If you have any queries on any issues raised in this newsletter, or any planning matters in general please contact:

Libby Clarkson on 01482 337260 or email libby.clarkson@rollits.com

This newsletter is for general guidance only and provides information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful, but if you do not wish to receive further mailings from us please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE or email pat.coyle@rollits.com. For details of how we use your personal information please refer to our Privacy Policy by writing to the same address or accessing our website at rollits.com

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Planning & Development **Newsletter**

SUMMER ***2024***

Planning & Development Newsletter

Summer 2024

Welcome to the first planning newsletter of 2024. This year has been extremely busy to date and we have been instructed on a number of interesting and exciting projects and developments.

In this newsletter we consider the changes to the liability period for planning enforcement, the Hillside judgment, the changes introduced in the new JCT contracts and what to consider when negotiating heads of terms for a promotion agreement which we hope you will find of interest.

If we can be of any assistance to you in providing advice and support, please do not hesitate to contact one of the members of our Planning, Development and Construction Team whose details can be found at the end of this newsletter.

We look forward to continuing to work with you throughout the year.

Libby Clarkson

Abolition Of Four-Year Rule in Respect Of Planning Enforcement

Prior to 25 April 2024 local planning authorities could not take enforcement action against building operations following a period of four years from substantial completion of the relevant works. Under regulations made on 2 April 2024 the four-year time period for local planning authorities to bring enforcement action against building operations was removed with effect from 25 April 2024, and replaced with a standard 10-year tariff that is applicable to all breaches of planning control. The ten-year period is also applicable to the change of use to a single dwellinghouse. These amendments apply only to planning enforcement in England and do not apply to Wales where the relevant four-year time period is still applicable.

These amendments are subject to transitional provisions, which provide that the four-year period will continue to apply where works were substantially completed before 25 April 2024. By way of example, if operational works were substantially completed in breach of planning control in January 2024 the works would still benefit from the four-year rule and would gain immunity from enforcement action from January 2028. The question of when works are substantially complete has been considered in judicial cases and the leading authority advises that the correct approach is for a holistic approach to be taken that involves a comparison between that which has been completed and that which would have been permitted under a planning permission.

If a dwellinghouse had been constructed, but was unfit for habitation, the works would not be considered to be substantially complete. The works would only be substantially complete when they had been completed for the purposes originally intended.

In situations where the four-year rule may still be applicable and the landowner wishes to rely upon it, it is imperative that they have sufficient evidence to demonstrate to the local planning authority that, on the balance of probabilities, the operational works were substantially complete prior to 25 April 2024. If the landowner is able to prove to the local planning authority that the works were completed prior to this cut-off date, the local planning authority should not take enforcement action in respect of the works.

If a landowner wishes to establish definitively that works undertaken without the benefit of a planning permission are lawful, then they can submit an application to the local planning authority for a certificate of lawfulness under section 191 of the Town and Country Planning Act 1990. This would establish whether a breach of planning control has become lawful due to a passage of time without enforcement action being taken. This is preferable to a retrospective application for planning permission as a landowner would not need to establish that the works complied with planning policy. Furthermore, conditions would not be included on a certificate of lawfulness whereas a grant of planning permission could contain conditions that would need to be complied with. The grant of a certificate of lawfulness should be sufficient to satisfy to any future purchasers of the property that the relevant works are lawful.

Promotion Agreements

Key Points to Consider when Negotiating HoTs

A land promotion agreement can be used where a developer or land promoter wishes to enter into an agreement which will place obligations on them to apply for planning permission for development and, if successfully obtained, thereafter market the property for sale in accordance with an agreed disposal strategy.

In return for funding the planning and marketing costs and the financial risk associated with applying for planning permission, the developer or promoter will be reimbursed for their costs and will receive an agreed percentage of the sale proceeds, once planning permission has been granted and the property has been sold.

When negotiating **HoTs** for a promotion agreement, the following key points should be considered:

1. The most important term for all parties will be the profit share on the sale of the land. We are currently seeing profit shares of between 18-35% being payable to the promoter or developer, and accordingly, the profit share can vary quite considerably depending on any site-specific issues and the planning risks involved. The list of agreed costs, which may be reimbursed to the developer or promoter, also needs to be considered and set out together with any costs cap.

