Introduction
The changes made to the Town and Country Planning Act 1990 (by the Planning and Compulsory Purchase Act 2004), which generally reduced the life of permissions from five to three years, will have a significant impact on developers. In particular, a developer having the benefit of a permission which requires extensive steps to be taken to satisfy pre-commencement conditions before works begin, will need to act promptly to satisfy such conditions and, organise a lawful commencement of development.

In addition, in the case of outline planning permissions, where environmental impact assessment (EIA) was required at the application stage, the linked decisions in Commission v UK and R. (Barker) v Bromley and, the requirement to consider the need for EIA at the reserved matters stage (where all likely significant environmental effects were not considered at the outline planning permission stage), only serves to increase still further the burden of pre-commencement conditions which a developer may need to discharge, before works may begin.

This Guide considers the position of a developer having the benefit of a permission which remains unimplemented and, the options available to prevent the expiry of such permission. Before considering these options, it is necessary to understand the time limits within which development must begin.

Time limits for commencement – Generally
The Town and Country Planning Act 1990 (the Act) sets out certain time limits within which development authorised by outline planning permissions and planning permissions (not in outline) must be begun, if the relevant permission is not to lapse.

Time limits for commencement – Planning permission not in outline (in this Guide referred to as a full planning permission)
The Rule
Section 91 of the Act provides that every full planning permission shall be granted subject to a condition that the development must be begun not later than:
(a) three years from the date on which the permission is granted; or
(b) such other period (whether longer or shorter) as the local planning authority may determine.

When granting full planning permission, most local planning authorities will adopt the 'default' period of three years.
This three year period may be varied, at the discretion of the local planning authority (or the Secretary of State on appeal), to specify such other period as may be appropriate.

This three year period may be varied, at the discretion of the local planning authority (or the Secretary of State on appeal), to specify such other period as may be appropriate. In deciding whether to choose another period, the local planning authority/Secretary of State shall have regard to the development plan and any other material considerations. In certain cases, e.g. large scale development, a longer period may be appropriate and, in such cases, the developer should always consider requesting a longer period within which to commence development.

If full planning permission is granted without a time condition, then it is deemed to have been granted subject to the three year condition referred to.

If legal proceedings are brought in the courts to challenge the validity of the grant of a full planning permission, the Act provides for the time limit for beginning development to be extended by a further one year.

Exceptions
This three year rule does not apply to the following types of permissions: namely, permission granted by a development order; retrospective planning permission; a planning permission granted for a limited period; certain mineral planning permissions; permission granted by an enterprise zone scheme; permission granted by a simplified planning zone scheme; and any outline planning permission.

Time limits for commencement – Outline planning permission
Definitions
An outline planning application may be submitted only in respect of the erection of a building and, an outline planning permission is one granted pursuant to such application and subject to a condition requiring the approval of one or more reserved matters.

Before 10 August 2006, reserved matters were defined as ‘siting, design, external appearance, means of access and landscaping’. After that date, the definition was amended so that the list now comprises ‘access, appearance, landscaping, layout and scale’; and each element now has a new definition.

The Rule
Section 92 of the Act provides that every outline planning permission shall be granted subject to conditions to the effect that:

(a) application for the approval of reserved matters must be made not later than the expiry of three years from the grant of outline planning permission, and;
(b) development must be begun not later than the expiry of two years from final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.

When granting outline planning permission, most local planning authorities adopt the ‘default’ periods of three and two years respectively.

Once again, these periods may be varied at the discretion of the local planning authority (or the Secretary of State on appeal). Thus, either may specify such other period as they consider appropriate (whether longer or shorter). In deciding whether to choose another period, the local planning authority/Secretary of State shall have
regard to the development plan and any other material considerations. In certain cases, e.g. large scale development, a longer period may be appropriate and, in such cases, the developer should always consider requesting a longer period within which to commence development.

