Is It Safe To Grant Planning Permission?

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To what extent is human safety, and the safe construction of buildings, a matter for the town and country planning system?

I suspect that a traditional, simplistic, approach would have been to say that the safety of buildings is instead a matter for the Building Regulations and other specific legislative requirements separate to the town and country planning system. Indeed, the National Planning Policy Framework's section 8 ("Promoting healthy and safe communities") falls short of advising as to the way in which buildings are constructed so as not to put their occupants at risk by way of fire, for instance, or instability; the focus of the advice is more broadly on encouraging healthy communities and lifestyles - and designing out crime.

However, the dividing line is now in practice sometimes difficult to discern, given that:

- The Government has introduced, effective from 1 August 2021, new requirements and planning practice guidance on fire safety and high-rise residential buildings, with new requirements as to the information to be submitted with applications for planning permission and making the Health and Safety Executive a statutory consultee in relation to specified categories of planning applications.
- Increasingly, local authorities in any event have been introducing policies in their local plans which cause matters such as fire safety and structural stability to be relevant considerations in the determination of planning applications.
- The courts have held that in relevant circumstances, where safety issues have been raised in connection with a development proposal which bring into play a separate regulatory regime, the decision maker must satisfy itself that the other regime is capable of regulating the relevant issues.

Are we getting ourselves into a tangle, albeit for the best of reasons?

The Government's new approach to fire safety and high-rise buildings

Following the Grenfell Tower fire on 14 June 2017 the Government commissioned the Independent Review of Building Regulations and Fire Safety. The report, published in May 2018, highlighted the need to transform the fire and safety regime and recommended that "some minimum requirements around fire safety will need to be addressed when local planning authorities are determining planning applications and will require input from those with the relevant expertise".

In response to the independent review, the Government introduced "planning gateway one", which has two key elements:

o First, to require the developer to submit a fire statement setting out fire safety considerations specific to the development with a relevant application for planning permission for development which involves one or more relevant buildings; and

o Secondly, to establish the Health and Safety Executive as a statutory consultee for relevant planning applications.

These elements were both introduced into law through the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021, which inserted a new article 9A and a new schedule 4 into the DMPO 2015.

Article 9A has been applicable to all planning applications made since 1 August 2021 and requires that an application for planning permission involving a "relevant building" must be accompanied by a fire statement "about the fire safety design principles, concepts and standards that have been applied to the development".

A "relevant building" is defined as being a building which contains either two or more dwellings or educational accommodation and which is either 18 metres or more in height or contains 7 or more storeys.

Important points to note:

o The height of a building, for the purposes of assessing whether or not Article 9A will apply, is to be measured from ground level with any storey below ground level to be ignored and any storey that is a roof-top machinery or plant area also being ignored; and

o An "educational dwelling" for the purposes of Art. 9A means "residential accommodation for the use of students who are boarders at school in connection with them attending a school" or "residential accommodation for the use of students attending higher education courses, further education courses or courses at 16 to 19 Academies."

To ensure consistency in the way in which information is provided, fire statements must be submitted on a form published by the Secretary of State and contain the particulars specified in the form, which includes information about:

o The principles, concepts and approach relating to fire safety that have been applied to each building in the development;
o The site layout;
o Emergency vehicle access and water supplies for firefighting purposes;
o What, if any, consultation has been undertaken on issues relating to the fire safety of the development; and
o How any policies relating to fire safety in relevant local development have been taken into account.

Of course, it is all well and good requiring this information to be provided, but how is it to be used?

The Health and Safety Executive was already a statutory consultee for planning applications around major hazard sites and major accident hazard pipelines. It is now additionally a statutory consultee in relation to development proposals to which Article 9A applies. In practice, its responses to local planning authorities set out the HSE's substantive response, setting out any specific significant areas of concern arising from the proposal as well as "supplementary information for the applicant" which is more advisory in nature.