2. What will be the initial and/or final long stop date for the promotion agreement and will any extensions be permitted for planning reasons or in the event of unfavourable market conditions? The promotion period needs to be sufficient to allow the promoter or developer time to both apply for planning permission, appeal if desired, and thereafter, market the property for sale upon the successful grant of planning permission. Further, if the developer or promoter wishes to take steps to promote the land in the local plan, then the long stop date will need to be reflective of this.

3. The HoTs should set out the developer or promoter's planning obligations in some detail and should include: what types of development are permitted, what type of planning permission may be applied for, whether the developer or promoter will be required to take steps to promote the land in the local plan, when should the planning application be submitted by, will the landowner have the ability to give prior approval to any application, will the application be in joint names, will there be any planning extensions to the long stop date and will the developer or promoter be obliged to appeal.

4. Likewise, whilst the disposal strategy is often agreed once planning permission has been granted, the HoTs should set out any material terms of disposal at the outset such as how the market value will be valued, which agent shall be appointed, the marketing period and whether the site can be sold in tranches or as a whole. Landowners also often wish to include a minimum land value for their protection.

5. How will the developer or promoter's costs be secured? Usually, a first legal charge would be entered into on exchange of contracts to secure thereimbursement of any planning or marketing costs on sale. However, if the land is already subject to a first legal charge, then other options may need to be explored.

6. Will there be any restrictions on the developer or promoter promoting any other land within a geographical area of the land, and if so, where?

7. In addition to setting out the developer or promoter's obligations, the HoTs should also set out the owner's covenants which should include obligations not to object to the planning application, not to do anything which could have an adverse impact on the planning application, a covenant to enter into any planning or statutory agreements promptly when required and not to enter into any disposals of the land during the promotion period without consent and/or a deed of covenant being required (where appropriate).

8. Usually, a promotion agreement would also grant the developer or promoter a licence to enter the land and take any planning preservation steps which are required, i.e. any steps reasonably necessary to implement the planning permission, if the land has not been sold before the expiry of the planning permission. Steps could include discharging any planning conditions, applying for reserved matters and/or carrying out a material operation on site.

9. The HoTs should also set out whether the agreement is assignable. Often promotion agreements are personal to a developer or promoter, unless otherwise negotiated, but the agreement may permit an assignment to a group company.

10. Landowners may also wish to consider whether they require any additional protections in the arrangement, such as a ransom strip or overage agreement.

11. Finally, it should be considered whether any additional site-specific issues need to be dealt with under the agreement, such as procuring any rights of way or service rights needed over third party land, or dealing with any third party claims. The HoTs should set out what the developer or promoter's obligations are in respect of such issues and what costs may be recovered by them on sale for dealing with these issues.

In addition to considering the above points, it is imperative that tax advice is obtained at the HoT stage as to the tax implications of entering into the agreement, to ensure that a promotion agreement is the most suitable vehicle for documenting the arrangement between the developer or promoter and the landowner.

Principles Established in Hillside in Respect of Competing Planning Permissions and Implications for Developers

In Hillside Parks Ltd v Snowdonia National Park Authority [2022] ("Hillside") the Supreme Court provided important guidance on how to approach separate grants of planning permission within the same red-line boundary and the effect of implementing a later permission that overlaps and isn't consistent with an earlier permission. In Hillside guidance was also provided in respect of the severability of planning permissions and variations to such permissions.

Planning permission had been granted in 1967 for 401 houses to be built, and between 1996 and 2011 the respondent local planning authority granted six planning permissions relating to specific areas of the site. In 2017 the authority informed the developer that works should cease because implementation of the 1967 planning permission had been rendered impossible by the development carried out under the later permissions. By way of example, houses had been built where some of the roads were meant to be under the 1967 plan. The High Court concluded that the works under the later permissions had rendered the 1967 plan impossible and the Court of Appeal upheld the decision.

The Supreme Court dismissed the appeal and held that it was unlikely that a planning permission for the construction of multiple buildings would be severable so as to permit the construction of any subset of those buildings.

