Rollits LLP

Planning

& Property Development Update

Autumn 2019
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Welcome

Welcome to our Autumn newsletter, which this time covers a range of planning and development topics which we hope will be interest and relevance to you.

We have also included a summary of some recent court cases.

As ever, if you have any queries please do not hesitate to contact us, we are always very happy to have a chat.

Mark Dixon

Town and village greens
Some practical considerations

Town and village greens (TVGs) are characterised as areas of open space which by immemorial custom have been used by the inhabitants of the town or village for the purpose of recreation and the playing of lawful games.

Under Section 15 of the Commons Act 2006, anyone can apply to register land as a TVG where "*a significant number of inhabitants of any locality, or any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years*". The use must have been exercised as of right i.e. without force, without secrecy and without permission, for a continuous period of 20 years at the time of the application, with a period of grace which is now one year.

The registration of land as a TVG is significant as it will prevent any development of the land taking place and will substantially devalue the land financially. Interrupting the use and enjoyment of a TVG is a criminal offence and it is also an offence to drive over a TVG (subject to some exceptions).

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Town and village greens – Some practical considerations (continued)

It may be difficult for a landowner to spot that their site may be at risk of registration as a TVG. This is particularly so if the site is unoccupied and not monitored, and whilst a local search can flag up whether a site is currently registered as a TVG to assist a developer, this does not prevent a future application being made. There is therefore a big risk to both landowners and developers, as landowners could hold a site which cannot be sold for development and is worthless, and developers may purchase a site which they cannot subsequently develop or incur significant wasted costs in relation to a site under a conditional contract or option which is subsequently terminated.

As a result of the number of TVG applications which have been historically made to try and thwart development, the law changed in 2013 to protect developers by the introduction of section 15C to the Commons Act 2006.

Section 15C of the Commons Act 2006 introduced a number of trigger events, such as an application for planning permission or the allocation of land for development, which once occurred, would suspend an application to register a property as a TVG. There are a number of terminating events, such as the planning application being withdrawn, not implemented or refused following the exhaustion of all appeal mechanisms, where the suspension would then come to an end. This means that once a planning application has been submitted, or land has been allocated, landowners and developers are protected against an application being submitted to register a property as a TVG until such time as a terminating event occurs.

Although the introduction of Section 15C offers protection to landowners or developers once a trigger event has occurred, it does not remove the risk of a TVG application in its entirety, especially in relation to unallocated land. This is because an application could be made before a planning application is submitted or submitted in the event that planning permission is refused before a revised application is lodged. Accordingly, landowners and developers should still be alert to the possibility of a TVG application and take the necessary steps to protect their interests.

There are a number of practical steps which can be taken by both landowners and developers to spot any potential issues and minimise any risks.

A landowner should consider:

- Frequently monitoring their land to see whether any persons are accessing the property and if so, they should obtain legal advice immediately to prevent such use.
- Restricting access completely by fencing and gating the property and ensuring any entrances are locked at all times.
- Placing permanent signs along the boundaries of the property stating that access is forbidden to the public and ensuring that any signs are replaced if they are removed or damaged. Photographic evidence should be taken of all signs erected and replaced (as appropriate) and legal advice should be taken as to the number of signs and the wording of the same.

- If any persons start to use the property for recreational purposes, consider whether this use could be permitted by way of signage and obtain advice on the wording of the same.
- Registering what is known as a section 15A notice or a landowner statement with the local authority, to prevent a TVG claim being made for a period of 20 years. This is particularly useful if the property has been used for recreational purposes for less than 20 years, as such a notice would stop the clock and prevent a claim being made for a further period of 20 years.

If a developer is purchasing a property for development they should always:

- Consider monitoring the land over a period of time to see whether any persons are currently using the property for recreational purposes.
- Carry out the specific enquiry on the local search to see whether the property is registered as a TVG.
- Raise replies to enquiries to ascertain whether the seller is aware of any persons accessing the property for any purpose and see whether any of the above mitigation measures have been taken. Consider whether it would be suitable to request that the property is fenced between exchange and completion (if the property is being purchased under an option agreement) or require the owner to submit a landowner statement.
- If there is a real risk that an application could be made to register the property as a TVG, ensure that any contract for the purchase of the property deals with what would happen if an application is made and allows the developer to terminate the contract in the event of a successful application.
- Keep any communications relating to the proposed development confidential and limit any information available to the public until such time as a trigger event has occurred.

The law on TVGs is extremely complicated and is continuously changing and accordingly if you are a landowner who has concerns that your site may be being used by the public for recreational purposes or are a developer wanting to ensure you are adequately protected in the contractual documentation for the purchase of the property we would recommend that you take legal advice as soon as possible.

