SQUIRE PATTON BOGGS

The Levelling-up and Regeneration Act 2023

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From 26 October 2023, what was the Levelling-up and Regeneration Bill is now an act of Parliament and is law (now the Levelling-up and Regeneration Act (Act)).

The Act promises to "speed up the planning system, hold developers to account, cut bureaucracy and encourage more councils to put in place plans to enable the building of new homes."

This article examines some of the key planning law changes that the Act makes/will make (in some cases, once the necessary secondary legislation has been made), with a focus on practical issues that have the potential to impact development going forward.

Enforcement

- **Immunity Period Increased**

  We have previously explored the amendments that the Act makes to enforcement immunity periods and the likely practical implications of this.

  The Act extends the deadline in which local planning authorities (LPAs) can bring enforcement action for unauthorised building operations and change of use to a single dwelling from four years to 10 years, thus creating a consistent time limit for each type of breach.

- **Temporary Stop Notices for Listed Buildings**

  LPAs have long had the power to issue temporary stop notices, which require developments to cease if a planning breach in relation to a listed building is suspected. The Act extends the cessation period from the current 28 days to 56 days.

  The rationale for this likely relates to the fact that such buildings are historically significant, and as such, more thorough investigations into a potential breach may be required.

- **Enforcement Warning Notices**

  The Act also creates a new power for LPAs to issue an enforcement warning notice where it appears that there has been a breach of planning control and there is a reasonable prospect that, if a planning application was made, it would be granted. The notice must state the matters that appear to the LPA to constitute a breach, and must specify a time period in which a planning application must be made. Further enforcement action may be taken by the LPA if this deadline is not met.

  This addition to the existing planning enforcement powers contained within the Town and Country Planning Act 1990 (TCPA) therefore has the potential to act as a "second chance" for developers and landowners in breach of planning control, with an opportunity to regularise a breach afforded to them by the LPA prior to formal enforcement action being taken. It must be noted, however, that this power does not impact the use of any other enforcement powers that LPAs have. It is, therefore, unclear as to how each LPA will choose to use it (in conjunction with their other enforcement powers), if at all. Nevertheless, should such a notice be received, action should be taken swiftly and within the timescale prescribed by the notice.

- **Enforcement Appeals Restricted**

  Section 174 of the TCPA previously allowed for appeals against the issuing of enforcement notices to be brought on the basis that for any breach of planning control, permission ought to be granted, or the condition or limitation concerned ought to be discharged.

  The Act amends section 174 TCPA, and removes this right to appeal against the issue of an enforcement notice where the land to which the enforcement notice relates is in England and the enforcement notice was issued after the making of an application for planning.

  For the purposes of this restriction, a planning application is "related" to an enforcement notice if granting planning permission for the development would involve granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control.

Timing of Development

As part of the government's commitment to encourage development – in particular, encouraging housing delivery – the Act introduces various powers that will require development pursuant to a planning permission to be built out and completed within a specified time period.

- **Completion Notices**

  Section 112 of the Act allows an LPA to serve completion notices where:

  – Planning permission is subject to a condition by virtue of section 91 or 92 of the TCPA that development must begin before the expiration of a particular period, and development has begun within that period but not completed

- Development has begun in accordance with a simplified planning zone scheme in England but has not completed by the time the area ceases to be a simplified planning zone
- Development has begun under an enterprise zone scheme in England but has not completed by the time that the area ceases to be an enterprise zone
- A planning permission under either a neighbourhood development order or a street vote development order is subject to a condition that the development to which the permission relates must begin before the expiration of a particular period, and development has begun within that period but has not been completed
- The LPA is of the opinion that the development will not be completed within a "reasonable period"

The effect of the completion notice is that the planning permission will cease to have effect at a specified time, which must be:

- At least 12 months after the completion notice was served
- If the notice relates to a case for in which planning permission was granted subject to a condition by virtue of section 91 or 92, or was granted under a development order with a time period for development to begin, after the time period specified in the planning permission condition

There is a right to appeal, and the provisions relating to this will be inserted into the TCPA as new section 93I. The completion notice will be of no effect until an appeal is either determined or withdrawn.

The LPA must comply with various formalities in relation to the notice and must serve the notice on the owner and occupier of the land (if different) and a person with an interest in the land that (in the opinion of the LPA) is materially affected by the notice.