It was held that where development carried out under a subsequent planning permission would depart in a material way from the original scheme and make it physically impossible to carry out development under the original permission, then that earlier permission could no longer be relied upon. In this scenario it would therefore be unlawful to carry out further development under the original permission.

The implications of new standalone drop-in planning applications frustrating further development under extant planning permissions in respect of land within a wider red-line boundary, is presently causing nervousness for developers of larger sites who still wish to undertake and complete development under the wider extant planning permission. Drop-in applications are regularly used on larger development sites as individual developers often seek to make standalone applications in order to secure amendments required for their own proposed development.

As such, it is therefore important that landowners of larger sites subject to planning permission have assurance that any amendments by individual developers on individual phases of the overall site would not have a material impact in the context of the scheme as a whole. The risk is that an approval could render further development under the original planning permission on the wider site unimplementable.

If the original planning permission was unimplementable, a new application would need to submitted to the local planning authority for the remainder of the development still to be carried out under the permission that had lapsed. As well as expense incurred in progressing a new application, there would also likely be the need for a further section 106 agreement (or variation to an original section 106 agreement), which would require signatures from all relevant landowners.

In view of Hillside, developers are also now likely to approach masterplans for larger sites and development agreements with added caution. Developers may seek to secure added flexibility to planning applications and phased schemes may be more prevalent. In particular, hybrid schemes could become more familiar with full and outline permissions given that outline elements are likely to provide additional flexibility for future amendments that may be required by developers of individual phases.

Development agreements with individual developers may seek to restrict the works or the scope of any applications to vary principal planning permissions that buyers can make in respect of the part of the site subject to the acquisition. The risk would be that an individual developer could submit an application for an amendment to a principal planning permission or submit a new standalone application that could, if approved and thereafter implemented, make the principal permission unimplementable.

Whilst the risk of an original planning permission being unimplementable rests with the landowner and developers, there could also be a negative impact for local planning authorities because this could adversely delay down housing delivery if a planning permission for a larger site lapsed and a new application was needed. Furthermore, there is also the risk that much needed regeneration schemes could be delayed. As such, local planning authorities may be more amenable in granting planning permissions that provide necessary flexibility for appropriate future variations to the development.

Hillside did nevertheless make clear that even if a new drop-in permission rendered development under the original permission unimplementable, the development that had been carried out at the time would not be unlawful. Landowners therefore have assurance that what has already been constructed would remain lawful.

If you have any queries regarding the implications of Hillside, please do contact Rollits' Planning and Development Team who would be happy to assist.

Key Changes Introduced by the JCT Design & Build 2024

The JCT suite of contracts is currently being updated with the JCT Design and Build together with associated contracts being released in April and the Minor Works contract released in May. Further Contracts within the JCT suite of documents are due to be published later in the year. Here we take a look at some of the key changes to the Design and Build contract from its earlier 2016 edition.

Extensions of Time

There has been an update to those events identified as "Relevant Events" entitling the Contractor to an extension of time. These include, following Covid 19, an epidemic which limits the availability or use of labour or prevents the Contractor from, or delays the Contractor in securing goods or materials or services which are necessary for the proper carrying out of the works.

Relevant Event also now includes the passing into law of any statute, statutory instrument or other subordinate legislation, regulation or bylaw, the exercise of statutory powers or in the case of guidance, publication of such guidance by the Construction Leadership Council.

Loss and Expense

Both of the Relevant Events identified above have also been included within the definition of Relevant Matters which entitles a contractor to claim loss and expense. However, in both cases, the contract particulars must state that these particular provisions apply for a claim to be made under this provision.

Design Lability

The clause which covers a Contractors liability in respect of design, now specifically provides that under no circumstances shall the Contractor be subject to any duty, obligation or liability which requires that any such design shall be fit for its purpose.

Supplementary Provisions

Three of the supplementary provisions contained within the 2016 contract have now been incorporated into the main body of the Agreement giving them greater prominence. These are:

Collaborative Working – Article 3 now provides that the parties are now required to work with each other and with other project team members in a corporative and collaborative manner, in good faith and in the spirit of trust and respect.

