

Brexit – what next for Planning?

Following the UK's vote to leave the EU on 23 June, we have been considering the possible implications for planning law and practice.

The structure of town & country planning is largely a UK domestic matter except in relation to EU environmental protection legislation. While we believe that the UK might decide to reduce environmental protection in certain areas, we also expect that the leave vote will affect planning more broadly in a variety of ways. A number of these may be for the benefit of the real estate development industry. This briefing sets out our top ten predictions for potential impacts of the vote on planning, both immediate and in the longer term.

Leaving the EU and choice of model

For the immediate future the UK is still an EU member subject to the same rights and obligations. This will not change until actual departure, which may not be for some years. The UK will have to decide how and when to leave the EU. Any regulatory change is, in any event, likely to be gradual. Outside of the EU sphere, it remains open for the Government to drive through changes to domestic planning law which can be achieved more quickly.

The extent of possible change to environmental protection legislation will depend largely upon the type of model negotiated to replace EU membership. If the Norwegian model of EEA membership is chosen, the UK will still need to comply with most EU environmental law including project-related and strategic environmental assessment. The political problems associated with adopting the Norwegian model have been well publicised over the past days and this briefing assumes that the UK would not choose that model. Another model such as the Canadian model involving some form of free trade agreement with the EU would enable much greater potential for moving away from EU legislation.

A further consideration for London must be the Mayor's separate call for further devolution of powers to London in a number of areas including planning, housing and transport.

Top Ten Predictions for Impacts on the Planning Regime

1. Tension in the Provision of Housing

Despite the likelihood of economic slowdown, we think that there will continue to be high demand for delivery of low(er) cost housing. Two pressures are likely to play against this demand: the political uncertainty is likely to have an effect – or at a minimum create a pause - on real estate development investment. Secondly, schemes that were viable before the leave vote may no longer be viable based on a post-Brexit valuation. Developers may have an opportunity to put pressure on Government to introduce new powers to modify Section 106 agreement obligations in relation to affordable housing (under the recent Housing and Planning Act 2016), only months after the Government repealed the appeal mechanism for unviable affordable housing obligations in Section 106BA of the Town and Country Planning Act 1990.

2. Revision of Development Schemes

Uncertainty was already stalking the residential development market, particularly in London. The additional uncertainty caused by the leave vote, and the likely pause on investment and funding, will inevitably delay some schemes being brought forward. It is also likely to lead to a number of developers looking at their schemes and the proposed mix of uses and

considering viability. There will be a number of existing permissions and Section 106 packages that will be revisited. Many of these will have been consented in a pre-Community Infrastructure Levy (CIL) world and will now have to contend with the interface between CIL and Section 106 agreements.

3. Planning Permission and Environmental Impact Assessment Reform

The Government has limited room for manoeuvre on EIA given the various international commitments which expect some form of EIA to be undertaken in a development context. The UK has traditionally gold-plated implementation of the EIA directives, but was opposed to some aspects of the 2014 EIA Directive which aimed principally to level the playing field on the standard of EIA among Member States. It is questionable whether the Government will now implement the 2014 EIA Directive (which it is obliged to do) by May 2017. Clarity is needed on this as soon as possible since many larger projects are likely to have scoped their EIA requirements in anticipation of the new Directive being transposed. Looking beyond current EIA rules and the 2014 Directive, there is some scope for the Government to reduce the number of cases in which EIA is required e.g. by further increasing development size thresholds. More dramatic changes could involve a move back to *bare* outline planning permissions (i.e. without having to establish the overall dimensions of the development, the so-called "Rochdale envelope"), and perhaps a return to once-and-for-all EIA before grant of planning permission.

4. Habitats Regulation Assessment Reform

It is at least possible that the UK will seek to roll back some of the protections provided by the Habitats and Birds Directives. In particular, the need to demonstrate an IROPI¹ case in the event of potential adverse impacts on the integrity of relevant European protected sites can be very challenging for developers and can require decision-makers to decline to grant permission. However, there would be some limits on the ability to change these areas given existing international obligations.

