The City of London Law Society

4 College Hill
London EC4R 2RB
Tel: 020 7329 2173
Fax: 020 7329 2190
www.citysolicitors.org.uk

CLLS Planning & Environmental Law Committee: Consultation Paper on Greater Flexibility for Planning Permissions

RESPONSE

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the Communities and Local Government's Consultation Paper "Greater flexibility for planning permissions" (the "Consultation Paper") has been prepared by the CLLS Planning and Environmental Law Committee. This Committee is made up of solicitors who are experts in their field.

We have structured this response by reference to the questions raised in the Consultation Paper. We have also made some general comments (and paragraph references are to paragraphs in the Consultation Paper).

2. SPECIFIC RESPONSES TO DETAILED QUESTIONS

Question 1 - do you agree that extensions to the time limits for implementing existing planning permissions for major schemes should be permitted for a temporary period?

As an immediate short term remedy, we do agree that extensions of time limits for implementing existing planning permissions for major schemes should be permitted. We welcome the Government's proactive response on this issue, which is timely.

However, we have some specific points to make on the proposals which are set out below and, where appropriate, by reference to paragraphs in the Consultation Documents.

Temporary Period

We would question why the concept of extending planning permissions should only be a temporary one. We recognise that to allow planning authorities the permanent power to renew/extend planning permission would require amending primary legislation (specifically s.73(5) of Town and Country Planning Act 1990) and would cause a delay. Therefore, we acknowledge the suitability of the proposed approach to ensure developers and local planning authorities are in the best position to respond quickly to the current economic climate.

However, in the longer term, we would suggest that serious consideration should be given to reintroducing the power to extend time limits imposed on the implementation of planning permission by means of an application under the Town and Country Planning Act 1990. This would remove the need for further temporary provisions in the event of future economic changes.

Although paragraph 12 refers to the discretion of local planning authorities to grant planning permissions for longer than the default period of three years, our members are still encountering resistance to longer permissions from some authorities. Accordingly, this discretion ought not be relied upon as an adequate alternative to a permanent right to apply to extend the life of a permission.

Interaction with s.73 Applications

15. We are concerned about the potential confusion that may be caused in the situation where the applicant not only seeks an extension of the time limit, but also seeks to vary a condition on the existing planning permission under s.73 of Town and Country Planning Act 1990, for example to authorise a minor material amendment. We would suggest that clear and express guidance must be provided, stating that, in those circumstances, an applicant should seek the extended time permission first, before pursuing a s.73 application to vary a permission. To do otherwise would mean any s.73 application granted would result in a fresh permission which would not benefit from the time extension provision because it will have been granted after 1 October 2009, the cut-off date for permissions that will be capable of being extended under the current proposals.

Similarly, we would suggest that express clear guidance needs to be provided in relation to s.106 agreements relating to fresh permissions granted under the time extension provision. Specifically, is the applicant or LPA entitled to reopen negotiations on the levels of contributions or the nature of obligations in a relation s.106 agreement? Is the LPA entitled to refuse the application for extension of time in those circumstances? It would be preferable for the guidance to state that changes to s.106 agreements should only be sought by the local planning authority where they are justified by a material change in circumstances since the original planning permission was granted.

Change in Policy

17. The paragraph states:

> local planning authorities should, in making their decisions, focus their attention on national and development plan policies and other material considerations which may have changed significantly since the original grant of [planning] permission. In doing so, it will be particularly important to ensure the development is consistent with the government's planning policies on climate change,

In relation to this statement, we have concerns that clear and express government guidance needs to be provided, indicating that:

- local planning authorities should only have regard to change in planning policies and change in material planning considerations, and

- any change in policy should not reopen consideration of any matters not related to the change in policy.

This last point is particularly important in light of the swift development of climate change policies.

Question 2 - Do you think it would be desirable to introduce a similar procedure which could be used to extend the time limits for implementation of a listed building consent or conservation area consent?

We consider that it is not only desirable, but imperative, to introduce similar procedures to extend the time limits for implementation of listed building consents or conservation area consents.

Without such parallel provisions no purpose would be served in obtaining an extension of time on a planning permission for a development which also needs listed building consent and/or conservation area consent.

Question 3 - Do you agree with the proposed approach to information requirements associated with an application to extend, and that applications for extension should be exempted from the requirement to provide design and access statements?

