



Arrested development

Development in lockdown: the pitfalls of an approaching deadline & compliance with permission conditions. [William Tyzack](#) reports

IN BRIEF

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Pursuant to s 91 of the Town and Country Planning Act 1990 (TCPA 1990) development work subject to a grant of planning permission must be begun within a period of three years, unless the planning authority has imposed, when granting permission, a different duration (whether longer or shorter). It is, furthermore, not permissible for a planning authority to extend the deadline by agreement with the landowner or developer. Conditions controlling the way in which the planning permission must be implemented may also be imposed by the planning authority, which may include works that are required to take place before

the development work begins. These 'pre-commencement works' could include, for instance, discontinuance of any existing land use, removal of buildings, certain access or drainage works, or landscaping.

While recent relaxation of lockdown restrictions, coupled with the modification of the government's 'stay-at-home' message for those who cannot work from home, will assist in getting building sites operating, the COVID-19 crisis continues to present a challenge to the implementation of schemes for which planning permission has been granted. This is particularly so for those schemes for which the proscribed commencement period is shortly to expire, or those schemes where pre-commencement works have not yet been carried out. If the commencement period expires, a renewed application for permission—with the potential for further cost, delay and uncertainty—would be required. In the last month or so much has been written about how there is an obvious solution for the government to this

problem: enact emergency legislation to extend the commencement deadline for projects where this is about to expire for a reasonable period.

Many have commented that it is surprising that no action has been taken in this regard, not least because such legislation has been enacted in Scotland under its devolved powers. That legislation—the Coronavirus (Scotland) Act 2020—includes provisions allowing a 12-month extension to planning permissions set to lapse during the 'emergency period', that being defined as the period of six months beginning with the date on which the Act came into force (7 April 2020). On 15 April 2020, the City of London Law Society Planning & Environmental Law Committee and the Law Society Planning & Environmental Law Committee wrote jointly to Robert Jenrick MP (Secretary of State for Housing, Communities and Local Government) setting out the need for an 'urgent fix' to the problem.

Notwithstanding a raft of other planning-related measures coming into force this month aimed at easing the pressures on the industry (such as extension of site operating hours), no decision has been taken to provide any leeway to expiring permissions. There is perhaps a policy basis underlying this: whereas the Scottish Government, as demonstrated by Nicola Sturgeon's announcement of 24 March 2020, has taken the view that construction should not take

place ‘unless the building that is worked on is essential, such as a hospital’, the position at Westminster level has throughout been that the continued operation of construction sites is consistent with the Chief Medical Officer’s advice, provided site operating procedures—ie which include distancing—are complied with. However, on a practical level many developers and construction firms have experienced difficulties in maintaining physical separation of workers on sites, or in complying with health and safety regulations while also adhering to rules on social distancing. Even recent reports of construction firms beginning to re-open sites have emphasised that resumed operations will not be at full capacity. With project completion deadlines inevitably under threat, the focus at least initially is likely to be on existing projects taking priority over those yet to begin.

So what are the options for developers in England and Wales who find themselves in the situation of an impending commencement deadline, but struggling to get on site to start work?

Minimal commencement of works

An obvious solution is to try to get on site to commence at least some works, with a view to continuing more major works later on. The key question for consideration here is whether such commencement works will satisfy the requirements of TCPA 1990, s 56. Under sub-s (1), development shall be taken to be initiated:

- (a) if the development consists of carrying out of operations, at the time when those operations are begun;
- (b) if the development consists of a change of use, at the time when the new use is instituted; or
- (c) if the development consists both of the carrying out of operations and a change of use, at the earlier of the time mentioned in paragraphs (a) and (b).

Subsection (2) then provides that development shall be taken to be begun on the earliest date of which any ‘material’ operation comprised in the development begins to be carried out. Material operation is defined in sub-s (4) as meaning:

- ▶ any work of construction in the course of the erection of a building;
- ▶ any work of demolition of a building;
- ▶ the digging of a trench which is to contain the foundations, or part of the foundations, of a building;
- ▶ the laying of any underground main or pipe to the foundations;
- ▶ any operations in the course of laying out or constructing a road or part of a road;
- ▶ any change in the use of any land which constitutes material development.

