September 2009

Review

Planning

Rescuing the three-year planning permission

In the heady days of 2005, the Government reduced the default time period for implementing planning permissions from five to three years in an attempt to prevent alleged land banking and delays in bringing developments to the market. They also made a complementary change to Section 73 of the Town and Country Planning Act 1990 (which allows developers to apply for permission not to comply with planning conditions or to vary the conditions), preventing the section from being used to extend the time for implementing a permission. In these straitened times, those changes are now causing problems.

The recession has led to a drastic decrease in the implementation of permitted schemes and the inevitable ensuing lapse of permissions will have a number of unfortunate consequences. The time and money spent in obtaining planning permission will be wasted, including substantial application fees. The expiry of planning permissions will further lower the value of developable land. What is probably of most concern to the Government is that the failure to take up permissions may delay economic recovery. Conversely, if the economy moves out of recession, local planning authorities could face a surge of applications that they are ill-equipped to deal with and will no doubt end up getting blamed for obstructing economic growth.

"Check your planning permission time limits now - you will not be able to extend them if they have expired"

The first round of permissions caught by the 2005 amendments started to expire in August 2009. The Government has decided that there is no time for new primary legislation and will deal with the issue through secondary legislation. The new legislation is in the form of orders which are The Town and Country Planning (General Development Procedure) (Amendment No. 3) (England) Order 2009 (SI No. 2009/2261) (will be referred to in this alert as "the GDPO Amendments") and The Planning (Listed Buildings and Conservation Areas) (Amendment)(England) Regulations (SI No. 2009/2262). The amendments will come into force on 1 October 2009. The new legislation also deals with the application procedures for non-material changes to planning permissions and consultation requirements for applications to vary conditions. This alert is about the new procedure for extending the time limits for permissions.

GOVERNMENT PROPOSALS

The consultation on the main proposals closed in August 2008. The Government undertook a further short consultation process for changes made, in response to the consultation responses, to the fee structure for applications to extend time. That consultation concluded on 17 September 2009.

According to the consultation, the Government intended to introduce a new type of planning permission called an "extension permission" or more formally an "extension of time for implementation beyond the period authorised by the original permission". A successful application would result in a new permission with a new time limit for implementation.

The Government has not actually introduced this new type of permission in the legislation; they merely make reference to it in the part of the GDPO Amendments that set out consultation requirements for planning applications. This is peculiar in light of the fact that Section 73 of the TCPA explicitly states that the section is not to be used to extend the life of a permission. Also, the consultation document states that existing regulation 3(3) of the Town and Country Planning (Applications) Regulations, which refers to renewals of planning permissions prior to the expiry of time limits for implementation, has been rendered inoperative by the 2008 legislative requirements for standard application forms.

Presumably the Government's approach is workable but what is missing, without the introduction of the power to apply for the permission, is the detail which the consultation hinted would be provided for the new extension permissions. Therefore authorities and developers will, it would seem, have

to rely on the statements in the consultation document, as set out below, or further Government guidance, which is expected in October 2009 and the draft standard application forms which are available for viewing on the Planning Portal.

In response to consultation responses, the power to apply for an extension permission is available in respect of all types of development instead of major developments as originally proposed.

The GDPO Amendments states that the power to apply for an extension permission will only exist in relation to permissions granted on or before 1 October 2009, where development has not begun. The practical effect of this is that only one extension will be allowed per original permission. A successful application will result in a new permission with a new time limit. Here it should be remembered that the default time limit for implementing a permission is three years but authorities retain power to grant longer or shorter time limits.

The consultation document states that where an extension permission is granted, the description of the development and all other conditions in the original permission must remain the same. As Section 106 obligations are normally triggered by a named planning permission, the authority and developer will need to consider whether a supplementary agreement is required so that implementation of the new permission will trigger any existing Section 106 obligations.

The consultation document also states LPAs will be expected to consider whether there are any material changes which will influence either the decision to grant an extension or the consideration as to whether an extension application is appropriate in the circumstances. This includes environmental issues and the consultation specifically mentioned compliance with climate change policies.

