



HEWITSONS

Planning *Briefing*

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Right to be heard is lost
Charities and developments

Welcome



Welcome to the latest Planning Briefing. Our aim is to help you keep up to date with the most important developments in planning law. If there's anyone you think would be grateful to receive this briefing, please pass it on or let us know.



Deborah Sharples

If you would like to discuss anything in this briefing further or, indeed any aspect of your work, please email me at deborahsharples@hewitsons.com or call 01223 461155.

Deborah Sharples
Head of Planning

Beware the condition precedent

The condition precedent is perhaps the type of planning condition that has caused the most difficulties in recent times.

A condition precedent is a condition which requires specified steps to be taken, such as the submission of a landscaping scheme, prior to the commencement of development. Breach of such conditions has, in the past, led to developers losing the benefit of the permission altogether, with the courts holding that works purporting to have implemented the permission were in fact unlawful.

This issue becomes even more pertinent in the current economic environment. Developers with unimplemented planning permission may be sitting back in the hope that the market recovers sufficiently to enable the permission to be implemented in time. The alternative is to make a token start of the development in order to keep the permission alive.

However, if the permission cannot be lawfully implemented without first satisfying a condition precedent, token implementation might either be expensive, if a condition has to be satisfied, or pointless, if it is not satisfied. In this context, it is important to understand that there are exceptions and qualifications to the principle that a breach of condition precedent will render a development unlawful.

One such exception is demonstrated by the recent case of *London & Stamford Investments Ltd v Stoke on Trent City Council* [2008] EWHC 2746. The Court followed the principles set out in earlier case law and held that the planning

permission had been lawfully implemented despite non-compliance with a number of conditions precedent.

This was because the developer had sought to regularise the position shortly after commencement of the works, with the result that the conditions had been satisfied before the permission was due to expire. In these circumstances, it would have been unreasonable for the local planning authority to enforce against the breach.

A second exception was dealt with in *Bedford Borough Council v Secretary of State for Communities and Local Government* [2008] EWHC 2304. This case was decided on the basis that the conditions that had been breached were not true conditions precedent. One condition stated that a landscaping scheme had to be approved by the planning authority "before the development commenced". The second condition stipulated that details of any intended boundary treatment had to be submitted to and approved by the local planning authority "prior to the commencement of development".

However, neither condition actually stated that "no development should take place until" the relevant details had been submitted and approved. Only the latter wording would have constituted a true condition precedent and therefore it was held that the permission had been lawfully implemented.

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ON THE COVER: Deborah Sharples, Partner, with Ross Hilliard of Shanks

Another key exception was formulated in R (on the application of *Hart Aggregates Ltd*) *v Hartlepool Borough Council* [2005] EWHC 840. This case established that not all breaches of conditions precedent will render implementation unlawful. Instead, it is only where there has been a breach which goes to the "heart of the planning permission". Where conditions precedent are small in number and insignificant in the circumstances of the case, breach of them will not prevent a planning permission from having been lawfully implemented. It is works of necessity that must be done or approved before building can sensibly start that are key in terms of implementation.

Clearly, the position in relation to conditions precedent and the lawful implementation of planning permission is far from straightforward. There is a line of case law that must be considered and the detailed drafting of the planning conditions must be examined with great care. This is particularly important for those who are seeking to keep permissions alive by way of token implementation.

Eco-towns – will they ever happen?

The eco-town idea was the first major policy announcement made by Gordon Brown when he began his campaign to succeed Tony Blair as Prime Minister in 2007.

The story so far

Eco-towns have generally been subject to considerable opposition. The most controversial aspect is the way in which the Government has gone about promoting the eco-towns with locations identified by a commercial bidding process, rather than the Regional Spatial Strategy and Development Plan. The proposals are said to be contrary to the basic principle, expressed through planning legislation, of the plan-led system of development control.

The first legal challenge to the eco-town project was lodged by the BARD (Better Accessible Responsible Development) campaign group, which opposed St Modwen's proposed 6,000-home Middle Quinton eco-town near Stratford-upon-Avon.

