

PROPERTY UPDATE

From banking to gambling - shortening the planning permission odds

Carefully presented and credible fall back position arguments can work to your advantage when promoting planning applications. Isabel Diver explains how.

In a recently reported decision, planning permission has been granted, on appeal, to change the use of a bank to an adult gaming centre. Cynics, headline writers, and stand up comics might have a field day with this, and as a planning lawyer I might suggest, tongue in cheek, that there is “no material change of use” from banking to gambling, and therefore no need for planning permission at all.

More seriously, the decision is worth commenting on as an illustration of some general points. When premises are no longer required for their existing use, owners and their advisers will start looking around for alternatives to generate income or widen the marketing appeal. Changes which avoid the need for any planning permission are attractive because of the savings in time and cost, and avoiding uncertainty of outcome.

Banks and betting shops are in the same Use Class (A2), and under the normal rules no express planning permission is therefore necessary to change a bank to a betting shop. An adult gaming centre is not within any Use Class. Joking apart, it is pretty obvious that the change from the bank use was a material change of use in planning terms, and therefore needed planning permission.

The “gamble” that seems to have been part of the bank’s case was to suggest to the Inspector that if the planning permission was not granted, the other likely alternatives would be no more harmful to the vitality or viability of

the area. In particular, they suggested that the property might either remain vacant for some time, or be changed to a betting shop. The Inspector accepted that there was little to choose between a betting shop or an adult gaming centre in terms of the vitality and viability of the shopping centre, and that there was therefore no justification for refusing the planning permission.

Fall back position arguments like this are often useful when promoting planning applications. Some decision makers will however probe quite rigorously to test if a fall back position being claimed is credible, or if in reality it is something that is never going to happen and therefore not a valid comparison. Carefully prepared and presented, however, they can help shorten the odds on securing planning permission.

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Green leases

It is estimated that buildings account for approximately 40% of all carbon emissions in the UK and the commercial property sector is under increasing pressure to reduce the environmental impact of a building's carbon footprint.

This pressure can be seen in a number of areas, for example stricter building regulations imposing more sustainable construction obligations. However, a new way of committing to reduce the environmental impact of the country's building stock is through the use of "Green Leases".

What is a Green Lease?

A Green Lease is a way of imposing obligations on landlords and tenants to ensure the more sustainable management and operation of a building.

A Green Lease, whilst similar to a standard lease, will incorporate a number of additional obligations on both landlords and tenants, including:-

- reducing carbon emissions by imposing obligatory energy efficiency measures (examples could range from the requirement to have a simple "Switch Off" campaign to the discouragement of like for like replacement of equipment/plant where a more efficient option is available)
- waste reduction and recycling commitments
- obligatory use of sustainable materials when carrying out alterations and restricting alterations that impact on the efficiency of the building, and
- the implementation of environmental policies (for example, green travel plans encouraging reduced car use).

Compliance with these obligations could be encouraged by financial incentives or penalties on either the landlord or the tenant.

What are the advantages to landlords and tenants in signing a Green Lease?

- For tenants, direct cost savings such as lower utility bills/building management costs/service charges.
- For landlords, the potential for higher rents. Reduced service charges and lower running costs will make buildings more desirable to tenants.
- Greater capital value for landlords – a greener, more efficiently managed building will attract a premium.
- Corporate image for both landlord and tenant – this is becoming increasingly relevant, particularly as Section 172 of the Companies Act 2006 requires company directors to have "regard to the impact of the company's operations on the community and the environment".

Will demand take off?

In the current economic climate, many landlords will be unwilling to incur capital expenditure in improving the efficiency of a building. There are concerns about whether they will recover the costs of such works. Tenants will be wary of potentially more onerous lease obligations, and also how long the green savings will take to filter through to their bottom line.

Both landlords and tenants will be concerned as to who will meet the responsibility for the costs of environmental improvement.

Some people will no doubt see them as a passing fad. However, it is predicted that demand for Green Leases will increase substantially over the next few years – some major UK institutions have already started using them, and it will not be long before more tenants start to demand Green Leases. It is anticipated that Green Leases (initially, probably just "watered down" versions) will quickly become the norm. Furthermore, with environmental issues continuing to dominate the political agenda, one has to wonder how long it will be before Green Leases are imposed upon the property industry.

Therefore, landlords seizing the opportunity to review their standard leases now may well find themselves innovative leaders in the field.

Matthew Smith, partner can be contacted on 01392 685205 or email matthew.smith@footanstey.com if you would like further information on Green Leases.



My word is my bond. Or is it?

A recent House of Lords case relating to a dispute over a property development has highlighted the importance of seeking legal advice as early as possible to ensure your legal position is satisfactorily protected.

A developer orally agreed to buy a block of flats from the owner. The developer agreed that he would, at his own expense, apply for planning permission for the demolition of the block and the erection of six townhouses. Once planning permission was obtained, the developer would then buy the property for £12m.

