

Kent Law Society

Frequently-Asked Questions on Planning Law

answered by Jeremy Baker, Principal Solicitor (Strategic Development),
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1. When do I need Planning Permission?

Planning Permission is needed for “development”. There are two main types:-

- (i) Building, engineering, mining or other operations (known as “operational development”); and
- (ii) A material change of use of any building or land.

“Operations” are activities which physically alter the land with a degree of permanence; “use” imports activities done in, on or under land which do not physically alter it in such a way. Therefore, for example, the storage of non-agricultural equipment on farmland would not normally be operational development, but may involve a material change of use from the previous agricultural use of the land to one for equipment storage. But, if equipment is erected and secured semi-permanently on land, eg in order to grade materials for use in aggregate production, then (as well as a material change of use of the land) the erection of the equipment may itself be operational development.

The deposit of waste on land is, however, a material change of use, rather than an “operation”. The same applies to the display on a building of advertisements which are not permitted under the Town and Country Planning (Control of Advertisements) Regulations 1992. (Such a display may also be a criminal offence.)

Planning permission for building operations is deemed to include permission for the use of the resulting building(s)/structure(s) for the purposes applied for, or if none are specified, then for the purposes for which the building(s)/structure(s) were designed.

By contrast, planning permission for a material change of use does not include permission for any operational development unless specifically applied for. However, both a material change of use and operational development can be included in the same application. For example, the conversion of a single dwelling into two or more dwellings is a material change of use and requires permission, as may some of the operations involved in the conversion (eg the installation of a second entrance).

2. What is Exempted from the need for Planning Permission?

The following do not constitute “development”:-

- (i) The use of any part of the curtilage of a dwelling for any purpose incidental to its enjoyment as a dwelling;
- (ii) The use of any land (and any building within such land) for agricultural, horticultural, livestock or forestry purposes;

- (iii) The change of use of any land or building from one use to another within the same Use Class (as to Use Classes, see the Town & Country Planning (Use Classes) Order 1987 as amended);
- (iv) Maintenance, improvements or alterations which affect only the interior of a building, or do not materially affect its external appearance. However, underground development, eg the creation or enlargement of a cellar; and the creation of 200 square metres or more of gross additional floorspace within a building used for the retail sale of goods other than hot food, are not included. Also, if a building is listed, listed building consent is needed for all works that affect its character, including works that do not materially affect external appearance, and works to the interior.

3. What is “Permitted Development”?

42 types of development which would normally require planning permission are currently permitted by the Town and Country Planning (General Permitted Development) Order 1995 as amended, and these are known as “permitted development”.

This Order grants planning permission for these developments, but in all cases subject to detailed limitations and conditions, and a careful study of the Order is necessary if it is intended to rely upon these rights. Examples of the matters covered are:-

- Certain changes of use between one Use Class and another;
- Certain extensions and other works to dwellings and within their curtilages;
- Certain minor operations, such as fencing;
- Certain temporary buildings and uses;
- Certain development by statutory bodies and utility companies;
- Certain works for agricultural purposes.

It is important to consider whether the land in question is entitled to take advantage of permitted development rights. For example, sometimes permitted development rights are limited, or removed altogether, by a condition on a previous planning permission, or by a planning agreement with the Local Authority (see Question 17 below). Some permitted development rights do not apply - or are more limited - in Areas of Outstanding Natural Beauty (in Kent, the Kent Downs Area of Outstanding Natural Beauty and the High Weald Area of Outstanding Natural Beauty), Conservation Areas, World Heritage Sites (eg Canterbury Cathedral, St Augustine’s Abbey and St Martin’s Church), and certain areas specified under the Wildlife and Countryside Act 1981, s.41(3). Yet other permitted development rights may have been removed by the Local Authority using a Special Development Order or an “Article 4 Direction”. Also, the scope of permitted development rights available may depend on whether any works utilising permitted development rights have previously been done.

Therefore, a check should be made with the Local Authority before commencing any work, even if you believe it is covered by permitted development rights. (It is a criminal offence to exceed the limitations or conditions applicable to permitted development rights.)

4. Do Demolition and other Works require Planning Permission?

Structural alterations, additions and rebuilding works to a building, and demolition of a building or part of a building, are all building operations and therefore need planning permission. The same applies to any other operations normally undertaken by a person carrying on business as a builder (whether or not so undertaken in the particular case).

It is best to seek permission for demolition of any existing buildings/structures within any planning application for the site's redevelopment.

