

REVOCATION OF PERMISSION AND DISCONTINUANCE OF USE (Sections 97 to 105 of the Town & Country Planning Act 1990)

The following briefing relates to general developments, however due to an increasing number of inquiries from those objecting to telecommunication base stations a special section has been included to deal with that aspect, the whole document should be considered as we have not repeated the general details in the base station section.

There are two separate routes to revocation of permission, the first is a straight forward revoking of permission and applies to development permissions that have not been started, or to those elements of a development that have not been commenced. The second course is that of discontinuance of use, and the removal of buildings and structure's, we will deal with each separately, but include the details that apply to both types of application within the revocation section.

Revocation of Planning Permission

The power of the local planning authority (*LPA*) to revoke planning permissions is contained in Section 97 of the Town & Country Planning Act¹ (*throughout the rest of the briefing we refer to this as the Act*), and the power of the Secretary of State is contained in S100, (*S98 contains the procedure for opposed cases and S99 the procedure for unopposed cases*).

Revocation is used where the development has not already started, or where it has started, to those parts that have not been started. A developer can avoid the process by starting the work, all this would arguably require is the turning of one sod of soil. However, there are many instances where developments are allowed to lay dormant, albeit that permissions only have a 3 year life span, they can be renewed, normally without much fuss (*except in the case of housing which now requires a full reappraisal due to the Greenfield Direction², and the new PPG3³*). With change of use then the cut off point is when that change of use takes effect.

Successive Secretaries of State have made it clear that they will only approve the rarest of cases. Therefore the grounds of revocation should be very clearly laid out, they should at least have the potential for success. The Courts will also potentially look to see if the application is no more than a finely veiled attempt to revisit a planning case already decided. Therefore the grounds should refer to issues that have come to light since the original decision, such that it is right and proper that the decision should be reconsidered, and further that when taking into account the new material it would be in the interests of good planning to revoke the permission.

All we do in this briefing is point you to the legislation, potential grounds, this briefing **CANNOT** define your chances in court, that can only be assessed after careful consideration of all the facts by a competent specialist planning barrister, we therefore urge anyone considering going to court to seek appropriate advise first.

However having said that, providing you put your case together by taking the recommendations contained in this briefing and apply them to your case, there is no reason why you cannot make a very good case for presentation to both the LPA and the Secretary of State. There is no cost involved other than your own out of pocket expenses.

1 http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900008_en_1.htm

2 <http://www.odpm.gov.uk/index.asp?id=1144422>

3 <http://www.odpm.gov.uk/index.asp?id=1143940>

You should consider your tactics when deciding whether to make an application to the LPA or the Secretary of State, or alternatively to make an application to both at the same time. Obviously there is much to be said for first making an application to the LPA and then the Secretary of State if you are not successful with the LPA, as this gives you two bites of the same cherry. But as with everything your own case will determine what is the more appropriate course to take.

There is no procedure for members of the public to make applications to revoke permissions, therefore the application must be in the format of a request, set out in a letter to the planning committee, or director of planning, alternatively by lobbying councillors, especially those on planning committees to take up the mantle and put the resolution to committee, indeed some local planning authority officers will not entertain requests from members of the public, they simply will not action them, so the only course in those cases is to persuade a councillor to put the motion requesting revocation/discontinuance to committee.

The procedure for unopposed cases (S99) is quite straight forward, the local authority can in the majority of cases simply make the order and that is the end of the matter. They must advertise the proposed order, and give any person likely to be affected opportunity of making representation to the Secretary of State, who will then give such objectors an opportunity of being heard by an inspector at a public inquiry. However, very few if any such unopposed orders are likely to be made for the type of development that most local communities object to, but if no objection is made within 28 days of the notified resolution then the order is confirmed without a hearing.

Opposed cases (S98) that have been before the LPA must be referred to the Secretary of State for confirmation. The Secretary of State must then if requested to do so enable any person who has been served a notice the opportunity of appearing before and being heard by a person appointed for that purpose (*public inquiry*). The Secretary of State may after the inquiry confirm the Order as is, or with any modification he considers expedient.