A developer may choose to make an application for the approval of all reserved matters at the same time or, make applications for certain approvals at one time and others at another. Applications may be made for an alternative set of approvals in respect of the same reserved matters, even after a set of approvals in respect of such matters has been issued. All reserved matter applications must be submitted within the three year period if the outline planning permission is to be kept alive. It does not matter if approvals are given after the three year period has expired, providing all the applications are made within the three year period. If an approval is eventually refused by the local planning authority (and not appealed) or is refused by the Secretary of State on appeal, in either case after the three year period has expired, then the developer will be unable to submit further reserved matter applications. Accordingly, in appropriate cases, it may be advisable for a developer to submit a range of alternative reserved matter schemes for approval, to maximise the chances of achieving all reserved matters approvals and, correspondingly, minimise the risk of missing an approval and thus allowing the outline planning permission to effectively lapse.

In addition, in relation to the requirement to submit applications for approval of reserved matters, the local planning authority may specify separate periods of time in respect of separate parts of the development. This will be particularly useful in relation to large scale development which is to be phased. In such a case, the requirement to submit applications for the approval of reserved matters within three years might apply only to the first phase. While there will remain a need to submit applications in respect of remaining phases, these might only be required at later dates. The utility of this provision is that it enables a developer, more easily, to make a ‘compliant’ commencement of development in conformity with the terms of the outline planning permission. This might otherwise be difficult to achieve on a large site (where development on later phases may not take place for several years), if the requirement remained to submit applications for approval of all reserved matters within three years.

If outline planning permission is granted without the time conditions referred to, then it is deemed to have been granted subject to the three and two year conditions respectively, referred to.

The Act does not provide for any extension of time where legal proceedings are brought in the courts to challenge the grant of an outline planning permission.

By reason of the operation of these provisions, the period allowed for commencing development under an outline planning permission can vary considerably. Assuming the statutory periods of three and two years (and ignoring the power to specify separate periods for the submission of reserved matters in respect of different parts of the development) the examples in the table below, illustrate the extent of this variation.
### Table: Conditions on Outline Planning Permissions

<table>
<thead>
<tr>
<th>Submission of all reserved matters (year from grant)</th>
<th>Approval of all reserved matters (year from grant)</th>
<th>Latest date to begin development (year from grant)</th>
</tr>
</thead>
<tbody>
<tr>
<td>one</td>
<td>one</td>
<td>three</td>
</tr>
<tr>
<td>one</td>
<td>two</td>
<td>four</td>
</tr>
<tr>
<td>two</td>
<td>three</td>
<td>five</td>
</tr>
<tr>
<td>three</td>
<td>four</td>
<td>six</td>
</tr>
</tbody>
</table>

**Non-reserved matter conditions on an outline planning permission**

Where a condition on an outline planning permission requires approval of a non-reserved matter e.g. a condition relating to drainage or density, then the courts have held that the requirement to submit applications in respect of reserved matters within three years, does not apply to such non-reserved matter applications. Instead, the position is regulated by the rules relating to full planning permissions, where there is no requirement to submit or secure approvals within a given period but only a requirement that development must begin within a fixed period, which is now also three years. This general rule may be varied by the terms of the outline planning permission.

Thus, if the outline planning permission specifies a fixed period of time for the submission or approval of non-reserved matters, then this would govern the matter.

The position is more complex where the outline planning permission specifies a period of time for the submission or approval of non-reserved matters which is ‘prior to the commencement’ of development. In determining such period it ought to be arguable that the fluctuating period allowed for the commencement of development under an outline planning permission, should prevail over the fixed three year period allowed for commencement under a full planning permission. In the case which established the rule the court was considering such a non reserved matter condition on an outline planning permission, which required submission and approval prior to commencement. However, for the purpose of its decision it did not need to consider the availability of the fluctuating period.

Accordingly, where there is a requirement on an outline planning permission to submit or obtain an approval of a non reserved matter ‘prior to commencement,’ and the developer has not done so within three years (but has longer than three years in which to commence development under the outline planning permission) then the question whether such developer might be allowed such fluctuating period as is allowed under the outline planning permission, in which to submit or obtain such approval, may still remain to be argued.
Developer’s options to protect an ‘expiring’ permission

Where a permission may become ‘time expired’, the developer has only a limited number of options to keep the permission alive. There are at least three options available and, these are considered below.

