Rollits LLP

Planning

& Property Development Update

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Welcome

Welcome to our first newsletter of 2021, which covers a range of planning and development topics which we hope will be of interest and relevance to you.

As we all emerge from the turmoil of the last 12 months, we are looking forward to continuing to work on a broad range of exciting projects in locations across the region.

In order to provide a first class service to clients we have added to the strength and depth of the planning and development team with the appointment of Associate, Stuart Lumb who brings over 10 year's specific planning experience over a wide range of development issues.

Please do not hesitate to contact us if you have any queries on the articles in the newsletter, or any planning matters generally. We are, as always, very happy to have a chat.

Mark Dixon

Changes to permitted development rights in England

On 31 March 2021 new rules came into force that will extend permitted development rights with the aim of revitalising England's high streets and town centres. These rules are part of a wider number of government measures introduced to help high streets and town centres recover after lockdown and support the hundreds of jobs that depend on housing and construction. They came into force on 21 April 2021.

Change of use of commercial buildings

The new rules will allow development consisting of a change of use of a building and land within its curtilage from commercial, business or service use to a dwellinghouse. The change of use of a building within this class is subject to appropriate conditions and limitations as set out below.

In order to develop under this rule an application for prior approval must be submitted to the local planning authority beforehand. The considerations under the 'prior approval' process include transport impact, flooding, noise impact and provision of adequate natural light. In respect of this latter rider, the standards are intended ensure that the dwellinghouses provide adequate natural light so as to avert the unsatisfactory situation that was encountered under the previous rules where offices without windows could be converted to dwellinghouses. It is also a condition that any development must be completed within three years from the date of receipt of prior approval.

The limitations include requirements that the building has been vacant for a period of at least three months in advance of the prior approval application, its use falls within one or more of a specified class (which include shops, banks, restaurants and gyms) for at least two years prior to the date of the prior approval application and the cumulative floorspace of the applicable building does not exceed 1,500 square metres.

Permitted development rights for schools, colleges, universities and hospitals

Permitted development rights for extensions to schools, colleges, universities and hospitals will also be extended to allow a wider range of development and also bring certain prisons within the scope of the right. The changes will allow public buildings to be extended further and faster, which will enable the swifter delivery of classrooms and hospital space.

Stuart Lumb

The Queen on the Application of Croyde Area Residents Association v North Devon District Council v Parkdean Holiday Parks Limited [2021]: Quashing of a planning permission granted in 2014

In the recent case of *The Queen on the Application of Croyde Area Residents Association v North Devon District Council [2021]* the High Court held that a planning permission granted in 2014 should be quashed. This planning permission unintentionally allowed the expansion of a caravan park, which was located in an area of outstanding natural beauty.

The grant of the planning permission was challenged by the Claimant on the basis that North Devon District Council ("NDDC") had acted unlawfully in granting the planning permission. The approved plans incorrectly identified a large area of land that was not used for camping and caravans and approximately 12 hectares of additional land owned by third parties. The Claimant and NDDC both agreed that the planning permission had been granted unlawfully, however NDDC asserted that the claim was statute barred due to the subsequent grant of a lawful development certificate in February 2020 for the stationing of caravans on the land.

The High Court held that the claim was not statute-barred because section 284 of the Town and Country Planning Act 1990 did not debar a challenge to a planning permission which underlies the grant of a lawful development certificate. It was acknowledged that this was an exceptional case even though in the vast majority of cases the lawful development certificate would be an overwhelming reason not to quash the planning permission.

It was further held that any delay on the part of the Claimant in issuing the claim was outweighed by the harm to the area of outstanding natural beauty that would result if the planning permission was upheld and in the circumstances it was appropriate to extend the time and quash the planning permission. An overriding factor was the harm that would flow from upholding the planning permission in that caravans could be stationed across the entire area. The interests of the credibility of the planning system weighed heavily in favour of quashing the permission.