Yes, we agree.

22. In relation to environmental impact assessment, clear guidance should be provided, drawing applicants' attention to the appropriate thresholds as set out in the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (SI 1999 No 293).

Question 4 - Do you agree that the fee associated with an application to extend should be in line with a fee chargeable for the s.73 application, i.e. a flat fee of £170?

Yes, we agree.

25. However, while we acknowledge that the fee regulations order will be likely to take 2-3 months longer to amend than the General Development Procedure Order ("GDPO"), we query that the fee payable in the interim period for an application to extend should be equivalent to that of a new application.

The Fees Order applies to applications for planning permissions but there is no definition of "planning permission" in the Order. Though the application to extend results in a fresh planning permission, it could be argued that it is not as a matter of fact an application for planning permission, in which case the fee regulations do not suggest a fee for such applications. This is supported by paragraph 9 of the consultation paper, which refers to extension applications as "*a new form* of planning application". Therefore, in the interim period such applications to extend should be allowed to be made free of charge, since no fee is specified for them.

If this approach cannot be followed, then we would query the impact of provisions allowing applications to extend in the interim period. If a full application fee is payable, such an approach would not place a potential applicant in any significantly better position than making a fresh application for planning permission, although on balance this does remain preferable to the alternative of not bringing the new power into force until the fee regulations can be changed since some applicants will have permissions that will lapse in the meantime.

Question 5 - Do you agree that extensions should only be possible for major development schemes?

As a point of the principle why is a distinction being drawn between major and minor developments? No justification for such distinction has been provided. It is acknowledged that individually, minor developments may not have the

same degree of impact on the local and national economies as major development, the cumulative effect of minor schemes. However, it is thought that smaller housing schemes promoted by registered housing providers in particular would total a significant number and make a not inconsiderable contribution to the economy and housing supply. In addition, on major schemes there are often ancillary subsequent detailed applications made to amend the development (e.g. to add additional homes) and it would make such schemes unviable if the extensions only applied to the original permission and not the subsequent minor applications (including reserved matters applications).

By way of a further example, one of our members is currently working on a large masterplanned development where the occupation of new buildings is restricted by a Grampian style planning obligation until such time as works to upgrade the ticket hall of the local railway station have been carried out. Those works are the subject of a separate planning permission that will shortly expire. It will not be possible to extend the permission based on the current proposals, because the works on their own constitute minor development. In reality, however, they are part of a much larger scheme of major development that will be held up if the life of the permission cannot be extended.

There are no doubt numerous similar examples elsewhere. It would therefore be preferable for all permissions to be capable of being extended rather than limiting the power to major developments only.

Question 6 - Do you agree that, except where the application for extension is an EIA application, local planning authorities should have discretion to decide which statutory consultees should be consulted?

While in principle we agree with the aim of reducing the burden of consultation, we have concerns that leaving the choice of appropriate consultees to the discretion of local planning authorities may leave such planning permissions vulnerable to challenge.

We suspect in practice that local planning authorities will just consult everyone who was consulted on the initial application.

Question 7 - What are your views on the [White Young Green ("WYG")] Options 1-3? Do you have any other suggestions for feasible options?

We concur with the consultation commentary that Options 1-3 would all require changes to primary legislation.

We have no strong preferences in relation to Options 1-3.

Please see general comments on Minor Material Amendments under response to Q.13.

Question 8 - Do you agree that, except where the application under s.73 is an EIA application, local planning authorities should have discretion to decide which statutory consultees should be consulted?

While in principle we agree with the aim of reducing the burden of consultation, we have concerns that leaving the choice of appropriate consultees to the discretion of local planning authorities may leave such planning permissions vulnerable to challenge.

We suspect in practice that local planning authorities will just consult everyone who was consulted on the initial application.

Question 9 - Do you agree with the proposed approach on notification and representations for non-material amendments?

We agree.

Question 10 - Do you agree with the proposed approach on information requirements for an application for a non-material amendment?

We agree.

Question 11 - Do you agree that, for non-material amendments, a decision should be made within 28 days of receipt of the application?

We agree.

Question 12 - Do you agree that the fee associated with an application for a non-material amendment should be a flat fee of £170, with the exception of non-material amendments to householder applications, where it should be a flat fee of £25?

