



Planning briefing note | May 2017

#10ThingsSH Common Pitfalls with Planning Applications

As planning lawyers, we get involved with a large number of applications for planning permission and other consents to enable development to proceed. We are frequently asked to undertake a pre-submission audit in order to:

- **check that applications comply with the myriad of planning and environmental rules;**
- **suggest improvements so that the applications can be validated and subsequently determined quicker;**
- **highlight inaccuracies or omissions that may otherwise lead to a successful claim for judicial review or which may make post-grant implementation more difficult; and**
- **(in some cases) reduce the grounds for refusal where a scheme is contentious and where a refusal and appeal are distinct possibilities.**

The issues that we come across are often straightforward for the project team to correct, but where they are not, we propose solutions to minimise the risks. This short article sets out ten of the most common problems that we come across with applications for planning permission.

Offering Backdoor Development Commitments

1. The proper place for development commitments is either in a condition attached to the planning permission; or, in a planning obligation within a Section 106 Agreement. Both a condition and a planning obligation can be properly reviewed, negotiated and managed during construction or operation of the approved development. However, with the increase in the number of reports, assessments and studies written by different authors, together forming the planning application, we see an increase in the amount of backdoor obligations, hidden within specialist reports, which are subsequently woven into the planning permission by a seemingly innocuous planning condition. We recently came across a Transport Assessment for an exclusive luxury hotel, which sought to commit the hotelier to provide information on local bus routes to visitors at the time they made their booking -



sounds innocent, but it would have created the wrong impression for the business.

Environmental Impact Assessment

2. Undertaking an EIA in order to produce an Environmental Statement is perhaps the most time-consuming aspect of putting together a planning application and has become the most fertile area for third party challenge - as a result it has to be robust and the conclusions within it need to be consistent and defensible. As lawyers, we focus on key chapters of the ES to ensure compliance with current EIA Regulations and best practice. Amongst other areas, we review closely the description of the development; the development parameters; and description of the baseline(s) so that obvious points of challenge are removed, whilst maintaining flexibility for the underlying development.

Inconsistency

3. It is rare that a planning application is entirely the work of a single consultancy - most pull in the skills of a number of technical specialists. Each specialist consultancy will have its own house-style for its report and when reviewing applications, we see references to "Site" "Property" "Development Site" "Application Land" and "Land" etc. Whilst this rarely produces significant legal issues, there have been occasions where officers have raised queries and delays have been incurred whilst ambiguous reports are re-written. The solution is simple - creating a central glossary of terms at the start of the project for all authors to follow.

Description of the Development

4. It is easy to make errors on the application form - often it is the last part of the application that gets attention, because it's just completing a few boxes, right? Well, sometimes completing the form is straightforward, but our experience is that circulating an early draft is beneficial: the description of the development is of critical importance, and key elements of the proposed uses within the scheme do get overlooked from time to time and relying on ancillary uses to permit the use isn't always workable or does not give sufficient comfort to development funders.

Minimal Property Investigation

5. A further application form issue that we come across is using the wrong ownership certificate, which can open up JR consequences in the worst cases - we often see long leaseholders using Certificate A, not B; and developers using Certificate B (to be used only where all relevant property interests have been identified) instead of Certificate C, which must be used, together with a newspaper notice, where it is not possible to identify all property interest holders. It's also good practice to refresh the Index Map searches shortly before submission, particularly when the initial searches were undertaken at the start of the application process.



Non-Compliance with Validation Guidance

6. The National Planning Policy Framework requires local planning authorities to publish their requirements for planning application content - i.e. the reports, assessments, studies, plans (at the correct scale) and statements that they will require in order to validate, or accept, a planning application. Whilst there is obviously a lot of similarity between authorities as to what they require, there are differences and from time to time these are only picked up at submission, which causes delay whilst the additional required information is prepared. A simple table of documents produced at the start of the application process, which is reviewed frequently, will ensure that there are no gaps at submission.



Incomplete Planning Conditions

7. Whilst some planning officers are not always willing to share draft decision notices, our experience is that many are - particularly where the proposed scheme, site or developer has unique requirements. Where a decision notice is shared in draft, we think it makes sense to review the conditions carefully to ensure that they're enforceable and fit for purpose, because if the conditions are poorly drafted, the risk of challenge increases and problems can arise during construction where the Project Manager and Planning Officer interpret conditions differently. We have been involved with a scheme that was contentious locally because of neighbours' concerns regarding roof plant noise. A condition was imposed requiring the submission of noise mitigation and the approval of those measures prior to commencement; however, there was no condition requiring implementation of the approved measures. With our help, the issue was corrected and judicial review avoided.

Inflexible Planning Conditions

8. This one is more of a pre-grant of planning permission rather than a pre-submission matter, but we come across a fair number of planning permissions containing conditions that don't maximise flexibility. Most commonly, planning conditions don't allow for phasing and therefore require remediation schemes for large sites to be agreed prior to any works commencing, notwithstanding that only part of the site is to be developed initially. Encouraging Planning Officers to share early draft conditions is critical so that the applicant can review and propose amendments to them. Whilst there is no duty upon Officers to do this, most Officers appreciate additional help and in our view Officers and applicants have a shared interest in making the conditions workable so that the scheme is implementable and the conditions can be readily satisfied or discharged.

Delaying Discussions on Planning Obligations

9. This is an aspect that is not always in the applicant's gift in so much as it is in the Planning Officer's control. However delaying discussions on the planning gain package, to be included with a Section 106 Agreement, can put an applicant at a disadvantage in later stages of the application.

Submitting a Section 106 Heads of Terms as part of an application can be helpful to set out clearly the developer's stall and begin to manage the Planning Officer's expectations. On those schemes that are considered by the Planning Committee, we find that once Members have resolved to grant planning permission

subject to the completion of a Section 106 Agreement, there can be a tendency for the lead Planning Officer to move on to the next application and momentum can be lost.

Focussing on the Wrong Goal

10. Planning performance agreements (PPAs), for medium or large schemes, can be a terrific means of securing resources within a local planning authority; but we have experience of the negotiation of PPAs being a distraction from the application itself. Agreeing a timetable or deadline for the drafting and negotiating of a PPA can be helpful so that applicants and Planning Officers can focus their attention on the scheme itself. You don't want the negotiation of the PPA to take longer than determining the application itself!

How can Stephenson Harwood help?

Stephenson Harwood's planning lawyers provide quick and commercial advice to our clients to enable them to maximise their chances of planning success. Planning law cannot be given in isolation to our clients' commercial objectives; we work closely with all members of our clients' professional team to secure the best results, delivered in a timely fashion and in an accessible format.



Ben Stansfield

Partner

T: +44 20 7809 2500

M: +44 7584 515 251

E: ben.stansfield@shlegal.com



Anita Kasseean

Senior associate

T: +44 20 7809 2509

M: +44 7827 353 106

E: anita.kasseean@shlegal.com



Lorrae Hendry

Associate

T: +44 20 7809 2602

M: +44 7711 347 439

E: lorrae.hendry@shlegal.com



Patrick Senior

Associate

T: +44 20 7809 2614

M: +44 7825 981 926

E: patrick.senior@shlegal.com

Follow us on twitter [@SH_EnviroPlan](https://twitter.com/SH_EnviroPlan)

To keep track of further news and insights into planning law issues in the UK, look out for our "Top Ten" series **#10ThingsSH**