# Developing themes

**23/11/2013**

**Five specialists from law firm Hogan Lovells review the most common pitfalls when planning a new development**

With the development pipeline beginning to pick up across the UK, it is useful to pick out some key obstacles that can stand between a landowner and a prospective development if the process is not managed efficiently.

When it comes to bringing a site forward for development, timing is critical. Deadlines will be set in planning permissions and by those providing finance and a delay can result in huge wasted contractor costs and postponement of the all–important capital or income return.

When mapping out the timeframe for development, landowners should therefore anticipate as much as possible the various hazards that lie ahead. Is the site free of occupiers and third–party rights? What statutory notices must be served on tenants and neighbours? Will the inclusion of residential property within the development require complex leasehold structures in order to circumvent various legal restrictions? Here are six such potential pitfalls, with some tips on how best to deal with them.

**Clearing occupiers from the site**

There can be obstacles for developers to overcome before gaining vacant possession of a site, depending on the nature of any occupation. A licence agreement may be easier to dispose of than a lease, but the court will look at the substance rather than form of any arrangement. Even trespassers can be difficult to remove, requiring a court order and the use of bailiffs or enforcement officers.

Any commercial tenancies are likely to be protected under the Landlord and Tenant Act 1954. This gives a tenant the right to renew a lease unless the landlord can oppose on one or more specified grounds. Typically, a developer will rely on ground (f) – that it intends to demolish, reconstruct or carry out substantial works of construction. This does not always require a complete redevelopment; it may be possible to recover possession if the developer plans to carry out "substantial" works to just part of the property. It has to prove an ability (including finance, requisite consents and access to other properties) as well as the desire to redevelop. Although the critical date is not until trial, the early provision of evidence can avoid a protracted and costly dispute. Where the developer and the landlord are not the same person, it is only the landlord's intention that is relevant.

Compensation is payable to the tenant where a developer successfully relies on ground (f). Based on rateable value, this can be substantial. It can be avoided if a "non–compensatory ground" is also relied on, such as offering suitable alternative accommodation.

*Mathew Ditchburn, partner*

**Dealing with the burden of restrictive covenants**

The existence of restrictive covenants over land can have a significant effect on its development potential and, in some circumstances, can sterilise it completely. Land that is otherwise suitable may be burdened by covenants that make any development subject to a neighbouring owner's approval or that restrict the land's use.

Generally speaking, restrictive covenants can only be discovered by reviewing the title to the property at the Land Registry or (in the case of unregistered land) reviewing the title deeds. It is therefore key to carry out early due diligence to identify any onerous restrictive covenants before substantial sums are spent on feasibility exercises.

Provided that restrictive covenants are identified early, it may be possible to resolve the issues they present. The following points are likely to be relevant and should be borne in mind:

- Does the covenant on its proper interpretation restrict what is proposed?
- Who has the benefit of the covenant? Have they lost that benefit as a result of changes in land ownership or because of a failure properly to register the covenant?
- Is there scope to negotiate a release with the beneficiaries?
- Is insurance available to protect against the consequences of breaching the covenant?
- Can an application be made to the Upper Tribunal to release or modify the covenant on the ground that it is obsolete or secures no practical benefit to the beneficiaries?

*Paul Tonkin, senior associate*

**Will a right to light be infringed?**

There are a number of ways that developers can seek to minimise the disruption and additional expense that a rights of light claim can bring to a development. It will not always be possible to find a site that is unaffected by adverse rights of light, particularly in London. Nor will it always be cost–effective to amend and limit the design of the development envelope so that it does not infringe any rights.

First, where there is a risk of nearby land acquiring a right of light across the development site by reason of having had 20 years' uninterrupted enjoyment (under the Prescription Act 1893),

then a timely light obstruction notice served before the 20 years expire could (subject to the notice being set aside within the year) prevent the right of light from crystallising. This will give the developer vital time to plan and construct the development that will ultimately impinge (lawfully) on the light enjoyed by that neighbouring land.

Second, the developer may want to investigate at an early stage the cost of insurance to cover the risk of any claims arising. Whilst this does not reduce the risk of a claim being brought, it covers the consequences if one is made. As insurers are likely to stipulate that no contact be made with potential claimants (an approach not favoured by the courts) this option is usually limited to small interferences with rights.

Third, where insurance is not an option, developers must approach the owner of the right to try to negotiate a settlement. If they seek too high a price for their agreement, the developer might be able to approach the local authority to explore whether they will step in and extinguish the rights under section 237 of the Town and Country Planning Act 1990. The threat of such action can focus minds and return compensation to more sensible levels.

