

The Real Deal Legal Update

Alerting the property industry
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In this issue

PLANNING ENFORCEMENT

What can neighbours do?

PROPERTY TRANSACTIONS

Late payments: grounds to terminate a contract?

PLANNING AND CONSERVATION

Protecting commercially sensitive information

STATUTORY REGULATIONS

Don't mess with the law!

PLANNING ENFORCEMENT

What can neighbours do?

The use of neighbouring land can have a huge impact on the value of a site, although in many cases a landowner has no direct control over its neighbours. The High Court has ruled that requirements imposed in planning agreements, such as developers' commitments to provide open space or community facilities, can be enforced only by the local planning authority, which will use its powers to secure its planning objectives, not necessarily to protect the individual interests of neighbours.

In *Milebush v Tameside*, a planning agreement required a town centre developer to give neighbouring properties rights of way on reasonable terms over its service road. The purchaser of the development imposed restrictions on how and when the service road could be used. A neighbour argued that these went too far and tried to enforce the planning agreement through the courts.

Although the right of way was intended to benefit the neighbour, the court said that it had no right to sue. If the council decided not to enforce the planning agreement, the only legal course available to the neighbour would be to challenge the council's decision, if it could show that the council went about it in the wrong way. The neighbour is lodging an appeal.

A landowner may take comfort from a planning obligation imposed on a neighbouring site, but in reality, there is sometimes little it can do to make sure that its neighbour performs.

Milebush Properties Ltd v Tameside Metropolitan Borough Council and another [2010] EWHC 1022 (Ch)

PROPERTY TRANSACTIONS

Late payments: grounds to terminate a contract?

If a contract states that one party can terminate if the other fails to perform its contractual obligations in any respect, how strictly will that be enforced? If one party is a day late in making a payment, does this give the other a get-out?

Not necessarily. An obligation that is a pre-condition to exercising a right will be strictly applied, such as a condition for exercising a break clause in a lease, but in other cases there is sometimes more latitude. Usually, termination is considered too draconian a response to a short payment delay.

That was the view of the High Court when Debenhams tried to terminate a pre-let agreement for a store in Fareham. The landlord told Debenhams that it was unable to make a substantial payment that was due to Debenhams when the retailer took access to fit out the store. It suggested a rent free period instead. A day after the payment was due, Debenhams served a termination notice. The threat of losing its tenant was enough for the landlord to find the money from somewhere, but Debenhams said it was too late. The court disagreed and the contract stood.

This does not mean that a contracting party has to wait indefinitely for a late payment, but a safer option is to serve a notice setting a final deadline before actually terminating the agreement.

Whilst any breach of contract is a matter of concern, you cannot assume that minor breaches will allow a party to tear up the whole agreement.

Dominion Corporate Trustees Limited v Debenhams Properties Limited [2010] EWHC 1193 (Ch)

PLANNING AND CONSERVATION

Protecting commercially sensitive information

If a developer gives information to a planning authority, there is no guarantee that it will remain confidential, even if it was supplied in confidence. Last month, a tribunal ordered a council to disclose a developer's cost estimate to a local residents' group.

The residents' group used the Environmental Information Regulations 2004 to obtain the document. While these recognise that trade secrets may need protecting, immunity from disclosure applies only where the public interest in controlling the information outweighs the public interest in disclosure. Factors include the risk of deterring developers from providing data that is important to the planning process, although developer's individual commercial interests are not relevant.

The cost estimate in this case related to the hypothetical refurbishment of a building in a conservation area and supported the developer's contention that demolition was the only viable option. Figures for an actual project, such as might be supplied when negotiating a planning agreement, might be viewed differently. An individual judgement must be made in each case.

Councils may accept generic information, such as cost index figures. Where that is not possible, developers should identify any genuinely sensitive information and supply it expressly on a confidential basis - but remember that this does not guarantee secrecy.

Bristol City Council v Information Commissioner EA/2010/0012

STATUTORY REGULATIONS

Watch out for statutory regulations that create criminal offences. Examples include a number of environmental offences and breach of a planning enforcement notice.

Last month, the Court of Appeal upheld an order confiscating the proceeds of a businessman's criminal venture. His crime was to persist in running a park-and-ride scheme despite losing his appeal against a planning enforcement notice telling him to stop.

The amount of the order, £760,000, was based on turnover and far exceeded the £180,000 profit that he had made.

Basso v R [2010] EWCA Crim 1119

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