However, the group's claims that the Government had drawn up its short list of potential eco-town sites without proper consultation were rejected by the High Court. It was held that there had

been adequate opportunity for public consultation on the principle of eco-towns and disagreed that the Government was trying to 'outflank' the planning system. The Court added that a Planning Policy Statement (PPS) would in due course provide an opportunity for the merits and demerits of alternative locations for the building of eco-towns to be properly consulted upon.

Where are we now?

The PPS was published as a consultation document in November 2008 and 12 potential eco-town locations were identified in the draft statement. The Government is now considering the responses to the consultation and will publish the final eco-towns PPS and list of locations later in the year.

However, the Government's proposed promotion of specific eco-town locations through a new PPS has been criticised by leading lawyers. In a recent opinion commissioned by the Local Government Association, John Steel QC has concluded that the Government's plans remain "unfair,

illogical and unreasonable," susceptible to judicial review and with a strong likelihood of being declared unlawful. In another legal opinion, released by the Campaign for the Protection of Rural England, John Hobson QC argues that, in pushing ahead with the PPS, the Government would be "usurping the function of the local planning authorities and distorting the plan making process."

What happens next?

The Government is now in a difficult position and a further legal challenge to its eco-town initiative looks inevitable. In addition, securing private finance for the developments is

becoming increasingly difficult in the face of fierce local opposition and the economic downturn.

Yet proceeding with the eco-town proposals continues to be regarded by the Government as essential if it is to make progress towards meeting its targets of reducing carbon emissions and building new homes. Whatever happens, it is likely to be some time before any true progress is made. By then, the opinion polls suggest that the future of the eco-town initiative is likely to be in the hands of an entirely different set of politicians. With both the opposition parties opposed to eco-towns, it has to be questioned whether they will ever happen.



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Charities and developments

Negotiating a development is often an endurance sport but for charities there are additional hazards to watch out for.

Charities cannot act like other organisations in going about their business and this includes developments. They may face the same issues, but their reaction must be different.

Objects and powers

Charities must only undertake exclusively charitable activities within the scope of their

objects and powers. This is surprisingly often overlooked and if only a siren were to go off at this point!

Most trustees and senior officers will be well aware of the scope of their objects. Otherwise, a check of the constitution should be made. As to a charity's powers, often all necessary powers are contained within its constitution or, if not, will be implied by law. In many cases the issue is not the scope and complexity of the objects and

Charities must only undertake exclusively charitable activities within the scope of their objects and powers.

powers themselves, but the nature of the development.

Charities involved in mixed use developments must strike a balance between ensuring the principal purpose of the development is in line with the charity's objects and ensuring that the development is sustainable in commercial and community terms. If the land is wholly or partly investment land, then it may be arguable that any non-charitable part of the development may nevertheless be appropriate.





Seal the deal

It is common for charities to enter into section 106 and other legal agreements requiring them to perform certain obligations in relation to a development. However, developers are also not infrequently asked to make payments which simply help to seal the deal. As a general rule, charities may only make payments to other parties to further their charitable objects or as a commercial investment. Depending on the nature of the payment, it may well be that a charity cannot legitimately make payments such as these so beware!

Slice of the action

Developments often include an element of 'wait and see'. An option might be granted for a further stage of development, or an overage or share of any future commercial return above a given point might be offered. A 'slice of the action' as HMRC sometimes call it.

Once again, this is an area for care. First, section 36 of the Charities Act 1993 requires that charities disposing of land usually do so on the best terms reasonably obtainable. It is difficult

to be sure the terms are the best reasonably obtainable if part of the deal lies uncertainly in the future.

Secondly, charity trustees must be careful not to fetter their discretion in relation to future decisions. To do so undermines their independence as charity trustees. To guard against this the development agreement must not absolutely bind the charity to a disposal and be subject to section 36 compliance.

