

CITY OF LONDON LAW SOCIETY

PLANNING AND ENVIRONMENTAL LAW COMMITTEE

Minutes of meeting held at 5.00 pm on Thursday 3 December 2015, at the offices of Stephenson Harwood, 1 Finsbury Circus, London EC2M 7SH

1 ATTENDANCES, APOLOGIES FOR ABSENCE AND NOTICE OF SUBSTITUTIONS

Members

Stephen Webb	King & Wood Mallesons LLP (Chairman)
John Bowman	Fieldfisher
Sebastian Charles	K & L Gates LLP
Ashley Damiral	CMS Cameron McKenna LLP
Claire Fallows	Charles Russell Speechlys LLP
Duncan Field	Norton Rose Fulbright LLP
Valerie Fogelman	Stevens and Bolton LLP
Ian Ginby	Clyde & Co LLP
Kevin Hart	City of London Law Society
Richard Keczkas	Berwin Leighton Paisner LLP
Romola Parish	Travers Smith LLP
Ben Stansfield	Stephenson Harwood
Lucy Thomas	Ashurst LLP
Matthew White	Herbert Smith Freehills

Substitutes and other Attendees

Sarah Bischoff	Norton Rose Fulbright LLP
Vicky Du Croz	Hogan Lovells
Elizabeth Hardacre	Clifford Chance LLP
Lorrae Hendry	Stephenson Harwood
Sophie Flax	Blake Morgan LLP

Apologies for Absence

Paul Davies	Latham and Watkins LLP (Vice Chairman)
Helen Hutton	Charles Russell Speechlys LLP (Secretary)
Jacqueline Backhaus	Trowers and Hamblins LLP
Douglas Bryden	Travers Smith
Jane Burgess	K & L Gates
Raminta Dereskeviciute	K & L Gates
Marnix Elsenaar	Addleshaw Goddard
Claire Fallows	Charles Russell Speechlys LLP
Claire Fielding	Wragge Lawrence Graham & Co LLP

Michael Gallimore	Hogan Lovells
Robin Holmes	Farrer & Co
Nigel Howorth	Clifford Chance
Rupert Jones	Weil Gotshal & Manges
Tim Pugh	Berwin Leighton Paisner LLP
Joshua Risso-Gill	Nabarro
Pat Thomas	Pat Thomas Planning

2 MINUTES OF LAST MEETING

Val said that she would be happy to step down as vice-chair or to share the position of vice-chair position with Paul, at the prerogative of Paul or the Chairman.

The minutes from the last meeting were approved.

3 MATTERS ARISING

None.

4 CHAIRMAN'S REPORT

- 4.1 The Chairman reported that Greg Jones QC has been appointed by the Irish Government to chair an independent review of the Irish Planning Board and this is due to report by the end of 2015. Details had been circulated amongst the group for their input however it was felt to be outside of the Committee's remit.
- 4.2 The Chairman had attended a recent National Law Society Planning and Environment Law Committee meeting in Wales. It was an interesting session and an invitation may be extended to someone in the Welsh Government to come and give a talk before the Committee.

5 UPDATE ON THE ROLE OF THE COMMITTEE

- a) Confirmation of terms of reference
- 5.1 Following the discussions at the previous meeting, in September, the Committee reviewed the terms of reference of the Committee going forward and these were agreed as:
- “to keep under review and promote improvements in planning and environmental law, policy, practice and procedures, with particular regard to the legal work carried out by solicitors both a) at law firms and b) in the public sector, who are located in the City of London”.***
- b) Environmental Committee arrangements
- 5.2 The environmental sub-committee was discussed. Invitations were sent out and there has been a 90% uptake. The first meeting will take place on 21 January 2016.

6 PLANNING MATTERS

a) Housing and Planning Bill – update and submission

6.1 Duncan Field and Sarah Bischoff gave an update on the report produced by a sub-committee tasked with reviewing the Housing and Planning Bill ("the Bill").

