

Legal developments

The first of a regular series on legal developments

A question frequently asked by English Heritage staff and local authority officers alike is ‘what is the status of English Heritage policy?’ My answer and that of my colleagues (to date without much in the way of evidence to back us up) has been that policies, such as, for example, the policy on Enabling Development, are material considerations which must be taken into account in relevant cases.

Welcome judicial support for that position came in June this year from no lesser an authority than the Court of Appeal (Lord Justices Pill, Potter and Judge – yes there really is a Lord Justice Judge!). In **R (on the application of Young) v Oxford City Council** (CA 27 June 2002) the Court of Appeal was faced with an appeal from a decision in the High Court (Ouseley J) to uphold the grant of planning permission for a development at Hill Top House, a Grade II listed building near Oxford. The appeal was on the ground that in granting permission Oxford City Council had failed to have regard to a material consideration – namely the English Heritage policy document *Enabling Development and the Conservation of Heritage Assets*.

The development at Hill Top House was the classic case of dilapidated large house in grounds in need of restoration. The developer claimed that in order to generate sufficient return to enable these works to be carried out he needed to build a terrace of five mews houses near the building.

It was common ground between the parties that English Heritage policy was capable of being a material consideration and that it had not, as a fact, been considered by the planning committee in granting permission. What was not clear was whether the planning committee had granted permission on the basis that the proposed mews houses were acceptable in their own right (in which case English Heritage enabling development policy should not have been applied) or only because the benefit to be derived from the restoration of the listed house outweighed the harm caused by the building of the mews houses (in which case it should).

Evidence was produced that had not been available in the High Court in the form of statements from Councillors who had been present at the meeting saying that they were clear that it was only the prospect of repair to Hill Top House that led the committee to grant permission. They would not have granted permission for the mews houses otherwise.

The Court of Appeal unanimously held that there is a two-stage decision-making process in such case – and that the reasoning should be clearly recorded in the minutes. First the decision-maker should consider whether the additional development proposed is acceptable in its own right – that it accords with Development Plan policy and does no harm to interests of acknowledged importance (the setting of the building if it is listed and so forth). If it is

acceptable, it is not enabling development and permission should, of course, be granted. If the development is not acceptable in its own right, the decision-maker should go on to consider, in accordance with English Heritage policy, whether the benefits in restoring the building outweigh the harm caused by the enabling development. Oxford had not gone on to the second stage and therefore the permission was quashed.

The message to local planning authorities is clear: ignore relevant English Heritage policy at your peril. You risk your decisions being quashed.

The other issue considered in the **Oxford** case will also be of interest to readers: promptness in bringing judicial review proceedings. The Court’s rules on bringing judicial review proceedings state that an application for judicial review must be brought ‘promptly and in any event within three months’ of the decision being challenged. The problem arises when there is a gap between the decision being taken and the permission issued – for example because there is a s.106 Agreement to be negotiated. Potential challengers have until recently been faced with a dilemma. Should they go to the not inconsiderable expense of bringing judicial review proceedings within three months of the decision when the development might never receive permission because negotiations break down or the development might change in the course of negotiations and go back to Committee? (In the **Oxford** case, proceedings had been brought within three months of the issue of the permission but more than three months from the decision to grant.)

Shortly before the **Oxford** decision the House of Lords moved to clarify all in their judgement in **R (on the application of Burkett) v Hammersmith and Fulham** [2002] 1 WLR 1593. Their Lordships decided that the rule should be that proceedings for a judicial review in planning cases should be brought promptly and in any event within three months of the issue of permission. The House of Lords also rejected the view that has grown up in recent years in lower courts that the time limit in planning cases is six weeks (in line with the time limit for a challenge under s.288 or 289 of the Town and Country Planning Act 1990). Their Lordships were very clear that the relevant rule says three months, therefore three months it is. This appears to me to be a sensible and pragmatic approach. At least now everyone involved – developers, decision-makers, objectors and not least those who have to advise on these issues – knows where they stand.

This is planned to be the first in a regular series of articles on legal developments. Ideas for future topics would be welcomed. □

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Enabling Development and the Conservation of Heritage Assets (Product Code 50535) may be obtained free of charge from: English Heritage, Customer Services Department, PO Box 569, Swindon, Wiltshire SN2 2YP; customers@english-heritage.org.uk