Browne Jacobson

Section 73 – the end of deeds of variation?

This case is a useful reminder of the importance of ensuring that when granting a section 73 application, previous section 106 agreements are not forgotten.

28 September 2020

This article is taken from September's public matters newsletter. Click here to view more articles from this issue.

Introduction

The High Court recently decided in the case of Norfolk Homes Ltd v North Norfolk DC [2020] EWHC 2265 that a section 106 agreement under the Town and Country Planning Act 1990 did not apply to later planning permissions granted under s.73 of the Town and Country Planning Act 1990.

The case is a useful reminder of the importance of ensuring that when granting a section 73 application, previous section 106 agreements are not forgotten. Importantly it suggests that it would be sufficient for the section 106 agreement to state that it would also apply to any subsequent section 73 permissions granted. This strongly suggests that deeds of variation are in fact not necessary where appropriate wording has been put in the original section 106 agreement.

Background facts

- On 15 August 2011, Norfolk Homes Limited made an application for planning permission to North Norfolk District Council ('the Council') for the construction of up to 85 dwellings and related infrastructure.
- The Council resolved to grant planning permission subject to a prior deed under s.106 of the Town and Country Planning Act 1990, which had been executed between the Council, Norfolk County Council and the previous owner. The s.106 deed required that 45% of the constructed units would be provided as affordable housing and financial contributions.
- On 22 June 2012, the s.106 deed was executed and on 26 June 2012, the Council granted planning permission.
- On 19 September 2013, the Council granted planning permission under s.73 of the Town and Country Planning Act 1990 to vary two of the conditions of the permission.
- On 2 September 2015, the Council granted another s.73 planning permission to remove conditions 19 and 20 of the 2012 planning permission and to put in place a new condition, which required construction details for reducing energy demand to be submitted for approval.
- Both the 2013 and 2015 permissions were not subject to the execution of a further s.106 deed.
- On 7 September 2018, the Council issued a decision notice under s.192 of the Town and Country Planning Act 1990 refusing a certificate that the September 2015 permission could not be lawfully implemented without triggering the s.106 obligations of 2012.
- Norfolk Homes, which now owned the land and was subject to the s.106 obligations, sought declarations that:
    - the continuing development of the dwellings under the 2015 permission was not subject to the obligations in the s.106 agreement executed in 2012; and

- an order requiring the Council to remove reference to the s.106 agreement from the local land charges register within 28 days of the Court's judgement.

Arguments

The Council argued against Norfolk Home's application on two points:

1. Properly interpreting the s.106 agreement and the variations of planning permission, together with the Supreme Court's decision in Lambeth London Borough Council v Secretary of State for Housing [2019], meant that the obligations applied to the 2015 permission; and

2. Additional wording should be implied into the s.106 agreement so that the meaning of 'Development' in the agreement would also include any developments carried out under s.73. Wording should also be implied so that the definition of 'Planning Permission' would also include planning permission subject to conditions varied under s.73.

Decision

Mr Justice Holgate found in favour of Norfolk Homes Development. Rejecting both the Council's arguments, he stated that:

- A true interpretation of the language used in the s.106 agreement meant that its obligations were not triggered by the 2015 development. Commenting on the s.106 agreement, he stated (at paragraphs 92-3) that:

  > "*… the language of the 2012 agreement is unambiguous and clear. It does not suffer from poor drafting….The parties might have chosen to make the triggering of the obligations dependent upon the carrying out of development defined in terms which were not tied to the application PO/11/0978 or to the permission granted on that application…. If they had done that, and had also expressed the term "dwelling" by reference to that broader definition of development, then plainly the 2012 agreement would have applied to the carrying out of development so defined, whether pursuant to the 2012 permission or any subsequent grant of permission conforming to that description. But the parties did not do that.*"
  >
  > He also held that the Supreme Court decision in Lambeth did not change the principles of interpreting public documents and that Lambeth did not involve the interpretation of an earlier document. In conclusion, the Council could not rely on the Lambeth decision in arguing that the s.106 agreement applied to the subsequent developments.

- There was no deficiency in the s.106 agreement that needed to be addressed by language being implied. It would also not be reasonable to imply the additional language.

Time to update section 106 agreement precedents?

The case demonstrates the dangers that local authorities can face if they approve planning permissions under s.73 of the Town and Country Planning Act subsequent to granting earlier planning permissions, which are subject to the obligations of a s.106 agreement.

Despite a run of recent cases in which the courts have been keen to stop drafting issues frustrating the intention of local planning authorities, this case is a clear reminder that s.73 applications create a new permission and failure to bind the permission to a previous s.106 agreement means that the applicant doesn't need to comply with the previously agreed obligations.

However it also discusses, albeit obiter, the insertion of clauses making the section 106 agreement binding on future s.73 permissions. Insertion of these kind of clauses has been steadily growing in popularity, especially with developers, as the intention is to avoid the time and expense needed to draft deeds of variation.

From the local authority's perspective, although many agree that the suggested provisions should be lawful, they don't want to risk developers seeking to avoid planning obligations once s.73 permissions have been issued. Accordingly many still insist on deeds of variation so that previous s.106 agreements bind the new s.73 permission.

The Norfolk case provides useful judicial consideration of this point. Although the case didn't directly concern the lawfulness of a clause stating that the s.106 agreement applied to future s.73 permissions, it does strongly suggest that this construction should be lawful.

As a minimum in my opinion s.106 agreements should contain a clause saying that they apply to future s.73 permissions, to help avoid a situation such as the Norfolk case. However perhaps it's time to now rely upon these clauses, to avoid the need for multiple sets deeds of variation?

Contact

Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

Related expertise

Services

Dispute resolution and litigation