We agree.

Question 13 - Do you have any comments on the guidance which has been included in this consultation paper? Is there anything else that you would like to see covered by guidance?

GENERAL COMMENTS

Clarification of Regulation 3(3)

14. We question the statement that the mechanism for extending the time limit under Regulation 3(3) of the Town and Country Planning (Applications) Regulations 1988 was effectively removed. Regulation 3(3) has not been revoked and remains in place; it allows an applicant to apply to renew an unimplemented permission.

We query that Regulation 3(3) has been effectively superseded by amendments to the GDPO requiring applications for planning permissions to be made on standard forms and to be accompanied by certain documents and information. There is no conflict between Regulation 3(3) and s.70 of the Town and Country Planning Act 1990 as the requirements for standard forms and certain documents and information under s.70 of the Act only apply to applications for planning permissions (as opposed to applications to renew planning permissions under Regulation 3(3)). In addition, the removal of the specific fee for a renewal application in the fee regulations cannot be construed as "removing" Regulation 3(3) in the same way. This is as, although there will be a delay to a new provision being inserted into the fee regulation to cover extension applications, it is proposed that the fee will then be assumed to be the same as for any other new application. This is in fact the rationale relied upon to justify the proposed new extension application being at the full fee rate until the new fee of £170 applies.

Clarification of relevance of EIA Regulations

18. We would seek clarification and the publication of clear and express guidance that:

- an application for a time extension to a planning permission does not constitute an extension for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (SI 1999 No 293) Schedule 2 para 13; and

- extension for those purposes refers to a physical extension in relation to the development.

Therefore if an application to extend time is made in relation to an EIA development and there is no change in the environmental impacts of the development there is no need for an environmental statement in relation to the application for extension of time in respect of such EIA development.

Minor Material Amendments

35 We endorse the need for a clear definition of Minor Material Variation.

31. We would seek clarification that the current s.73 of Town and Country Planning Act 1990 already provides this existing route for applications to make minor material variations where such variations pertain to a condition on the existing planning permission, i.e. no new legislation is required before developers can utilise this procedure.

This route effectively encompasses Option 4 of the WYG report.

Of the WYG Options suggested we would endorse Option 4A as providing the simplest, speediest and most transparent mechanism for Minor Material Amendments. If it is not made mandatory to list all plans within a condition then effectively it would become a lottery for developers as to whether they would be able to rely on the s.73 route to make minor material changes.

Guidance would also be welcomed on the ability to use section 73 to insert a new condition listing the approved plans where none currently exists, in order

to bring a planning permission within the scope of the minor material amendment procedure when otherwise it would not be.

Non-Material Amendments

43-47 We would comment that non-material amendments can currently be made by informal application to LPAs; such an approach is endorsed by the common law position.

However we would welcome any process which clarifies and formalises such an approach.

Material Amendments

We considered in passing that WYG Option 6 should be considered as an appropriate approach for Material Non-Minor Amendments. It is a serious shortcoming of our planning system that significant variations cannot be made to developments after the grant of planning permission save by the submission of a new planning application for the entire scheme. Where a planning permission authorises the development of several buildings, as is usually the case with large scale regeneration projects, this is a significant hindrance to developers faced with projects that evolve over time due to value engineering, design development or the specific requirements of tenants following pre-lets.

Effectively, Option 6 would provide a more streamlined alternative to a full planning application in these circumstances, where the variations proposed go beyond the scope of the material minor variations procedure.

The ability to limit the scope of a planning application only to those changes to the development being sought by the applicant would relieve a burden from developers and local planning authorities alike and would be more comprehensible to consultees and stakeholders.

Such a procedure is already operated informally by Westminster Council, who categorise such applications as "changes in the course of construction" and fast-track them in comparison to applications for new development. In reality, however, such applications are full applications for planning permission for the whole development as varied.

We recognise that Option 6 would be likely to require new primary legislation and thus falls outside the range of proposals being considered in the current consultation. However, we suggest that it would be valuable for this issue to be considered further as part of any future changes under review by CLG.

CLLS Contacts

Sebastian Charles, K&L Gates
Sara Hanrahan, Winckworth Sherwood LLP
Matthew White, Herbert Smith LLP
Romola Parish, Travers Smith

5 August 2009