Joint ventures

Once again, charities have to dance somewhat more nimbly than others in negotiating joint ventures. They cannot give in to the commercial pressures of the development and agree to something improper for a charity.

It is very helpful to include a catch-all provision in the development agreement that "nothing in this agreement requires or shall be deemed to require the Charity to do or omit to do anything which is inconsistent with its status as a charity". It goes without saying of course that this protection needs to be borne out in practice.

Trading companies

Setting up a subsidiary company can be a very useful mechanism for enabling activities otherwise inappropriate for a charity, whilst the charity retains overall control.

However, care needs to be taken in funding and governance arrangements. The charity cannot usually stand behind its non-charitable subsidiary so as to rescue it from commercial hot water or to fulfil an obligation in support of the subsidiary which is inappropriate for a charity.

Fools rush in

So, common though it may be for charities to be involved in developments, their approach cannot be the same as non-charitable organisations. Their trustees have an additional layer of duties as charity trustees. They cannot take the same approach to risk as commercial entities, and they must always bear in mind that developments must fall within their objects, no matter how commercially attractive the alternatives may be.

For more information contact Chris Knight – Head of Charities Team at chrisknight@hewitsons.com or call 01604 233233.

Government's *Planning for Prosperous Economies* suggests change in approach

The Government's proposed new Planning Policy Statement 4 (PPS4) "Planning for Prosperous Economies" will require local planning authorities to give greater weight to economic considerations.

The draft, out for consultation until 28 July 2009, brings together the Government's policies on town centres, employment and development in rural areas. The Government's stated aim is that by presenting policies for economic development in one document, it will lead to greater certainty for business. One example would be speedier decisions on planning applications which in turn, the Government predicts, will lead to fewer appeals and challenges.

Although much of the existing policy is being retained or updated, this proposed new guidance introduces a change of emphasis which will require local planning authorities to give greater weight to economic considerations when preparing their policy documents and dealing with planning applications.

The Government makes it clear in the guidance that it sees the planning system as a key lever it can use to contribute towards promoting economic growth. This has given rise to concerns about the potential impacts of economic development on environmental and quality of life considerations, including the need to address climate change.

Town centre policies

The new guidance removes the 'need test' for retail development proposals outside town centres, but the sequential approach is retained. This requires developers to demonstrate that there are no suitable town centre sites which could accommodate the proposed development before they apply to build on out of town sites.

The impact test has been strengthened and requires a detailed assessment against key impact criteria, including accessibility to a choice of transport and limiting carbon dioxide emissions. The general view is that this change of emphasis may lead to more support for edge of centre proposals.

The guidance requires local planning authorities to pro-actively "plan for consumer choice and promote competitive town centre environments" by, for example, recognising the valuable contribution smaller shops and markets make to consumer choice and the town centre character generally.

Meanwhile the proposed 'competition test' has been omitted due to Tesco's successful challenge against the Competition Commission's recommendation that a competition test should be imposed to address any potential adverse effect on competition as a result of the way in which the groceries business operates in the UK.

The policy which requires local planning authorities to manage and encourage the evening and night time economy in town centres by promoting uses which appeal to a wide range of ages and social groups is retained.

The national maximum parking standards in PPG13 are to be replaced by local maximum standards for non-residential development. Guidance is given as to how local planning authorities should go about setting their maximum standards. There is to be no minimum parking standard, other than for parking for disabled people.

Rural Policies

The key principle remains that the countryside should be protected by strictly controlling development in the open countryside.

Most of PPS7 is being replaced but the section relating to housing will remain, including the paragraphs dealing with agricultural dwellings and the policy permitting isolated new houses of exceptional quality and outstanding design.

Overall, the new guidance places greater emphasis on a need for change in rural communities to allow for new economic development. In the Government's view all types of business and enterprise can, in principle, be appropriate in rural areas to enable communities to prosper whilst ensuring continued protection for the countryside. It is now clearer that acceptable uses in the countryside include hotels and other serviced accommodation.