In the absence of such an application, and subject to the Proviso below:-

- (i) Demolition of listed buildings, buildings in Conservation Areas, and scheduled ancient monuments, is controlled by separate legislation and therefore does not require planning permission as well as consent under those regimes;
- (ii) Demolition of any dwelling, or of any building adjoining a dwelling, normally requires a special procedure, involving prior notice to the Local Authority, a public notice, and the prior approval of the Local Authority in certain cases;
- (iii) Demolition of any small building whose external cubic content is 50 cubic metres or less, does not require permission, even if adjoining a dwelling;
- (iv) Demolition of a dwelling ancillary to a non-residential use (eg an estate manager's cottage on a farm estate) does not require permission;
- (v) Demolition of any gate, fence, wall or other means of enclosure does not require permission (although it may require consent if it is in the curtilage of a listed building or in a conservation area);
- (vi) Demolition of any other building, not being or adjoining a dwelling, does not normally require permission.

Proviso:- If any proposed demolition may have significant environmental effects (including upon architectural and archaeological heritage), then notwithstanding the above, it has recently been ruled that a planning application accompanied by an environmental impact assessment is required by European Law.

5. What if required Planning Permission is not obtained, or Planning Conditions are not complied with?

Unlike unauthorised works to listed buildings and protected trees, it is not a criminal offence to carry out development which requires planning permission without obtaining it, nor to breach a planning condition (other than one applying to permitted development).

However, the Local Authority may take enforcement action, by serving a planning contravention notice requiring information about activities on the land and ownership interests in it.

The Local Authority may also serve (unless there are no significant planning objections to the unauthorised development) an enforcement notice, or a breach of condition notice, specifying a period within which an unauthorised use or breach of condition must cease, and/or unauthorised alterations or development must be undone. This period must be reasonable, and may be extended by the Local Authority (or the Secretary of State on appeal against the notice). In an urgent case, a stop notice may be served, subject to limitations, and in an appropriate case an injunction may be sought in the Courts to prevent continuing breaches.

Failure to comply with a stop notice, an enforcement notice or a breach of condition notice is a criminal offence, but there is a right to appeal against an enforcement notice and this should always be used in an appropriate case. (There is no right of appeal against a breach of condition notice or a stop notice). The time for appealing is specified in the enforcement notice and cannot be less than 28 days.

6. For how long can Enforcement Action be taken?

Where a planning condition is breached, or a material change of use (other than that of a building into a single dwelling) takes place without planning permission, enforcement action may be taken for up to ten years. If no enforcement action is taken within that time, a Certificate of Lawfulness of Existing Use may be obtained from the Local Authority to provide immunity from enforcement action in perpetuity.

Where operational development takes place without planning permission, or a building's use is changed to that of a single dwelling, the time limit for enforcement action is only four years from its substantial completion. But this only prevents enforcement action against a building erected without planning permission, and enforcement action against its use may still be possible for a further six years (or ten years from its first use), so careful consideration should be given before applying for a Certificate of Lawfulness of Existing Development after only four years.

Proposals to extend the time limits for enforcement, in some circumstances, are contained in the Localism Bill, currently before Parliament. It may therefore be advantageous to seek Certificates of Lawfulness sooner rather than later, but you should take competent professional advice.

7. Who Makes Decisions on Planning Applications?

Most decisions are taken by Officers of the relevant Local Authority, acting under delegated powers from their Councillors. Major applications, and others where there is (perceived to be) controversy, may be decided by Councillors themselves at a Planning Committee or Development Control Committee Meeting. Local Authorities vary in their practices and nomenclature, and most have helpful websites giving more information.

When a valid planning application is made to a Local Authority, a decision should be made within 13 weeks for applications for major development, or 8 weeks for all other applications. In the case of any application requiring environmental impact assessment, a period of 16 weeks probably applies. If an application is not decided in these timescales (and no extension of time is agreed between the Local Authority and the applicant), or if an application is refused, or if planning permission is granted subject to conditions to which the applicant objects, the applicant can appeal to the

Secretary of State using a prescribed form, either online (see www.planningportal.gov.uk/planning/appeals) or in writing.

Appeals are handled by the Planning Inspectorate, Bristol, who will send a Planning Inspector to determine the appeal. An appeal may be handled by way of Written Representations, or an Informal Hearing, or a Public Local Inquiry for major cases, and the Inspector will always carry out a Site Visit. The Inspector will then write a Report giving his/her Decision and reasoning. In very major cases, the Inspector's Report will only contain a Recommendation, and the Secretary of State will make the final Decision.