Can I use my property as an Airbnb?

Over the last few years Airbnb has grown tremendously and is now an extremely popular way for individuals to travel at an affordable price. It is also becoming a common way for property owners to generate income from their property on a short term basis.

However, there have been many cases of property owners facing drastic consequences as a result of letting their property as an Airbnb without considering the underlying legal issues and so this article looks at the possible barriers which may prevent an owner from letting their property as an Airbnb, any consents which may be required and the risks of ignoring these issues.

The first consent which may be required is planning permission. Due to the rise in popularity of Airbnb, many authorities have put restrictions in place prohibiting the use of properties in their locality as

temporary accommodation, and in such circumstances a planning application would be required as there would be a material change of use. In Greater London, for example, there is a restriction in place prohibiting the letting of a property as temporary accommodation for more than 90 nights in any calendar year without planning permission.

Accordingly, a property owner should check the planning status of Airbnbs in their local planning authority and obtain advice on whether a planning application is needed before letting a property; otherwise they could face the risk of planning enforcement action being taken if consent was required and not obtained.

The second question to ask is whether the title deeds to the property prohibit the use of the property as an Airbnb. Many property deeds contain restrictive covenants, such as a covenant not to carry on trade or business at the property or a covenant to use the property as a single private residence only. Such covenants could be breached by using the property as an Airbnb, and so it is important to identify whether there are any restrictive covenants, whether they are still enforceable, and if so by whom. Otherwise, there is a risk that the person with the benefit of the covenant could try and enforce the covenant by way of an injunction or damages.

Thirdly, if the property to be let on Airbnb is leasehold, the terms of the lease should be checked as many leases prevent sub-letting and "the parting with or sharing possession of" a property and the Courts have held that the use of a leasehold property as an Airbnb will be a breach of such alienation provisions. Some leases will however permit sub-letting with the landlord's consent. If a tenant breaches its tenants covenants in the lease then the landlord could take action to remove the tenant from the property and so the terms of the lease should be checked, and any consents obtained, before letting the property as an Airbnb.

Fourthly, if the property is subject to a legal mortgage then the terms of the mortgage agreement should be checked. Mortgage agreements differ from lender to lender but many agreements will prevent a borrower from letting the property at all and some may prevent the borrower from letting the property without the prior consent of the lender. Some lenders may have conditions to granting consent, such as charging a higher interest rate, and some lenders will refuse consent entirely. If a borrower breaches the terms of the mortgage agreement by letting the property, or letting the property without consent (as appropriate), then the implications could be grave and could include a fine, repossession of the property or immediate repayment of the mortgage. The breach of the mortgage rules could also cause the home insurance to be invalidated immediately.

Fifthly, the property insurer should be notified of the proposed use as an Airbnb and again their consent may be required (which again may be refused or granted subject to conditions such as an increase in the premium).

Finally, the tax consequences should be considered as any earnings from lettings must be declared to HMRC and tax may be payable on the rent. Accordingly, we would always advise that specialist tax advice is sought before opening the doors of your property to others.

Using a property as an Airbnb often seems like a lucrative way to generate extra income from a property but as this article sets out there are many consents which are needed and challenges to overcome before letting a property. However, provided the property owner considers all of the necessary risks before letting the property, Airbnb could be a fantastic way to increase the income from a property.

Overage agreements

Some key points to consider

Overage agreements, otherwise known as clawback agreements, allow a seller to recover additional monies from a buyer following the sale of their property if specified events occur which increase the value of the property, such as planning permission being granted or the land being sold at a premium.

Overage agreements are becoming increasingly common in land transactions as they also allow the seller to share in the uplift in value of the property following the sale whilst allowing the buyer to initially pay a lower price for the property until such time as a specified event occurs.

However, such agreements are highly litigated as parties often find that the overage agreement does not accurately reflect the deal that they thought they were entering into, does not consider all of the circumstances which could occur in the future, or a dispute arises as to the amount of overage actually payable.

Accordingly, if you are proposing to enter into an overage agreement you should carefully consider the key terms at the outset and ensure these are properly recorded in the agreement which is entered into.

Some of the key terms to consider are as follows:

1. The trigger event

First, it needs to be considered what event or events will trigger the payment of the overage and this could include:

a) The grant of planning permission for development or change of use;

b) The implementation of a planning permission;

c) The disposal of the property for a price over an agreed threshold; and/or

d) The disposal of the property following the grant of planning permission.

