

Keeping a planning permission alive during the COVID-19 crisis



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Topics covered in this talk

- Time limits for commencement of development and submission of applications for reserved matters approvals
- Section 106 obligations and Community Infrastructure Levy payments becoming due

Introduction

- Real problems emerging already on these issues in particular
- Some suggestions as to possible solutions within the current legal framework, however effective solutions will require changes to guidance and/or legislation
- Despite these real problems, none of these issues have yet been subject of new guidance or legislative change yet
- Also not been mentioned in either the recent Chief Planner's letter on COVID-19 advice or the LGA's Planning Advisory Service's FAQs on COVID-19
- But change may be coming

Time limits for commencement and reserved matters applications – the relevant law in England in TCPA 1990

- Section 91 – development must begin no later than 3 years from the grant of permission
- Section 92 – for outline permission, applications for reserved matters approval must be made no later than 3 years from the grant of permission, and development must begin no later than 2 years from the final approval of reserved matters
- In both cases the LPA can direct a different time limit at the time of grant
- Section 73 amendments – cannot use this to extend time limits (s.73(5))
- Note: s.96A for non-material amendments

Problems for commencement and reserved matters applications during the COVID-19 crisis

- Construction industry shutdown and staff shortages
- Staff shortages and remote working challenges for applicant's planning team
- Not commercially viable
- Staff shortages and remote working challenges within LPA dealing with discharge of pre-commencement conditions and reserved matters applications
- Risk of losing the permission – have to re-apply in a new policy context and possible implications for funding

Solutions in the current legal framework?

- Cannot apply to amend time limits
- Commence development with a “material operation” (s.56 TCPA 1990) – may be suitable in some instances
- Deemed discharge of conditions – but a number of exceptions
- Reserved matters applications – starting point is the wording of the condition – likely only need submission of application not validation (Seivers v Bromley)

Need for new legislation – the only real solution

- New legislation for separate application to extend time or an automatic extension
- Understand something the Government is looking into
- Did it previously to deal with the last recession – new application procedure in October 2009 – though need it quicker than last time
- Preferable to have an automatic extension given existing pressures on LPAs (see s.91(3A) and (3B))

Section 106 agreements

- Problems arise where there are ongoing financial contributions, particularly when linked to passage of time
- Viability and affordable housing is a particular example – early and late stage reviews where, contrary to what was anticipated, a certain level of progress has not been reached or developer been unable complete units or sell them

Section 106 agreements – renegotiation and modification

- Planning obligations can be voluntarily renegotiated at any point – but depends on the willingness of both parties
- A right to apply for modification after specified period under section 106A TCPA 1990 – test is whether the obligation still “serves a useful purpose” – not a high test
- Refusal can be appealed or challenged
- Until modified, the s.106 obligation remains an enforceable contract
- Need guidance from Government as to renegotiation

Community Infrastructure Levy

- Similar issues arise as to commercial viability
- Informal agreement with the charging authority
- Exceptional circumstances relief – PPG says that an authority can grant this relief “if it deems that the levy would have an unacceptable impact on the viability of a development”
- But this must be before development commenced and is relief not a deferral
- LPA alter their installment policy in order to effect a deferment of installments
- Again a need for Government guidance or a new mechanism to apply for deferment of payments

Summary

- Real problems arising on as to time limits, section 106 obligations and CIL payments due to the COVID-19 crisis
- Some suggestions as to solutions in the current legal framework
- But only real solutions will come through changes in guidance and legislation

Thank you for listening

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