Option 1 – renew the permission before its expiry date;

Option 2 – make a lawful commencement of development by satisfying any pre-commencement conditions on the permission and, then commence development before the relevant expiry date;

Option 3 – vary any difficult pre-commencement conditions on the permission and, then commence development before the relevant expiry date.

Option 1 – Renewal of permission

A ‘streamlined’ renewal procedure

Regulations made under the Act appear to provide a ‘streamlined’ procedure for the renewal of permissions where the time allowed for the commencement of development has not yet expired ie. the permission is still extant and, development has not yet begun.

In such circumstances an application need only be made in writing, giving sufficient information to enable the local planning authority to identify the previous grant of permission. Such application need not be on the form supplied by the authority and need not necessarily contain all the information normally required. However, this ‘streamlined’ renewal procedure will cease when the Government introduce their proposed national standard planning application form.

In practice, the existing procedure does not operate in the streamlined manner envisaged. This is because, in respect of any application to renew a full planning permission or to renew an outline planning permission, regulations enable the local planning authority to require the developer to supply further information to enable them to determine the application. In the case of the renewal of a full planning permission, the local planning authority may also request further plans and drawings necessary to enable them to determine the application. In the case of the renewal of an outline planning permission, separate regulations provide that if the authority is of the opinion that the application should not be considered separately from all or any of the reserved matters then, it may require further details to be submitted. A local planning authority may use these powers to seek the same supporting information provided at the time of the original application. Where any of this information requires to be updated, the developer will need to revise this, to accompany the renewal application. These powers might also be used to request information increasingly sought by local planning authorities in connection with a modern planning application eg. an energy statement and/or a sustainability assessment. In addition, certain applications will also need to be accompanied by further documentation required by these and other regulations eg. a design and access statement or an environmental statement.

If the local planning authority refuse permission pursuant to a renewal application or fail to determine the application within the relevant prescribed period then, the developer may appeal to the Secretary of State, in the usual way.
Policy advice and relevance of the existing permission

A renewal application will be dealt with by the local planning authority in the same way as any other application namely, by having regard to the development plan so far as material and, to any other material considerations. As a consequence, renewal applications will be determined in accordance with the following principles.

1 An existing permission on the same site will always be a material consideration, which the decision maker must have regard to.

2 The weight to be given to an existing permission is a matter of judgement for the local planning authority/Secretary of State. In exercising their discretion and, determining the weight to be given to such permission, the following considerations will be relevant:

   (a) where circumstances/policy has not changed then, significant weight will attach to the previous decision.

   (b) the local planning authority/Secretary of State are entitled to have regard to the likelihood of the existing permission being implemented ie. whether implementation is theoretical or real. For them to give additional weight to an existing permission, the developer will need to provide evidence that the implementation of such permission is a real possibility.

   (c) the local planning authority/Secretary of State will be entitled to refuse an application for the renewal of a permission where circumstances have materially changed. In this respect new national policy statements or, the emerging policies of a regional spatial strategy/local development document will be material considerations to be taken into account.

   (d) the local planning authority/Secretary of State are free to disagree with a previous decision. When doing so they must deal with the matter properly and adequately and, give reasons for any difference of view.

New section 106 obligation

Where a section 106 obligation was entered into contemporaneously with the grant of the original permission then, the grant of a renewal permission will usually result in the need for a further section 106 obligation to repeat the requirements of the earlier obligation or, declare that such requirements will be triggered by a commencement of development pursuant to the renewal permission.

Option 2 – Lawful commencement of development

Introduction

This option involves two elements: first, satisfying any pre-commencement conditions; and secondly, commencing development before the relevant expiry date.

Satisfying pre-commencement conditions

Definition

Pre-commencement conditions are conditions which require the submission of reserved matters or further details to the local planning authority or, the approval of such details by the local planning authority, before development is begun.

If the local planning authority refuse to approve an application for approval of reserved matters or a submission of further details or, fail to determine any such...
application within the relevant prescribed period, then the developer may appeal to
the Secretary of State in the usual way.

