Pre-commencement conditions

Gateley Plc

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Sacking the Gatekeepers?

In the Queen's Speech on 18 May 2016 we were promised a new Neighbourhood Planning and Infrastructure Bill. Amongst the evils this is supposed to address, Her Majesty singled out 'pre-commencement planning conditions' as a significant problem which could slow down or prevent start on much needed new homes.

The intention is to introduce new requirements to ensure that pre-commencement conditions are only imposed where absolutely necessary. Whilst the basic elements of this will not be known until a Bill is introduced into Parliament, in this article we consider the principle behind it.

What are pre-commencement conditions?

Any condition which requires something to be done before development can commence at all under a particular planning permission, is a pre-commencement condition. There is no specific statutory form for such conditions, but they will typically begin with (or at least include) the words 'Development shall not commence until…', or words to that effect.

What is the court's view?

The court has identified pre-commencement conditions as playing a particular role within a planning permission. Such conditions function as 'gatekeepers', such that unless and until all the pre-commencement conditions have been satisfied, the planning permission cannot be lawfully implemented at all.

This can have dramatic consequences, and when faced with cases in which failure to discharge one or more pre-commencement conditions would seemingly have resulted in a development having been unlawful for many years, the court may also take into account the relative importance of the subject matter which the condition addresses. On the basis of the court's decision in *R (on the application of Hart Aggregates Limited) -v- Hartlepool Borough Council* [2005] EWHC 840 (Admin), it will, in those situations, ask itself whether the condition 'goes to the heart' of the planning permission or not.

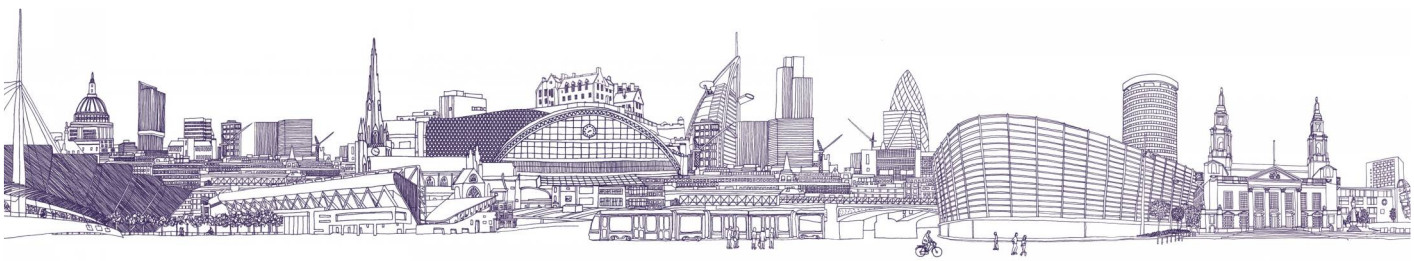
The approach adopted by many developers is therefore to take pre-commencement conditions seriously, and to ensure that they are discharged before starting on site.

Are pre-commencement conditions a problem in practice?

The Queen's Speech implies that there is significant overuse, or indeed misuse, of pre-commencement conditions by Local Planning Authorities. Certainly there will often be a significant number of planning conditions requiring the submission of further details on matters, whether it be archaeology, tree protection, drainage or any other material detail to be addressed before construction works begin.

Fewer such conditions might well be welcome, but the conclusion that local planning authorities are guilty of widespread abuse may not be fully borne out by experience. Indeed, it may be that on some schemes, the developer will itself request the inclusion of one or more pre-commencement conditions on a planning permission in order that the permission can be issued more quickly. Where the alternative to having such a condition is for matters of detail to be dealt with before the issue of a permission, and therefore delay it, it may be commercially preferable to simply build in sensible pre-commencement conditions and enable the issue of the planning permission sooner.

To overcome the problems pre-commencement conditions have posed in the courts over the years, such as the type of situation which arose in the *Hart Aggregates* case, Parliament would have to abolish them completely. Whether it would be right to do so is for debate, but this proposal falls far short of that in any event.



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Will a new 'necessity' test make any practical difference?

It should be borne in mind that, in effect, there is already a 'necessity' test applicable to all planning conditions. This is one of the tests stated by the court in *Newbury District Council -v- Secretary of State for the Environment* [1981] AC578 which are, in full:

1. Has the planning condition been imposed for a planning purpose (not for an ulterior purpose)?
2. Does the planning condition fairly and reasonably relate to the proposed development?
3. Is the planning condition reasonable/unreasonable in the *Wednesbury* sense? (i.e. is it so unreasonable that no reasonable council could have imposed it?)

A planning condition which was 'unnecessary' would arguably fail the second and third of the Newbury tests anyway. Arguably, no change in the law is needed to make an unnecessary pre-commencement condition an unlawful planning condition as well.

It would, of course, also be contrary to the National Planning Policy Framework and the National Planning Practice Guidance, which state: "Planning considerations should only be imposed where they are:

1. necessary ……' (NPPF paragraph 206).

That is policy already, again, no change seems to be required.

Furthermore, the legislature has already sought to speed up the process of enabling start-on-site by improving the performance of Local Planning Authorities when it comes to discharging all planning conditions (including pre-commencement conditions).

Through the machinery of section 74A of the Town and Country Planning Act 1990, it has, from April 2015, introduced a system of 'deemed discharge' of planning conditions.

Whilst that could, itself, be improved in a number of ways to make it more 'user-friendly' for the housing industry, it does at least address the practical concern about delay in discharging conditions when the council is given further written details to approve under any planning condition.

Conclusion

The Government announced the Neighbourhood Planning and Infrastructure Bill within a few days of the enactment of the Housing and Planning Act 2016, a sure sign that legislators recognise that there is more to be done to reform the planning system if it is to be fit for purpose when it comes to new housing.

Having fewer pre-commencement conditions to discharge before starting on site has obvious attractions. There will, however, always be matters of detail which ought properly to be addressed before a housing scheme is implemented, whether they are dealt with as part of the planning application or through the discharge of pre-commencement conditions later. Fewer gatekeepers will not necessarily mean quicker admission.

Singling out pre-commencement conditions as a source of significant delay might be more indicative of a degree of legislative desperation in the face of perceived persistent under-supply, rather than identifying a genuinely serious evil afflicting the planning system.

Pre-commencement conditions are far from perfect, but there are other systemic weaknesses which delay start-on-site, and which reformers might better focus on before grappling with something which existing law and policy should be able to deal with when required.

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