



LEGAL NEWS

DEVELOPERS (RESIDENTIAL & COMMERCIAL) UPDATE 3.08

Michelmores 

Government Push affecting Developers

GOVERNMENT PUSH TO ENCOURAGE RESIDENTIAL DEVELOPMENT

With fears of a slowing down of the housing market, the Government's drive to meet its housing targets in the South West region has never been more evident. One should expect at the very least, inspectors appointed to deal with Planning Inquiries and other appeals to recognise this trend if not local planning authorities.

When submitting applications for residential developments which might be contrary to current Development Plan policy it will be worth taking note of the following.

EMERGING NATIONAL POLICY

The highly intense political drive from central government to meet its housing targets is readily evident in the Housing Green Paper which was published in Summer 2007 and provides a clear indication of future national planning policy. In particular the Paper includes the following comment:

"Where councils have not identified enough land and do not grant sufficient planning permissions, planning inspectors will be more likely to overturn ... decisions [of local planning authorities to refuse planning permission] and give housing applications the go ahead at the appeal stage."

EMERGING REGIONAL POLICY

The housing numbers which will appear in the Regional Spatial Strategy when adopted (probably by the end of 2008), are likely to be significantly higher than those proposed by the Regional Planning Body in the draft RSS published in June 2006. Following the Examination in Public which concluded last year, the EIP Panel published its report in January 2008. The recommendations in the report endorse the view that housing growth should be closely linked to the key cities and towns in the region but at the same time stressed that there was a need to significantly increase the number of houses, including the level of affordable housing provided across the South West.

In particular the annual rate is recommended to increase from approximately 23,000 to 28,000 of which an average of 35% should be affordable. Of the most notable increases are the more urban areas of West Cornwall and what is known as the Polycentric Devon and Cornwall, Torridge and North Devon (the latter of which currently comprises North Cornwall, Torridge and North Devon Districts). These two areas are proposed to be subject to an increase in housing number by some 55% and 70% respectively. In fact only the Isles of Scilly and the

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Employment News



Site Waste Management



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More than just lawyers...

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Lifetime Standards for new homes

On 25 February 2008 the Government published its planning strategy to provide life time homes which are suited to families with pushchairs through to those in wheelchairs. There are 16 key features which will make up the standards which will require the provision of wider doors, improvements to bathroom and staircase designs to ensure that stair

lifts can be accommodated. From 2011 all new social housing will have to be built to the new standards and other homes to such standards from 2013.

FOR MORE INFORMATION PLEASE CONTACT
GRAHAM CRIDLAND, PARTNER, PLANNING AND
PROPERTY TEAM
gjc@michelmores.com

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Community
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Levy in 2009

Community Infrastructure Levy

Following the welcomed abandonment of the Planning Gain Supplement, it seems certain that the Government will proceed with its proposals to introduce the Community Infrastructure Levy in 2009. This new form of development tax will require those implementing a planning consent to pay a levy that will be set down in local development documents and be determined by reference to the size and type of the development.

The levy will be set by local authorities but local authorities need not adopt the levy and may decide

to continue to recover financial contributions towards infrastructure via Section 106 Deeds. It seems likely that Section 106s will in any event continue to be used to secure affordable housing.

The current proposals will be addressed in detail at the Michelmores' 2008 Planning Seminar on 22 April 2008 in Exeter.

FOR MORE INFORMATION PLEASE CONTACT
KAREN TRICKEY, ASSOCIATE
PLANNING TEAM
krt@michelmores.com

Promising to use "reasonable endeavours": what does it mean?

Contracts often require parties to use "reasonable" and sometimes "best" endeavours to get something done by the completion date. The phrases are not precise and are used when it is not certain what exactly will be involved. What comprises "reasonable endeavours" was considered recently by the Court of Appeal in the case of *Yewbelle Limited v London Green Developments Limited* (2007).

The Court of Appeal held that:

- In using reasonable endeavours a party is not required to sacrifice its own commercial interests.
- When the point has been reached where all reasonable endeavours have been exhausted, a party is not required to start again where to go on would be a repetition of what that party had already sought to do.
- If, after making such endeavours there is nothing that the party can reasonably do that would have a real or significant chance of

success, then the undertaking would be released.

Obligations to use "reasonable" or "best" endeavours will continue to be used by contracting parties. However, to avoid some of the difficulty associated with these obligations where any steps to be taken can be identified, these should be set out expressly in the contract. Taking those steps will then be part of the exercise of using reasonable endeavours even if they are detrimental to the party's commercial interests. For example if a party is to use reasonable endeavours to obtain a required consent, it is to appeal if that consent is refused? If a party is to procure the performance of another, what is it expected to do and if that is to include laying out money to achieve the desired result then this must be made clear.