**Analysing pre-commencement conditions**

There are three ways in which the courts have approached pre-commencement
conditions.

First, a distinction has been drawn between those conditions which were ‘conditions
precedent’ ie. which expressly prohibited development commencing until a
particular requirement had been met, using words such as ‘no development shall
be carried out until…….’; and those conditions which contained no ‘prior condition’
but were more in the nature of positive obligations requiring some action to be
taken before development is commenced, eg. ‘the developer shall ….. before
commencing development’. Where works are carried out in breach of these
conditions then, in the former case, there will have been no material operation and
therefore no lawful commencement of development. Any works carried out will be
unlawful and may be enforced against. In the latter case, the development will have
lawfully commenced but, there will remain a breach of condition which the local
authority can enforce against.

Secondly, in other cases, the courts have declared that it is not necessary or helpful
to try to determine whether conditions are ‘conditions precedent’. Instead it is only
necessary to ask the question: ‘are the operations permitted by the planning
permission, read together with its conditions?’ If the operations contravene the
conditions they cannot properly be described as commencing the development. This
approach is probably the preferred one and, closest to the recognised general rule,
referred to below.

Thirdly, in *R (Hart Aggregates) v Hartlepool BC*, the court sought to classify
conditions between those which go to the heart of a permission and, those which
merely amount to a failure to obtain approval of one particular aspect of the
development. Whether a condition goes to the heart of a permission is a nebulous
concept and will include a consideration of how many conditions were not complied
with and their significance.

**Pre-commencement conditions – the general rule**

Notwithstanding these different approaches, the general rule in respect of pre-
commencement conditions, (sometimes referred to as the Whitley Principle – from
the decision in *Whitley & Sons v Secretary of State for Wales*) is well established, and
provides that: ‘operations carried out in breach of a condition will be unlawful and,
cannot be relied upon as material operations which will commence development.’ In
such circumstances the relevant works will not be authorised by the permission; they
will constitute a breach of planning control; and they will be subject to the usual
rules of enforcement. It follows that pre-commencement conditions are important
and need to be complied with.

**Pre-commencement conditions – exceptions to the general rule**

However, as with many general rules there are a number of exceptions. Where a
developer has been unable to commence works in accordance with the requirements
of a planning permission then it may need to rely upon one of these exceptions.
These are:

1. Where the pre-condition has been met in substance, although not in form eg., the relevant matter was approved by a local planning authority committee but, the formal written notice of approval was not issued before material operations commenced and, the authority has decided not to take enforcement action.

2. Where the developer has applied for an approval before the expiry of a relevant time limit and, approval is subsequently given, so that no enforcement action can be taken. In these circumstances, material operations carried out before the expiry of the time limit (in accordance with the scheme eventually approved) will be treated as being done in accordance with such eventually approved scheme and, amount to a lawful commencement of development.

3. Where the local planning authority has agreed to allow work to start without compliance with the relevant pre-condition, ie. effectively ‘waived’ the formal requirements of the condition. While informal waiver may occur regularly in practice, a local planning authority has no power to waive or modify conditions on a permission and, the courts have declared that this exception is likely to be of limited application. This is because planning operates as a branch of public law and to allow developers and local planning authorities to reach side agreements or understandings concerning compliance with conditions, bypasses the role of the public who would otherwise have an entitlement to be consulted, and object or make representations. The provisions of section 73 of the Act (dealing with the modification of planning conditions and its associated requirements for publicity and consultation), exists to deal with such circumstances. This exception seeks to bypass the use of section 73, to the detriment of third parties. As a consequence, this exception might now be expected to apply only in exceptional circumstances eg. where failure to comply with the relevant pre-condition does not have any impact or effect on the general public.

4. Where it would be unlawful in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding.

This principle is derived from a case where a permission authorised works on public open space. A condition prevented development taking place until alternative open space had been provided. Subsequently, it became unnecessary to build on the open space and, therefore, alternative open space was not provided. However, the condition remained unsatisfied. A third party claimed there had been no commencement of development because the condition requiring alternative open space had not been complied with. While the court acknowledged that there had been no lawful commencement, so that the permission had lapsed, they said that it would be irrational or an abuse of power for a local planning authority to take enforcement action in respect of a requirement, the need for which had ceased to exist.

