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Disposal of Development Land: Part 1 of 2

Town and Country Planning Regulations 2020

The latest changes in English planning law have really opened up routes to the redevelopment of land on disposal. Under the **Town And Country Planning Regulations 2020**, from 1 September 2020, Class A1, shops, A2 financial and professional services, A3 restaurants and cafes and B1 business will, subject to a number of exceptions, all be subsumed by a new Class E planning use.

Purpose built blocks of flats will be able to build two additional storeys of no more than 7 metres in extent. Mixed use premises can now add further flats as long as the premises currently have at least three storeys, and provided in both cases that the total building height does not exceed 30 metres. Offices, with exceptions, can also be converted into flats.

And it looks unlikely to stop there: on 4 December 2020, the Government published its proposals for permitted development between Class E and Class C3 dwellings.

So where does that leave us in terms of planning? Are we to be completely without regulation? The answer is, not entirely.

Certain types of property have been witheld from the new class E. Drinking establishments and hot food takeaways, (the old use classes A4 and A5) are now added to the list of sui generis uses, along with cinemas and live performance venues (theatres). A change of use involving those uses therefore still requires planning permission.

In addition, the permitted development of flats as above described are subject to 'prior approval'. This means that, whilst the local authority cannot refuse permission to develop on planning grounds, it can nevertheless be refused because of flooding risk, external appearance, loss of natural light, traffic and highway impact or in the case of defence assets. Obtaining building regulations consent could also add another layer of complication post Grenfell: see ***London and Ilford Holdings v Soverign Properties [2018] EWCA 1618*.**

From a legal perspective, the new planning provisions will not affect leasehold or freehold restrictive covenants that bind the property. In ***Sequent Nominees v Hautford [2019] UKSC 47,*** there was a provision in the lease that the tenant would not apply for planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld. The premises consisted of a six-storey building with 70 years remaining on the lease. The tenant ran an ironmonger's business from the basement. He wished to obtain planning permission to let out the upper storeys as residential units. The landlord objected because he did not want to risk the premises being subject to enfranchisement claims under the Leasehold Reform Act, which they could be if they became residential. The Supreme Court held that the landlord was reasonable in refusing consent to the change of use. This decision has massive implications on those kind of covenants in leases, in the light of the new lease class order.

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Freehold Covenants Over Land

It is not just leasehold covenants that you need to think about in a disposal of development land, but also freehold covenants.

In ***Graham v Easington District Council*** **(2009)**, the Lands Tribunal allowed the discharge of a restrictive covenant under **S.84 of the Law of Property Act 1925** as not securing any practical benefits, where the beneficiary of the covenant was a local authority whose planning department had already given planning permission for development. The land that was the subject of the application was situated in the North East of England, on the site of a former colliery in Horden in County Durham. The Local Authority, Easington District Council, had sold the land in August 2000 and had imposed restrictive covenants against use other than as a coach depot and an associated residential bungalow, which would be used in conjunction with the coach depot. The bungalow had been built but no coach depot had subsequently materialised.

Soon afterwards a planning application to build housing on the site was made. The Planning Officer objected, on the grounds that the area including the depot had been earmarked for the industrial regeneration within the locality, and, if residential housing was allowed, this would detract from the possibility of industrial development. Nevertheless, the Planning Authority gave planning permission for thirty houses. The planning permission would, of course, be of little worth unless the covenants were discharged, and the local authority Estates Department refused to do this. This led to an application to The Lands Tribunal under **S.84(1) Law of Property Act 1925**.

S.84(1) provides that a covenant may be discharged on the following grounds: -

"(a) By reason of changes in the character of the property or the neighbourhood or other circumstances the restriction ought to be deemed obsolete.

(aa) The restriction impedes reasonable use of the land and does not secure to the persons entitled to the benefit any practical benefits of substantial value or the restriction is contrary to public interest. It may be the case that if the owners' interest in the land is only in relation to a monetary payment there may be no practical benefit.

(b) The person entitled to the benefits of the restriction has agreed either expressly or by implication for the covenant to be discharged.

(c) The proposed discharge or modification will not injure the person entitled to the benefit."

The Tribunal accepted that a covenant might be obsolete even though, as in this case, it was less than eight years old. However, they stated that the ground was not applicable here. Instead, they accepted an argument under ground (aa) that, as the local authority Planning Committee had given planning permission, and as there was a perceived need for affordable housing in the area, the District Council were preventing reasonable use of the land in failing to discharge the covenants. Moreover, it also followed that ground (c) was also applicable in that the authority would suffer no loss or injury should the covenant be discharged.

The Lands Tribunal may award compensation to the beneficiary of a restrictive covenant which has been discharged. The Local Authority wanted compensation based on ***Stokes v Cambridge (1968)*** principles, i.e., one third of the enhanced value of the land, which amounted to some £272,000.

However, the Tribunal accepted that, following ***Stockport Borough Council v Alwiyah Developments (1983),*** this was not a valid means of assessing compensation in the present case. In the Stockport Borough Council case, compensation for the discharge of restrictive covenants which allowed the building of 42 houses on open land was assessed by reference to the reduced value of neighbouring land. This was valued at £2,250.