8. What are the Time Limits for Challenging Planning Decisions?

The time limit for the applicant to appeal against a refusal of permission, or a grant of permission with unacceptable conditions, is six months (or 12 weeks if the application relates to an existing dwelling) from the date of refusal, or six months from the date of grant of the unacceptable permission.

The time limit for the applicant to appeal against non-determination of a planning application by a Local Authority is six months from the date by which it was supposed to have been determined (see Question 7 above), or from the expiry of any agreed extension of time. In practice, if negotiations with the Local Authority continued after the six-month period expired, the Planning Inspectorate is often lenient about a late appeal.

A challenge by a third party to a Local Authority's decision to grant permission must be brought by way of an application for judicial review to the High Court within three months of the date on the decision notice (not the date of the decision to grant).

A challenge by a third party or by the applicant to an Inspector's decision on appeal, or to a decision of the Secretary of State, must be brought to the High Court within six weeks of the date of the decision.

9. Which Local Authority deals with Planning matters?

Where there is only one Council (in the Medway, Bexley and Bromley Council areas), that Council deals with all planning matters of whatever nature.

In 'two-tier' areas (Kent County Council area, ie Kent excluding Medway), the local District or Borough Council deals with all planning matters apart from waste-related and mineral-related matters (including recycling and aggregates). Waste and mineral planning is dealt with by Kent County Council.

Therefore, the District or Borough Council prepares a Development Plan, deals with planning applications, and carries out enforcement, for all developments other than waste and minerals development. Kent County Council prepares a Development Plan, deals with planning applications, and carries out enforcement, for all waste and minerals matters.

As an exception to the above, Kent County Council deals with planning applications for its own developments (eg schools, libraries, "community hubs" or "gateways", non-trunk roads, social care and children's facilities, etc) throughout its area.

10. What is the Development Plan?

Since 1991, the Planning system has been what is known as “plan-led”. Following various changes over the years, this currently means that each Local Authority must prepare a plan for development in its area, in order to guide development, both numerically and spatially (geographically). That plan was formerly a “Local Plan” (or in London Boroughs, a “Unitary Development Plan”), and is now a “Local Development Framework”.

The Development Plan for any District or Borough comprises:-

- the adopted Development Plan Documents within the relevant Local Development Frameworks,
- any remaining “saved” policies from the relevant Local Plans (or Unitary Development Plan), and
- (in Kent) the Regional Strategy (The South East Plan 2009), although this will be abolished when the Localism Bill is passed by Parliament and receives the Royal Assent; or (in London) the London Plan, which is in the process of revision and will continue in force.

11. What is a Local Plan (or Unitary Development Plan)?

A Local Plan (or Unitary Development Plan, as it is known in London Boroughs) is a document which covers the whole of a District/Borough and contains a series of policies on development-related topics, and a map indicating development proposals for particular parcels of land (known as “allocations”).

New Local Plans ceased being prepared in 2006, but Local Plans in force in September 2007 remain in force (known as being “saved”), although the then Government deleted some policies from most “saved” Local Plans which it felt were no longer up-to-date. The remaining “saved” policies in Local Plans are being progressively replaced by Local Development Frameworks as these have emerged since September 2007 and continue to emerge.

Each Local Authority should be able to provide a list (usually available on its website’s Planning pages) of its Local Plan policies which were “saved” and are still extant because they have not yet been superseded or replaced by policies in Local Development Frameworks. Some Local Authorities have none remaining.

12. What is a Local Development Framework?

New-style plans called Local Development Frameworks were introduced in 2004, and all Local Authorities either have adopted or are now creating Local Development Frameworks for their Districts/Boroughs (or, in the case of Kent County Council, for waste and minerals development throughout Kent, excluding Medway).

A Local Development Framework is a suite of several documents (unlike a Local Plan) comprising:-

- (a) a Core Strategy Development Plan Document, which sets out strategic policies on development for the whole of a District/Borough (or County);
- (b) one or more other Development Plan Documents, which set out more detailed policies for particular areas (eg a town centre, a rural area, or a proposed new housing expansion area) or particular topics (eg affordable housing, or open space);
- (c) one or more Supplementary Planning Documents, which give more detail on how policies in the Core Strategy and/or other Development Plan Documents should be interpreted and applied;
- (d) a Proposals Map, which shows all the spatial (geographical) development proposals in all the Development Plan Documents on a map base; and
- (e) a Statement of Community Involvement, outlining how and when the public and other bodies are able to participate in the Authority's planning processes, including the consideration of planning applications and the preparation of the Local Development Framework.

