Ashurst London
February 2013

Real estate briefing

Round-up of recent legal developments

Growth And Infrastructure Bill

The Growth and Infrastructure Bill (the Bill) had its second reading in the House of Lords on 8 January 2013. Details of the proposed measures are set out in our client briefing which was written shortly after the Bill was introduced into Parliament.

Town and village greens

The Bill contains controversial provisions that will change the laws on the registration of town and village greens aimed at addressing landowners' concerns that applications are simply being made to obstruct development.

The reforms will apply in England and will prevent local inhabitants from applying to register land as a town and village green (TVG) when an application for planning permission has been made or granted or land has been earmarked for development by a local authority. The exclusion of the right to apply to register land as a TVG will not affect the accrual of any period of qualifying user and local inhabitants will retain the right to apply to register land as a TVG if a planning application is withdrawn or refused (where all avenues of appeal have been exhausted), or if a planning permission expires without having been implemented, or when a development plan or draft plan ceases to be effective.

This aspect of the Bill provoked a heated debate at its second reading in the House of Lords. Detractors see this as weakening village green protection, whilst advocates of the reforms believe this will put control back in the hands of a democratically accountable planning system.

The Bill also provides a mechanism for landowners to deposit a statement and map with the Commons Registration Authority terminating any period of use "*as of right*" on the land to which the statement relates. The form of statement and map will be prescribed by regulations and may be combined with a statement or declaration made to counter claims to public rights of way access the land under section 31(6) of the Highways Act 1980.

Where the requisite period of 20 years use as of right has already accrued before landowners deposit their statement and map, local inhabitants will still be entitled to apply to register land as a TVG so long as they do so within 2 years as prescribed by section 15(3) of the Commons Act 2006.

New EPC regulations

The Energy Performance of Buildings (England and Wales) Regulations 2012 (the 2012 Regulations) came into force on 9 January 2013 and consolidate the Energy Performance of Buildings (Certificate and Inspections) (England and Wales) Regulations 2007 (the 2007 Regulations) and all subsequent amendments to them.

The 2012 Regulations introduce additional requirements arising from the Energy Performance of Buildings Directive (recast) 2010 such that:

- property advertisements must include details of the EPC rating, where available;
- DECs are required in public buildings larger than 500m^2 that are frequently visited by the public (this previously only applied to public buildings larger than 1000m^2);
- an EPC must be displayed in commercial premises larger than 500m^2 that are frequently visited by the public (where an EPC has already been issued on the sale, rent or construction of that building);
- content of the EPC is to be improved by including a list of energy efficiency improvements that could be carried out as part of a major refurbishment.

However, as there is no penalty for failure to display an EPC it cannot be enforced.

The list of buildings which are exempt from the requirement to display an EPC has been extended, so that it now includes:

- buildings and monuments officially protected as part of a designated environment or because of their special architectural or historical merit;
- buildings which are used for religious activities or as places of worship (removing the requirement that this should be their primary or sole purpose);
- non-residential agricultural buildings which are in use by a sector covered by a national sectoral agreement on energy performance; and
- stand-alone dwellings with a total useful floor area of less than 50m^2.

There is also no longer a requirement to attach an EPC to an agent's written particulars.

Flood and Water Management Act 2010

The provisions in the Flood and Water Management Act 2010 relating to the statutory designation of third party structures and other features are now in force in England and Wales.

Designation is a form of legal protection for structures or features which are privately owned and maintained and which contribute to the management of flood and coastal erosion risks. Once a structure or feature has been designated, anyone wishing to alter, renew or replace it must seek consent from the responsible authority, which could be the environment agency, local flood authority, district council or internal drainage board.

A designation is a legally binding notice which will be registered as a local land charge. Therefore this burden attaches to and runs with the land.

Whilst designation makes no physical change to the structure or feature concerned, it does mean that any alteration removal or replacement is only permitted with the consent of the responsible authority.

Any structure or feature (nature or manmade) is eligible for designation. This might include a wall or building or a natural feature on private land such as a hill, bank or ditch. The key condition for designation is that the structure or feature affects a flood or coastal erosion risk.

