Certificates of Appropriate Alternative Development

What they are and how to deal with them? Paul Singleton tells us

On the 6th April 2012 a number of important changes to Sections 14-18 of the Land Compensation Act 1961 (LCA) came into effect. Some of these will be of interest only to specialist practitioners in the compensation field, but the changes to Section 17, concerning applications for Certificates of Appropriate Alternative Development, and Section 18, concerning appeals in relation to such certificates, are likely to be of wider interest.

Greater London has seen a large number of compulsory acquisitions arising from schemes such as the Olympics and DLR. The clamour for further large scale infrastructure provision continues with a number of major projects in the offing, such as the Thames Water Tunnel, Crossrail, HS2, and even the creation of additional runway capacity in or around London and the Home Counties with all of these projects being likely to involve the compulsory acquisition of land. It is too early to say whether the changes to the LCA will lead to a surge in Section 17 applications, but London Authorities should expect to receive their share of these over coming years.

This article summarises the key changes to Sections 17 and 18, provides a timely explanation of the main rules and good practice in making and dealing with applications for Certificates of Appropriate Alternative Development.

Purpose

Section17 Certificates are a useful tool when assessing the level of compensation due following the compulsory acquisition of land. The amended Section 17 provides for the Local Planning Authority to issue a certificate in respect of the subject land to confirm the LPA's view that either:

- There is development that is appropriate alternative development to the acquiring authority's development scheme (that underpins the compulsory acquisition) (a positive certificate), or
- There is no development that is appropriate alternative development (a negative certificate). Amended Section 14 of the LCA gives added force to a positive certificate issued under S17, providing that it should be assumed that planning permission was in place at the relevant valuation date for the form of development specified in the certificate. Conversely, the issue of a negative certificate will now lead to the assumption, for the purposes of section 14, that there is no alternative appropriate development to be taken into account when valuing the land.

Applications can be made either by the land owner or by the acquiring authority and must specify each description of development that the applicant considers to be appropriate alternative development and include a statement setting out the reasons for holding that opinion.

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Scope of the Certificate

One key change to S17 is that "classes of development" has been replaced simply by "development", hopefully helping to remove some of the confusion that has surrounded the Section 17 process. This provides a clearer basis on which applicants can seek, and LPAs can issue, a certificate specifying not only an acceptable range and mix of land uses, but also the general form and quantum of development for which planning permission could have been expected at the relevant date. This will be of greater assistance in valuing the land than the simple list of land uses which many past certificates have comprised, but applications will need to include more detailed information to support and justify the form and quantum of development envisaged if this outcome is to be achieved.

LPAs should note, when issuing a positive certificate, that this should specify every description of development (whether specified in the application or not) that they consider to constitute appropriate alternative development. Hence LPAs should take a broad view of such applications rather than reacting only to what the applicant has set out.

Key Assumptions

The amended Sections 14 and 17 state that the assumptions to be adopted when considering applications are that:

- the question of whether planning permission for alternative development would have been granted is to be addressed as at the relevant valuation date, not the date of publication of the making of the CPO;
- this consideration is to be made on the assumption that "scheme" underlying the CPO is cancelled in its entirety at the "launch date" which will normally be the date that notice of the making of the CPO was first published;
- no action (including land acquisition, development or works) has been taken by the acquiring authority wholly or mainly for the purposes of the scheme;
- there is no prospect of the same scheme, or any other scheme to meet the same or substantially the same purpose, being carried out by the exercise of a CPO or other statutory function; and
- if the scheme is for the construction of a highway, that no highway will be constructed to meet the same or substantially the same need.

These rules more clearly define the scheme cancellation assumptions to be adopted but do not require the decision maker to assume that any development plan or other policies related to the scheme did not exist at the relevant date.

Other considerations

A certificate can relate only to land which is the subject of the application but the applicant may specify that the land would have been developed in conjunction with other (normally adjoining) land and LPAs need to consider such applications in the form that they are submitted. When issuing a certificate the LPA is also required to indicate:

- Any conditions to which permission for the development could reasonably have been expected to be subject;
- Whether permission would have been granted at the valuation date or at only at a time after that date; and
- Any pre condition for granting permission (including the requirement for a planning obligation).