However, neither was compensation on this basis valid in the present case as the Local Authority had suffered no loss and would, therefore, receive no compensation. Instead, the Tribunal awarded compensation based on the difference in value of the land with and without the restrictive covenants at the time of the original purchase in August 2000. This amounted to £23,500.

One further recent case worth mentioning that tackles this issue, albeit relating to long leaseholds, is ***Shaviram Normandy v Basingstoke and Deane Borough Council [2019] UKUT 256***. Here, a long lease stated that the premises could only be used for commercial purposes. Conversion into residential flats was possible through permitted development. However, the Landlord refused to surrender the covenants. The tenant applied to the Lands Chamber to discharge the covenants under **S.84 (12) Law of Property Act 1925.** The Upper Tribunal held that rentals would not be affected by a change from commercial to residential use and the covenants did not secure any practicable benefits and were contrary to public policy as there was a need for housing. A requirement that the Landlord give their licence for underletting was not discharged, however, as the head rent was dependent on the underletting rents and the Landlord had an interest in who the underlessees were.

Town and Village Greens

Another danger zone when disposing of development land is the risk of a third party claim being made that the land is a town or village green. **Under S.15 of the Commons Act 2006**, anyone can apply to register land as a town or village green, where a significant number of the inhabitants of the locality have indulged as of right in 'lawful sports and pastimes' on the land for a period of at least 20 years and:

- either they continue to do so at the time of the application; or
- they ceased to do so before the time of the application, but the application is made within one year of the cessation.

The effect of registration is that, if land is a town or village green, you can't drag vehicles across it of any kind; nor can you change the surface. So, in other words, you can't build on it. Needless to say, this is fairly catastrophic for a would-be developer of the land.

The user must be 'as of right', meaning that the old land law adage applies: *nec clam, nec vi, nec precario* (use without force, secrecy or permission).

Since the Commons Act came into force cases have been coming through the courts thick and fast. Of particular interest is the judicial review case of ***R (on the application of Lewis) v Redcar and Cleveland Borough Council*** **[2010] UKSC 11**, which concerned a local authority owned golf course. The land was earmarked for a mixed development including 300 houses in conjunction with Persimmon Homes. Four of the locals made a claim that the land should be registered as a village green based on dog walking and family recreational activities, including blackberry picking and non-linear walking (i.e. meandering!).

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Despite the fact that the locals always gave the golfers priority over their own activities, the Supreme Court held that the land had been used without force, secrecy or permission for the requisite time period and so the registration was allowed. There was no further requirement in the legislation in relation to deference to others, and so the giving of priority to golfers was an irrelevance.

After this case, large amounts of land where the owner has allowed the locals onto the site, may give rise to Village Green claims. In particular, playing fields may be open to such claims. In Wales, there is also a draft Disposal of Playing Fields (Wales) (Community Involvement) Measure 2010 which requires extensive consultation before the disposal of playing fields.

Luckily, the recent 2019 Supreme Court decisions relating to the cases of ***R (Newhaven Port & Properties Ltd) v East Sussex County Council*** **[2015] UKSC 7** and ***Lancashire County Council v The Secretary of State for the Environment, Food and Rural Affairs and Another*** **[2016] EWHC 1238 (Admin)** have massively reduced the likely success of any village green claim against a government body. The court in both cases held that, where land is acquired by statute for a specific purpose which is inconsistent with the use of that land as village green, then the primary purpose will override any claim for village green that is made against it. This is known as the 'statutory incompatibility' ground.

The decisions will make future village green claims against statutory bodies difficult. But the risk is still high in respect of privately owned land, and private landowners who have traditionally taken a generous approach to locals habitually trespassing on their land should beware. All is not lost, however, if the landowner has erected signs forbidding entry onto the land, even where the signs have come down or been vandalised. See ***Taylor v Betterment Properties (Weymouth) Ltd and another*** **[2012] EWCA Civ 250**, in which the High Court accepted that, although signage put up by the landowner and forbidding entry had long since gone, locals would have realised that they were trespassing by virtue of the fact that they were entering the land through gaps in the fence.

Further restrictions are on the way. Section 13 of the Growth and Infrastructure Act 2013 (section not yet in force) proposes to insert a new section 15A in the Commons Act 2006 to allow a landowner in England to deposit a Town and Village Greens statement ('TVG') with the Commons Registration Authority, the purpose of which will be to bring to an end any period of use by locals that might later be claimed to amount to a claim of village green. The Commons Registration Authority will be required to keep a register containing prescribed information about deposited statements.

Section 16 and Schedule 4 of the Act propose to insert a new section 15C and Schedule 1A into the CA 2006, that will exclude the right to apply to register land as a TVG where certain "trigger events" relating to the past, present or future development of land occur. These trigger events, set out in Schedule 1A of the Commons Act, include publicity for a planning application, adoption of a development plan and the making of a neighbourhood development plan.
Schedule 1A also specifies "terminating events" which correspond to each trigger event and result in the right to apply becoming exercisable again. The Secretary of State may insert new trigger or terminating events or remove or amend existing ones.

The Planning (Wales) Act 2015 has provision to introduce **S.15 and S.16** in Wales. It came into force on October 1st 2018. **S.16** will only prevent village green claims on the grant of planning permission or on production of a development plan and not as in England, publication of a planning application or a draft development plan.

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