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Planning Obligations - More Process But Also More Opportunities

Modifications to Section 75 Obligations

Despite the publicity regarding the changes to section 75 of the 1997 Act, there still appears to be some uncertainty regarding modification procedures and how applications will be evaluated. The Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010 are designed to address these uncertainties, but there are potential pitfalls in the Regulations for the unwary applicant and the following practical issues should be considered:

Formal application required in all cases: In terms of section 75A of the 1997 Act, it's now only possible to modify or discharge a planning obligation (section 75 agreement as was) by means of a formal application to the local planning authority. This means that while there are many section 75 agreements in existence which contain contractual provisions regarding modification and discharge, these have now been superseded by the new statutory provisions.

Notifying interested parties: The planning authority must serve notice of the application on certain interested parties providing them with 21 days to submit representations. While interested parties will clearly include landowners and other parties against whom the planning obligation is enforceable, some authorities are taking a broader approach and seeking representations from community councils or objector groups. Some pre-application discussion with the case officer is recommended to agree an appropriate list of parties in advance.

No middle ground: An application seeking modification of a planning obligation must specify the alternative wording sought. The planning authority is entitled only to approve or refuse the application. There's no scope for the planning authority to propose amended wording in response to any representation received, even if the broad principle of the application is accepted. There is merit in seeking to agree the wording with the local planning authority on a without prejudice basis prior to the submission of a formal application.

How will an application for modification be assessed?: The Annex to Circular 1/2010 indicates that there should be no presumption against any application for variation and that the planning authority should take into account any change in circumstances, e.g. external factors affecting the development meaning that it's no longer reasonable to insist upon a particular obligation. The onus is on the applicant to narrate the change in circumstances since the agreement was originally concluded and to explain why the revised planning gain package or delivery timetable is necessary.

Timescales: The planning authority has two months in which to determine the application for modification. This will be sufficient in some cases, but what if the original application was controversial and there is a desire to refer the wording to committee? Is input from other departments (education, roads) required? Two months may not be realistic in many cases, particularly given the 21 day notification period.

Right of Appeal Welcome - but Practical Issues Remain: Although there's a right of appeal in the event that the application to modify is refused or not determined within two months, it's worth being aware of some practical issues. One point raised

by practitioners is the concern that, in the event of an appeal in which the Reporter rules that the modification ought to be granted but the planning authority disagrees with the decision, the planning authority's cooperation is still required to get the modification drafted, signed and registered. The decision notice itself is insufficient to effect the change. Planning authorities could seek to frustrate the process by refusing to sign the agreement or dragging the process out.

Can you modify an "old" section 75 agreement?: Yes. Although the Act itself is not entirely clear, recent guidance issued by the Chief Planner indicates that the Government's position is that the provisions within the section 75A are intended to have retrospective effect. The Chief Planner's guidance has caused some disquiet amongst planning authorities who feel that it should not be possible to revisit older agreements in this way, but the DPEA has confirmed that it will apply the provisions retrospectively in the event of any appeal.

Conclusions: Many developers will welcome the opportunity which the new Regulations provide, particularly as it is underpinned by the availability of a right of appeal to Scottish Ministers. There is also no fee payable and no limit to the number of applications which can be made. However the process is not as straightforward as it used to be. Successful applications will be carefully prepared to avoid the potential practical pitfalls of the application process. As with all applications under the new system, front loading, pre-application discussion and high quality applications are key to successful attempts to modify or discharge.

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