Each Local Authority must also produce a Local Development Scheme, which gives details of its adopted Local Development Framework documents, and a timetable and outline contents for those it is producing or intends to produce in the future. This is usually available on its website.

All Local Development Framework documents require public consultation before their adoption by the Local Authority, and Development Plan Documents additionally must be independently examined by an Inspector to determine whether they are "sound" and may be adopted by the Local Authority.

13. What are the rules on Deciding Planning Applications?

In all cases, the decision-maker on a planning application is required by law to make the decision in accordance with the Development Plan, unless "material considerations" indicate otherwise. It is in this sense that the planning system can be described as "plan-led".

Therefore, applicants for planning permission should identify all relevant policies in the Development Plan (see Question 10 above) which lend support to their application, and ensure that the decision-maker takes these into account.

Conversely, a person who objects to a planning application should seek to show how the proposed development would not comply with Development Plan policies, and support this by evidence (from experts, where relevant) that the development would cause harm in a planning sense to a matter of acknowledged importance in the planning system, such as a policy seeks to protect.

14. What are Material Considerations?

Any consideration which relates to the use and development of land is capable of being a planning consideration. Material considerations must be genuine planning considerations, ie they must be related to the development and use of land in the

public interest. The considerations must also fairly and reasonably relate to the application concerned.

All the fundamental factors involved in land-use planning are included, such as the number, size, layout, siting, design and external appearance of buildings and the proposed means of access, together with landscaping, impact on the neighbourhood and the availability of infrastructure.

However, private matters such as personal interests, the ownership of land, covenants and rights of way, rights of light, a view, and competition between businesses, are not normally material considerations and will be disregarded. The effect of a development on residential amenity, however, is a planning consideration.

Relevant policy documents which are not part of the Development Plan are also material considerations, such as Local Development Framework documents not yet adopted, Government policy as expressed in Planning Policy Statements (PPS) and the earlier Planning Policy Guidance Notes (PPG), other Ministerial policies, the policies of authorities such as the Highways Agency and Network Rail, and other local policy documents such as Local Transport Plans, Air Quality Action Plans, etc.

15. Who is notified of Planning Applications?

If the applicant is not able to certify that he is the sole owner of all the land affected by a proposed application, then the applicant is responsible for serving notice on all owners of that land (including any agricultural tenants, and any leaseholders with seven years unexpired) of whom he knows or whom he could ascertain by taking reasonable steps. The applicant must then certify to the Local Authority in the application form that he has done this. A Local Authority is under no duty to proactively enquire into the accuracy of the applicant's certificate (eg by carrying out Land Registry searches), although if it comes to the Local Authority's attention that the applicant's certificate is inaccurate or that other owners of part of the land were not notified, then the Local Authority should require the applicant to regularise the situation before it determines the application. A planning decision may be unlawful if such an owner was not given notice of it and thus had no opportunity to make representations to the Local Authority before its determination. Nevertheless, planning permission does not override the law of trespass nor confer the right to carry out works on, over or under land in the ownership or possession of others.

The amount and nature of other publicity that is given to planning applications depends on the type of application involved. This can involve the Local Authority in publishing a notice in a local newspaper; and/or erecting a site notice on the highway near the site; and/or notifying immediate neighbours.

Details of the statutory requirements are set out in the Town and Country Planning (Development Management Procedure) Order 2010. Where development affects the setting of a listed building, or the character or appearance of a Conservation Area, s.67 and s.73 respectively of the Planning (Listed Buildings and Conservation Areas) Act 1990, and Regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990, apply. If statutorily-required publicity is not given to an application before its determination, the decision may be unlawful.

In addition, many Local Authorities carry out more public consultation than the statutory minimum, for example by notifying nearby residents even though they are

not immediate neighbours. Their policies in this respect are set out in their Statements of Community Involvement, which should be available on their websites. Failure to carry out extrastatutory consultation promised in a Statement of Community Involvement may lead to a challenge on the grounds of breach of a legitimate expectation, by someone aggrieved by the failure.

