



Property and Planning Law Bulletin Issue 22

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Changes to the Law on Enforcement of Planning Breaches

Under the present planning system, if development or a change of use takes place without the necessary permission first being obtained, the Local Planning Authority only has a limited time within which to take enforcement action. This will be four or ten years depending on the nature of the breach. Once this time has expired, no enforcement action can be taken and the development or change is deemed to be 'lawful'.

In the February 2011 issue of Blandy's Property and Planning Bulletin we explained the proposals for reform which are contained in the Localism Bill. If enacted, Local Planning Authorities will be able to apply to the Court for an extension of the enforcement period where there has been 'concealment' of the breach. This means that if they didn't discover the breach until the 4/10 years had expired, they may still be able to take action.



The Localism Bill provisions aim to avoid situations such as that recently experienced in Hertfordshire – a Mr Beesley obtained permission for an agricultural building in the green belt but actually fitted it out as a dwelling which he kept disguised until the four year period had expired to prevent enforcement action being taken. The case has been right through the appeal system and the Supreme Court has recently issued its decision which clarifies the extent of immunity which can be relied upon.

Mr Beesley had in the past been quite clear in stating that he intended to disguise the house from the Local Planning Authority. On that basis the Court held that the principle of public policy, that a person should not benefit from their wrongdoing, will apply to planning cases. Mr Beesley was therefore unable to rely upon the four year immunity rule and the Council can proceed with their enforcement action.

This case therefore provides an important limitation on the rules for immunity from enforcement of planning breaches. If you were to apply for a Certificate of Lawfulness after the expiration of 4/10 years, the Local Planning Authority may at present be able to refuse if there has been deceptive conduct, on the basis of this recent Supreme Court decision. With the additional powers of the Localism Bill provisions, the Local Authority would then be able to apply to the Magistrates Court for permission to take enforcement action out of time. If and when the Localism Bill provisions come into force (which is expected to be in early 2012), it will be important to carefully consider the position of any works or changes of use which have occurred on your land, as an application for a Certificate of Lawfulness may in fact alert the Planning Authority to a breach which has been concealed, leading to enforcement action being taken out of time.

Consultation on relaxation of rules for converting commercial properties to residential use

The Department for Communities and Local Government is currently consulting on a proposal to include new permitted development rights for change of use of commercial properties to residential use.

At present, planning permission is required for the 'development' of land, which includes a material change of use. In order to convert a commercial property into residential use planning permission will first be required. This can be a time consuming and costly process for developers.

In some cases, change of use does not require a specific planning permission as it is 'Permitted Development', as set out in the Town and Country Planning (General Permitted Development Order) 1995. In effect, this order grants a planning permission for change of use between certain types of activity. If the proposals were taken forward, a change from Class B (which includes business, general industrial, storage and distribution uses) to C3 (dwellinghouses) would be granted permission as permitted development and therefore not require a specific planning permission.

The aim of the proposal is to increase the available housing stock, which in turn may have an impact on sale and rental prices. However, it may also result in a reduction in available commercial floorspace (given the financial benefits of conversion to residential) which could have a significant impact on businesses looking for new premises or involved in rent reviews.

This will also be of interest to those operating from commercial premises who wish to ensure their operations are not constrained in the future. If neighbouring commercial premises were converted to residential use, businesses may face an increase in complaints to the local authority regarding noise, traffic or other 'nuisance' issues, despite residents being aware when they moved in that they would be living next to commercial premises.

The consultation runs until 30 June 2011.

Could your land agreement be anti-competitive?

"In edition 12 of the bulletin, we alerted you to upcoming competition law changes which would bring land agreements within the scope of Act. Those changes have now been implemented and the following article provides further clarification on the implications of these changes."

From 6 April 2011, land agreements between individuals or corporate entities engaged in business activities containing restrictions regarding use or the exercise of a right over land which prevent, restrict, or distort competition are automatically void pursuant to s.2(1) Competition Act 1998 ("CA1998") (the Chapter I Prohibition).