The grounds could be very similar to that used in opposing the application in the first place. There would though be others such as new evidence coming to light that would make the development on the site inappropriate. Or it may be discovered that the site has protected wildlife that was not taken into account at the time of the original decision (*this would have to be very exceptional*), or perhaps (more likely scenario) the committee was misled by a material fact which had they known the truth of that the decision to grant permission would not have been made. The main point here is that good research would need to be carried out before submitting your request, making sure that there is nothing left to chance. Planning Sanity can possibly help out here with formulating the pre application case for submission to the LPA. However, no promises can be made in this respect as it depends on available volunteers and resources at the time.

At the forefront of councillors minds when making revocation, or discontinuance orders is that they will have to pay the developer compensation, this can be substantial. Planning Sanity argues that this should not be a consideration, if in the view of the decision-maker the development is contrary to good planning and/or amenity of the area (*there is some case law that would support that view, but it is very sketchy*). Most of the cases involving revocation and discontinuance are about the level of compensation rather than the revocation itself, with councils having too many eyes on their budgets.

Both types of order do potentially violate the human rights of the land owner, care should therefore always be made in the decision making process to give full account of any objections, and making sure that any person affected by the order is fully informed of what is happening, thus avoiding any potential human rights challenge, as a campaign group you should monitor this, and ensure that the planning officers are not being lazy. The process for compensation is set out in S107 (*revocation*) or S115 (*discontinuance*) of the Act, and include expenditure, loss or damage incurred in carrying out work rendered abortive by the revocation or modification, and any loss or damage sustained which is directly attributable to the revocation or modification.

There are few cases where revocation has gone to the courts, and then been reported. One such case (*although it is not very helpful, but nevertheless points to the pitfalls of seeking revocation orders*) is *R v London Borough of Hammersmith and Fulham ex parte The Trustees of the Council for London Branch of the Protection of Rural England* (CPRE). This case revolved around Environmental Impact Assessments (EIA) and the European Directives, and how they should be applied. The case was hopelessly lost on the technical ground that a member of the public cannot sue under a right conferred by a directive that was correctly transposed into UK law. Thus to argue that the case itself was not looked at sufficiently is not a ground that will get you revocation. Whereas if you can argue that new information is available that was not before the decision maker then the chances of success would be greater, but it should be kept clearly in mind that few cases would be successful.

The object of using revocation is to persuade the council to take it up, rather than expecting to take the matter through the courts yourselves, unless there are very strong grounds, or to use the process as a means of highlighting your campaign. If the Councillors take it forward then of course you are relieved of any burden, or fear of cost orders being made against you. But if it is not taken up then you have a great media opportunity, which is always a good campaign aim. The idea being to accuse the council of not taking the views, or needs, of the local community into account, but instead acting to support the interests of the developers, or that they put money before the interests of the community.

The overall policy is that the power should only be used if the original decision is judged to be grossly wrong, so that damage is likely to be done to the wider public interest. Clearly from this it will be seen that something more is needed than just simply that it was morally wrong to grant the permission, or allow the development to proceed. There needs to be a clash with policy to the degree that it would be wrong to allow the proposed development to continue, or the development to continue to be used for its present purpose.

Discontinuance of Use

If you think that revocation is difficult then discontinuance could potentially be even more difficult. Section 102 of the Act provides for the Order requiring the discontinuance of a use, or alteration or removal of buildings or works. For our purposes a mast is a works. The criteria is: **If, having regard to the development plan and to other material considerations, it appears to a local planning authority that it is expedient in the interests of proper planning of their area (including the interests of amenity).**

The Act then goes on to say that the council can order removal. However such orders have to be confirmed by the Secretary of State, which would if there was objection, mean a public inquiry. And unlike revocation the LPA cannot make unopposed orders without referral to the Secretary of State.

The grounds for discontinuance may very well be different from those of revocation, especially if the development has been in place for some years. In those cases you have the adverse effects of the development to point to. An example might be an industrial unit that has a very bad reputation for pollution (*albeit that other ways of dealing with pollution offences exist, see our briefing paper on statutory nuisance*⁴). However you would be pointing to the adverse effect upon the amenity of the area, whether the development is in keeping with the locality and so forth.

Base Station Revocations

At the heart of any application involving phone masts must be the recommendation of the Stewart Inquiry that all existing base stations that were approved without consideration of the fear that the local community hold as to the adverse health effects from masts be revoked. See para 1.36 of the Stewart Report:

⁴ <http://www.planningsanity.co.uk/briefs/statnuisance.doc>

'We recommend that all base stations, including those with masts under 15m, permitted development rights for their erection be revoked and that the siting of all new base stations should be subject to the normal planning process'.

