



Property Development Newsletter

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&
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SOLICITORS

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Unilateral Undertakings and Appeals

Millgate Developments Ltd. R v Wokingham Borough Council 2011

We are receiving a number of calls from clients in relation to this decision, and how this impacts on their own development proposals and submission of unilateral undertakings. To recap the facts of this case, Millgate were refused planning for 14 homes. One of the reasons for the refusal was failing to provide satisfactory provision for local amenities. The Council stated this could be overcome by an undertaking to pay £170,500.00. In submitting the appeal Millgate submitted a unilateral undertaking to pay this amount on commencement of the development. Millgate won the appeal but in making his decision the Inspector stated the Council had not provided anything to show that the contribution was necessary. In light of the Inspector's comments Millgate asked Wokingham to cancel the unilateral undertaking.

Wokingham refused Millgate's request. The Court held that the undertaking was voluntary and conditional only on the grant of planning and commencement of development. It was not conditional upon an Inspector finding the undertaking unnecessary.

So Millgate still needed to comply with the undertaking even if it was not necessary.

The decision highlights that it is worth considering on an appeal to include a precondition that the undertaking should only take effect if the Inspector deems the undertaking necessary to make the development acceptable. Consideration should also be given as to whether a draft undertaking should be submitted to the Inspector which is only executed following the request of the inspector.

Renovations amounting to Nuisance

Renovations can always take longer than you first thought...but four years?

That is the time it took one small developer to renovate a terraced house. Now most reasonable people can tolerate building work over short periods but sporadic ad hoc works over such a timeframe is a different matter.

The Court in the case of Jones and another v Ruth and another felt that the prolonged delays in this case, the noise and pollution, the poorly fixed scaffolding

and the lack of privacy all amounted to a private nuisance and awarded the adjoining owners a hefty £97,000.00 in compensation. We are not told whether there was any profit in the renovation after this reward. So the lesson to be learned here is to complete works diligently and in a reasonable period.

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Rights of Light—Update

We have reported in the past on the decision of HKRUK II (CHC) Ltd v Heaney (2010) which saw a decision of a court to grant an injunction to knock down part of a building erected in breach of rights of light. With likely costs of demolishing alone thought to be in the region of £1-2 million it needn't surprise you that the developer in this case appealed the decision. Whilst we have not see the formal decision at this time we do

understand that the appeal was successful and that our learned friend, Mr Andrew Francis of Searle Court, was involved in this successful outcome. Many will remember Mr Francis from a Herrington & Carmichael seminar on Restrictive Covenants. Naturally our congratulations go out to him.

Is deception a defence to planning enforcement?

Er.....No, is the simply answer. The extent that people go to avoid planning permission is always amusing. Just when you think you have heard everything something new comes along. In a case that went to the Supreme Court a landowner obtained permission for a barn, and then constructed a building which looked like a barn from the outside but was in fact fitted out like a dwelling house. Having lived in the building for four years the landowner then sought a certificate of lawfulness of existing use or development. Whilst we always applaud creative thinking the landowners problem was that the building was never constructed as a barn, so there was no

change of use, and even if there were, the landowner had been dishonest and there is a public policy issue of preventing parties from benefiting from their own wrongdoing. Secretary of State for Communities and Local Government and another v Welwyn Hatfield Borough Council (2011)



Ignore Restrictive Covenant objections at your peril!

The risks of a development strategy deliberately implementing a planning consent in breach of covenants were brought home to George Wimpey (Bristol) Limited and Gloucestershire Housing Association Limited when their application to modify restrictive covenants failed at the Lands Tribunal. In this case planning permission was given in 2006 for development. In 2007 Wimpey were contacted by objectors claiming breach of covenant and asking Wimpey to stop their preparatory work. Wimpey simply ignored this and started building works. In 2008 an injunction was sought by the objectors preventing the development from proceeding. Wimpey countered this by seeking to modify the covenants at the Lands Tribunal, where they lost the argument. What is interesting in this case

is that the Lands Tribunal made it very clear they would not modify the covenants as Wimpey had adopted a deliberate strategy of forcing through the development and of ignoring objectors, with the hope that by so doing they would have so altered the nature and character of the land. George Wimpey Bristol Ltd and Gloucestershire Housing Association Ltd



Local Government Ombudsman (LGO) rules in favour of developer

In April the LGO found South Holland District Council guilty of maladministration after they took enforcement action against a developer which was against their own legal advice and national policy guidance! The developer in this case, Nestwood Homes Limited, had planning permission for a development but sought to alter three of the plots. They provided the council with information, plans, elevations, which showed the site in this area being raised by 1.7 metres. The Council approved the plans. However, following complaints from neighbours to the development the Council informed Nestwood that they did not have planning permission for the raised levels. The Council sought advice from a barrister, who agreed with the developer – that by approving the plans the council had essentially provided consent! Despite this the Council started enforcement

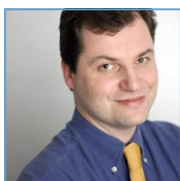
action against the developer which Nestwood appealed but they were soon losing plot buyers due to the enforcement action and legal proceedings Nestwood complained to the LGO.

Now It is rare for the LGO to become involved in complaints by developers about planning procedure but the LGO felt it was unreasonable to expect Nestwood to take judicial review when the issues at stake were not public policy but rather planning law and the council's own administration. The LGO felt the conduct of the Council amounted to maladministration and was such that they required the Council to make a formal apology to Nestwood, pay Nestwood's losses and in addition pay £25K compensation to the company directors for all the stress involved.

“Plain speaking legal advice”



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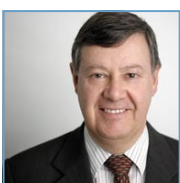
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