COVID-19 AND IMPLEMENTING UK PLANNING PERMISSIONS

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Our previous article, 'UK planning system adjusts to COVID-19', discussed the steps taken so far to address the ongoing planning challenges arising as a result of COVID-19 in the UK. For the most part, this dealt with procedural issues regarding meetings, appeals and hearings in light of the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ("the Regulations"), which came into force on 4 April 2020.

> "The speed at which the government has moved to address some impacts is encouraging, but for developers particularly, there remain a lot of unanswered questions."

Since then, the *Town and Country Planning (General Permitted Development) (Coronavirus) (England) (Amendment) Order 2020* ("the Order") has also come into force which confers on local planning authorities ("LPAs") and health service bodies certain permitted development rights for emergency development.

Thus far, the government intervention has focussed squarely on the immediate effects of COVID-19: the inability of groups to gather for meetings and the need to rapidly respond to the rising number of COVID-19 patients with the quick construction of hospitals, for example. As we have previously commented, there has yet to be any consideration to the practical impact of COVID-19 on extant planning permissions, including those that are nearing their implementation date, or those where payments under s106 agreements or community infrastructure levies ("CIL") are due.

While the speed at which the Regulations and the Order were prepared and came into force does indicate that the government can progress certain measures efficiently provided there is sufficient political will, for many developers particularly, there remains a lot of unanswered questions.

THE ORDER

For owners of premises that are currently unable to be put to their normal use, the Order provides opportunity for temporary repurposing of those premises to assist in the COVID-19 crisis.

The Order amends the Town and Country Planning (General Permitted Development) (England) to include a temporary permitted development right ("PDR") for certain emergency developments to be carried out by or on behalf of LPAs (and prescribed health service bodies) without the need to obtain express planning permission.

The Order defines "emergency" as an event or situation which threatens serious damage to human welfare in a place in the UK, and the development must broadly be connected with either the prevention, reduction, control, and mitigation of, or otherwise be in connection with, an emergency.

Importantly, this PDR can be exercised by or on behalf of LPAs and, further, the LPA does not need to own the land outright; the Order explicitly refers to land that is "owned, leased, occupied or maintained by it".

The PDR is subject to three conditions:

- if the developer is not the LPA, it must notify the LPA as soon as practicable following commencement of the development;
- the use of the land for the purposes authorised by the Order must cease on or before 31 December 2020; and
- within 12 months of the cessation of the emergency development, any structures on site must be removed and the land restored to its former condition (or as otherwise may be agreed between the developer and the LPA).

The breadth and scope of the repurposing of existing buildings under the Order will be welcome by many property owners who have been unable to continue using their premises in the normal way but will be able to now provide some assistance in the COVID-19 crisis.

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IMPLEMENTING PLANNING PERMISSIONS

For developers who have not yet implemented their permissions, or for those where they are part-way through that process, it seems to us that there remain a number of concerns, including:

- How planning permissions can be implemented within the confines of COVID-19 restrictions, including a prohibition on all non-essential travel and social distancing requirements, which presents a considerable logistical quandary; and
- CIL payments that are due or s106 financial obligations which are tied to the passage of time in some manner may further impact the viability of a development.

Where planning permissions are close to reaching the implementation date, it is clear that the current crisis presents in a number of issues:

- Firstly, most LPAs' physical offices are closed with limited operating capacity. This will likely lead to delays in the processing of applications seeking to discharge of pre-commencement conditions;

- Secondly, physical implementation may be practically difficult. As the crisis rolls on, labour shortages may emerge with workers either sick or self-isolating, or it may be that physical implementation is too difficult on the basis that the relevant safety standards cannot be guaranteed to be met while also following government rules on social distancing and non-essential travel; and
- Thirdly, the economic impact may result in issues around the commercial viability of commencing construction in the near future.

An obvious, complicating factor is the inherent tension between the government's COVID-19 safety measures and construction sites remaining open and operational. While the Construction Leadership Council has published Site Operating Procedures guidance[1] that has been welcomed by many construction companies, it has also been met with opposition from a number of entities who have called for all non-essential construction sites to close on the basis that it is too difficult to implement appropriate COVID-19-related safety measures on construction sites.[2] The UK government's recent guidance on social distancing in the construction and manufacturing sector[3] has not clarified matters and states that construction work can continue, "*if done in accordance with the social distancing guidelines wherever possible. Where it is not possible to follow the social distancing guidelines in full…you should consider whether that activity needs to continue for the site to continue to operate*".

TO SAVE THEIR PERMISSIONS FROM LAPSING, DEVELOPERS MAY NEED TO PRESS FORWARD WITH IMPLEMENTATION WHILE THEY STILL CAN.

The picture is not entirely clear-cut for developers with planning permissions that need to be implemented, and where the reconciliation of COVID-19 safety measures with the practical operation of a construction site is a difficult balancing act. In order to save their permissions from lapsing, developers may need to press forward with implementation while they still can.

In light of growing opposition and a rise in the death toll from COVID-19, it is plausible that the government may restrict construction in the coming weeks to only "essential works". If this happens, then developers would certainly not be able to meet the implementation date.

Aside from the desire to keep planning permissions alive, is the need to also comply with all relevant planning conditions, including any obligations under a related s106 Agreement, and CIL obligations.