In that case the developer executed a planning obligation covenanting to comply with the conditions of the lapsed planning permission and, as a consequence, the local planning authority subsequently resolved not to take enforcement action.
For this reason it is suggested that where:

(a) a developer has acted in breach of a pre-commencement condition (as a consequence of which there has been no lawful commencement of development, so that the permission has lapsed and the local planning authority is able to take enforcement action); and

(b) the breach is more procedural than substantive; and

(c) the local planning authority is still supportive of the development and, minded not to take enforcement action; and

(d) the carrying out of the development would not require environmental impact assessment;

then, with a view to persuading the local planning authority not to take enforcement action, the developer may (with the co-operation of the local planning authority) enter into a section 106 obligation with such authority or, execute a unilateral undertaking in favour of it, in either case covenanting to observe the conditions of the lapsed permission and any other necessary controls over the carrying out and future use of the development.

5 Where enforcement action against the breach of the pre-condition is no longer possible because the time limit for taking action has expired (e.g. in the case of: the construction of a building, four years has elapsed; a change of use to a single dwelling house, four years has elapsed; a change of use of a building (other than to a single dwelling house), ten years has elapsed; and a breach of condition, ten years has elapsed).

6 It may be that a commencement in breach of a condition may be sufficient to amount to a lawful commencement of development if it does not go to the heart of the permission and, is only minor in nature. However, this exception is still to be developed by the courts.

Commencing development

Introduction

Development is taken to be begun: in the case of operations at the earliest date on which a material operation is carried out; in the case of a change of use when the new use is instituted; and, where development comprises carrying out operations and a change of use, the earlier of the operations being carried out or the change of use being instituted.

Material operations

A material operation is defined by Section 56 of the Act to mean:

(a) any work of construction in the course of the erection of a building.

(b) any work of demolition of a building.

(c) the digging of a trench, which is to contain the foundations or part of the foundations of a building.

(d) the laying of any underground main or pipe to the foundations or part of the foundation of a building or, any such trench.

(e) any operation in the course of laying out or constructing a road.

(f) any change in the use of any land which constitutes material development.
The courts have acknowledged that this list is not exhaustive, as it does not deal comprehensively with the range of commencement works which might begin other forms of development. Examples of ‘other operations’ which might suffice to begin development include the excavation of a lake or cutting; the raising of an embankment; the driving of a tunnel; or land raising. In addition, there are special rules governing the beginning of development under minerals permissions.

Genuine intention to carry out/complete the development is irrelevant
For some years, the courts have grappled with two competing principles:

The first is that works must be undertaken in good faith for the purpose of carrying out development, ie. works must not be carried out simply to keep a permission alive but, there should be a genuine intention on the part of the developer to carry out and complete the development and, this intent must not be ‘colourable’.

The second, and contrary principle, is that the Court should not concern itself with subjective matters of intention but, only with whether the works have (objectively) physically been undertaken.

After much debate the courts have determined that they will not be concerned with the subjective intention of the person carrying out the works. To infer intention introduces a gloss or requirement which is not present in the statute. Further, introducing an enquiry into the state of mind of the developer creates difficulties, both for the local planning authority and a prospective (and actual) purchaser of land, in relation to any ‘commencement’ which may have occurred.

Instead, the courts have determined that the test is an objective one namely, whether what has been done, has been done in accordance with the permission and, in addition, whether the works were material (ie. more than ‘de minimis’).

The objective test
There are two elements to the objective test.

The first is that the works carried out must clearly relate to works authorised by the planning permission. Thus, the digging of a trench which is to contain the foundations of a building must be in the position indicated on approved plans and, not in an unrelated position on the site.

The second requirement is that the works must be material (in the sense of being more than de minimis). Otherwise, the degree or extent of the work done (subject to the de minimis principle) is not relevant. The court is not concerned with the quantum of the works undertaken. Equally, it does not matter that the cost of the works is small by comparison with the total cost of the project. It follows that commencement works need not be very extensive in nature.

