Planning & Development Newsletter

Rollits LLP

SUMMER
2023

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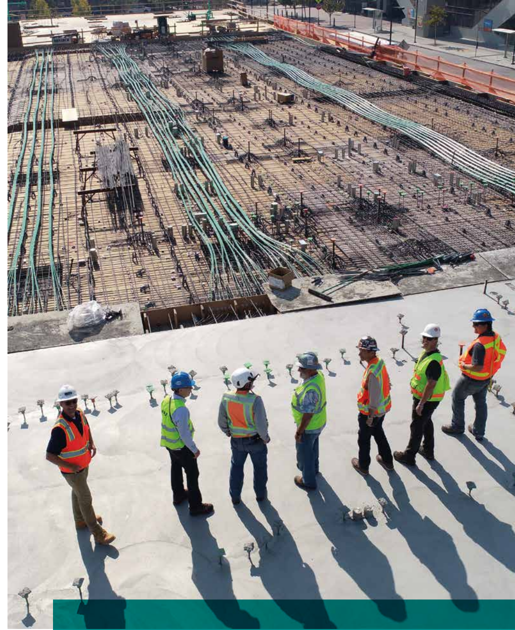
The planning system is presently subject to significant proposals for reform with proposed changes including the removal of a need for councils to maintain a rolling 5-year housing supply of deliverable land for housing, housing targets becoming advisory only rather than mandatory and the introduction of National Development Management Policies to speed up the production of plan-making. Furthermore, amendments are also proposed to the National Planning Policy Framework that are expected to assert the supremacy of national policy, change the policy tests for plan-making and provide greater protection for the green belt.

Nevertheless, the reforms proposed need to be considered in a political context because there is a prospect of a change of government at a likely general election next year.



Summer 2023

Whilst new legislation may be introduced and amendments made to the National Planning Policy Framework, a new government could decide to reverse such changes. The planning system is therefore presently in a state of flux and it is imperative that planning practitioners monitor the proposed reforms and keep abreast of developments in this regard.

The planning system is also subject to other reforms including a new requirement for development sites to provide biodiversity net gain and a possible new use class for short-term holiday lets and within this newsletter we address these proposed reforms. We also consider the effect of overage agreements and rights of way in respect of development.

Rollits' experienced planning and development team are available to advise and assist on any planning related queries that you may have moving forward. Please get in touch if we can help with any current issues you may have.

Key Considerations When Dealing With Overage Agreements

We are frequently instructed to deal with the sale and purchase of land where an overage agreement is required by a seller as part of the Heads of Terms to enable the seller to share in any uplift in value of the property in the event that the buyer develops the property and/or sells the property with the benefit of planning permission (as appropriate) within an agreed timescale following completion.

Overage provisions are extremely contentious and highly litigated as when a trigger event occurs later down the line, 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 obtain legal advice as part of the negotiation of the Heads of Terms, and ensure your intentions are properly documented in the agreement which is entered into.

When negotiating Heads of Terms for an overage agreement, the following terms should be considered and discussed with the land agent and lawyer in the event further advice is required.

The **Trigger Event**

Firstly, you should consider what event(s) will trigger the payment of overage and this could include one or more of the following events:

- The grant of planning permission for development or a change of use;
- The implementation of a planning permission;
- The disposal of the property for a price over an agreed threshold; and/or
- The disposal of the property following the grant of planning permission.

If you are selling a property subject to overage then you may want the trigger event to be the grant of planning permission to enable you to recover the overage payment as soon as possible.

However, a trigger 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 are likely to 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 agreed to be 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, or ten working days following the agreement or determination of the overage amount.

What Development Will Trigger Overage?

One of the key considerations which is often overlooked when negotiating Heads of Terms is what development will trigger the payment of overage, i.e. residential development, any development, specific changes of use.

Another consideration which is becoming more important is whether the exercise of permitted development rights will trigger overage, and if so, which classes of right will be caught by the overage provisions. The latter point is extremely difficult to deal with as permitted developments change on an annual basis and there is no guarantee the permitted development rights regime will continue for the life of the overage agreement or will not be replaced with a different regime. Detailed discussions should therefore be had between the parties to ensure any development which could be carried out under permitted development rights or any future replacement legislation, such as a barn conversion to residential use, is covered by the agreement if it is the intention to do so.

The Amount of **Overage Payable**

Next, you may wish to 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, such as following the grant of planning permission, which sounds simple in practice; however, there are a large number of other considerations which are often overlooked. Questions to consider include:

- 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 as watertight as possible.

How Long Will the **Overage Period** be?

The parties should consider 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.

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 should be agreed between the parties during the Heads of Terms discussions and then subsequently drafted carefully.

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 the 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.

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.

Summary

As you will note from the previous points, overage agreements are extremely complex and the parties must consider the various points in depth to ensure that they are fully protected and their intentions are properly recorded.

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 an agent and lawyer to ensure that the heads of terms include all of the necessary clauses and thereafter that the agreement reflects your intentions.

