

Keeping Planning alive in troubled times – a time bomb for our banks?

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These are challenging times for the Development industry. Many developers are unable to obtain finance to develop consented schemes and as a result schemes are being mothballed until market conditions improve. This has brought the issue of how to protect the planning status of land into sharp focus.

This issue is important not only for developers but also for banks and administrators where a bank has already sought to enforce its security.

Until development is 'commenced' under a planning permission, that planning permission has a finite life. This period is usually five years in the case of full planning permission and in the case of outline permission, reserved matters approval applications must be submitted within three years of the outline permission being granted. However, it should be noted that under the reform of the planning system in Northern Ireland, it is proposed to reduce these time limits.

Once development is commenced, save in certain circumstances, the permission endures without expiry.

A developer or landowner should keep a planning permission alive by 'commencing' development in order to crystallise the value of the land (whether for security against future borrowing or to attract potential buyers of the asset), or indeed to create a fallback position in the event that an application for a revised scheme are unsuccessful.

Developers, banks and administrators should be aware that a failure to commence development may jeopardise the future development of the land because there may be a change in the planning policy context or indeed a change in the local political context. This is particularly the case in Northern Ireland where a suite of Area Plans are in the process of being adopted, although these have been subject to legal challenges, once adopted large areas of land will be "de-zoned" making it difficult if not impossible to obtain planning permission on these sites in the future. Under the Review of Public Administration, planning matters will be devolved to local Councils which may result in once popular proposals losing support.

Developers who wish to implement their permission must first and foremost ensure that all pre commencement conditions are discharged. After that, a 'material operation' must have been carried out (as defined in the legislation). What is a 'material operation' will vary on a case by case basis. However, the works may include:

The pegging out of access roads (with a degree of permanence and scale to fulfil its role as a guide to construction), or the laying of hardcore to form an access road;

The excavation of trenches for the purposes of constructing foundations, or other built development; and/or

Works to new or existing services.

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However, the specified operations must genuinely be done for the purpose of carrying out the development. The works do not in fact have to be particularly costly or extensive, nor do they have to be carried out with any intention as to the remainder of the works. In simple terms, the more one does, the more likely it is that development will have been commenced.

It is usually worthwhile discussing in advance with Planning Service to explain what is being done, and then formally set out the position in writing. Where foundations or other services have been put in, it is advisable to obtain photographic evidence and to keep any receipts or other documentary evidence of the date of implementation. There have been a number of cases in the local courts and the Planning Appeals Commission, where there have been challenges to whether or not a permission was implemented on time, emphasizing the need to keep meticulous records of the commencement of development.

Where a planning permission is subject to a planning agreement (sometimes referred to as the Article 40 Agreement) care needs to be taken to ascertain whether implementation will trigger certain financial obligations. There may also be overages in the purchase contract which are sometimes triggered by the commencement of development. It is therefore worthwhile to seek specialist legal advice as to whether or not such issues apply in a particular case.

Lenders must take steps to ascertain whether or not planning permission has been issued on land over which they have taken security, when that permission expires and whether or not that permission has been implemented. Failure to implement a planning permission may result in the bank holding what is essentially a worthless charge. Unfortunately all too often banks are not examining these issues until their customer is in financial difficulties by which time the planning permission may have already lapsed or there may be insufficient time to implement the permission.

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