Examples of lawful works of commencement
The following are examples of works which have been held by the courts to constitute material operations and thus lawful works of commencement:

- putting in pegs (1½”– 2” square; 2½’ long and 6”–10” above ground level) at intervals of about 50’ along the centre line (and the line of pavements on each side) of an estate road, for the first 250’ of such estate road.
• excavating a 9’ trench for the foundations of a garage and, putting a concrete foundation into such trench.
• digging a trench to contain foundations (which was then backfilled for safety reasons).
• excavating a mound of earth of an area of approximately 720 square metres, on the boundary of a site to form a service yard (operations in the course of laying out or constructing a road).
• works to create a private drive to a house (held to be capable of being a 'road').
• constructing walls on an approved alignment even though, in some instances additional works were undertaken, eg. door openings were omitted and sill heights were higher than required.

Effect of lawful commencement of development
An effective commencement of development will be sufficient to lift the time limit for all of the development, even though commencement is only made in respect of a small part.

Thus, if an effective commencement of development occurred in year three of the life of a planning permission, it will be possible to begin a subsequent stage of the development several years later, because the initial commencement will have protected the planning permission, so that the three year time limit ceases to have any relevance, in respect of future stages of the development.

A caveat on triggering planning obligations
If a developer has entered into planning obligations with a local planning authority pursuant to a section 106 agreement or unilateral undertaking and, these are expressed to be conditional upon the developer commencing development then, the developer will need to consider whether such obligations will be triggered by a commencement of development, which involves only minimum works. Every agreement and unilateral undertaking will need to be considered according to its terms but, the following general comments may be made:

1 Many agreements will declare that certain works preparatory to construction, eg. demolition or other minor works, shall be deemed not to amount to a commencement of development for the purposes of the agreement or undertaking. In such circumstances, it may be possible for the developer to carry out works which are sufficient to commence development for the purposes of the Act (and thus keep the permission alive) but, not trigger planning obligations in an agreement or undertaking.

2 Where planning obligations are restrictive in nature and relate to occupation, eg. not to occupy part of the development then, a commencement solely for the purpose of keeping a permission alive, will not breach these obligations.

3 Where planning obligations are positive in nature, eg. to pay sums of money or to carry out works then, such obligations may be triggered by a commencement of development. Where the obligation is to pay money or carry out works within a given period after occupation then, the obligation will not be triggered by a commencement solely for the purpose of keeping a
planning permission alive. However, if the obligation is to pay/carry out works within a given period after the commencement of development, then a commencement will usually cause such an obligation to crystallise.

A caveat on completion notices
Where development has begun and the local planning authority is of the opinion that the development will not be completed within a reasonable period, it may serve a completion notice, stating that the permission will cease to have effect ie. terminate on a given date (being not less than twelve months after the notice takes effect). The notice must allow a period of not less than twenty-eight days for objection. There is a right of appeal to the Secretary of State and, an opportunity to be heard at a public local inquiry.

If there is no appeal, or, there is an appeal which is dismissed and the notice is confirmed then, the permission is terminated, ie. ceases to have effect in respect of works which remain to be completed. Any further operations will be unauthorised and will be liable to enforcement action.

Development which has been carried out before a completion notice takes effect ie. partially completed development, will remain lawful, so that a local planning authority cannot issue an enforcement notice in respect of it.

Completion notices are used in circumstances where a commencement has taken place but, there appears to be no desire on the part of the developer to finish the development.

Option 3 – Variation of pre-commencement conditions and lawful commencement of development
Introduction
This option comprises two elements: first, the making of an application to vary any difficult pre-commencement conditions; and secondly, the making of a lawful commencement of development.

