

Planning by Deceit?

In R (on the application of Welwyn Hatfield Council) v Secretary of State for Communities and Local Government and another [2009] EWHC 966 (Admin) (“Beesley”), the High Court quashed a Planning Inspector’s decision to grant a certificate of lawfulness of existing use or development (“CLEUD”).

In March 2000, Mr Beesley obtained planning permission to erect a hay barn. The planning permission was granted subject to conditions including a condition that the building would be used only for the storage of hay, straw or other agricultural products.

Construction was completed in July 2002. Although the building looked like a barn from the exterior, it was fitted out as a normal dwelling house inside. Mr Beesley moved into the new dwelling house in August 2002.

Four years later in August 2006, Mr Beesley applied for a CLEUD. The Local Planning Authority refused to grant the certificate, and Mr Beesley appealed. He asserted before the Planning Inspector that he deliberately deceived the Council when he applied for planning permission for a barn, and that he always intended that it would be used as a dwelling house.

The Planning Inspector decided that the certificate should be granted and the Council applied to the High Court to overturn the Planning Inspector’s decision.

The Court held that the development had not acquired immunity in August 2006 from

planning enforcement action under Sections 171B(1) or (2) of the Town and Country Planning Act 1990 (“the 1990 Act”) because there had been no change of use of the building to use as a dwelling house; Mr Beesley had always used the building as a dwelling house.

The Court considered its decision was consistent with the decision of the House of Lords in Sage v Secretary of State [2003] 2 All E R 689, [2003] 1 WLR 983 and commented that nothing said by the House of Lords in Sage dealt with the situation in Beesley, where a developer practised a deceit from the outset in order to try to take advantage of the four year rule.

The Court noted that the 1990 Act does not contain any provisions to deal with fraud and concealment of the actual use from the Planning Authority. The Court considered that this was a serious loophole in planning law. Collins J said “... the legislation could have contained provision which dealt with fraud and concealment of the actual use from the planning authority. It does not do so. Whether it should do so is a matter which ... ought to be carefully considered by those responsible for legislation because... there is a serious loophole in the planning law.”

The Court also considered that Mr Beesley may have committed a criminal offence by obtaining planning permission by deception, and that, if the dwelling house were allowed to remain, its value could be removed from him under the Proceeds of Crime Act. The Judge did not indicate what offence he had in mind. He may however have been referring to the offence of fraud by false representation, contrary to Section 2 of the Fraud Act 2006,



which states that a person commits an offence if he dishonestly makes a false representation with the intention of making a gain for himself or another.

Recovery under the Proceeds of Crime Act 2002 is limited to property obtained through conduct that is unlawful under the criminal law.

The decision in this case reinforces the Courts’ view that a developer should not be able to take advantage of the four year rule by deceit.

Many will recall the case of Robert Fidler, who deliberately concealed a new dwelling house behind haystacks for four years. Relying on the case of Sage, the Planning Inspector decided that the straw bales that concealed the building were part of the totality of the building operations and that the building was not substantially completed until the bales had been removed. Mr Fidler’s appeal against planning enforcement action therefore failed.

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Section 73, TCPA 1990: A Useful Tool?

Some points to consider

“Determination of applications to develop land without compliance with conditions previously attached.”

This is the heading to section 73 of the Town and Country Planning Act 1990, and is commonly referred to as an application to vary a condition on an existing planning permission. This does not reflect the true nature of applications and permission pursuant to section 73.

- A section 73 application, if successful, gives a new permission and leaves intact the existing permission, giving the developer a choice of which to implement if development is not already commenced. A developer should in those circumstances make clear to the planning authority which permission it ultimately implements!
- It can be granted subject to the same or different conditions from the existing permission.
- Dependant on the conditions set out in it the new permission may provide for a further 3 years for commencement of the development from its date.
- Common practice for planning authorities is to issue a decision notice referring only to the condition which is changed.
- Whether the new permission is subject also to the conditions on the existing permission will be a matter of interpretation, but they will usually be incorporated by reference.
- Best practice for planning authorities is to set out all the conditions which the new permission is intended to be subject to.
- A section 73 application cannot be used to grant planning permission for something which is a fundamental alteration of the original permission. It is not necessarily the case that if there is a condition restricting an activity, that activity is, by implication, within the scope of the original permission.
- The Government is currently consulting on the use of section 73 applications to deal with “minor material amendments”. The consultation, “Greater flexibility for planning permissions” was published in June 2009 and the consultation ends on 13 August 2009.
- A section 73 application cannot be used to vary condition on an existing planning permission to extend the time within which development must be commenced, or an application for approval of reserved matters must be made. (N.B. see the article below on extension of time limits)
- Other time limits within conditions, for example for submission of schemes, or for expiry of temporary consents, can be extended by a section 73 application.
- The fee for a section 73 application is currently £170, a considerable reduction on many of the fees for full applications.
- When considering a section 73 application the decision maker is confined to a consideration of the planning issues relating to the condition and (save in specific cases such as an extension of a temporary permission) cannot re-open debate relating to the principle of development.
- The requirements for Environmental Impact Assessment apply equally to a section 73 application but it is not necessary to specify in a screening or scoping request of a planning authority the section pursuant to which your planning application will be made.
- Section 73 should not be confused with section 73A which provides for a retrospective permission to be granted and supplements the planning authorities' powers of granting planning permission, rather than being a mode of planning application.

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EXTENDING THE TIME LIMIT FOR COMMENCEMENT

In response to the economic downturn and pressure from developers, the Department for Communities and Local Government (“the DCLG”) wrote to Local Planning Authorities (“LPAs”) in April 2009, reminding them that they have discretion under Section 91 of the Town & Country Planning Act 1990 to grant planning permission for a period other than 3 years, if appropriate.

The DCLG also published a consultation paper in June 2009. The DCLG is seeking to extend the time limits for existing planning permissions by way of an amendment to the Town and Country Planning (General Development Procedure) Order 1995 (“the GDPO”). The amendment would only apply to major developments and would take effect from 1 October 2009. “Major developments” are defined by Article 1(2)

of the GDPO as development involving (for example) the winning and working of minerals; waste development; housing developments of 10 or more houses; buildings with a floor space of 1,000 square metres or more; and development on a site with an area of 1 hectare or more.

The DCLG has indicated that this new type of application would be a temporary measure and that there would be a flat fee of £170. Only one extension would be available for each planning permission and the existing planning permission would have to be granted before 1 October 2009.

The proposals apply in England only.

Developers need to be aware that they may need to enter into a supplemental agreement if the original planning permission was granted subject to planning obligations

under a Section 106 agreement. In addition, an environmental impact assessment may be required because the application to extend the time limit is considered to be a new planning application under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

If it is not EIA development it is suggested LPAs will have discretion to decide which statutory consultees should be consulted.

The consultation period ends on 13 August 2009.

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