No heads of terms were drawn up, and neither party instructed solicitors. The developer however spent nearly £200,000 on successfully obtaining planning permission. The day after planning was received, the inevitable happened and the owner sought to renegotiate the price.

The developer issued proceedings arguing that he was entitled to an interest in either the property or the proceeds of sale.

The owner argued that the developer had incurred the expense of obtaining planning permission at his own risk, and denied that there was a legally enforceable agreement between them.

The Court found that, on the specific facts of this case, the developer was not entitled to any proprietary rights in the property.

However, the developer was entitled to payment for his services and expenses involved in obtaining the planning permission. This was the case even though the value of the property had been considerably increased by the grant of the planning permission, which was obtained at the developer's expense and risk.

The outcome serves as a timely reminder of the importance of seeking advice when entering in to arrangements of this type. Whilst it is appreciated that at the start of a business relationship there is generally a large element of goodwill and trust between the parties, it must be remembered that there is considerable risk in proceeding without a written contract (particularly if you are going to be incurring expenditure) and it is always safer to document the understanding formally so as to avoid any costly misunderstandings or disputes.

If you would like further information on the issues raised in this article, please contact Charlotte Price, solicitor on 01392 685333 or email charlotte.price@footanstey.com

Community Infrastructure Levy

The Community Infrastructure Levy was introduced by the Planning Act 2008. The government have postponed implementation of this Levy until April 2010 but the Levy will be coming and this article attempts to summarise the implications for you.

What is The Community Infrastructure Levy?

It will be a Levy, payable by developers, to make a contribution to infrastructure works that will be required as a consequence of development.

The Levy can make provision for infrastructure that is required within an area as a result of development. In the normal course of events, this will deal with area wide requirements such as highways, drainage, waste treatment, community infrastructure such as hospitals and waste facilities.

How will the Levy be set?

A Levy is to be set as an element of the Local Development Framework (the local plan in old money!). It is envisaged that the Council (normally the County Council) will be required to consider the requirements for infrastructure for the next 10-15 years and to produce, in effect, a shopping list of their requirements to enable development to proceed in accordance with their local development framework. If major projects are identified, then in practice the infrastructure to support it will be provided.

This shopping list will be compiled and presented as a document which will then be subject to an examination in public as part of the development of the Local Development Framework.

The government inspector will consider any representations made to him and issue a report in effect approving or amending the original document which will then contain details of the elements that will make up the Levy.

When will it be payable?

The current guidance provides that it will become payable on the commencement of development and it will be within the discretion of the Council to stagger payment over time. Initial indications are that around 25% will be payable upon commencement and the remainder as negotiated.

How will the Levy affect planning obligations and planning conditions?

Planning conditions and planning agreements will still be used to deal with the following issues:-

- Affordable housing
- Provision of land to enable infrastructure works to take place
- Land or contributions for local amenity areas
- Contributions for on site maintenance of areas like landscaping
- Other site specific matters

The other items of infrastructure will be funded through the Levy.

When is it likely to come into force?

The regulations which will empower local authorities to begin preparing a CIL are anticipated in 2010. The process of setting a CIL will take a further 12-18 months.

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Riparian Rights

With weather forecasters predicting that we are heading for the hottest summer ever, even the most reluctant gardeners will be forced to take action to keep their gardens green. However, with ever-rising water charges and pressure mounting to be eco-friendly is there a cheaper and more environmentally friendly way to keep your garden green?

You may be lucky enough to have a stream running across or at the end of your land but is it your stream and how can you use the water?

If the stream runs through your land then it is likely that it will belong to you, although a quick check of your property deeds should confirm this.

The situation is more complicated where your property abuts a stream. The usual presumption is that you will own to the mid-point of the stream, again you should check your property deeds for any evidence to confirm or rebut this presumption.

It is important to note, however, that just because you own the stream, or part of it, you do not necessarily own the water running through it although you will, usually, be entitled to use the water subject to the restrictions set out below. These rights are known as riparian rights and again you should check your property deeds which may contain specific rights and provisions.

Riparian rights are common law rights and have, for some time, been restricted by statute. Under the Water Resources Act 1991 it is an offence for any person to abstract water from any source or supply (subject to a few narrow exceptions) without a licence from the Environment Agency.

There is, however, a useful exception to this general rule as owners of land adjoining water sources can take water from the supply as long as the water is used for normal household or agricultural purposes and is restricted to less than 20m³ (4000 gallons) per day.

Such a supply should be sufficient for gardening and other domestic purposes and may prove a very useful alternative during increasingly common periods of water shortage.

What happens, however, if your new found source of water means that others downstream lose their source? Whilst you can not permanently dam the stream to deprive users downstream, you are perfectly entitled to exercise your rights reasonably even if this results in others downstream not having a sufficient supply.

If you would like to discuss your legal rights in relation to a water supply or stream on your property, Rachel Stacey, solicitor can be contacted on 01392 685249 or email rachel.stacey@footanstey.com



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