Whilst it is of course open to a decision maker to take into account the advice of a statutory consultee but to determine, with appropriate reasoning, why it is appropriate not to follow the advice, in matters of human safety it would be a brave officer, committee of councillors or inspector who were to take that approach. What the HSE has to say is therefore extremely important. But it is also important to ensure that its requirements do not go beyond what is reasonably required.

Whilst not statutory consultees, the relevant local fire brigade, for instance, in London, the London Fire Brigade, may also choose to make representations in relation to a proposal and the same considerations apply. Whilst they are a statutory consultee under the Building Regulations, by the time that a proposed development has the benefit has planning permission it may of course be too late to build into the design the additional measures that are required so one can well understand why it is sensible for concerns to be expressed at this stage, although again, plainly, they should not go beyond what is reasonably required.

The difficulties of seeking to push back against a decision-maker which is acting on the advice of a consultee with specialist expertise was illustrated by the approach taken by *Thornton J in Crest Nicholson Operations Limited v West Berkshire Council* [2021] EWHC 289 (Admin). Crest and others challenged West Berkshire Council's designation of a Detailed Emergency Planning Zone ("DEPZ") under the Radiation (Emergency Preparedness and Public Information) Regulations 2019, which were "part of an international, EU and national response to the meltdown of three reactors at the Fukushima Daiichi nuclear power plant in Japan in March 2011 following an undersea earthquake."

“The Claimants contend that the rationale for the new and radically extended DEPZ on a recommendation by the privately run operator, AWE, is simply not known. The only publicly facing document contains, at best, a partial rationale for the designation, which is insufficient, as a matter of law, to meet the requirements of the Regulations. The document was not made available to the public until after the DEPZ was designated which was procedurally improper and in breach of statutory requirements. Regulatory oversight of the designation process has been deficient.”

The challenge failed:

“The Courts have recognised the need for judicial restraint where the issue under scrutiny falls within the particular specialism or expertise of the defendant public authority. In R(Mott) v Environment Agency Beatson LJ observed that “a regulatory body such as the [Environment] Agency is clearly entitled to deploy its experience, technical expertise and statutory mandate in support of its decisions, and to expect a court considering a challenge by judicial review to have regard to that expertise” (§63). In this case the defendant public authority is the local authority which does not itself hold the technical expertise itself to assess AWE’s work. Nonetheless it drew on assistance and advice from the ONR and PHE. I consider this to be akin to the position where the defendant public authority relies on experts, which the Courts have acknowledged entitles the public authority to a margin of appreciation (relevant that the defendant “had access to internal expert advice and the views of external bodies” in deciding whether there was material before the defendant on which it could rationally be decided that the approval should be made: *R(Christian Concern) v Secretary of State for Health and Social Care* [2020] EWHC 1546 (Admin)(Divisional Court) at §30 (Singh LJ)) (see also “Where a screening decision is based on the opinion of experts, which is relevant and informed, the decision maker is entitled to rely upon their advice”; *Lang J in R (Swire) v Secretary of State for Housing Communities and Local Government* [2020] EWHC 1298 (Admin) at §61).”

In practice, not only does it become difficult for local planning authorities to do anything other than rubber-stamp the advice that they receive, given that to do so without sufficient reasoning might not just render their decision liable to challenge, but they also need to be aware of the potential for liability in common law negligence to arise. After all, in *Kane v New Forest District Council* [2001] EWCA Civ 878 the Court of Appeal held that a pedestrian injured by a car when he had left a footpath to cross a road had a real prospect of success in a negligence claim against a local planning authority, given that the authority had required the path to be provided in relation to a development but had not done anything to make sure that the crossing point would be visible to drivers.

The court said this: “it was [the local planning authority] who required this footpath to be constructed. I cannot accept that in these circumstances they were entitled to wash their hands of that danger and simply leave it to others to cure it by improving the sightlines. It is one thing to say that at the time when the respondents required the construction of this footpath they had every reason to suppose that the improvements along The White Cottage frontage would ultimately allow it to be safely opened and used: quite another to say that they were later entitled to stand idly by whilst, as they must have known, the footpath lay open to the public in a recognisably dangerous state.”

