

# A cunning plan

In the first of a series of articles on planning law, **Linda Russell** looks at what conveyancers need to know about planning permissions

This series of articles is designed to help conveyancers in a practical way by addressing the planning issues they may encounter during their practice. This first article looks at planning permissions, conditions and obligations under section 106 of the Town and Country Planning Act 1990 (TCPA 1990).

The article looks at the role of the planning system; the basis for determining applications; the meaning of development and the need for planning permission; material planning considerations; the imposition of planning conditions; the requirement of community benefits and the importance of carefully checking the content of planning permissions, conditions and obligations.

Subsequent articles will cover permitted development, breaches of planning control, enforcement and lawful development.

## THE ROLE OF THE PLANNING SYSTEM

The aim of the planning system is properly to control the development of land in the UK, in the interests of the public. The role of the local planning authority (LPA) is properly to control the development of land within its own area.

The planning system is completely separate from other means of control, such as licensing requirements or building control. It is neither ancillary to, nor subordinate to, other such controls. Each separate control stands alone. For example, it sometimes happens that a development proposal can be granted planning permission, but it cannot satisfy building regulation requirements or environmental health requirements, or perhaps a restrictive covenant cannot be removed or overcome. In such circumstances, notwithstanding that it has planning permission, the development cannot proceed.

## THE MEANING OF 'DEVELOPMENT'

If your client has built something onto their property, or changed the use of his land in some way, or if he plans to, it is important to know whether planning permission was, or is, required for it. It is equally important to do so, of course, if your client hopes to buy land on which something has been built, or if a use has been changed.

extensive public consultation and debate. There are strategic policies, core policies, and also policies specific to certain areas, particularly if those areas are to be redeveloped. Supplementary policies are often adopted later.

The purpose of adopting planning policy is not only to guide the LPA, but also to guide those wishing to make, support or

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Planning permission is required only if the act falls within the definition of 'development'. Development has a specific meaning in planning terms. There are two types, or limbs, as follows:

### 1. OPERATIONAL DEVELOPMENT

This is physical works to the land, resulting in a permanent alteration of the land. The development may be in, on, over or under the land. It includes the erection of buildings on the land, a cellar beneath it, a wall on it, or a bridge over it. It is work normally undertaken by a builder, and includes the demolition of buildings.

### 2. A MATERIAL CHANGE OF USE OF THE LAND

This is a change in the use of the land that is significant in planning terms. Whether or not it is significant depends on the amenity effect it has on others. Examples are changing the use of a shop to a restaurant, or a field to a golf range.

## DETERMINING AN APPLICATION

Each LPA adopts a development policy framework aimed at securing and facilitating the LPA's vision for the future viability and vitality of its area. This framework is based on government policy, and is the result of

object to applications. The LPA's planning policies are the most important documents within the planning process.

Accordingly, as a matter of law, planning applications must be determined in accordance with policy, unless material planning considerations indicate otherwise. A determination that is not based on policy and material planning considerations is vulnerable to challenge. The type of challenge depends on whether the decision being challenged is to grant or to refuse permission.

## MATERIAL PLANNING CONSIDERATIONS

These include: government policy; case law; previous decisions of the local council or planning inspectors; the design, appearance and layout of the scheme; its visual impact, or other impact including noise, smell or any nuisance; the impact on trees, listed buildings or conservation areas; highways safety and parking.

The following are not material planning considerations: private property rights; boundary or access disputes; restrictive covenants; rights of way; the effect on property values; or the loss of a private view.

## PLANNING CONDITIONS

As a matter of law, if a planning proposal is acceptable in planning terms without being restricted in any way (by planning conditions or by an obligation under section 106 of the TCPA 1990, unconditional permission should be granted.

In cases where the proposal would be acceptable, but only if it were subject to restrictions, permission should be granted subject to those restrictions.

The imposition of planning conditions is the most common form of restriction on permission. The LPA has the power to impose planning conditions only on land which is 'within the control of the applicant'. Financial contributions cannot be demanded by way of planning conditions (in some cases, it is possible for an LPA to secure such restriction or contribution by imposing a particular type of condition, known as a 'Grampian condition', but there is not sufficient space to explore that here).