Developers are also concerned about the impacts on cash flow of implementing permissions and triggering CIL and S106 liabilities; it is plausible that problems could arise where there are ongoing financial contributions required, the payment of which is linked to the passage of time.

Where a development is liable for CIL and where developers rush to implement the planning permission (thus triggering the CIL liability) in circumstances where there is no real prospect of construction continuing due to COVID-19 restrictions, the viability of the development may be called into question as the triggering of CIL will encumber the developer with a significant liability upon commencement of development, without any certainty as to when full scale development can commence, or the market which the completed development will face upon completion.

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Unlike s106 agreements which are amenable to renegotiation and amendment, any CIL obligations flow from the Planning Act 2008 and any failure to pay can lead to enforcement action being taken. One possible avenue of recourse is set out under the Planning Practice Guidance ("PPG") which provides for "exceptional circumstances relief" to be granted in circumstances where a person responsible for a specific scheme cannot afford to pay the levy.[4] In particular, under the PPG, this can be granted in circumstances where an LPA "deems that the levy would have an unacceptable impact on the viability of a development". However, such relief is subject to a number of conditions, not least of which is that it must be applied for before commencement of the development. For developments that have commenced and a payment deferral is required, the LPA would need to amend its own instalment policy to capture payment deferrals for the duration of the COVID-19 crisis; certainly, some government guidance at least on this issue would be well received by developers and LPAs alike.

Likewise, in relation to s106 obligations, issues of viability and affordable housing are two such examples where it is conceivable that contrary to what was anticipated at the time that planning was obtained, that projected progress has not been met, or indeed the required number of units haven't been able to sell in the current climate. There have already been industry calls to reinstate section 106BA of the Town and Country Planning Act 1990 which, prior to being withdrawn in 2016, allowed developers to apply to a LPA to have the affordable housing obligations in a s106 agreement modified. In the absence of the mechanism under s106BA, it is still possible to renegotiate planning obligations at any point, but this hinges on the willingness (and capacity) of both parties. The existing pressures on LPAs may mean that these cannot be renegotiated in time, and we would recommend that any developer concerned about meeting its s106 obligations to start discussions with its council as soon as possible.

LOOKING AHEAD

Ultimately, any real solutions to these issues require legislative changes and government guidance.

On the question of implementation, it seems to us that there are a number of possible solutions. Certainly, the response to the 2008 financial crash provides a precedent for the MHCLG adopting temporary measures to make it easier for developers and LPAs to keep planning permissions alive.[5] The government could extend the provisions of the General Permitted Development Order 2015 in a similar way to permit developers to apply for extensions.

Scotland has directly addressed the implementation of planning permission in the Coronavirus (Scotland) Bill 2020 ("the Bill"), which passed stage 3 on 1 April 2020 and awaits royal assent to enter into force. The Bill includes provisions allowing a 12-month extension to planning permissions due to lapse during the coronavirus emergency.

"Legislative intervention is required from the Government in order to provide the industry with some much-needed clarity and reassurance on the matter."

Thus far, the UK government has failed to make a similar provision under the Coronavirus Act 2020 to apply to England and Wales. However, this is a pragmatic approach and the speed at which the Regulations were enacted lends some support to the idea that further legislative amendments could be imminent.

This would be a logical response and one that follows precedent. The government has already made amendments to a plethora of legislation, including the Local Government Act 1972, through the Coronavirus Act 2020, amended the Town and Country Planning (General Permitted Development) (Amendment) Order 2020, and brought into force the Regulations. It stands to reason that further legislative amendments may be made to specific planning legislation in the weeks to come.

Additionally, the MHCLG could extend the provisions under the Town and Country Planning (Development Management Procedure) Order 2015, regarding deemed discharge of a condition, which enables LPAs to be deemed to have given consent, agreement or approval. This could be a viable measure for LPAs to adopt in light of a reduction in operating capacity as a result of COVID-19. Granted this mechanism has a stricter application, however it may provide a solution in some cases.

CONCLUSION

The COVID-19 pandemic will have significant repercussions for developers and the wider construction industry which are likely to be felt past the end of the government lockdown. Legislative intervention is required from the Government in order to provide the industry with some much-needed clarity and reassurance on the matter, particularly in instances where developers are in a race against time to implement their permission. Developers should be prepared to adapt quickly to this rapidly changing environment which is highly likely to delay most developments.

Rachael Davidson, a former senior Associate in our London office, also contributed to this article.

[1] https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/04/Site-Operating-Procedures-Version-3.pdf

[2] Including but not limited to the Institute of Occupational Safety and Health (https://www.iosh.com/more/news-listing/halt-construction-work-that-isn-t-designed-to-help-save-lives-says-iosh/), the Federation of Master Builders (https://www.fmb.org.uk/about-the-fmb/policy-and-public-affairs/responding-to-coronavirus-covid-19/), the Transport Salaried Staffs' Association (https://www.tssa.org.uk/en/whats-new/news/index.cfm/stay-at-home-and-shut-construction-sites-says-cortes), and Sadiq Khan, London Mayor.

[3] https://www.gov.uk/guidance/social-distancing-in-the-workplace-during-coronavirus-covid-19-sector-guidance#construction

[4] https://www.gov.uk/guidance/community-infrastructure-levy

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/5997/1729942.pdf

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