

June 09 PLANNING CONDITIONS

At last people with land which has development potential are starting to move forward with proposals which have been put on hold for the last couple of years. This could be the opportunity for those able to help developers to meet the potential Section 106 requirements to provide social housing and community facilities, such as primary health care centres.

To secure your position you will need to sign a contract with the developer before planning permission is granted.

What do you do if the planning permission is not to your liking? Will you be able to refuse to go through with the contract (i.e. terminate the contract) or appeal the planning decision?

The answer to the last question is normally 'no', because the developer does not want to hold up its development while you seek to change a condition which you do not like. It is therefore vital that in agreeing the terms of the development agreement you state the basis on which you are able to terminate the contract. The threat of a termination may be sufficient to make the developer appeal the decision if the planning permission has been granted with conditions which you cannot abide. The prospect that you could be in a position to terminate the contract should be sufficient for the developer to ensure that you are closely involved in the negotiations with the planning authorities at the outset to ensure that there are no conditions which you find objectionable.

So the big task at the drafting stage is to state all the possible conditions which you would find objectionable and therefore would want to terminate the contract if they were imposed. This can be a challenging task because planning conditions are moveable feasts, with planning officers suggesting conditions arising out of negotiations which you may well not have thought of before, which are project specific.

However some planning conditions can clearly be identified as unacceptable. Some examples are given below of conditions which you might state are unacceptable.

If the condition causes the cost of carrying out the development to be materially increased by a planning condition:

This is becoming increasingly difficult to justify when planning authorities are imposing obligations to require buildings to be redesigned to decrease their impact on the environment at the planning stage. Is that cost acceptable?

If a condition will reduce the rental value of the property:

The argument then arises as to how much the rent has been reduced as a result of the planning condition as opposed to any other factor, and how far it has to be suppressed before you should be allowed to terminate the contract.

If there is a condition which reduces the capital value or profitability of the proposed development a similar issue arises.

Less controversial exclusions to state in the contract are:

- the requirement that a third party's co-operation is required to meet a planning condition should be excluded. Any requirement that the frontage of the property is made available for future road widening or as a bus stop may be objectionable for your use.
- ensure that you have a requirement that there is sufficient parking (for residents, doctors on-call etc) and parking and access for people with disabilities. A health care centre may require a dedicated ambulance bay.
- for social housing, a condition that not more than a specified number of people live in a flat should be excluded on the grounds that it would be nearly impossible to monitor and

enforce.

- any planning condition requiring a public highway not to be used for loading and unloading vehicles should be excluded.
- any planning condition which does not relate to a planning issue should be excluded, such as a requirement to keep the property clean and tidy.

The conditions need to be excluded both at the planning condition stage and in the Section 106 agreement.

You also need to make sure that any contributions to be paid to the local authority towards the provision of amenities, do not fall on you. As the property is subject to the planning, as an owner of part of the larger development, you will be liable to pay these costs. Another sign of the times is that you cannot rely on an indemnity from the developer to meet these costs or requirements and therefore you should ensure the section 106 agreement is drafted so that you and your tenants are excluded from the requirement.

There may be times when you accept an onerous condition because of the particular circumstances, but it is important that at the beginning you are able to decide whether or not such a condition is acceptable.

Justin Cumberlege
justincumberlege@cartercamerons.com