While the completion notice can be withdrawn by the LPA, and the Act makes provision for appealing such a notice, this new power emphasises the importance of implementation and timely completion of development. What is uncertain at present, however, is the way in which different LPAs will approach the exercise of this new power, with it being likely that some LPAs will be more forthcoming in serving such notices going forward.

- **Non-implementation, etc.**

The Act also provides powers for LPAs to decline to determine an application for planning permission where the development is of a prescribed description, and application is made by a person who either:

- Has previously made an application for planning permission for development in the LPA's area
- Has a connection of a prescribed description with the development to which the earlier application related

Notably, the land that was the subject of the earlier application does not need to be the same land as related to the subsequent application.

The development must not have been begun, or have been begun but not been substantially completed, and the LPA must be of the opinion that the carrying on of the development has been unreasonably slow.

When considering whether a development has been "unreasonably slow", the LPA should have regard to all the circumstances and should consider:

- Whether a commencement notice has been served and, if so, whether the development was begun and carried out in accordance with the same
- Whether a completion notice in respect of the earlier development has been served and the earlier permission subsequently became invalid
- Any prescribed circumstances

If a planning application is made and the development falls under the description prescribed, then the LPA may require (by notice) for the applicant to provide such information (being information of a specified description) as the LPA may specify for the purpose of its functions under this section.

Any information requested by an LPA needs to be provided within 21 days beginning on the date of service of the notice requesting the information. If this does not happen, then the LPA may decline to determine the application. Care must also be taken to ensure that any information given is neither deliberately nor recklessly false or misleading, as such a statement will make the person giving the statement guilty of an offence.

Amending Applications Through Section 73B

Previously, amendments to planning permissions (while often required as developments progress) were only possible either pursuant to section 73 TCPA (if the amendment was deemed to be "material") or pursuant to section 96A TCPA (in the case of non-material amendments).

Applications pursuant to section 73 of the TCPA have been the subject of various court decisions – one of the most recent being that such applications are not limited to just "minor material amendments" (see the decision of the High Court in *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 176 (Admin)). This helpfully clarified what was previously a tension between the position under the TCPA and the position under the Planning Practice Guidance – the previous version of the relevant paragraph referred to section 73 being applicable to "minor material amendments" only.

The Act's introduction of the new section 73B will allow applications for planning permission "not substantially different" from an existing planning permission to be made, where the applicant (see section 73B (1)):

- Makes a request for determination on this basis
- Proposes conditions subject to which the permission should be granted
- Identifies an existing planning permission by reference to which the application is to be considered

Notably, the existing permission used as reference must not have been granted under section 73 or 73A of the TCPA, or other than on application.

This section does not enable planning permission to be granted in a way that differs from the existing permission as to the time by which a condition requires development to be started, or an application for reserved matters approval(s) to be made.

Any application granted pursuant to this section must not result in a consent that is different in effect from the existing permission.

Again, it is unclear how this section of the Act will be applied in practice, and there is further secondary legislation required to further prescribe how an applicant is to do what is required by subsections (1) and (3) of this section. As with section 73, however, there will undoubtedly be a need for the scope of this section to be clarified by the courts going forward.

The Infrastructure Levy

The new Infrastructure Levy will replace (on a non-discretionary basis) the current Community Infrastructure Levy (CIL) regime. Going forward, CIL will now only continue to apply in Greater London and in Wales.

There is little in the way of detail with respect to the Infrastructure Levy within the Act – however, it is expected that it will be based upon the final gross development value of the development. Further detail will be provided in secondary legislation that, hopefully, will be clearer than the existing CIL regulations.

Conclusion

The Act has clearly given further power to LPAs to compel development to come forward and has given further flexibility to applicants in terms of amending planning permissions. While this has been done in the hope of delivering more homes, revitalising high streets and overall "levelling-up", whether the Act will have its desired effect remains to be seen. In certain instances, it will be crucial for secondary legislation to be made in a manner that is clear and easy to understand.

Any ease with which the Act enables development to come forward will have to be considered in conjunction with the new rules relating to biodiversity net gain (discussed in detail in the following articles here and here). The prospect of delivering a 10% gain on the biodiversity on development sites (or off-site where required) has caused developers concern for some time, and as with those points set out above, it is of vital importance that the forthcoming secondary legislation deals with the issue succinctly and clearly. We await with interest to see whether the Act, with all of its good intentions, will achieve its aims and facilitate development.

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