

## Property development opportunities: protecting your interests

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### **If you are holding property with development value, how do you realise its value?**

Simply owning a property with development potential does not always enable you to realise it. You may not have the resources, expertise or the time to pursue an application for, or implement any, planning permission.

Potential value might be realised by utilising a third party 'promoter' in a way that does not involve the same level of upfront cost or planning risk.

Note, however, that the land will require active management to prevent adverse rights being acquired which might thwart development potential pending the outcome of the planning process.

Here is our brief guide to help you navigate the process:

### **Assessing the opportunity**

1. The first stage is to spot the development opportunity. The property in an estate which may be more than it first appears. For instance, a small house with a very large garden, a field near a village, or an office building which is past practical use are examples of properties which might have development potential. If you believe that you have inherited all (or part) of such a property, investigating the opportunity could ensure that gain, rather than a canny buyer. There are ways of approaching this which mean that the costs can be largely borne by a promoter, and which reduces your overall financial risk.
2. In order to make the most of land and property in an estate, landowners should consider seeking the advice of a suitable property agent from the outset. An agent will be able to fully assess the development opportunity available.
3. Property agents can help to identify the potential of land and negotiate heads of terms on behalf of landowners. Specific advice on planning costs and other considerations will also be available from agents.
4. Perhaps most usefully, property agents can advise on the likely financial return on a development project. This will help landowners to make an informed decision on how best to realise the development potential.
5. The key point to make when considering an opportunity is; if you are not certain whether there might be an opportunity – then ask. It is not always obvious whether a site might have development value, but an initial discussion with our team or your surveyor will usually be enough to establish whether the prospect for development of a site merits further consideration.
6. Once a development opportunity has been identified, landowners will need to decide whether to 'self-promote' the land in order to obtain planning permission or enter into an agreement with a third party who may be better placed to realise value for the landowner – at a price, in return for shouldering the risk!
7. Increasingly, landowners are choosing to enter into agreements as a way of making the most of the land and lessening the burden they face. The use of these type of development agreements is becoming more common, but the documentation is specialist and can seem baffling. There are three main types of agreements (i) Option and Promotion Agreements (ii) Conditional Sale Agreement and (iii) Overage Agreements.

## Option and Promotion Agreements

8. A promotion agreement is generally used where a landowner wishes to appoint a third party to 'promote' its land to obtain planning permission and thereby increase its value. Once the promotion objectives have been met, the property will be placed on the open market and the proceeds of sale will be split in pre-agreed proportions between the landowner and the promoter. The landowner and promoter therefore share the common incentive to seek the best possible price for the property.

9. The promoter will usually pay the landowner an initial promotion fee for the benefit of promoting the land, as well as the landowner's legal and surveyor's costs. The promoter then has the right to promote the land by appointing necessary professionals, preparing a planning application, obtain planning permission, and appealing against a refusal. The landowner will usually have some involvement in the process, by approving the planning application, but the process will be led and managed by the promoter.

10. When it looks as though planning permission is likely to be granted, the promoter will prepare a marketing strategy for the landowner's approval. The parties must co-operate to try and achieve the sale/s of the development areas of the property at the highest possible price.

11. The advantage of a promotion agreement is that it will align the interests of the landowner and the promoter as it will be in both parties' interests to secure the best price for the land.

12. An option agreement works in much the same way. However, rather than receive a proportion of the proceeds of the sale of the property to a third party, the promoter has the ability to purchase the property at a pre-agreed level of discount (usually expressed as a percentage of the market value of the property with the benefit of planning permission).

## Conditional Sales

13. Under a conditional sale agreement a promoter agrees to purchase the property for a pre-agreed price if the planning permission is granted. The price will reflect a discount as against the anticipated market value of the property with the benefit of planning which reflects the promoter's risk in pursuing planning permission.

14. The difference between a conditional sale and an option agreement is that if planning permission is granted the promoter must buy the property for the agreed price. This is useful in that it gives a landowner certainty over the outcome if planning is achieved.

## Overage

15. Selling with the benefit of overage is different to all of the above options because the sale of the property takes place before planning permission has been granted. The overage deed gives the landowner a contractual right to receive a payment in the event that planning permission is granted and to thereby share in any uplift in value.

16. This is attractive for a landowner because it means that some value from the property is realised earlier than would be the case were a sale to take place following the grant of planning permission. However, an overage deal hands control of any promotion activity over to the buyer and there will rarely be any positive obligation for a buyer to pursue planning permission. This means that there might be more uncertainty regarding if or when any development value might be realised.