When advising a client on the purchase of property, it is most important to check the planning permission for the property, and, in particular, the conditions imposed on that permission. Subject to exceptional cases, conditions do not expire, but remain in perpetuity; most are as valid 10 or 20 years later as they were at the time they were imposed. A condition can be disregarded only if it required a one-off act, for example, to demolish an outbuilding, and that outbuilding has been duly demolished. The only other time a condition does not have to be complied with is if that condition has not been complied with for 10 years (in some cases, four years), in which case it is deemed to be lawful not to comply with it. Lawful development is a subject in its own right. I will cover it in my third article in the series.

The next article in this series deals with permitted development (PD) rights. Those rights can be removed by a condition (or subsequently, by a direction under article 4 of the TCPA 1990) so that a client proposing to buy a property with the firm intention to extend it may not have PD to do so. He may make an express planning application to carry out the works, but it may be refused. It is easy, and very dangerous, to overlook the presence of such a condition removing PD rights.

## SECTION 106 OBLIGATIONS

If there is a perceived need to restrict development outside the control of the

applicant, or if there is a justifiable need to demand a perceived public benefit, such as a financial contribution, this will normally be pursued by way of an obligation under section 106 of the TCPA 1990 (or 'section 106 obligation'). This section provides a legal mechanism whereby the LPA can require an applicant to covenant to provide a public benefit. This benefit may be in the

say so at the very beginning of the permission. It might use the terminology that it is subject to a section 106 'agreement', as opposed to a section 106 obligation, but that is merely incorrect terminology based on the unamended provisions; it does not affect the legality of the permission. If there is a section 106 obligation, you will need to obtain a copy

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form of providing a new highways infrastructure to accommodate a new development, or a financial contribution, for example, towards providing education to the children of the inhabitants of the new proposed dwelling houses, or towards new highways infrastructure.

Section 106 obligations can be sought by way of an agreement, or by way of a unilateral undertaking by the developer. The LPA should provide a template section 106 obligation on its website, but not all LPAs have yet done so.

LPAs are acting in the interest of the community. Solicitors are acting in the interest of clients. LPAs need to be able to justify their demands based on their adopted policies as described above. Sometimes they cannot, but the demand is made anyway in the hope that the developer or his agent will not appreciate that it cannot be justified. If it is justified, in seeking planning permission, extensive negotiations often take place before the content of a section 106 obligation is agreed. If it cannot be agreed, the LPA will have to refuse permission on the basis that the developer refused to make the contribution sought by the LPA. The developer then appeals the refusal, and the planning inspector appointed by the secretary of state will decide whether or not the demand of the LPA is justifiable.

As with any planning or enforcement appeal, if a solicitor can persuade the inspector that the LPA has behaved unreasonably, that solicitor can seek a costs award on behalf of his or her clients.

When checking the planning permission, it is very important to see whether the permission is granted subject to a section 106 obligation. It will normally

of it, as the precise wording of each obligation may be important.

As with conditions, section 106 obligations do not expire. They can only be challenged after five years, so if your client wants to carry out development restricted by a section 106 obligation before that time, he will need to obtain the consent of the LPA to do so.

## CONCLUSION

Sadly, as we are only too well aware, clients are becoming increasingly keen to complain, and also to litigate, sometimes as a way of avoiding payment. A failure to check planning documentation carefully and advise clients accordingly can – and sometimes does – result in all manner of unfortunate events. The most common problem is clients erecting extensions without the PD they thought they had. Sometimes, we are able to remedy the situation and negotiate with planners an acceptable way forward. However, this is not always possible, leaving the unhappy client looking to his conveyancer to recover wasted costs and so on.

Accordingly, to protect themselves against complaints, and even worse, court proceedings, I cannot stress enough the importance of carefully checking the precise wording of any planning permissions, conditions, and section 106 obligations. ■

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