Aside from the legal requirements since 1 August 2021 discussed above, authorities’ plans may include specific policies which impose additional requirements.

For instance, the March 2021 London Plan contains stringent policies in relation to fire safety. Policy D12A prescribes a general fire safety strategy requirement applicable to “all development proposals”. Policy D12A requires that:

- Fire safety should be considered at the earliest possible stage of the development design and continue to be a core factor in the design process.
- Developments must achieve “the highest standards of fire safety”.

A ‘reasonable exception statement’ is available for minor development proposals (e.g. householder applications). Guidance has been published as to the operation of the policy.

Policy D12B requires the submission of a fire statement as part of a planning application for “major development proposals”. The statement must be prepared by someone who is “third-party independent and suitably-qualified”

– “a qualified engineer with relevant experience in fire safety, such as a chartered engineer registered with the Engineering Council by the Institution of Fire Engineers, or suitably qualified and competent professional with the demonstrable experience to address the complexity of the design being proposed.” The statement must set out how the proposed development will function in terms of:

• The building’s construction method and products and materials used
• Means of escape for all building users and evacuation strategy
• Passive and active fire safety measures
• Access and facilities for the fire and rescue service
• Site access for the fire and rescue service
• Future development of the asset and the ‘Golden Thread’ of information

This requirement is separate from and additional to the statutory requirement for fire statements. Two separate documents are required.

One can see how gradually, whether by legislation or policy, whether national or local, decision makers find themselves having to grapple with detailed and technical fire safety issues as part of their determination of a planning application or appeal.

Furthermore, caution is required on the part of the decision maker before determining that an issue is a matter for another regulatory system. In *Valero Logistics UK Limited v Plymouth City Council* [2021] EWHC 1792 (Admin) Thornton J considered a challenge by way of judicial review to a council’s grant of planning permission for commercial use of a helipad which was situated, at the nearest point, approximately 125 metres from distilled fuel storage depots operated by Valero Logistics. The depots are regulated as “COMAH sites” under the Control of Major Accident Hazards Regulations. Valero challenged the grant of planning permission on various grounds, including that the council had failed to consider a material consideration by not considering the risks posed by the development to the COMAH sites and had acted irrationally by relying on the existence of other regulatory regimes i n deciding to grant permission.

“The Claimants point to the potentially catastrophic consequences of a helicopter crashing onto highly flammable fuel and say that what unites the grounds is a decision-making process and decision that abdicates responsibility for the dangers created by the proposed development. In particular, the Defendant conspicuously failed to engage with the scale of the risk posed to the COMAH sites by commercially operated helicopters flying at low heights over large quantities of highly flammable fuel. To the extent the Defendant recognised any risk, it sought to off-load it onto the Civil Aviation Authority (CAA) even though the CAA did/does not have the mandate or the expertise to evaluate the consequences on the ground of crashing aircraft or to take land-based decisions accordingly. These remain the safety responsibilities of others including the Defendant who is said to have been, and remains, in denial about this.”

The claim failed on all grounds. Thornton J summarised the approach to be taken to safety and other matters covered by other regulatory regimes as follows:

“Where a regulatory regime exists to deal with an issue raised by a planning application, it is open to a Local Planning Authority to place reliance upon the effective operation of that regime in determining an application for planning permission. However, the Local Planning Authority cannot simply ignore the issues in question. It must satisfy itself that the other regulatory regime is capable of regulating the relevant issues..”

The safety concerns were indeed considered by the council’s planning committee. As summarised by the judge:

“It is clear from the [discussion at the planning committee] that the Planning Officer and Members recognised that the risks to the COMAH sites from a helicopter crash were a principal issue in their consideration of the planning application. Extensive consideration was given to the risks and their mitigation including: how the helicopter is operated (under regulatory controls imposed by the CAA); who operates it (professional pilots); type and class of helicopter (Performance Class 1); and where the helicopter is flown (precise flight paths to and from the Site, mainly over water and strictly enforced). In addition, the Members ensured direct communications between the Site Operator and COMAH sites (as well as the Harbour Commissioners) prior to flights. The Committee understood correctly that it must exercise its judgment to assess the risks of the proposal having taken account of the views of

the HSE and Civil Aviation Authority. The planning judgment reached was that the current ancillary ad hoc private helicopter use from the Site was less safe than the increased regulation over and greater professionalism of, commercial flying operations from the Site.