And finally, if all else fails and the development must go ahead, the developer should be prepared to mount a robust defence in court.

*Dellah Gilbert, counsel*

**Neighbourly relations: dealing with party walls**

Developers often think of the Party Walls etc. Act 1996 as creating additional obstacles and time –consuming notice periods when a development site is being prepared. However, the statutory regime is permissive, and grants to the developer a range of rights and protections when carrying on its works that it otherwise would not enjoy.

Broadly speaking, the 1996 Act is engaged where works will interfere with or create party walls and party structures on or next to the boundary between the development site and a neighbour's land. By way of a party wall award, specialist surveyors identify matters that might be of concern between the neighbours (eg the effect of the works on building stability) and prescribe a scheme of works (and, where appropriate, compensation), which should satisfy those concerns.

The benefits of engaging the 1996 Act should not be underestimated. A party wall award will typically allow the developer to enter a neighbour's land to carry out works: an act that otherwise might have constituted a trespass or a nuisance.

Compliance with the 1996 Act should also help to smooth relations between the developer and the neighbours. The award, compiled by specialists acting for each party or by a neutral third–party surveyor, should ensure that the works are carried out to an appropriate standard and will make a provision for appropriate compensation.

The notice periods are usually measured in months, so must be factored into the development timetable, but some notice procedures can be disposed of altogether, if the parties agree. Otherwise, if notices are served early enough before works commence there is no reason why the 1996 Act should delay a development.

*Tim Reid, senior associate*

**Combatting the risk of collective enfranchisement**

Under the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993, long leasehold residential tenants can exercise a statutory right to acquire the freehold of their building. Tenants under long leases (over 21 years) may also have a right to extend their lease term and reduce their rent to a peppercorn, in return for a premium.

Where a developer's profit depends on being able to retain the freehold (and rental income) for a period, or being able to sell the freehold unencumbered by enfranchisement rights, it is now important to ensure that developments are designed with lease structures to prevent such rights from arising.

Particular problems arise where, for example, the scheme involves granting a single headlease of a block of flats to a provider of residential accommodation, even where the flats themselves are not let on individual long leases. Recent case law has shown that the head tenant might be able to acquire extended leases of each individual flat for a premium, thereby reducing its rent to a peppercorn in respect of each flat, paying the market rent only in respect of the remaining common parts and substantially reducing the developer's projected return from the site.

Various schemes might prevent enfranchisement rights from arising (for example, granting the head tenant a series of leases of less than 21 years, or including an "enforcer" lease within the structure, so that any such rights are exercisable only by a company connected with the developer), but there is no one–size–fits–all solution.

*Tim Reid, senior associate*

**Eliminating the right of first refusal for residential tenants**

Tenants of flats may enjoy rights of first refusal, which can be a concern for those developing, buying, selling or leasing blocks of flats or mixed use schemes.

Failure to follow the procedures in the Landlord and Tenant Act 1987 can lead to criminal sanctions, and deals being delayed by months or being undone altogether.

Where a landlord proposes to dispose of an interest (or part of it) in a residential or mixed–use building, he or she must first offer that interest to the residential tenants of the building on the same terms, and allow two months for their decision.

The scope for avoidance is limited and the 1987 Act encompasses a wide variety of disposals, including auction sales and the grant of new leases of part. Even the grant of a new lease of purely commercial premises within the building may require the service of a notice.

When creating a new mixed–use development, however, there is scope for structuring ownership to reduce the risks posed by the 1987 Act, for example by:

- creating a scheme where residential flats are less than 50% of the floorspace;
- creating an intermediate lease of at least seven years of the residential part only of the scheme; and/or
- granting a separate long lease of any part of the property that has redevelopment potential (for example, undeveloped open spaces, the roof and airspace above it).

*Ed John, senior associate*

There are some development pitfalls that cannot be avoided, such as where a third party has already acquired a right over the site, whether under a restrictive covenant or an easement of light. Others might be avoided if given proper consideration when a development is planned, so that physical and leasehold structures can circumvent certain legal restrictions.

The overriding theme, however, is to plan ahead and do your homework. Problems take time to be resolved, and solutions take time to be designed and negotiated. To ensure a development not only gets out of the starting blocks but crosses the line on time, developers should not underestimate the value of tackling these issues at the earliest opportunity.

**EG Practice & Law**