If you are selling the property it is likely you will want the trigger event to be the grant of planning permission to enable you to recover the overage payment as soon as possible. However, on implementation may also be desirable to ensure that you receive an overage payment in respect of the planning permission which is actually implemented, as developers often submit planning applications to "test the water" and if granted, may later apply for a more profitable scheme. Buyers meanwhile will want the trigger event to be upon the disposal of the

property when they are in receipt of cash to be able to pay the monies due.

In the event that the trigger event is the grant of planning permission, it should be agreed whether this means the grant of outline planning permission or the approval of the last of the reserved matters.

Once the trigger event has been agreed, it then needs to be decided when the overage payment will actually be payable as it is likely this will be a later date, such as ten working days following the end of the judicial review period, where the trigger event is the grant of planning permission.

2. The amount of overage payable

Next you should consider how much overage will be payable and how the overage payment will be calculated.

Often, the overage payment will be an agreed percentage of the uplift in value of the property, for example, following the grant of planning permission, which sounds simple in practice; however, there are a large number of other considerations which are often overlooked.

For example, will any costs be deducted from the "enhanced value" before the overage is calculated such as s106 obligations and the costs associated with obtaining planning permission? If there is a dispute between the parties as to the amount of overage payable, how will this be dealt with? On what basis will the market value of the property, with and without the benefit of planning permission, be assessed?

The price calculation is usually the most heavily negotiated clause, for obvious reasons, and professional advice should be sought from a valuer to ensure the clause is watertight.

3. How long will the overage period be?

The parties must decide how long the overage period will be. A buyer will want as long a period as possible whereas the seller will want a reduced period to ensure the land is tied up for as little time as possible.

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Overage agreements – Some key points to consider (continued)

4. How many bites of the cherry?

One of the most heavily negotiated points in overage agreements is how many times the seller will benefit from an overage payment and whether this will be a one off payment or an unlimited number of payments during the life of the overage period. This must be agreed between the parties, drafted carefully and will often depend on the term of the overage period and the bargaining position of the parties.

5. How will the overage agreement be secured?

One of the most crucial points to consider is how the overage agreement will be secured to ensure that the terms of agreement bind future owners of the property (in the event that the disposal itself is not a trigger event and the overage agreement is not subsequently released).

A seller is likely to want a legal charge over the property, so that in the event that the overage payment is not paid when due, it can exercise its rights and take possession of the property to recover the monies due. However, this is unlikely to be acceptable to a buyer if they anticipate any future development could be funded by borrowing money from a lender who will require a first legal charge over the property. Depending on the circumstances, the lender and seller could take charges over different parts of the property, or the seller could take a second legal charge and a deed of priority could be entered into, to deal with this issue.

Alternatively, a deed of covenant could be required on a disposal, obliging any future owner to enter into a direct covenant with the seller confirming it will comply with the terms of the overage agreement going forwards, coupled with a title restriction to prevent any disposal until such time as the deed of covenant is provided. This is the most frequently used method of securing an overage agreement.

6. Disposals

Usually an overage agreement will allow the buyer to enter into pre-agreed disposals of the property without making an overage payment, obtaining a deed of covenant (where applicable) or obtaining the seller's consent, to make the development workable in practice. The seller and the buyer should consider the types of future development which could be carried out and the types of permitted disposal which may be entered into.

Disposals which should be considered include infrastructure agreements, deeds of easement, short term leases and legal charges.

As you will note from the points above, overage agreements are extremely complicated and involved and the parties must consider the various points in depth to ensure that they are fully protected. The drafting of overage agreements is also fundamental as there are many cases on the interpretation of such agreements, with just one word changing the whole nature of an agreement.

For that reason, if you are considering entering into an overage agreement, it is vital that you obtain professional advice at the outset from a solicitor to ensure that the heads of terms include all of the necessary clauses and thereafter that the agreement is watertight and fully protects you.

A summary of the 2019 amendments to the Permitted Development Rights

On 25 May 2019 the provisions of *The Town and Country Planning (Permitted Development, Advertisements and Compensation Amendments) (England) Regulations 2019* came into effect, which include the 2019 amendments to the Permitted Development Rights regime contained in The Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO").