The ‘materiality’ of an operation has been considered by the courts to be a question of fact and degree, and (in general) an objective approach to the consideration of whether the threshold is met. It was held in *East Dunbartonshire Council v Secretary of State for Scotland and another* [1999] 1 PLR 53 that a subjective intention was not relevant. The test to be applied is not the quantum of the work involved (although the work cannot be *de minimis*), but whether that work is related to the planning permission involved. An example is *Thayer v Secretary of State of the Environment and another* [1991] 3 PLR 104, in which the Court of Appeal held that removal of a boundary hedge to provide an opening and an amount of surface earth removal in preparation for a driveway satisfied the test of commencement. Lord Justice Purchas commented that the specified operations are not necessarily extensive, that very little need be done to satisfy the section, but that which is done ‘must genuinely be done for the purpose of carrying out the development’.

Difficulty in complying with pre-commencement conditions

What options are available if compliance with the conditions imposed on the grant of permission is proving difficult in the current crisis? If the condition is not complied with (ie development works commence without compliance with the condition) implementation of the permission will have been rendered unlawful. In *Whitley & Sons v Secretary of State for Wales* (1992) 64 P&CR 296, Lord Justice Woolf held that works that contravene true conditions precedent cannot be taken as lawfully commencing development. The condition, however, must go to the heart of the permission, which therefore requires examination of how the condition is worded. A landscaping condition, for instance, may not be central to the development, and could be completed later.

There is also the possibility of an application under TCPA 1990, s 73 for permission to develop without compliance with conditions previously attached to the grant. This gives the planning authority power to vary or discharge (or indeed leave undisturbed) the conditions, but it is worth remembering that s 73 expressly cannot be used to extend the time by which a development must be started (s 73(5)(a)). In light of the public consultation (and potential environmental impact assessment) issues that are in play, planning authorities are not at liberty to agree the modification of any conditions informally; a proper application does need to be made. If, which is likely in the current climate, there would be insufficient

time to bring, and have determination of, a s 73 application before the expiry of the permission, developers may be inclined to take the following steps:

- ▶ To submit an application under s 73 to vary or discharge the conditions, and commence work before the deadline. The application having been made before the deadline, providing it is successful work done in advance of the deadline will amount to lawful commencement.
- ▶ To make use of TCPA 1990, s 73A. This enables a local planning authority to give retrospective permission for development carried out without complying with a condition. Though of course far from ideal and developers should certainly tread carefully, an option would be to comply as much as possible with the conditions, leaving the conditions which simply cannot be met for a retrospective s 73A application.
- ▶ Perhaps also as an option of last resort, to press on, complying as much as possible, in the hope or expectation that it would be a lawful exercise of the local planning authority’s discretionary power *not* to take enforcement action. In *Hammerton v London Underground* [2002] EWHC 2307, [2002] All ER (D) 141 (Nov), Mr Justice Ouseley was ‘unpersuaded’ that it is always necessary for a fresh planning application or s 73 application to be made: ‘The lawful exercise of the discretionary power to take no enforcement action under section 172 entails no particular statutory procedures or public consultation.’

Comment

Coronavirus has had an enormous impact on the construction industry and its workforce. While the reports of sites re-opening are positive in an economic sense, and to be welcomed in terms of enabling people to return to work, the challenge of protecting workforces from transmission of the virus remains, and safety is of course paramount. It is unfortunate that the government has not legislated to remove the obvious challenge facing landowners and developers with an impending expiry deadline. There are, as outlined above, legitimate steps that can be taken in terms of minimal commencement or a s 73/73a application, but these are not without their own uncertainties and create an unfortunate added complexity. Moreover, the possibility that steps might be taken in breach of planning conditions is very far from ideal. **NLJ**

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