According to the consultation, it will be particularly important to consider whether the development is an “EIA” scheme - i.e. whether it should be subject to environmental impact assessment. If it is an EIA scheme, the question would be whether the LPA has reason to believe that the environmental impact of the scheme has changed since grant of the original permission. The developer will therefore have to factor in the cost of considering environmental impact when deciding whether or not to make an extension application.

The new legislation did not amend the procedural requirements for applications for EIA schemes so, as stated in the consultation, if the application is an EIA application, the standard procedure for such an application must be followed.

The proposals require changes to fees regulations. Although the new legislation will come into force on 1 October 2009, changes to fees regulations must go through a longer procedure (expected to be in place in November or December 2009 at the earliest). In practical terms, this will mean that a developer who has to make an extension application prior to the new fees regime coming into force will have to pay a full planning application fee, while a developer who is lucky enough to have a permission which extends beyond the introduction of the new fees regime will pay the following:

- £500.00. for major development, defined in article 1(2) of the 1995 GDPO.
- £170.00. for minor development (which presumably means any developer which is not classed as a ‘major’ development).
- £50.00. for householder development.

It seems from the legislation that the application for an extension permission will follow the usual application procedure except that the developer will not have to provide a Design and Access statement, the consultation requirements will be limited to what the authority considers to be appropriate and plans and drawings will not have to be provided.

The consultation advised that it would be a good idea for applicants to provide supporting information as to why an extension is being sought and whether there have been any changes in policy of material consideration since the grant of the original permission.

In the amendment to the Listed Buildings regulations, the requirement to provide three copies of the listed building or conservation area application form and a Design and Access statement is removed where such an application is connected to an application for an extension permission.

OUR COMMENTS

It will be critical for the prospective applicants to engage with the LPA before submitting their applications to ensure that the procedure is appropriate and no additional conditions or other changes to the terms of the permission are necessary. If changes to the terms of the permission are required, then it seems from the consultation that the LPA should refuse the extension application and request a full application. Clients may need to consider first making an extension application followed by a section 73 application (for a new permission with varied conditions).

The applicant should also check that any Section 106 obligations will remain unaltered where a supplemental agreement is proposed. This would be in keeping with “the spirit” of the consultation document - but be aware the process does not expressly prevent councils from requesting more onerous obligations. On the other hand, entering into a supplemental agreement could provide an opportunity to agree a deferral of payments or reduction in other planning gain. Hammonds’ planning team is already engaged in renegotiating a number of Section 106 agreements and would be happy to assist you in this process.

The proposals on fees are also problematic. It is unfair that applicants who need to renew their application before the new fees regime is in place should have to pay a full application fee. LPAs could be requested to exercise their discretion to waive the application fee for any extension application in advance of the new fees regime. This does not require legislation.

CONCLUSION

The Government no doubt feels that shortening the implementation time period was a justified decision back in 2005, but is prepared to make concessions in light of the current economic climate. It is therefore approaching the problem as if the developer has to prove that it has a case for extending the permission. The mechanisms in the legislation lead to complexities which are not likely to make things easier for developers facing an uphill battle with their local planning authority. Making an application sooner rather than later is likely to be the best tactical approach, and good strategic professional support will probably help too. Some developers and practitioners feel that a full reversal to the original five-year position, with little or no burden on the developer, is the solution. It remains an inescapable fact that something has to be done now, so that the developers whose permissions are about to come to an end do not lose out.

In the meantime, remember that the Government has not removed the ability of LPAs to grant time limits greater than three years. The three year limit should be seen as the starting point for discussion. So, whenever making planning applications, remember to request expressly that the LPA grants a five year time limit (or longer as appropriate).

Finally, check your planning permission now. You can apply to extend the time limit for implementation if you have a planning permission granted on or before 1 October 2009 where development has not begun. If you do not apply, the only alternative is to implement the permission but, because of pre-conditions and other factors, ‘digging a trench’ may not be sufficient to save your valuable permission – so please consult the Hammonds planning team.

FURTHER INFORMATION

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