As well as the need, often, to look back to an historic date and set of circumstances, Section 17 applications differ from planning applications because there is no intention or prospect that the alternative development will be built. What those valuing the land need from the certificate is a degree of clarity on land use and the acceptable form and quantum of development, together with the identification of any constraints or requirements that could impact on value, but there is no need for the applicant and LPA to resolve all the details of the development envisaged on the land.

A more pragmatic approach, based on the application of a "reasonable expectation" test as to whether permission would have been granted at the relevant valuation date, is therefore appropriate. This will require applicants to provide an adequate level of information to support and justify the Certificate that they are seeking and officers to exercise their judgement based not just on a re-reading of the policies and guidance that were extant at the valuation date but also on their experience (or that of colleagues) of how these policies were in practice being applied at that date.

Care may be needed if the acquiring authority and local planning authority is one and the same or where planning officers have been involved in the promotion of the council's scheme. This is because the effective operation of the certificate system really requires that planning officers are free to apply a detached and disinterested approach to the consideration of whether a certificate should be issued and what this should include.

Appeals

Appeals under the new S18, whether against a Certificate issued or the LPA's failure to determine an application within the appropriate time limit (two months from the LPA's receipt of the application) will be heard by the Upper Tribunal (Lands Chamber) not by the Planning Inspectorate. The Tribunal will consider the appeal afresh as if the application has been made to it in the first instance.

Appeals will be subject to the Upper Tribunal's normal rules and case management procedures involving a strict timetable for the submission of statements of case and expert reports and with expert witnesses needing to recognise their duty to the Tribunal and being subject to perjury rules. These changes form part of a wider suite of changes to the planning assumptions in respect of land compensation that have long been sought by many practitioners.

Section 17 Certificates are not a necessary part of settling any claim but an increase in their use is possible given the added force that they now have and planning officers may see more applications landing on their desks in coming years. ■

Bargain basements?

The need for clear and consistent planning guidance is the priority for advocates of basement extensions argue Malcolm Dowden and Helen Hutton

Stamp duty land tax (SDLT) was introduced in December 2003 with the dual objectives of taxing the transfer of value in land rather than documents, and closing down the widespread avoidance prompted by increases in stamp duty rates after 1997.

The first objective was driven by government plans to create a system of electronic conveyancing which would be entirely incompatible with a tax based on the stamping of physical documents. That project subsequently stalled, leaving anti-avoidance and steadily increasing rates of tax as the key features of SDLT. The most recent, and purposely punitive, increases include:

- a rate of 7 per cent for residential property transactions over £2 million, with an effective date on or after 22 March 2012, and
- a rate of 15 per cent for residential property transactions over £2 million with an effective date on or after 21 March 2012, where the buyer is a corporate entity (excluding property developers). This is to punish the common avoidance technique of putting property into a company so that future sales attract the share-sale stamp duty rate of 0.5 per cent.

SDLT rates for commercial or mixed use property begin at 1 per cent where the price exceeds the £150,000 threshold and rise to 4 per cent where it is above £500,000. Once a threshold is passed, the higher rate applies to the whole price, not just to the part that crosses the line. SDLT rapidly becomes a very expensive tax which is increasingly difficult to avoid. One result of these increases is a quest to find alternative and tax-efficient means to meet demands for increased space, whether for residential, commercial or mixed use. Where there is no scope for conversion within the existing envelope, extension upwards into the airspace or downwards into the subsoil may be an attractive option.

Anti-avoidance

Stamp duty was an 'optional' tax whereby liability depended on the existence of a stampable instrument (a conveyance or transfer). Even if a conveyance or transfer existed, keeping it offshore was enough to avoid the need to pay stamp duty.

A common avoidance method for higher value properties was 'resting in contract'. This meant that contracts were exchanged and the purchase price was paid, but no conveyance or transfer was completed. As rates climbed between 1997 and 2000 the frequency and scale of 'resting in contract' schemes increased, culminating in the Private Eye exposé of their use in a property outsourcing deal to which the Inland Revenue was itself a party.

SDLT explicitly ended 'resting in contract'. Liability is triggered by a transfer of value in property. The point at which that occurs is 'substantial performance', when at least 90 per >>>

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