In respect of the issue of delay, the judge relied upon the broad principles drawn from the previous case of *R (Thornton Hall Hotel Ltd) v Wirral MBC [2019]* where the Court of Appeal decided that time could be extended, and relief granted, in proceedings to quash a planning permission brought five and a half years after the permission had been granted. In this case the intention of the authority had been to grant a permission to allow the use of marquees for weddings for a period of five years, but in fact the authority failed to attach the appropriate time-limited condition. The unintended effect was that a permanent permission had been granted.

The unique circumstances in both of these cases and the grave errors leading to the unintended planning permissions led the courts to quash the permissions that would previously have been considered safe from lawful challenge. Nevertheless these cases do not appear to counter the generally accepted position that a claim for judicial review against the grant of a planning permission must be lodged within six weeks from the date of the decision as the actions only succeeded in both instances due to the exceptional circumstances.

Stuart Lumb

Ten key points when drafting section 106 agreements

When entering into a section 106 agreement it is often tempting to sign the agreement as quickly as possible without reviewing the detail of the agreement in any depth as it is often holding up the grant of planning consent and has often taken some time to materialize and is therefore causing a delay to the commencement to the related development.

However, there are a number of important factors which must be considered before a section 106 agreement is completed otherwise there is a risk of the agreement being invalid, incorrect costs being paid or delays when the land or any plots are sold in the future.

Whilst not an exhaustive list, ten key points which should always be considered before a section 106 agreement is executed and completed are as follows:

1 The land ownership and any interests in the land should be determined and all landowners and parties with an interest in the property should be a party to the agreement, or grant consent to the agreement, depending on the nature of the interest. This would include any lender, tenant or any party with an interest in the land, such as an option to purchase. The parties should also have access to all land to which the obligations under the section s106 agreement relate.

2 The accompanying plans and drawings should be checked to ensure they are correct as it is surprising how often an incorrect drawing or plan is appended, such as a previous revision of a drawing.

3 Whilst seemingly obvious, the contributions should be verified to ensure the calculations are correct and the payment dates are acceptable. Again, it is surprising how often incorrect contributions are included within a section 106 agreement as either the sums have been calculated incorrectly or due to a typing error or duplication of another agreement.

4 The trigger dates and restrictions within the agreement should be considered to ensure that funds are readily available when due and diarised to ensure they are met. Further, any non-monetary obligations should be carefully considered to ensure they are acceptable and suitable for the development and will work in practice.

5 The agreement should state that the section 106 obligations will only come into force upon implementation of the planning permission and not upon signature of the agreement or upon the grant of planning consent. The section 106 agreement should also cease to apply in the event that the planning consent is quashed, varied, revoked or otherwise comes to an end.

6 An obligation should be placed on the Council to provide evidence of compliance with the planning obligations promptly upon request and to remove the section 106 agreement form the local land charges register once all of the obligations have been complied with.

7 If the planning consent is for residential development, a clause should be added to the agreement providing that any plot purchasers shall not be bound by the section 106 agreement if this can be negotiated with the relevant local planning authority to give the plot purchasers comfort that any breach of the section 106 agreement will not be enforced against them going forwards.

8 If the property is subject to a legal charge, the agreement should include a mortgagee protection clause providing that the mortgagee will not be liable for any obligations under the agreement unless and until they take possession of the property.

9 Where a landowner is entering into an agreement where there is a developer on board, an indemnity should be sought from the developer for any contributions contained within the agreement, and any costs or claims incurred by the owner in the event of a breach of the agreement by the developer.

10 Any affordable housing provisions should be reviewed in detail and signed off by the registered provider if they are known. The section 106 agreement should also provide that any protected tenants and their mortgagees shall not be bound the terms of the s106 agreement.

When entering into a planning agreement, we would always advise that legal advice is sought to ensure the above points are adequately dealt with and to ensure the agreement is valid and that no issues will arise in the future which could prevent development, lead to delays and/or additional costs arising, for example when the residential development plots are sold or in the event that the local planning authority takes enforcement action.