The significant changes to the regime are as follows:

1. The temporary right to enlarge a dwellinghouse has been made permanent. Class A, Part 1 of Schedule 2 of the GPDO permits extensions of up to 8 metres for a detached dwelling or up to 6 metres for any other dwelling (subject to a number of conditions and restrictions).
2. Class Q of Part 3 of Schedule 2 (permitting a change of use of an agricultural building to dwellinghouse(s)) has been amended to provide that any dwellinghouse cannot exceed 465 square metres.
3. A new Class JA in Part 3 of Schedule 2 has been added, to permit a change of use from Class A1 (shops), Class A2 (financial and professional services), Class A5 (hot food takeaways), a betting shop, a pay day loan shop or a launderette to a use falling within Class B1(a) (offices). This is subject to a maximum floor space of 500 square metres and the prior approval of the local planning authority is required for certain matters.
4. Class M of Part 3 of Schedule 2 has been altered, to permit a change of use from Class A5 (hot food takeaway) to a dwellinghouse.
5. Class D of Part 4 of Schedule 2, which permits temporary flexible use for specific classes of building, has been amended to allow the temporary flexible use for up to 3 years (previously up to 2 years flexible use was permitted).

When seeking to rely on a permitted development right, it is critical to carefully consider the conditions and restrictions relating to that right. This will ensure that the right is available for the proposed development or change of use and an exclusion doesn't apply, in addition to ensuring the development or change of use is carried out in accordance with any conditions imposed.

Some interesting cases from 2019

Non-material amendments to reserved matters permitted

In the case of *R (Fulford Parish Council) v City of York Council*, the Court of Appeal has quite sensibly confirmed that section 96A of the Town and Country Planning Act 1990 ("the Act") gives a local planning authority the necessary powers to grant non-material amendments to conditional approvals of reserved matters.

Under Section 96A of the Act, a local planning authority has the power to "*make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material*".

In this case, outline planning permission was granted subject to conditions for 700 dwellings together with open space and community facilities and then reserved matters approval was subsequently granted subject to a condition requiring the approval of a bat mitigation strategy and method statement.

Following implementation of the planning permission, the applicant made an application for a non-material amendment to the reserved matters application to vary the approved plans and the bat mitigation strategy which was approved by the local planning authority. This approval was challenged by The Parish Council by way of judicial review who argued that the local planning authority did not have the power under Section 96A of the Act to grant consent as a reserved matters approval was not a planning permission. It was further argued that Section 96A could not be used post-implementation.

The Court of Appeal dismissed the appeal and held:

1. The "planning permission" referred to in the wording of Section 96A includes the planning permission (being the outline planning permission) and any conditions to which it is subject irrespective of when the conditions were imposed. This meant the planning permission included the conditions imposed in the reserved matters approval.
2. An application for a non-material amendment of reserved matters is an application for an amendment to an existing condition which is expressly permitted by Section 96A(3)(b).
3. The powers under Section 96A are non-material only and so there would be no material impact from their decision.
4. The powers were not being made retrospectively as the bat mitigation strategy had not yet been put in place. The development had been implemented but had not been carried out in its entirety.

This decision is welcomed by developers to give clarity to the law as it has been uncertain for some time as to whether section 96A of the Act could be used to make a non-material amendment to a reserved matters approval.

Interference with solar panels held to be a material planning consideration

In the case of, *R (McLennan) v Medway Council and another [2019] EWHC 1738 (Admin)*, the High Court held that the interference with solar panels is a material planning consideration.

In this case an owner installed solar panels on their dwellinghouse and, a year later, their neighbour applied for planning permission to build an extension to their house. The owner objected to the planning application on the grounds that the extension would interfere with the solar panels and the generation of electricity therefrom. The local planning authority granted planning permission and held that the solar panels were not a material consideration as it was a private interest and not a public interest in need of protection.

On appeal, the High Court granted the appeal and held that the local planning authorities reasoning was wrong, as solar panels play an important role in combating climate change, and the local planning authority could not ignore the effect of the development on the solar panels.

Further, the NPPF clearly identifies that climate change is a planning consideration. Accordingly, the Court held that the local planning authority could not treat the effect on solar panels as immaterial especially given the importance of renewable energy at national level.

It will be interesting to see how this case is applied going forwards and whether similar objections are brought against planning applications for other types of renewable energy in the future.

New case law on landlord's right to redevelop

Under the Landlord and Tenant Act 1954 ("1954 Act"), a tenant of a business lease is granted security of tenure, which means that at the end of the term of the lease the tenant has a statutory right to remain at the property and be granted a lease renewal, unless of course the parties have "contracted out" of the 1954 Act.

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Some interesting cases from 2019 (continued)

There are however a number of grounds upon which a landlord can contest a tenant's right to a lease renewal and one of the grounds which a landlord can rely upon if applicable is section 30(1)(f) of the 1954 Act, i.e. *the landlord's intention to redevelop*, known as Ground F.

