

The issues

An issue likely to face many developers during the current covid-19 pandemic crisis is how to keep valuable planning permissions alive, if they are close to expiring. All planning permissions have a fixed lifetime and if the development is not commenced within that lifetime the permission will lapse. Although you can normally expect a planning permission to be renewed following its expiry that may not be the case if planning policies have changed in the interim or it may not be granted again on such favourable terms.

Leaving aside the very real practical issue of getting the necessary works undertaken, in order to implement a permission all relevant planning conditions first need to have been satisfied. In the context of outline or hybrid permissions that means ensuring that all outstanding reserved matters have been approved and in the case of all permissions that all pre-commencement conditions have been complied with. Once these issues have been dealt with the permission can be implemented by carrying out certain defined works (known as a material operation). These works are generally quite limited in nature, and once undertaken they will keep the planning permission alive, even if the works are then suspended.

Although it is not a pre-condition to the successful implementation of a planning permission, doing so may give rise to a liability for the payment of community infrastructure levy ('CIL') and it may also trigger section 106 obligations, which could also include obligations to make financial payments. In the current climate, minimising the financial implications of implementing a planning permission may be crucial.

In this context it is important to remember that it is not possible to extend the lifetime of a planning permission through the submission of an application to vary planning conditions under section 73 of the Town and Country Planning Act. Also, starting a planning permission, but not carrying on with the development, may trigger a viability review, if one was included in the original section 106 agreement. Whilst it seems highly unlikely that any development that is undertaken now is going to be more valuable than it was at the time it was granted planning permission (so that the outcome of any viability review is unlikely to cause concern) a developer will want to avoid the cost of undertaking an unnecessary review.

Some solutions

Whilst it may not be possible to extend time limits for submitting reserved matters and commencing development it is possible to make the process less complex by varying pre-commencement conditions so that compliance takes place some time after commencement. In the same way, section 106 obligations could be varied by agreement with the planning authority so as either to reduce payments due on commencement or to defer their payment until later.

The CIL code is statutory so has less flexibility than the section 106 regime. Nonetheless there are options to mitigate CIL liability, for example by introducing a phasing scheme into a permission, which enables the CIL to be phased, to introduce payments in instalments or even seeking a 'non-enforcement' agreement with a planning authority in respect of liabilities that arise on commencement.

Possible legislation

In Scotland the government has already acted to extend automatically the lifetime of all planning permissions that are about to expire, by 12 months. As yet there is no sign of such a change being introduced in England and Wales. If the recession induced by the financial crisis is followed, measures were introduced to allow fast track appeals for section 106 agreements on viability grounds and the rules were relaxed to allow section 73 applications to extend the lifetime of planning permissions. Again, as yet, there is no sign of such changes being made.

For further information, or to discuss a particular issue, please get in touch with your usual Maples Teesdale contact or

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