Libby Clarkson

Restrictive covenant benefiting garden land also held to benefit dwelling by Lands Tribunal

In the case of *Re Copleston's Application [2021] UKUT 18 (LC) (16 February 2021)*, the Lands Tribunal considered whether restrictive covenants which benefitted the garden land of an objector also benefitted the objector's house, despite the fact that the covenants were only originally intended to benefit the garden land.

In this case the applicant successfully obtained planning consent for the construction of a dwelling in the garden land of their existing property. However, the garden land was subject to a restrictive covenant not to build on the land save for a garage, summerhouse and shed etc. The applicant therefore applied to the Lands Tribunal to modify or discharge the covenant under grounds s84(1)(a) and (aa) of the Law of Property Act 1925 to enable the development to go ahead.

Section 84(1) of the Law of Property Act 1925 gives the Lands Tribunal powers to wholly or partially discharge or modify a covenant on being satisfied:

- That by reason of changes in the character of the property of the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the covenant ought to be deemed obsolete (section 84(1)(a)); or
- That in a case falling within subsection 1A, the continued existence thereof would impede some reasonable user of the land for public or private purposes or as the case may be, would unless modified impede such user (section 84(1)(aa)).

Section 84(1A) authorises the discharge or modification of a covenant, by reference to its impeding some reasonable user of land under ground (aa), in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user, "either does not secure to the persons entitled to the benefit of it any practical benefits of substantial value or advantage to them, or is contrary to public interest."

In this case, the application under ground (a) above failed as there was not sufficient evidence of development within the neighbourhood to render the covenant obsolete.

Whilst determining the application under ground (aa) above, the Lands Tribunal had to consider whether the covenants secured any practical benefit to the persons entitled to their benefit. If this point was considered in respect of the garden land only (i.e. the benefitting land) then the covenants would not secure any substantial practical benefit to the objector. However, if the covenants were considered in respect of the objector's property as a whole and included the dwelling, then the covenants clearly secured a substantial practical benefit to the property and the objector for amenity reasons, issues with overlooking and issues with ground elevation.

The Lands Tribunal held that the covenants should be considered in respect of the property as a whole on the grounds that the property is a single integrated entity, of which the benefitting land forms more than half, and the enjoyment of the covenants could not meaningfully be divisible between the benefitting and non-benefitting land. Further, Section 84(1A) did not refer to the substantial practical benefit of the benefitting land only. The Lands Tribunal therefore refused the application.

Whilst this case may be extremely fact sensitive, it is a useful reminder that the Lands Tribunal has a great number of powers when determining applications to modify or discharge restrictive covenants under the Law of Property Act 1925.

Libby Clarkson

Rollits welcomes planning law specialist

A specialist planning solicitor who has built up more than 10 years' experience in the public and private sectors has joined our team. Stuart Lumb, who had previously worked with Knights PLC, has joined the firm as an Associate and will work across both the York and Hull offices.

Stuart took his first post as a qualified solicitor at Newcastle City Council in 2010 having followed his LLB Law at the University of Sheffield and a Legal Practice Course at Northumbria University before completing a training contract at Gateshead Council. He served as a planning solicitor at Calderdale Council from 2012 until 2014 and then spent nearly two years as a senior planning solicitor with Barnsley Metropolitan Borough Council.

Stuart, who lives in Leeds, joined Shulmans LLP in November 2015, staying with the firm after its acquisition last year by Knights PLC.

As an Associate at Rollits he brings experience in dealing with a wide range of development issues including planning agreements, judicial review, planning enforcement, proposed lawful development and planning policy.

Visit the Planning and Development section of the Rollits website…

Information

If you have any queries on any issues raised in this newsletter, or any planning matters in general please contact:

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The law is stated as at 23 April 2021.

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