17. In addition, most promoters will not want to take on this level of risk – as it requires them to purchase the property before knowing whether planning can be obtained. As a result, overage is most often encountered in a legacy type situation to prevent a buyer from benefitting from any future uplift in value without sharing that benefit. It is not commonly encountered as a way for a landowner to maximise the value of property.

## Threats and protections

18. It is important to protect land whilst awaiting the outcome of the planning process, which can be very lengthy. Landowners need to be vigilant, to protect third party rights being acquired over land during this time. There are particular risks associated with open land, as public rights can be acquired through long use by the public.

19. If significant numbers of local people use land for recreation for at least 20 years, a member of the public can apply to the commons registration authority under the Commons Act 2006 to register the land as a 'town or village green'. The use will only qualify for the purpose of making an application if it is open, without force, and without the landowner's permission. There is therefore a particular risk of the public acquiring rights to use land as a green where local people use the land without the landowner's permission in circumstances where the owner knows, or ought to know, of the use but does nothing to prevent it (ie the landowner acquiesces in relation to the use).

20. Public rights of way over a defined route across land can also be acquired in a similar way. Local authorities are required to maintain a 'definitive map and statement' open to public inspection recording and describing public rights of way in their area. A member of the public can make an application to the local authority for an order modifying the definitive map and statement to record new rights based on long use. An applicant will usually rely on Section 31 Highways Act 1980 when making an application to modify the definitive map but can also make an application based on the 'common law'. If an applicant relies upon:

- Section 31 Highways Act 1980, a landowner is presumed to have dedicated a way as a highway if the route has been enjoyed by the public, without interruption, for a period of at least 20 years. For the statutory presumption to arise, it is not necessary for the applicant to demonstrate that there was an intention on the part of the landowner to dedicate the route as a highway;
- the common law, a period of less than 20 years use may be sufficient to establish a new right of way. However, there are a number of hurdles to overcome to establish a claim on this basis. The applicant must show that the owner intended to dedicate the route as a highway. Evidence based on use by the public must be sufficient to justify an inference that the landowner intended to divest himself forever of the right to exclude the public from using the way. Applicants often face difficulties establishing a claim against a landowner in respect of periods of use during which the land is let, mortgaged or held by trustees. Historically, the courts have found that landowners are not legally capable of dedicating a route for use by the public in these circumstances.

- Whilst it might be possible to develop land around or subject to a public footpath, the creation of a green will have a devastating impact on the development value of land. A green will prevent development over the entire area over which the public has acquired rights.
- A landowner can try to protect land against the risks of a green or public rights of way being registered by:
- depositing a 'statement and map' in the prescribed form under Section 15A Commons Act 2006 with the commons registration authority and Section 31(6) Highways Act 1980 with the appropriate council. This stops time running against the landowner and brings qualifying use by the public to an end. The Authority is obliged to publish the statement. However, a 'deposit' will not assist a landowner where 20 years qualifying use has already accrued, and may precipitate an application. Where a statement and map is deposited with the commons registration authority, a member of the public must make an application to register the land as a green within one year of the deposit;

Where use by the public continues after a statement and map is deposited, time starts to run again, and a further 'statement' under the Commons Act 2006 and 'declaration' under the Highways Act 1980 should be lodged. The period of time for doing so is 20 years in respect of a deposit with the commons registration authority. It is also 20 years for statements and maps deposited in England under the Highways Act 1980 since 1 October 2013;

- excluding local people from and preventing physical use of the land. The land will need to be actively managed. It should be fenced, and any gates giving access to the land should be locked. If the public continue to obtain access after the land is secured by force (for example, by cutting holes in the fence), the use will not qualify for the purpose of establishing a green or public rights of way. However, the landowner should in these circumstances take steps to repair the fence;
- prohibiting access by erecting signs. For example, a notice should be erected indicating that the land is 'private property: no access for any purposes'. Continued use in the face of signs of this nature is not qualifying use. Use 'by force' also means use which is contentious;
- permitting access to particular groups. Any use by groups accessing land pursuant to a permission is not qualifying use;
- using the land in such a way to interrupt use by the public or in a way which is inconsistent with their use (for example, actively farming the land); and
- making an application for planning permission. The right to apply to register land as a town or village green ceases when one of a number of 'trigger events' specified in Schedule 1A to the Commons Act 2006 occurs. An application for planning permission in relation to the land is a trigger event which suspends the right to make an application for a green unless and until the planning application is withdrawn, declined or refused, or a granted application expires. Putting in a planning application which has good prospects of success is therefore a good way of protecting the land against third party claims for a green but it will not protect the land against claims for public rights of way.

If an application is made to register public rights, it is important to investigate the history of the land use and assess the merits of the application at an early stage.

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