The Chapter I prohibition, which was transposed into UK law from EU legislation, was enacted to protect businesses and consumers from anti-competitive behaviour. Chapter II of the CA1998 prohibits abuse of a dominant market position.

Any restriction that makes it difficult for competitors to gain a foothold in a market where the land is used or provides exclusivity thereby protecting a party from competing rival business may be considered anti-competitive. The latter category of restriction is more commonly used in property related transactions and may appear in agreements in the form of restrictive covenants preventing a landlord from granting a lease of its neighbouring land to a competitor of the tenant or conversely by a landlord restricting the permitted use of a tenant in order to preclude any activities from competing with those of the landlord. Such restrictions may also be imposed on a disposal to prevent the land passing into competitors' hands.

The specific anti-competitive restrictions will be unenforceable whilst all other terms will remain in full force and effect if capable of being severed from the rest of the agreement.

The Office of Fair Trading ("OFT") has published guidance suggesting that cartel arrangements whereby parties to a land agreement restrict land use with a view to carving up market shares such as price fixing will amount to a serious breach of competition law.

The OFT has further clarified that it is unlikely to take action where none of the parties has a market share exceeding 30% of the relevant market. However, it may be difficult to determine the geographical extent and size of the market in question, both for commercial property market and the market for relevant goods/services. This does not preclude the OFT from taking action where market shares are smaller. Indeed, the threshold for action is reduced to only 5% in the case of the combined effect of a series of connected "parallel agreements".

Not all restrictions on use of land or the exercise of rights over land will be considered anti-competitive. Indeed, the OFT acknowledges that "many legitimate reasons" exist justifying the imposition of restrictions on the use of land and therefore the OFT envisages that only a very small minority of restrictions will actually infringe competition law.

Seemingly anti-competitive restrictions or agreements may still be exempt from the Chapter I prohibition if the benefits of the restrictions outweigh the appreciable impact of their anti-competitive aspects. Ultimately, the appreciable or actual economic effect of each agreement will turn on the individual facts. There are also specific exemptions.

The sanctions for anti-competitive practices are potentially onerous. The OFT, the European Commission or any sector regulators may take enforcement action against parties which can result in the imposition of fines of up to 10% of a firm's worldwide turnover, in addition to taking steps to cease the anti-competitive practice. Other penalties include company director disqualification orders and private court action from parties detrimentally affected by the anti-competitive restrictions. Small businesses are afforded immunity from financial sanctions in certain circumstances. There may also be mitigating factors to reduce the level of any potential sanctions.

Whilst the repeal of the land exclusion order does not operate retrospectively, it is quite possible that agreements entered into prior to 6 April and still subsisting may now fall foul of competition law. It is important to bear in mind that circumstances and market conditions change meaning that restrictions originally considered to comply with competition law may subsequently fall within the Chapter I prohibition. Periodic reviews will therefore be necessary in order to monitor market conditions and trends to ensure that existing or future land agreements do not infringe competition law.

The law relating to this area is complex and it will often be difficult to conclusively determine which restrictions/transactions will fall foul of the CA1998. Various factors must be considered including the relative market shares of the parties to the agreement. If you or your organisation are party to an agreement which you believe may potentially infringe competition law, you should seek legal advice as to the enforceability of those provisions.

Please contact a member of our Property team for further information and advice on 0118 9516800.



*Interview with Simon Dimmick on Changes to the
planning Enforcement Regime for Property Bytes March
2011*

http://www.livingstongunn.co.uk/default/index.php?option=com_acymailing&ctrl=archive&task=view&mailid=15&key=52e8444d38f2feaa40504974a04132d6&subid=888-ac1bf2869db557de7caf18177e878a78&Itemid=172

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Contact us

We hope you found this edition of interest. If you would like to discuss any of the matters raised in more detail or if you have any other property related queries, please contact the following:

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