Variation of difficult pre-commencement conditions
Many permissions will contain conditions which require the submission or approval of further details prior to the commencement of development. Some of these conditions will relate to matters which clearly need to be satisfied before development is commenced. Others may concern matters which could be approved at a later date, without prejudicing proper planning control over the site. If, (in the case of a condition falling into the latter category) compliance is difficult, eg. because the condition requires the submission of details in respect of the whole of a scheme then, the developer might apply to vary the more onerous pre-commencement conditions and substitute a requirement to submit details only in respect of the first phase of the scheme before work commences, leaving the submission of details in respect of subsequent phases of the scheme to be made later. The purpose of such a variation would be to enable the developer to make a ‘compliant’ commencement.

Such a variation may be achieved informally (where this is permitted by the permission) or, more usually formally, by way of an application under section 73 of the Act.
Informal variation

An informal variation may be possible where the condition includes within it, a mechanism for its own variation. Thus, a condition which states a requirement to obtain an approval but, qualifies this with words such as; ‘except where the local planning authority has given its prior written consent’, or ‘within such other period as the local planning authority may agree’ is one which contemplates the possibility of a variation. Such wording would appear to permit a variation of the condition by exchange of correspondence and, without the need for a formal application under section 73. However, some doubts have been expressed as to the willingness of the courts to uphold such a variation, in the basis that this ‘process’ bypasses the use of Section 73, to the potential detriment of third parties.

Variation under section 73 of the Act

Introduction

Section 73 of the Act enables a developer to make an application for planning permission for the development of land without complying with conditions subject to which an existing planning permission was granted.

The section is not available if the permission has lapsed i.e. the time limit within which development must begin has expired, without development having commenced.

Section 73 used to be available to permit the making of an application to extend the time limits within which development must be commenced or, applications for approval of reserved matters must be made. However, the section has been amended, so that permission cannot now be granted under section 73 to the extent that it has effect to change a condition subject to which a previous permission was granted, by extending the time within which development must begin, or an application for approval of reserved matters must be made.

Procedure

An application under section 73 is required to be made in writing and give sufficient information to enable the local planning authority to identify the previous grant of permission and any condition in question. Such applications are subject to the same requirements for publicity, design and access statements and EIA (where required), as any other application for planning permission. Further, the local planning authority have the power, under existing regulations, to require the applicant to provide further information, plans and drawings necessary to enable them to determine the application.

Matters to be considered by the local planning authority

A local planning authority’s jurisdiction under section 73 is more limited than when considering an application for permission in the usual way. In considering such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted.

If the local planning authority consider planning permission should be granted subject to the same conditions, they must refuse permission. If the authority decide that permission should be granted subject to different conditions, they shall
grant permission accordingly. An authority can impose new conditions on the fresh permission providing they do not amount to a fundamental change to the proposal.

A section 73 application is not to be used by a developer to seek a fundamental change in the form of the original development. Neither is the section to be used by local planning authorities to correct deficiencies in an earlier permission.

When issuing a permission under section 73 it is desirable that all conditions to which the new permission is subject should be set out in the new permission and, not left to be established by cross referencing between the old and new permissions.

If the local planning authority refuse the application or, fail to determine it within the relevant prescribed period then, the developer may appeal to the Secretary of State in the usual way.

**Effect of the grant**

While an application under section 73 is often described as an application to amend conditions on an earlier permission, a determination under the section does not amend the existing permission. The legal consequence of a grant is the grant of a new permission, leaving the original permission intact, and unamended.

**New Section 106 obligation**

Where a section 106 obligation was entered into contemporaneously with the grant of the original permission then, the grant of a section 73 permission will require a further section 106 obligation to repeat the requirements of the earlier obligation or, declare that such requirements will be triggered by a commencement of development pursuant to the section 73 permission.

**Commencing development**

The second element of this Option 3 is commencing development before the relevant expiry date and, the comments set out under the heading 'Commencing development' in Option 2, apply equally here.

**Conclusion**

Most permissions will contain a number of conditions which require to be complied with before works start. It is essential for a developer to assess the requirements of such conditions at an early stage. The reduction in the life of permissions from five to (generally) three years means that developers need to act promptly to satisfy such conditions and make a lawful commencement of development or, establish a strategy for the renewal of the planning permission. If the significance of such conditions is overlooked, then the benefit of the permission may be lost.