Excessive Use of Rights of Way

Over the last few years we have seen an increase in issues arising for development sites where the access to the site is over a private access and not an adopted highway, as just because a development site benefits from a right of way over a private road, this does not automatically mean that the right of way may be used to access the property for all purposes, and in particular, the construction and use of the property for the intended residential or commercial development.

Accordingly, when seeking to purchase development land with the benefit of a right of way over a private access road, the underlying title documents need to be considered at the outset of the transaction to establish whether a right of way exists, and if so, whether there are any restrictions or limitations on the use of that right of way.

There are two main ways in which a right of way may be acquired: expressly, where rights are granted in a deed such as a transfer or deed or easement, or by prescription, where a right of way is claimed once it has been exercised continuously for a period of 20 years without force, without secrecy and without permission. Where an express right of way exists then the deed granting the rights must be construed to ascertain the extent, nature and purpose of the right of way.

This is a matter of construction and the extent, nature and purpose of a right of way is not always as clear as one would hope. For a prescriptive right of way, the manner and extent of right of way and character of the dominant and servient land needs to be considered to ascertain how the right of way may be exercised and for what purposes.

Rights of way are frequently drafted to state that the right may be used for "all purposes" but this does not automatically mean the right of way can be used for all purposes and it would need to be considered what was in the contemplation of the parties at the time of grant and whether the intention was for the right of way to be truly exercised for all purposes, including future development purposes. Each case must be considered on its own facts and there is considerable case law on the interpretation of rights of way.

Further, just because no use is specified within the right of way this does not automatically mean that a right of way can be used for all purposes.

Within common law there is a principle of excessive user whereby a party cannot exceed the use for which a right of way has been granted. The use of a right of way can be exceeded by exceeding the nature, purpose or amount of that use, i.e. by changing the use of the property and the frequency of the exercise of the right.

The leading authority on excessive user is the case of McAdams Homes Ltd v Robinson - which introduced the following two stage test:

- Does the development of the dominant land represent a radical change in its character or a change in its identity, as opposed to a mere change or intensification in its use?
- Will the use of the dominant land, as redeveloped, result in a substantial increase or alteration in the burden on the servient land?
- Where the answer to both questions is "yes", the dominant owner's right to enjoy the easement will end, or at least be suspended for so long as the radical change of character and substantial increase in burden are maintained.

In this case the intended development was a change of use of a property from a bakery to two houses and the Court deemed the change of use of the right of way was excessive as it was a “radical change and substantial increase in use of easement”.

Accordingly, if you intend to purchase development land with the benefit of a private right of way we would always advise that advice is taken at the outset to ensure the right of way can be used for the intended purpose. Otherwise, there is a risk that a claim could be made or an injunction sought when the development commences and an argument made that the right of way does not exist for the intended purpose or that the intended purpose exceeds the use.

Introduction of a Use Class for Short Term Lets and Associated Permitted Development Rights

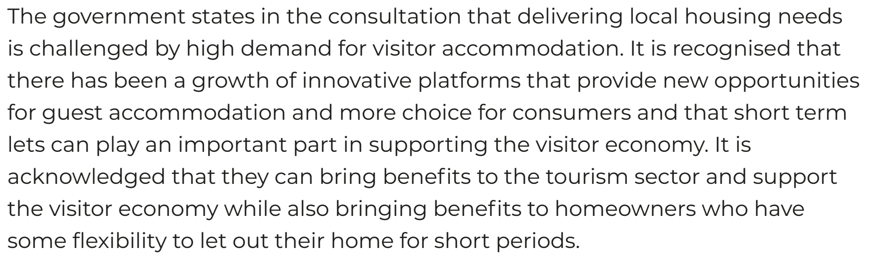
On 12 April 2023, the government published a consultation 'Introduction of a use class for short term lets and associated permitted development rights'. The consultation seeks view on the following matters:

• The introduction of a new use class for short term lets under a new Cass C5 (short term let). This would be use of a dwellinghouse that is not a sale or main residence for temporary sleeping accommodation for the purpose of holiday, leisure, recreation business or other travel. When the new use class comes into effect existing properties would fall into the new use class C5 where they meet the definition or remain as C3 dwelinghouses.

• The introduction of new permitted development rights for the change of use from a dwellinghouse to a short term let and vice versa. It is proposed that permitted development rights would not be subject to any limitations or conditions where there is no local issue. Where there is evidence of a local issue, the permitted development right for change of use to a short term let can be removed by making an Article 4 Direction in line with national policy.

• Possible flexibility for homeowners to let out their home for a number of nights in a calendar year through either changes to the dwellinghouse use class (Class C3) or additional permitted development rights. The government is proposing a limit of a certain number of nights a year should apply and consulting on whether this limit should be 30, 60 or 90 nights in a calendar year. Planning permission would still be required where a main or sole C3 dwellinghouse is let out for longer than this number of nights in a calendar year where there is a material change of use.

• The introduction of a planning application fee for the building of new-build short term lets. The government is proposing that where new-build short term lets are developed, a planning application fee for each short term let equivalent to that for new dwellinghouses shall apply.