Ground F states as follows:

"*on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding*".

In *London Kendal Street No 3 Ltd v Daejan Investments Ltd*, the Court held that the landlord had the necessary intention to redevelop to oppose a lease renewal under Ground F, notwithstanding the fact that there was a likelihood of the development being prevented by way of an injunction.

In this case the tenant had been granted separate leases of 4 suites on the ground floor of a building, one which it occupied itself as offices and the others which were let on short term licences. The landlord wanted to carry out works to the basement of the property so that it could let the additional space and create a new entrance to the building where the suite being occupied was located. The landlord obtained planning permission and funding for the proposed development and entered into the necessary construction documentation.

The tenant applied for a renewal lease of the suite at the end of the lease term which the landlord opposed to on the grounds that it intended to redevelop the property. The tenant subsequently applied to the Court for a new lease and argued that the landlord did not have a reasonable prospect of developing the property as the development would breach the terms of their other leases, namely that there would be disturbance and disruption to the tenant's business and a breach of the right to quiet enjoyment, and accordingly the tenant would seek an injunction.

The Courts held:

- The landlord had the necessary intention to develop the property before the lease renewal was opposed. This was evidenced by the fact the landlord had obtained planning permission, funding and entered into the building contract; and
- Whilst there was a risk that the development may be stalled by an injunction, the dispute was "capable of resolution" and so the tenant could not prove that there was "no real prospect" that the landlord could carry out the works.

This case contains useful guidance for landlords looking to oppose a lease renewal on redevelopment grounds. When looking to oppose a lease renewal in such circumstances, landlords should consider whether there are any hurdles which could prevent the development going ahead which a tenant could use to challenge the landlord's opposition. However, this case itself is useful for landlords as it makes clear that any legal complaints or injunctions cannot be used by tenants to create another barrier to redevelopment and each claim is distinct from the other.

It is also a useful case for tenants whose lease renewal is being opposed, as they can look at the legal, planning and financial elements of the development to see whether there are any factors which could legitimately stop the development going ahead which they can use to challenge the landlord's decision.

Varied planning permission held by Supreme Court to include planning condition from earlier permission

In the case of *London Borough of Lambeth v Secretary of State for Communities and Local Government and others*, the Supreme Court has held that a planning condition imposed in an original planning permission was also included in the varied planning condition following a section 73 application, despite not being replicated therein, as whilst the varied permission was a new planning permission, it granted permission to carry out the same development as the original permission subject to the varied conditions.

In this case, planning permission was granted in 1985 for a DIY store which included a condition that the property could only be used for "*the retailing of goods for DIY home and garden improvements and car maintenance, building materials and builders' merchants goods and for no other purpose…*".

Some years later, in 2010, the local planning authority granted permission for a varied permission for the sale of a more extensive selection of goods. The varied planning permission listed the goods to be sold and stated the property could not be used "*and for no other purpose (including the retail sale of food and drink or any other purpose in class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended)…*".

In 2013, the applicant then applied to vary the planning permission to permit the sale of food, which was refused, and in 2014 the applicant applied under section 73 to vary the above condition to permit the use of the property as a catalogue showroom retailer, which was approved and granted subject to three conditions, none of which related to the sale of food. The permission did however restrict the development to non-food sales in the description of the development of the permission.

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Some interesting cases from 2019 (continued)

In 2015, the applicant applied for a Certificate of Lawfulness of Proposed Use and Development for all retail purposes including food as the 2014 permission did not contain the condition from the previous permissions preventing the use of the property for the sale of food. The local planning authority refused to grant a certificate and on appeal, the planning inspector allowed the appeal. The local planning authority subsequently applied to the High Court and Court of Appeal and both appeals were dismissed. However, on an appeal to the Supreme Court the appeal was allowed.

The Court reiterated the well known position, that a section 73 permission is a whole new independent permission, but stated that the consent granted permission for the same development as the previous consent, subject to the varied conditions.

The Court further looked at the natural interpretation of the permission and held that a reasonable reader would look at the permission and read the permission as that described in the development, subject to the variation of the specified conditions.

Local planning authorities will be delighted by this decision although it should be noted that this case is highly fact-specific due to the description of the development in the 2014 permission. Had the 2014 permission not described the development to include non-food sales, it would be interesting to see whether the result would have been the same, as this case goes against the principle that a section 73 permission is a whole new permission independent of the original permission.

Accordingly, varied planning permissions should always repeat any relevant conditions from the original permission to ensure there is no dispute going forwards.

Information

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

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The law is stated as at 28 August 2019.

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