**Option 1 – renewing a permission** will often be the developer’s preferred choice, since it avoids the need to obtain any pre-commencement approvals and commence works. However, in practice the process is not as streamlined as developers might wish and, the local planning authority is always able to use its powers to seek further information, rendering the process similar to that of a normal planning application. The most significant risk for the developer in pursuing this option is that policy may have become more restrictive, resulting in the renewal application being refused or, making the process of renewal more difficult.
Option 2 – making a lawful commencement of development will be dependent upon an analysis of the permission and the ability to secure all necessary approvals. This is a difficult area and failure to secure one or more approvals may result in the lapse of the permission. A further disadvantage of this option is that where there is an accompanying planning obligation, the commencement of development may trigger substantial planning obligations.

Option 3 – involves varying conditions and then making a commencement. Where the informal variation process is not available, a developer must fall back on a section 73 application. While the local planning authority must consider only a narrow range of issues, such applications are still subject to the submission of a formal application and, all of the usual requirements to provide supporting documents, information and, for publicity, will apply.

While this Guide identifies three options to keep a permission alive, these are not (at least at the outset) exclusive options. At the initial consideration stage a developer may not need to make a definitive election as to the option it prefers and, for all practical purposes, may not be able to do so. It may be prudent to pursue two or more options in order to achieve the desired outcome. If the developer were to pursue only one option and, later found that this was not going to be forthcoming then, it may be too late to pursue either of the other options. However, in making such choices a developer will not be able to make a renewal application if it has already made a commencement of development.

All of these options involve the co-operation of the local planning authority. At an early stage the developer should discuss these options with the authority and, endeavour to secure its support for one or more of these. However, even with such support, a prudent developer may still wish to pursue two or more options, in case its preferred option runs into difficulties with officers, councillors or third parties.

A final caveat on related real estate documentation – Many land transactions including option agreements, conditional contracts and overage arrangements, will contain trigger events such as the grant of planning permission or the commencement of development, from which various rights and obligations will flow eg. the running of periods for the exercise of options; the creation of unconditional contracts; or the triggering of obligations to make overage payments. A developer pursuing one of the options referred to in this Guide will need to consider the effect of its actions on all related real estate documentation.
Further Information

To view or download this Guide, or our other publications or to obtain further information on our range of services, please visit www.bdb-law.co.uk

T: 020 7227 7000
F: 020 7222 3480

Contacts in the Planning Group

Robbie Owen
Partner and Head of the Major Projects Group
T: 020 7227 7076
E: robbieowen@bdb-law.co.uk

Paul Thompson
Partner
T: 020 7227 7064
E: paulthompson@bdb-law.co.uk

Mark Challis
Partner
T: 020 7170 0323
E: markchallis@bdb-law.co.uk

John Qualtrough
Partner
T: 020 7153 8520
E: johnqualtrough@bdb-law.co.uk

This Guide is written in general terms and is not a substitute for detailed advice on the subject. You should seek specific advice before taking any action based on the information in this Guide.

Bircham Dyson Bell LLP processes your personal data in connection with the operation and marketing of a legal practice and will occasionally send you information relating to the firm. If you would prefer not to receive this information, please notify us in writing.

If you would like us to amend your contact details, please send a fax or letter for the attention of the Client Records Administrator at Bircham Dyson Bell LLP.

Bircham Dyson Bell LLP is regulated by the Solicitors Regulation Authority and is a member of Lexwork International, an association of independent law firms.

Bircham Dyson Bell LLP is a progressive law firm renowned for its personal service. We offer a wide range of services to the business, public and charity sectors as well as services for individuals.

Our range of services includes parliamentary, public law and planning, real estate, corporate, employment, intellectual property, commercial litigation and dispute resolution, private client and charities.

The firm issues a number of publications, including:

- Major Projects Bulletin
- Planning Bulletin
- Public Law Bulletin
- Road User Charging Bulletin
- Corporate Bulletin
- Employment Bulletin
- IP Bulletin
- Individual Matters Bulletin
- Charities Bulletin