The following aspects of the Bill were discussed:

- The starter homes provisions: it is not clear how this would fit with authorities' obligation to do an objective assessment of housing need;
- The Secretary of State's to force through Local Plan designation: although there are obvious tension with the Localism agenda, the Government's clear drive to ensure that local plans are brought forward was welcomed;
- The permission in principle ("PiP") concept which together with at technical details consent the PiP regime would grant full planning permission for development of land: concerns were raised regarding how local planning authorities will resource the bringing forward of allocations and how duties under the Environmental Impact Assessment Regulations would be satisfied in respect of PiP;
- The Secretary of State's power to require authorities to keep register of particular kinds of land: the Committee's view was that authorities should be given discretion to exclude sites from the register;
- Changes to the nationally significant infrastructure project ("NSIP") so that housing which is either "associated" with an NSIP or "on the same site as, or next to or close to" an NSIP to be included in an application for development consent under the Planning Act 2008: this was welcomed, but the Government should clarify the legal and policy framework and provide examples of the type of housing development which may qualify, and this should be focused on the functional relationship between housing and the NSIP, rather than a set geographical distance;
- Changes to compulsory purchase orders ("CPO") powers, timetable and process including the proposal of a one year extension of the time limit for CPOs where a challenge is made to the validity of the order: the Committee's view was that this extension should run for the entire time it takes to deal with the challenge, and the Secretary of State should also be subject to a specific timetable for the avoidance of delays. The proposed power for courts to quash the decision to confirm a CPO (rather than having to quash the entire CPO itself) was welcomed.

6.2 The Committee's comments on the Bill were submitted to the Public Bill Committee on 25 November 2015.

6.3 Matthew White suggested that further comments should be submitted in relation to the new Clause 137, which replaces section 237 of the Town and Country Planning

Act 1990 to provide a new power to override easements and other rights when undertaking development. As drafted it is not clear that the new power will entitle developers who become successors in title to the specified authority to take free of the easements and other rights. Express provisions should be included in clause 137 to ensure any easements and other rights remain unenforceable against the original developer and any successors in title or persons who derive title from the developer.

- 6.4 Richard Keczkcs raised a concern that if the Secretary of State has the power to mandate when land goes on the brownfield register this could affect local plans in various stages.
- 6.5 The Chairman queried how the Government subsidy for starter homes would be administered in practice and how the Government will ensure this reaches developers who will be providing starter homes.
- 6.6 Sebastian Charles queried how the detail in relation to the starter homes would work, and in particular which development it would apply to, the level of provision that would be required, and whether off-site provision would be acceptable.
- 6.7 The Chairman asked whether there was an appetite to send further comments in to the public bill committee and there was a general feeling that there was. Matthew and Sebastian will send their comments to Duncan Field, so that further comments can be submitted to the public bill committee.

b) Review of the Community Infrastructure Levy

- 6.8 The Government has set up a panel to review the Community Infrastructure Levy ("CIL") and a consultation paper has been released entitled "Community Infrastructure Levy Review Panel Questionnaire". A sub-group would be meeting at 10am on 8 December 2015 to put together the Committees submissions.
- 6.9 Matthew provided a quick summary of the questionnaire. The focus of the questionnaire is the extent to which CIL does or can provide an effective mechanism for funding infrastructure, and to recommend changes that would improve its operation. The closing date for comments is 15 January 2016.
- 6.10 Matthew stated that one issue the Committee should cover is that where infrastructure improvements are required to mitigate the impact of development, and the infrastructure is included on the local planning authority's Regulation 123 List, there is no mechanism under CIL to secure delivery at the time needed for the development or require local planning authorities to commit to guaranteed delivery of the infrastructure to be funded by CIL (as there would have been under the S106 regime). Therefore where infrastructure is required to be delivered by a certain time, mechanisms are being used by developers outside the CIL and section 106 systems to secure this, for example in London under section 156 and Schedule 11 to the Greater London Authority Act 1999.
- 6.11 This can mean that the developer has to commit to the funding of the infrastructure twice (under the CIL regime and through other means to ensure it is delivered at the appropriate time) which creates an additional financial burden on developers. In

addition, using novel provisions present an additional risk to the developer of legal challenge as such agreements have not been tested by the courts.

