Dechert LLP

COVID-19: English planning update

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The COVID-19 situation has led to the government in England changing planning laws. In this note we examine these laws, including new rights for restaurants and pubs to trade as food takeaways, relaxation of certain planning controls, and the postponement of all public local inquiries.

New permitted development right to allow pubs, wine bars, restaurants and cafes to trade as food takeaways

Under planning laws, properties with permission for "A3 use" comprise restaurants and cafes for the sale of food and drink for consumption on the premises. Properties with "A4 use" permission comprise drinking establishments (pubs and wine bars) with expanded food provision. Neither class of permission permits food takeaway use. To resolve this issue, the Government has made an amendment to the General Permitted Development Order to permit an A3 use or an A4 use to change to a use for the provision of takeaway food. This amendment is for a temporary period, expiring on 23 March 2021.

This permitted change comes with two caveats. First, some planning permissions contain conditions prohibiting a change out of a specific use class to another use. Existing planning permissions will therefore need to be carefully scrutinised before any such permitted change is implemented (although we anticipate that local planning authorities are highly unlikely to enforce such conditions in the current environment). Secondly, the amendment does not affect the terms of any existing lease of premises. Consequently, if tenants intend to repurpose premises, they will need to agree a variation of the user clause in their lease(s) with their landlords.

Relaxation of certain planning controls over food retail premises and distribution warehouses

In a Ministerial Statement given on 17 March 2020, the Government advised local planning authorities to take a "positive approach to their engagement with food retailers and distributors to ensure that planning controls are not a barrier to food delivery". Specifically, the Government advised that local planning authorities should not seek to take planning enforcement action "which would result in unnecessarily restricting deliveries of food and other essential deliveries during this period".

As some planning permissions contain conditions restricting the times, number and hours of delivery of food to retail premises and distribution warehouses, we expect this Government advice to be useful to tenants in negotiating variations of the terms of their leases with their landlords. Many leases contain obligations to comply with planning laws and we would therefore also expect landlords to be receptive to requests from tenants to vary the terms of leases to cater for these changes of use, or to enter into side letters temporarily waiving these obligations.

Indeed, the Government expects local planning authorities not to enforce such conditions at the present time. The Government advice specifically refers to restrictive planning controls and includes planning conditions as an example. We expect therefore that this advice will also extend to similar restrictions containing agreements entered into between a local authority and a developer (section 106 agreements), which often contain restrictions on the use of the land and a requirement for the developer to make contributions towards the local infrastructure and facilities.

This relaxation is intended to be temporary – the Government has stated that it "will review the need for the flexibility outlined in this statement after the pressure from the coronavirus has reduced, and it is the intention to withdraw it once the immediate urgency has subsided." We expect local planning authorities to comply with the Ministerial Statement - any enforcement by local planning authorities which goes against the spirit of the Ministerial Statement is likely to be looked upon negatively by the Government and the public.

Planning permission commencement time limits

All planning permissions are subject to a condition requiring development to commence within a specific period. This is usually three years for any planning permission which is not in outline only. On the grant of any planning permission, it is open to a local planning authority to impose a longer period than three years for the commencement of development. If development does not commence within that period, the planning permission will lapse. As yet, the Government has

not proposed any specific extension to the time limit imposed in planning permissions for the commencement of development.

Where an owner or developer has made an application for planning permission which has not yet been determined, it may wish to ask the local planning authority to impose a longer period for commencement, say five years.

An application can be made under section 73 of the Town and Country Planning Act 1990 to vary or remove conditions associated with a planning permission. But where planning permissions have already been granted and the development has not commenced, it is not possible to use section 73 applications to extend the time period for commencement. However, it may be possible to use section 73 (or non-material amendment applications) to relax pre-commencement conditions which are preventing a lawful commencement of development for the purpose of keeping a planning permission alive.

If taking a step to commence development in order to comply with a condition that requires development to commence, owners and developers should take care not to trigger section 106 obligations. While it may be attractive for an owner or developer to take this step in order to save a planning permission that is in danger of lapsing, owners and developers should undertake a full review of the planning permission and section 106 agreement to ensure that they do not inadvertently trigger costly obligations by taking this action. There may, for example, be a method of commencing the development without triggering the section 106 obligations.

In addition, it should be recognised that any commencement of development works are likely to trigger at least some, if not all, of the financial obligations to pay Community Infrastructure Levy ("**CIL**"). CIL is a charge on additional floor space that local authorities may choose to set. It is paid primarily by owners or developers of land that is developed and is based on a formula that relates to the size and character of the development to the amount charged.

Section 106 agreements and CIL

In a Written Ministerial Statement issued on 13 May 2020, the Government stated that planning authorities are encouraged to consider deferring the delivery of section 106 obligations, by entering into deeds of variation, to defer the payment of financial obligations, and to take a pragmatic and proportionate approach to the enforcement of planning obligations.

In addition, in the same Written Statement, the Government announced an intention to make a temporary amendment to the CIL Regulations, to enable local authorities to defer CIL payments, to temporarily dis-apply late payment interest and to provide a discretion to return interest already charged. However, these relaxations will only apply to, and benefit, small and medium sized developers with a turnover of less than £45 million. The proposals will not apply to, or assist, larger developers.

Where an owner or developer has made an application which has not yet been determined, then:

- in relation to section 106 obligations being negotiated, it will wish to ensure that all obligations are linked to future events such as occupation (or completion) rather than commencement; and
- in relation to CIL, it will wish to agree with the local planning authority a phased planning permission in order to take advantage of CIL phasing relief. This relief has always been available to a party, however, we expect that it will be more relevant now given that it allows a developer more time to pay any CIL due for the development.

The postponement of all public local inquiries, examinations, hearings and site visits

The Planning Inspectorate have announced the postponement of all public local inquiries, examinations, hearings and site visits in respect of planning appeals and local plan enquiries.

Planning Officers are currently working remotely. We understand that they are progressing applications where they can through emails and online meetings. In relation to smaller planning applications, these are being progressed (albeit more slowly) through a combination of existing delegated arrangements (where available) and new virtual committee meetings. Our understanding is that the larger applications are struggling to progress. This is for a number of reasons: first, because they are more complex and usually rely on face-to-face meetings to progress; secondly, because where they are still at an early stage, applicants are withdrawing them in some cases to preserve cash; and thirdly, because a number of planning consultancies are furloughing some of their staff and the right consultants may no longer be available to progress them.

Similarly, we understand that very simple written representation appeals may be going ahead, for example, where the inspector can make a site inspection without involving others, such as viewing the appeal site from the public highway. Otherwise, there is no end date to the existing postponement.

Operation of the building regulations and planning enforcement

In relation to building regulations, many local authorities have suspended site inspections for their Building Control teams and have moved to an "evidence-based" approach. This approach needs to be agreed with the appointed surveyor in advance and involves a telephone-based "inspection", and supplying photographs and videos to the Building Control team at the local authority for surveyor's assessment.

Likewise, in relation to planning enforcement, a number of local authorities have confirmed that most site visits will cease, with the focus switched to a photograph and/or evidence review.

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