Sustainable Development and Environmental Considerations – Clause 2.1.5 now includes the requirement for the Contractor to suggest economically viable amendments which may result in an improvement in environmental performance and sustainability.

Notification and Negotiation of Disputes – Clause 9.1 now incorporates the previous supplemental provision in relation to seeking to avoid disputes has now been incorporated requiring a Party to promptly notify the other of any matters which may give rise to a dispute and difference and for the senior executives to meet for direct, good faith negotiations to seek to resolve the issue.

Legislative Changes

The 2024 contract also includes a number of amendments which reflect recent legislative changes including the Building Safety Act 2022 and Corporate Insolvency and Governance Act 2020. There are also amendments to reflect recent legal developments in particular, the Supreme Court decision in Triple Point Technology which determined that liquidated damages would stop running at termination if it occurred before practical completion and thereafter, an employer has a right to general damages.

Notices

The notice provisions now expressly provide for the ability to serve notices under the contract by email but only where it is stated in the contract particulars that this relevant clause will apply.

Whilst there may not be as many changes to the 2024 version as some people had predicted, parties should still seek to familiarise themselves with the new terms t to ensure that they are complaint and don't fall foul of any of the new terms, or alternatively, know what additional clauses they may be able to rely upon if the need arises.

Meet Our Planning Team

Libby Clarkson

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Libby Clarkson leads the planning and development team at Rollits and has nearly ten years post qualification experience in acting for developers and landowners in option agreements, conditional contracts, promotion agreements and overage agreements, and thereafter, any associated planning and infrastructure documents and estate site set up.

Libby also has a particular expertise and interest in dealing with development projects in the education sector, negotiating and advising on construction documentation and leading solar farm projects for agricultural clients.

Libby adopts a friendly, efficient and proactive approach to working with her clients to achieve the desire outcomes in the requisite timescales.

Stuart Lumb

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Stuart works in Rollits' planning and development team, and has 14 years' post qualification experience in both local government and private practice in the areas of planning, highways and rights of way. Stuart has extensive experience in dealing with issues in respect of proposed development including planning agreements, judicial review, planning enforcement, proposed lawful development and planning policy.

It is important that clients considering acquiring land or property have full knowledge of the planning position as part of their due diligence, and particularly any policies or restrictions that could affect future proposals for development and use of the land. Likewise, it is helpful for landowners to be aware of any planning restrictions on their land so as to manage expectations. With a thorough understanding and knowledge of planning law and practice, Stuart is able to provide clear and practical planning advice to clients in these situations.

Planning policy is regularly subject to change and Stuart actively keeps up to date with developments in both planning law and policy. Stuart would be able to assist with any queries you may have on any specific recent changes to planning law or policy.

Alex Richardson

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Alex is a Paralegal working with the Planning and Development Team and has several years of property experience with a particular focus acting for developers in the sale of new build homes and acting on behalf of landlords and tenants in lease extension transactions via both the statutory and voluntary procedure.

The legislation in these areas has been widely discussed in recent years with leasehold reforms in particular to take effect over the course of the next few years and Alex and the team are on hand to assist with any queries you may have because of such changes which may affect your property.

Caroline Hardcastle

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As a long-standing member of the commercial litigation team, Caroline has over 20 years' experience of construction disputes acting for employers, main contractors and sub contractors on a wide variety of issues including defects, delay, loss and expense and within a variety of forums, including Adjudication, Arbitration and the Courts.

Caroline enjoys building lasting relationships with her clients, getting to know them and what is important to them. Understanding clients and the sectors in which they operate allows her to provide advice and support they need in context.

Disputes can be a stressful and a difficult time for clients therefore being able to resolve disputes (in the client's favour!) and allowing them to move on and get on with their everyday work gives Caroline a huge sense of achievement.

John Ashworth

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John is a member of our commercial dispute resolution team where he specialises in regulatory law, advising and defending individuals, businesses and other organisations where they are facing prosecution by a relevant authority.

He also specialises in contractual, construction and property disputes where he advises individuals and businesses on understanding their duties and navigating compliance with existing and new regulations such as the recent changes introduced by the Buildings Safety Act 2022.