- 6.12 Duncan said one problem he often sees is poorly drafted Regulation 123 Lists, which such broad categories (e.g. "education" or "transport") so that no development can be secured through S106 agreements due to the prohibition in Regulation 123. There was some discussion as to whether the CIL regime is flexible enough to deal with delivery of infrastructure at all.
- 6.13 There was a general feeling that the regime is not satisfactory and is not an effective mechanism for funding infrastructure, and bringing forward development. A discussion was had as to what evidence could be provided to show that the CIL regime inhibits deliverability of projects. There was also a discussion as to how radical the committee could be in any response – would it be possible to propose that the CIL regime should be scrapped altogether?
- 6.14 Richard mentioned that if we are to push S106 back into focus we would need to touch on the Governments proposals for mediation where there are delays.
- 6.15 The Chairman said it would be possible to be radical in our response but then suggest ways in which the CIL regime could be improved if it is to be kept.

7 RECENT/UPCOMING ENVIRONMENTAL MATTERS

7.1 Val Fogelman said that Paul Davies sends his apologies as he is at the UN Climate Change Conference in Paris.

a) MOJ Consultation on Costs Protection for Environmental Claims

7.2 Val provided a quick summary of the MOJ Consultation of Costs Protection for Environmental Claims and the matters which the Committee would be dealing with in its response to the consultation:

- The MOJ have proposed a revised definition of an Aarhus claim so that the Environmental Costs Protection Regime will apply to all cases (which fall within the scope of the Aarhus Convention) whether brought by way of a judicial review or a review under statute. Currently it is for a court to determine whether or not the regime applies. Although the Committee generally supports this in principle, there is a lack of clarity around the revised definition which currently does not touch on the subject matter of a claim. The court's power to determine whether the regime applies is supported.
- The MOJ has proposed changes to eligibility so that so that only a claimant who is a 'member of the public' is entitled to costs protection, to bring the regime in line with the Aarhus Convention. The Committee is concerned that proposed changes might be construed so as not to include organisations and companies and that this may have an effect for example on NGO's and other organisations in bringing claims forward.

- There was also a question around the levels of costs protection available and financial transparency. The regime currently requires that the costs of the proceedings must not exceed the financial resources of the claimant and must not appear 'objectively unreasonable'. It currently contains no subjective element, capping the amount for individual. The MOJ proposes a 'hybrid' model whereby the costs caps would be set at a default level, but any party could make an application for the court to vary their own – or another party's – costs cap. Whilst this 'hybrid' model was welcomed by the Committee, there is an issue around transparency as claimants are not currently required to file at court and serve on the defendant a schedule of their financial resources at the commencement of proceedings, meaning parties who do not deserve a protective costs order may still obtain one. The Committee's view is that a claimant should be required to show a schedule of their financial resources to the court where they are seeking to vary the costs cap, and that such an application should be subject to a test of reasonableness.

7.3 Duncan said that in his experience all planning judicial reviews already claim Aarhus protection.

7.4 Ben Stansfield and Val are currently drafting the Committee's response and will submit this to the MOJ shortly.

b) Other environmental issues

7.5 Sebastian said that there was an Environment Agency consultation on onshore oil and gas, and that the guidance note is worth reading.

7.6 The Chairman mentioned that there is a DEFRA review of local air quality guidance and a consultation which runs until 21 January 2016. He asked whether there was any appetite to put together a response to this consultation, and in light of resourcing issues of the Committee there was a general feeling that there was not sufficient capacity to do so at present.

7.7 Duncan said he would circulate an interesting opinion by Robert McCracken QC, instructed by Clean Air London, in which he was instructed to clarify the extent to which planning decisions should take into account breaches, or potential breaches, of air pollution limits.

7.8 The opinion states that local planning authorities are under a duty to consider, when taking planning decision, breaches of air pollution limits and that there is a requirement to improve air quality. In addition it states that an assessment of air quality impacts should include a review of the monitoring points across London and not just a single monitoring point.

7.9 The opinion has an impact on proposals for Heathrow expansion as the assessment was only carried out using a single monitoring point.

7.10 The Chairman said that there are two additional consultations to bring to the attention of the Committee:

- The National Infrastructure Commission has put out a call for evidence on the future of energy – the closing date is 8 January 2016.
- The Government has produced a technical discussion document regarding extending mandatory licensing of houses in multiple occupation - the closing date for any comments is the 18 December 2015.

7.11 The Committee was not minded to put together submissions in response to these consultations.

8 ANY OTHER BUSINESS

None.

9 DATE OF NEXT MEETING

The date of the next Meeting was agreed as 5pm on 18 February 2016 at the offices of Clyde and Co.

Prepared by Sophie Flax on behalf of Helen Hutton

Hon Secretary