Planning application consultation

A consultation to streamline information requirements for planning applications was published in July 2012, which proposed greater scrutiny of local lists, changes to the outline stage of the planning application process, and amendments to the standard application form. The government has decided to take forward these proposals.

The public response to the July 2012 consultation highlighted further action that could be taken to improve the planning application process by:

- streamlining the requirements around the Design and Access Statements to focus on the developments where they offer the most benefit; and
- looking at the broad powers that local authorities have to request information to validate a planning application to ensure that requests are genuinely necessary to consider the issues associated with a planning application.

The government has published a further consultation paper to address these issues and, in the case of changes to validation procedures, these are designed to complement the measures that are currently being taken forward as part of the Bill. The consultation closes on 4 March 2013.

Greenhouse gas reporting by companies

In January 2013, following the close of the consultation (see our client briefing of October 2012), the Department for Environment, Food & Rural Affairs published an update stating that the regulations are being finalised and that guidance for companies is being drafted. The regulations are expected to be laid and the guidance published in the next few months.

Simplification of CRC Energy Efficiency Scheme

The government has confirmed that the CRC Energy Efficiency Scheme (the Scheme) will not be scrapped for the time being, but it will be simplified. On 10 December 2012, the Department of Energy and Climate Change published its response to its consultation on simplification of the Scheme. The effectiveness of the Scheme will be reviewed in 2016.

Tenant's break clauses

Commonly, a tenant's break option is conditional on payment of the rent up to and including the break date. A vital question is: where rent is payable quarterly in advance must the tenant pay a full quarter's rent when that break date falls between two quarter days?

The Apportionment Act 1870 does not apply to rents payable in advance and therefore the court has again had to consider whether a tenant can apportion rent payable in advance in *Canonical UK Ltd -v- TST Millbank LLC* [2012] EWHC 3710(Ch).

Canonical was the tenant under a lease which reserved rent "*yearly and proportionately for any part of a year*" to be paid to the landlord in quarterly instalments. The lease contained a tenant's break option, exercisable subject to various conditions, including the payment of all rents "*up to and including the Break Date*" and payment of a reverse premium equal to one month's rent.

In February 2012, Canonical served notice on the landlord to terminate the lease on 22 August 2012 (the "Break Date"). Canonical duly paid a full quarter's rent shortly after the June quarter day, and vacated the premises by the Break Date. The landlord contended that Canonical had not exercised the break option correctly because, Canonical had not paid the reverse premium. The tenant argued that it had complied with the break conditions because it had paid a full quarter's rent on the June quarter day and that, since no rent was payable in respect of the period after the Break Date (i.e. the period from 23 August – 28 September), the excess amount paid in respect of that period was sufficient to cover the reverse premium.

The High Court rejected Canonical's argument. The judge's reasoning was that a full quarter's rent must be paid on each quarter day during the currency of the term (except at the commencement date and the end of the contractual term by effluxion of time). The break option simply stated that, provided the tenant has paid the yearly rent up to and including the Break Date (and satisfied the other conditions), the lease would terminate. There was no provision for apportionment of the last quarter's payment before the Break Date. The words "*proportionately for any part of a year*" in the rent payment clause in the lease only applied at the commencement and expiry of the full contractual term of the lease.

Canonical's payment was held to be in satisfaction of the quarter's rent, and so the reverse premium was unpaid. Therefore, the tenant failed to break the lease.

Leave to appeal the Canonical decision was granted in the High Court, and it is expected to be heard by the Court of Appeal in February 2013.

Judicial Review

The Ministry of Justice has very recently conducted a consultation on reforming the procedure for judicial review, with proposals to "*stem the growth in applications for judicial review*".

Of interest to developers and others will be the proposal to shorten the time limit for applying for judicial review in relation to planning permission decisions from 3 months to 6 weeks. If carried out, this would reduce the period of uncertainty for developers when it can be risky to start a project without knowing whether a challenge will be mounted against the permission.

Further information

For further information or advice please speak to any of the Ashurst contacts listed below.

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