In particular, support should be given to small-scale economic development where it provides the most sustainable option in villages or other locations that are remote from local service centres, even though public transport is not regularly available. This makes it clear that economic development in rural locations should not be refused on grounds of increased car use.

The PPS7 policy supporting the use or replacement of buildings in the countryside has been strengthened, and the preference for economic development over residential conversions remains.

For more information contact Karen Dennett on karendennett@hewitsons.com or call 01223 461155.

In its final form PPS4 will replace the following planning policy guidance:

PPG4 (1992) – Industrial and Commercial Development and Small Firms

PPG5 (1992) – Simplified Planning Zones

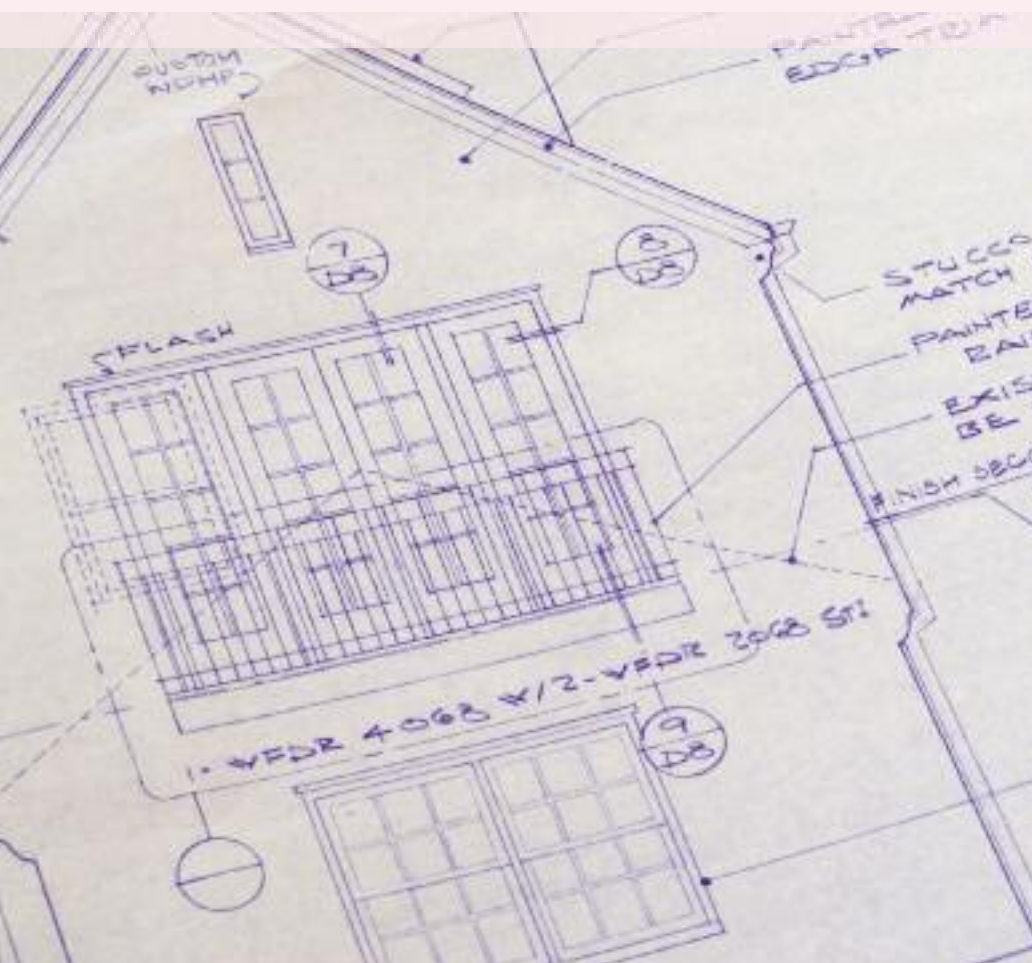
PPS6 (2006) – Planning for Town Centres

The majority of PPS7 (2004) – Sustainable Development in Rural Areas

Paragraphs 53, 54 and Annex D of PPG13 – Transport

Right to be heard is lost

More time allowed for the implementation of planning permissions



The Department for Communities and Local Government has recently issued a reminder to local planning authorities that they can grant planning permissions for more than the usual three years.

