive well-being effects that come from having a modern, well-equipped and designed workplace.

However, we all know that basking in the after-glow of a successful project has often come at a price in terms of long hours, massive commitment on behalf of staff and the odd testing time along the way. There are no easy answers but there are some things to do or, more importantly, not to do, in order to make your life easier. Here is our guide based on many years' experience, some pain, and plenty of happy days when it all goes right.

1. Plan ahead

Complex projects contain many different strands and even the best managed projects can go awry. The best place to start is at the end: when do you want to open the new facility?

You need to work backwards from an intended opening and then good project management will help you clarify whether you have allowed enough time to secure the relevant consents, build out and fit out in time for your intended opening. More

complex arrangements, where you may be selling premises and re-investing the sale proceeds into paying for a new build can be tricky. A delay can have a massive impact on morale, but also on cash-flow, so a project needs constant checking for affordability and timing. The key is to check and build in room for manoeuvre with the other side where you can.

2. Check what you own

This is basic but fundamental and it is easy to slip up. Check the legal boundaries - do you own absolutely everything? What about access rights?

We have seen instances where the building is within a red line but a canopy overhanging the main entrance fell outside the legal boundary or another where a new wider development scheme meant a client needed legal rights of access across land it didn't actually own nor, despite raising the question, had it been thought fit to ask for rights of pedestrian access at the time of the legal transfer.

It is also vital to make sure that the boundary for the development as used within the planning application precisely matches the legal title. These issues can usually be fixed but invariably cause delay and cost money.

3. Get buy in

This works internally across the governance, strategy and financial parameters within which you operate. Make sure you factor in times for executory approvals, and delegated authority outside those meetings. Reports to Members will invariably address the fundamentals behind the rationale for the development. A well-written Report will explain the background, provide the options that have been considered (and in an even-handed way discounted), assess the transaction for best value, as well as ensuring the local authority's statutory duties are complied with. The key is to ensure that the authority's decision-making processes are reasonable and not susceptible to judicial review.

“ It is practically often difficult to unpick commercial deals if the procurement analysis changes. ”

It also means getting the support externally: does the finance stack up and deliver best value? Is a development likely to go through planning smoothly? What about engaging with constituents and making sure you garner public support? An early conversation with advisers will help identify any likely pressure points.

4. Consider what (regulatory) consent you will need

Early consideration should be given to the nature of the development and whether it is a land deal or subject to OJEU rules and regulations. If the local authority is developing its own premises, then OJEU will invariably feature if you wish to incur in excess of £4.1m of works where the local authority is exercising a decisive influence on the type or design of the work.

Care always has to be taken if a project is being developed off-market. The question of whether OJEU applies will depend not only on the sums and design input the local authority wishes to have, but also on whether a project is actually a land deal and can be described and documented as such.

The courts will always look behind the wording so care needs to be taken, especially if you are engaging in any sort of joint venture, because it is practically often difficult to unpick commercial deals if the procurement analysis changes.

Planning Building Regulations Listed Building consents are the principal regulatory issues to address in relation to the development itself. Less obvious ones might be legally driven around your title: development near a boundary might mean



you need party wall consent from your neighbour (remember foundations, too) and in a built up area could mean rights to light need checking.

A failure to address these early on can be expensive in terms of time and money, just when you need to be saving both.

5. Make sure your project is free from challenge

Part of this turns on the fundamental rationale for the development and recording this in a cogent and clear way, making sure the local authority's own rules and procedures are followed correctly.

Part of this also turns on securing planning permission, that has been properly granted (a key point where the local authority may well be developer/land owner and also the LPA) and is immune from challenge.

It might also be, however, making sure that you have procured a contractor and professional team in a legally compliant way, in accordance with OJEU, or at least understood the nature of risks. Greyer areas exist where a developer is offering to sell land to a local authority but with the benefit of a new building... and the local authority is taking an interest in the specification and fit out. Beware!

6. Expect the (un)expected

Quite often things will come in from left field. In pretty much all major developments, something will happen which might impact on funding, timing, need for consent or sometimes all three.

It might be a ribbon of shifting sand which was undiscovered when a contractor was doing trial boreholes which then meant piling foundations (luckily a fixed fee construction contract had been entered into) or the need to cap off redundant service media (when buying a brownfield site, be sure to make a seller practically responsible or allow a deduction from the purchase price).

Whatever the situation, the moral is to allow for a sufficient contingency because something will invariably happen, you can expect it.

7. Keep on top of the detail, but don't lose sight of the bigger picture

The ultimate aim should be to develop out new buildings on time and on budget. Good advisers will help you get there and should advise on the risks of doing or not doing things in a certain way. We have plenty of experience of advising senior managers on a host of risks but the aim should be to make sure the project happens. The law should be seen as an aid to project delivery not an end in itself. Grand-standing by your professional advisers is to be avoided at all costs.

8. Have a good team and be organised, but also flexible

You will have an experienced team within your organisation, a handful of whom will be involved in a major project, but they also have a day job to do. This is where experienced advisers and good project planning comes in, internally but also feeding off what your advisers bring in.

An experienced development lawyer should work with your project managers to ensure the legal documentation is negotiated and settled in a timely way, working within the time frames for planning, funding and overall deliverability. Yes, the (un) expected might happen but hopefully you have allowed sufficient contingency into the programme. We always recommend an early meeting to tease out likely issues.



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We also recommend having regular project team catch-ups (sometimes even daily at times of great activity) of advisers and the client with identifying key action points and tasking individuals to make things happen. In that way, you can adapt quickly and with little fuss.

9. Did we mention timing?

Be clear about timing from the outset and what are the likely matters that could send the project awry? Have all relevant time frames been built in or insured against? A common issue can be the time it takes from obtaining a resolution to grant planning and then securing planning contingent on completing a s106 agreement. The grant of planning will follow completion of the s106. It is only then that period within which a third party can challenge the grant of planning starts to run. You have a choice of either waiting for those 6 weeks to expire or obtaining insurance against the risk of challenge. Either way there is a cost - of time or money.

Embarking on a major project is exciting if a little daunting. There are plenty of traps for the unwary. With good planning, good organisation and practical and experienced advisers around you, you can deliver a major development on time and on budget.

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Clive provides specialist advice on property development, planning and commercial property for a wide range of clients including universities, colleges, local authorities and landed estates.



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