16. What is a “Nationally Significant Infrastructure Project”?

Until March 2010, very large planning applications were handled no differently from ordinary planning applications, except that if they were decided by an Inspector or the Secretary of State, a public local inquiry (often lasting many weeks or months) would always be held. Following concern about the time taken to obtain planning permission for some projects such as Terminal 5 at Heathrow Airport, the Planning Act 2008 introduced a new streamlined procedure for major projects in the fields of energy, transport, water, waste water and waste, which are called “Nationally Significant Infrastructure Projects”. These include, for example:-

- all motorway and trunk road developments;
- certain large port and airport developments;
- certain railway and rail-freight developments;
- certain power stations and wind farms; and
- certain water supply and waste treatment developments.

For these, instead of a planning application to a Local Authority, an application for a Development Consent Order is required to the Infrastructure Planning Commission, Bristol. The Localism Bill, currently before Parliament, proposes to transfer this to a new Major Infrastructure Planning Unit within the Planning Inspectorate, Bristol.

A significant amount of consultation with the public, local organisations and Local Authorities is required, both before and after the application is formally made. Once made, the application is heard at a hearing by a panel of Inspectors, and a decision is made by the Secretary of State within quite a short timetable (eg one year).

17. What is a “Planning Obligation” or Section 106 Agreement?

A Section 106 Agreement is a legal agreement between a Local Authority and a landowner which regulates the use of land, and/or requires payments to be made in connection with it. A s.106 Agreement is therefore used where it is not practical to regulate the use of land through a planning condition, for example because the necessary wording cannot be embodied in a condition (eg linking the occupation of an agricultural worker’s dwelling to a particular agricultural holding shown on a plan).

A s.106 Agreement is also used in order to secure financial contributions from developers towards the cost of infrastructure for which their developments generate a need, such as roads, schools, health facilities, affordable housing, public art, bus services, open spaces, sports and leisure facilities, etc. Sums payable to a Local Authority for such purposes are generally referred to as “developer contributions” or “s.106 contributions”.

More information about the use of Planning Obligations is contained in DCLG Circular 05/2005 and the Community Infrastructure Levy Regulations 2010, Regulations 122 and 123.

18. Where can I get help and advice on Planning matters?

If you are a householder wishing to carry out alterations or extensions to your dwelling, you should always discuss your proposals with the Local Authority, who will be able to advise you on the availability of permitted development rights, as well as the Development Plan and other policies that apply to your area and dwelling. Most Authorities charge for pre-application advice, but this service is free for “householder development” proposals.

For more significant proposals (eg an additional dwelling in the garden), your architect may be willing to handle the planning side for you, and to negotiate with the Local Authority on your behalf.

You may wish to employ a planning consultant to advise you, especially if your development is likely to be controversial or at variance with the Development Plan. Planning consultants are Members of the Royal Town Planning Institute (MRTPI) who offer their skills to the public and businesses. They vary from sole practitioners to large firms and companies who carry out planning work for major developers and investors. Information on planning consultants can be found at www.rtpiconsultants.co.uk.

Some solicitors (who may be members of The Law Society’s Planning Panel, and/or Legal Associates of the RTPI (LARTPI) carry out planning work (see www.lawsociety.org.uk/choosingandusing/findasolicitor.law).

Some Chartered Surveyors (who may style themselves Chartered Planning and Development Surveyors) also specialise in planning work (see www.ricsfirms.com).

If you wish to oppose a planning application made by someone else, you are likely to find that a professional such as these can assist you in formulating your objections in planning terminology and also help you to find and deploy planning policies and other evidence in support of your case. In the case of a significant development proposal which raises issues of more than local importance and which the Local Authority appears likely to approve, you may wish to take advice on requesting the Secretary of State to “call in” the application for his own determination, instead of leaving it to the Local Authority to decide.

If you wish to challenge a planning decision, either for or against development, you should normally consult a solicitor with expertise in planning matters. The timescales for any such challenge are short (see Question 8 above).

Individuals and community groups who cannot afford to employ a planning or other professional may be able to obtain advice and assistance in planning matters from South East Planning Aid, Chatham, a registered charity run by the Royal Town Planning Institute. Its planning advice helpline number is 0870 850 9806, or you can email it on secw@planningaid.rtpi.org.uk.

You may also be able to obtain some assistance from a Citizens’ Advice Bureau.

The above Answers are believed to reflect the law as at 12 May 2011 and are tailored to the area of the Kent Law Society, but do not constitute specific legal advice. Professional advice should always be sought on each case.