Mast Revocation under Section 97 of the T&CPA 1990

The question of whether a mast permission under the prior approval process is answered from the wording of the various sections of the Town & Country Planning Act 1990. The power to make development orders is contained within Section 59 of the Act, any permission granted as a consequence of a development Order is subject to the same terms and conditions as a decision made by a local planning authority, or the Secretary of State either on appeal or by which has been reserved to the Secretary of State by the calling in of the application.

Section 97 enables the local planning authority to revoke or modify any permission granted under Part 111 of the Act. The power to make development orders is contained within Part 111, therefore the local planning authority have the power to revoke a permission granted either by default, or for any permission that is granted without a reference to the local planning authority.

97.-(1) If it appears to the local planning authority that it is expedient to revoke or modify any permission to develop land granted on an application made under this Part, the authority may by order revoke or modify the permission to such extent as they consider expedient.

Whereas Sections 98 and 99 deal with opposed and unopposed orders. 98(1) makes it clear that an opposed order cannot be made without first referring the application to the Secretary of State for confirmation, therefore in an opposed case the best that the local planning authority can do is to make a resolution that they are minded to revoke, and then leave the final decision to the Secretary of State. Which in reality means as a consequence of S98(3) that the matter would be determined by a public inquiry. However, the unopposed process does not apply to Orders that have deemed consent granted by the Secretary of State, therefore irrespective of whether it is an opposed or unopposed process the opposed process must be used for permitted development approvals.

The end result is that the local planning authority may make a resolution that they are minded to revoke any permission granted by the General Development Order, even those that are granted by default, but the decision **MUST** be confirmed by the Secretary of State.

But also keep in mind that under Section 102 the Secretary of State has mirror powers to the local planning authority. And that the local planning authority would have to pay compensation to the developer (*operator*) equal to any loss caused by the permission being reversed.

The question of the payment of compensation is determined by a reference to the Lands Tribunal if the sum cannot be agreed between the developer and the local planning authority. These provisions are set out in Sections 107 and 108, however that aspect does not really concern the question of the revocation or discontinuance of use, and therefore we have not dealt with it. It is though worth mentioning *Corbett v Restormel Borough Council & Anor [2001] EWCA Civ 330*⁵. This case was started by a councillor in an effort to circumvent the councils obligation to pay compensation if they revoked planning permission, the case being a straight forward challenge to the grant of permission by the council, that is the council in the guise of a councillor effectively sought to overturn its own grant of planning permission. The Court of Appeal stated:-

The justice of this case seems to me to require that L&P should not be deprived of their compensation purely as a result of the automatic application of jurisprudential doctrines in relation to invalidity. It may be

⁵ <http://www.bailii.org/ew/cases/EWCA/Civ/2001/330.html>

that if deprived of compensation under the Act they would have an alternative remedy sounding in similar damages against the Council as a result of misrepresenting that the planning permission had been validly granted and misusing statutory powers. If so the present proceedings would even if successful have achieved little of substance. However, this has not been argued and I do not pause to investigate the chances of success of such an action in the present state of our law

When the case finally went to the Lands Tribunal⁶ to set the amount of compensation payable the council were forced to pay £2,758,000,00 plus a further £68,379,27 in costs (*plus the cost of the court cases*), making nearly £3million in compensation, it can therefore be seen that with these sums at stake it will always be difficult to persuade councils to revoke permission or order discontinuance.

The point is illustrated further and brings up the question of whether the cost to the local authority of the payment of compensation can be taken into account in the case of *Alnwick District Council v. Secretary of State for Environment, Transport and Regions and Safeway Stores PLC and Others [1999] EWHC Admin 782*⁷ where Mr Justice Richards found that where the local authority if forced to pay compensation would result in the inability to provide facilities then there had to be a direct link to the land where those other facilities were to be constructed. In other words there has to be a land use connection. If the provision was for future leisure development on another part of the same plot then there may be a direct link, but not where the alternative site is remote from the application site. As a consequence of that finding compensation in the realm of £4million was likely to be sought by Safeways from the Council even though this was a section 100 revocation order made by the Secretary of State and not the local planning authority.

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⁶ http://www.bailii.org/ew/cases/EWLands/2004/LCA_47_2002.html

⁷ <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/1999/782.html>