5. CPO and Human Rights

It seems likely that there will be little change to requirements to demonstrate a public interest case (balanced against effects on property rights) in order to make a case for CPO. Before the referendum, the Government's plans to repeal the Human Rights Act had already been watered down at the time of the Queen's speech by a confirmation that the new Bill of Rights would be based on the European Convention on Human Rights (which is implemented by the Human Rights Act). While the Government sought to withdraw from the Convention, Boris Johnson in fact took a different view during the referendum campaign, stating that the UK should remain a party to the ECHR. Irrespective of the type of document we end up with, it seems unlikely that the principles of rights to property, or to private and family life, would be dramatically changed.

6. Access to Justice and Freedom of Information

The question over the UK's direction of travel arises in a number of areas currently subject to EU law. These include freedom of environmental information and access to justice requirements in environmental litigation (e.g. costs protection orders) in the development context. Are these checks and balances likely to remain unchanged? While covered by EU law, these protections derive from the international Aarhus Convention², and withdrawal from Aarhus would be needed to make any real changes to these areas. We have not seen suggestions that the UK would make such a withdrawal, although future interpretation of the rules, which has until now mainly been driven by EU case law, is likely to change.

7. Are Major Infrastructure Projects at Risk?

Taking two obvious examples:

- **Crossrail 2:** The vote to leave has been characterised by some as a vote against a London-centric Britain. If this translates into a challenge to funding priorities, it seems likely that the justification for proceeding with Crossrail 2 will

¹ Imperative Reasons of Overriding Public Interest

² The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) (1998)

become more difficult. The UK Treasury's £80m budget to progress Crossrail 2 could well be at risk now, although no emergency budget has been delivered. In any event the timetable for Crossrail 2 is likely to be challenging if significant private sector and development contributions are less available than for Crossrail 1. However, the need to support the economy and maintain London as a world class financial and business city may ultimately push Government to prioritise the scheme.

- *Airport Expansion:* Would a new airport out in the Thames estuary be back on the agenda if Boris Johnson becomes Prime Minister? The press is reporting that a senior minister has stated that a third runway at Heathrow looks to be "dead in the water" with Cameron's resignation. While that may be taking it too far, it seems inevitable that a decision by the Government on a location for new South East airport capacity (i.e. Heathrow or Gatwick) will be further delayed at least until a new Prime Minister has been chosen later this year. This is despite Heathrow supporters urging against further uncertainty and delay. In the environmental sphere, any relaxation to air quality rules as a result of leaving the EU could potentially help to prevent at least one avenue of challenge to the case against Heathrow.

8. Anything else that Prevents a Major Development Slowdown

In the face of an inevitable slowdown in activity in the short term, the Government is likely to look afresh at all the areas of reform in previous years and see where additional encouragement might be given to developers – e.g. increasing permitted development rights, a broad approach to the new "permission in principle" under the 2016 Act, reducing community infrastructure levy burdens, removing EU procurement rules or clarifying whether developers must comply with procurement rules as a result of Section 106 obligations or relaxing greenbelt restrictions.

9. Close Examination of Mortgage Exclusion Clauses

Enforcement under security documentation is likely to increase where borrowers struggle to meet their repayment obligations. Lenders may increasingly need to look to their powers to enforce or take possession of assets. Where Section 106 Agreements do not include mortgagee exclusion clauses and borrowers default on their planning obligations, local planning authorities could seek to recover outstanding sums from lenders, who will need to work closely with the authorities moving forward.

10. Greater Clarity and Less Delay on Legal Challenges:

Much time, effort and money has been spent on legal points being referred to the European Court of Justice for interpretation of questions such as the extent of EIA obligations, application of public procurement rules to Section 106 Agreements and the extent of requirements to disclose environmental information. If the post-Brexit model does not involve the ECJ as a final arbiter of these types of questions, it should result in less delay and cost to developers.

Final Comments

The next few months are likely to be marked by considerable uncertainty as initial shock and slowdown gives way to debate over how the UK can move forward on areas previously covered by EU law. If you would like to discuss your concerns or experiences or share views on the likely future of planning law and practice, please let us know.

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