This has been prompted by the current economic uncertainty which has made it difficult for developers to bring schemes forward within the standard period allowed for the implementation of planning permissions.

A number of local planning authorities have responded by announcing that they will consider allowing developers up to five years to implement their planning permissions. This was the standard period allowed before changes were introduced to the Town & Country Planning Act 1990 four years ago.

This of course does nothing to help developers with existing permissions that are due to expire shortly. Accordingly, the Government has also published proposals to reintroduce the ability to apply for an extension to the duration of existing permissions. The proposals, released for consultation until 13 August, apply to consents granted on or before 1 October.

As part of a plan to make the planning appeals service more customer focused and efficient there is no longer a statutory right to be heard by a Planning Inspector on a planning appeal.

This right was removed by way of secondary legislation introduced in April 2009, under the provisions of the Planning Act 2008. The purpose of this change was to improve the planning appeals service to make it more proportionate, customer focused and efficient, while maintaining the principles of fairness, openness and impartiality.

Whether these objectives will be achieved will largely depend on how good the Inspectorate proves to be in applying their criteria on a fair and consistent basis.

Under the new system, the Planning Inspectorate will determine whether written representations, an informal hearing or even a public inquiry should be used for planning and enforcement appeals under the new section 319A of the Town and Country Planning Act 1990. They will make this decision within seven working days of receiving the appeal and will notify the parties accordingly.

The appellant and the local planning authority will then have the opportunity to put forward their views on their preferred procedure, but the Inspectorate will make the ultimate decision. There is no right of appeal against this, although they can change their minds and their decision can be challenged through the courts.

The Planning Inspectorate has published a list of criteria it will apply in reaching its decision in any particular case which has been endorsed by the Secretary of State. An appellant, local authority or interested third party who wants an oral hearing will now need to convince the Inspectorate that they will need to clarify matters beyond the written statements or test the evidence by questioning.

Where a substantial number of third parties wish to speak, or where complex policy or technical issues are likely to be raised, the Inspectorate is likely to be willing to hold a public inquiry.

For more information contact Gemma Harris on gemma.harris@hewitsons.com or call 01223 461155.



Future of Stansted expansion uncertain

The public inquiry into the expansion of Stansted Airport has been deferred again by the Secretary of State for Communities and Local Government following the Competition Commission's final report on the future of all BAA Airports.

The Competition Commission's report orders BAA to sell Stansted, casting doubt on the future of the BAA planning applications and, in particular, the associated compulsory purchase orders.

In seeking to acquire land compulsorily an acquiring authority needs to show:

- a need for all land identified in the order prior to it being made and subsequently confirmed
- that there are no outstanding impediments to the implementation of the order

- that there is adequate funding for the project for which the compulsory purchase powers are being used
- that there is a clear and compelling case in the public interest for the project and that clearly identifiable public benefits can be provided

Clearly, BAA is not now in a position to give these assurances about its proposals for a second runway at Stansted Airport. The Competition Commission was aware of this in its report and identified it as a potential problem, given the importance of capacity development in the South-East and government policy¹. This begged the question whether a future purchaser should be compelled to proceed with the scheme, which the Commission felt they should not.

BAA believes that the Competition Commission's analysis is flawed and its remedies may be impractical in the current economic conditions.

They announced in May that they intend to challenge the Competition Commission's findings. However, until this appeal is decided, the future of the proposals for the expansion of Stansted are uncertain.

In addition, the downturn in passenger numbers and flights leaving and entering UK airports, particularly in the South-East, in the last year or so has been significant. This may call into question whether there is a clear and compelling case in the public interest of providing additional runway capacity and additional facilities at Stansted at all.

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¹ Para 10.143 The Competition Commission and BAA airport market investigation – 19 March 2009



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