The Claimants criticise the Committee's understanding of risk analysis but they construe risk assessment and minimisation too narrowly to assert that the risks to the COMAH sites cannot be accounted for unless specifically addressed. This is to ignore the broader set of technical and organisational mitigation to reduce the risk of a helicopter crash. The Claimants submit that the Defendant should itself have gone to the helicopter accident statistics and done its own risk assessment to test the 1 in a billion chance of catastrophic helicopter failure set out in the Interested Party's risk assessment but, as the Planning Officer said during the debate, the Planning Committee are not specialist risk assessors. The Committee heard representations from Valero on the safety risks at the Committee meeting. The Claimants' submissions seek to hypercritically retest the merits of the decision. It is correct to say that the officer erred in reporting the risk of failure to the Committee as 1 in 9 billion not 1 in 1 billion. The risk was however correctly reported in the Officer's written report. It is well established that the reports of Planning Officers must not be subject to hypercritical analysis. The same must apply with even greater force to the oral discussion at a Committee meeting where an officer is responding on his feet to questions from members without the luxury of contemplation allowed for in the production of a written document. It is apparent from a review of the transcript of the whole meeting that the Officer and Committee members understood (and were concerned) about the nature of the risks posed by the proposed development to the COMAH sites and further understood that it was ultimately a matter of planning judgment as to whether the risks and mitigation measures (general helicopter technical and organisational requirements, as well as specific COMAH site requirements and regulation by the CAA) were acceptable. They formed the view that they were acceptable, which was a view they were, in my judgment, entitled to come to on the evidence before them."

So, a decision maker can rely on the effective operation of another regulatory regime, as long as it satisfies itself that the other regulatory regime is capable of regulating the relevant issues.

The background to the Government's introduction of the requirement for fire statements for relevant developments and the expanded role of the HSE as statutory consultee, is of course the Grenfell Tower tragedy and the scandal subsequently uncovered as to the unsafe nature of many other developments, due to the cladding and other materials used in their construction or refurbishment.

Finally, the Building Safety Act 2022, which received Royal Assent on 28 April 2022, has an unusual and specific interface with the planning system. During the course of the Bill's passage through Parliament, the then Secretary of State for Levelling Up, Housing and Communities, Michael Gove, had placed pressure on residential developers to sign a building safety repairs pledge committing to remediate life critical fire safety works in buildings over 11 metres that they have played a role in developing or refurbishing over the last 30 years in England and to reimburse any funding received from government remediation programmes in relation to buildings they had a role in developing or refurbishing. As of 9 August 2022, 49 developers have signed the pledge. As part of the "encouragement" given by the Government for developers to make the commitment, a clause was included within the Bill which now comprises section 128 of the Act, empowering the Secretary of State by regulations to prohibit developers from taking advantage of any planning permission or certificate of lawfulness obtained under the Town and Country Act 1990, if they are not members of such a scheme despite not being members.

Section 128 (3) provides as follows:

"A prohibition under the regulations may be imposed for any purpose connected with—
(a) securing the safety of people in or about buildings in relation to risks arising from buildings, or
(b) improving the standard of buildings,
including securing that safety, or improving that standard, by securing that persons in the building industry remedy defects in buildings or contribute to costs associated with remedying defects in buildings."
Let us hope that there is never cause to use the power given the obvious legal uncertainties arising: what if for instance, planning permission is obtained in another party's name, or if the proscription is unjustified or disproportionate? Can the means – barring a particular entity from reliance upon the planning system – ever justify the ends – seeking participation in a "voluntary" building safety repairs scheme?