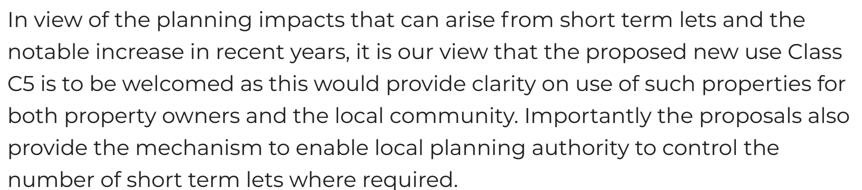


The government states in the consultation that delivering local housing needs is challenged by high demand for visitor accommodation. It is recognised that there has been a growth of innovative platforms that provide new opportunities for guest accommodation and more choice for consumers and that short term lets can play an important part in supporting the visitor economy. It is acknowledged that they can bring benefits to the tourism sector and support the visitor economy while also bringing benefits to homeowners who have some flexibility to let out their home for short periods.

However, the rise in the number of short term lets has prompted some concerns. High concentrations of short terms lets in areas such as coastal towns is reported as impacting adversely on the availability and affordability of homes to buy or rent for local people and the sustainability of the communities more generally. Further, there are worries with regard to the viability of local shops, schools and other local services impacted by the lack of a permanent population and properties being vacant over the winter.

The government recognise that there is a wider public interest in supporting sustainable communities and providing homes to rent or buy. The government consider there is clear rationale for planning charges to give local communities greater ability to control the number of short term lets in their area and support the retention of existing dwellinghouses to buy or rent.

It is undeniable that there are planning impacts with short term lets because where there is a concentration of such uses it may be considered to impact on the character of the premises and the area. Individual properties can have particular impacts arising from the churn of people, such as noise and traffic from arrivals and departures, the storage and handling of waste, noise from parties and the inconvenience to neighbours and burden of local planning authority resources.



In view of the planning impacts that can arise from short term lets and the notable increase in recent years, it is our view that the proposed new use Class C5 is to be welcomed as this would provide clarity on use of such properties for both property owners and the local community. Importantly the proposals also provide the mechanism to enable local planning authority to control the number of short term lets where required.

Impact of Biodiversity Net Gain in Residential Developments

Biodiversity net gain is a strategy to develop and contribute to the recovery of nature. Its purpose is to ensure that the habitat for wildlife is in a better condition than prior to development. From November 2023 all new developments in England for 10 or more homes will be required to provide a 10% biodiversity net gain and there is the potential for up to 20% biodiversity net gain to be delivered if required by the local planning authority. For small sites, to lessen the burdens and allow a longer period for developments and local planning authorities to adapt, the transition period has been extended until April 2024. Small sites are defined as between one and nine dwellings on a site of less than one hectare or with a site area of less than 0.5 hectares where the number of dwellings is not known.

In respect of proposals for development, developers must try to avoid loss of habitat to a piece of land that they plan to undertake development work on. If they are not able to do this, then a developer must create habitat either on-site of off-site. On-site means the land the development work is on and off-site means either the developer's own land away from the said development site or units bought from a land manager. The new off-site market in biodiversity units can enable landowners to create and enhance habitats on their land to generate biodiversity units. If on-site or off-site land cannot be used, then a developer must buy statutory credits from the government, The government will use any monies paid to invest in habitat creation elsewhere in the United Kingdom. As well as assisting nature, the generation of biodiversity units also provide the opportunity for landowners to benefit financially by selling the said units.

The biodiversity net gain provisions will provide that every planning permission in England shall be deemed to be granted subject to a condition that development cannot begin until the developer has submitted a biodiversity gain plan to the local planning authority and the local planning authority has approved the plan. The purpose of the deemed condition is to ensure that the biodiversity net gain objective is met. The plan should contain an assessment of the value of natural habitats before development and after development, and also ensure that it allows for planning permission to be subject to conditions. The local planning authority can only approve the biodiversity net gain plan if the biodiversity value attributable to the development exceeds the pre-development biodiversity onsite habitat by at least 10%.

The biodiversity value of any habitat or habitat enhancement will be calculated in biodiversity units using the biodiversity metric that will be provided and published by the Secretary of State to meet the biodiversity net gain objective. The metric does not account for individual wildlife species, but instead uses habitat categories as a proxy measure for biodiversity and the species those habitats support. The metric is used to measure biodiversity losses and gains and can also be used to calculate how a development will change the biodiversity value of a site.

In addition, the statutory scheme for conservation covenants will support the implementation of biodiversity net gain. Conservation covenants are private voluntary agreements between a landowner and responsible body, such as a conservation charity or public body. They provide for conservation of natural environment and heritage assets for the public good in England and will support the implementation of biodiversity net gain over a long period.

Developers seeking to carry out residential development will now need to consider biodiversity net gain prior to submission of any application for development and assess whether biodiversity improvements can be provided on-site. This will become an integral factor in the consideration of proposals for residential development and may lead to improvements in the attractiveness of future residential developments having regard to the incentives to provide habitat improvements on-site.

Information

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

The law is stated as at 13 June 2023.

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