FOR MORE INFORMATION PLEASE CONTACT
EMMA HONEY, PARTNER
COMMERCIAL PROPERTY TEAM
eeh@michelmores.com



Push for residential homes

The policy specifically promotes residential development that “contributes to the creation and maintenance of sustainable rural communities” and even “in market towns and villages”.

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Dartmoor and Exmoor National Parks see no increase which given their characteristics presents no surprise.

CURRENT NATIONAL PLANNING POLICY

The most relevant government policy on housing is contained in PPS3. Of course this document should be given considerable weight in the determination of any application for residential development, being the most up to date statement of national housing planning policy.

The policy specifically promotes residential development that “contributes to the creation and maintenance of sustainable rural communities” and even “in market towns and villages”. PPS 3 refers to the need for local planning authorities to identify sites for residential development which are deliverable within a five year period. More particularly, it specifies that to be considered deliverable the site should be suitable for development, available, and achievable within five years. Applications for residential development which meet these criteria will stand excellent prospects of approval even though they might be contrary to the Development Plan. This is illustrated by a series of recent decisions on appeal.

RECENT APPEAL DECISIONS

Of the many relevant recent appeal decisions, note should be made of a development by Redrow Homes at Ogwell Cross, Newton Abbot (July 2006), secondly, a development in East Taphouse, Liskeard (August 2006), thirdly, a development by Gleeson Homes in Bedford (August 2007) and finally a development in South Gloucestershire (December 2007).

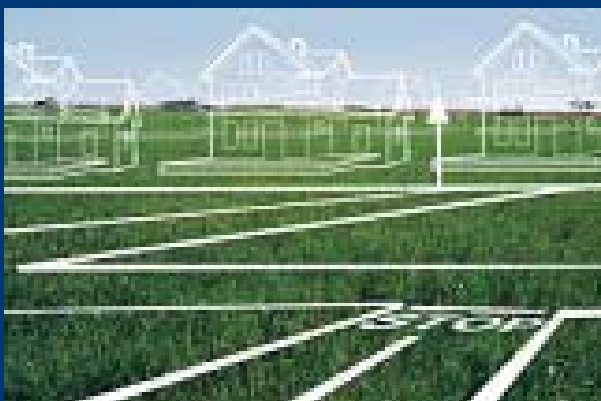


In each case, the site was outside the development limit for the area and as such contrary to the Local Plan policies. They all provide examples of applications for residential development which might have been refused a couple of years ago, but are succeeding on appeal as a result of the national drive to increase residential development.

They indicate a trend towards allowing residential development even in sites which are outside development limits where there is not a deliverable five year supply of housing and there is a need for affordable housing in the area. The applications were all approved by the Secretary of State contrary to the professional advice of their inspectors who were appointed to determine the appeals.

In the most recent decision for example, an appeal involving a green field residential development comprising 1200 dwellings was approved contrary to the Inspector’s recommendation. The Secretary of State agreed with the Inspector’s finding that the development was contrary to the Development Plan and was of harm to the green belt, but nevertheless decided with a proposal for 33% affordable housing, the scheme would provide urgently needed affordable housing in an area where the planning authority had not been able to show a 5 years supply of deliverable sites.

FOR MORE INFORMATION PLEASE CONTACT
KAREN TRICKEY, ASSOCIATE
PLANNING TEAM
krt@michelmore.com



Opinions from Europe

ATTENTION ALL EMPLOYERS

We report on a case that is currently proceeding through the European Court of Justice (ECJ) and which is likely to have a significant impact on the rights of workers in the UK.

We report on a case that is currently proceeding through the European Court of Justice (ECJ) and which is likely to have a significant impact on the rights of workers in the UK. The case, *Coleman v Attridge Law*, addresses the question of whether protection against disability discrimination should be extended to workers who, whilst not disabled themselves, care for (or are closely associated with) a disabled person.

On a literal reading, the Disability Discrimination Act 1995 (DDA) only protects a worker from disability discrimination on the grounds of their own disability. However, the European Framework Directive (which the UK is required to implement) refers to prohibiting discrimination "on the grounds of" disability. The issue in *Coleman v Attridge Law* was whether this wording requires the UK to also prohibit discrimination against non-disabled workers on grounds of their association with a disabled person.

Miss Coleman worked as a legal secretary in a law firm and was also the mother of a disabled son. She contended that she was subject to harassment and discriminatory treatment by her former employers in relation to her disabled son. Miss Coleman alleged that, when she returned to work following maternity leave, she was accused of being "lazy" and using her

child to manipulate her working conditions. She also complained that she was denied flexible working conditions, despite colleagues being allowed to work from home.

Miss Coleman contended that the DDA did not adequately implement the EC Framework Directive, and that the Tribunal should imply the words "all persons associated with a disabled person" into the DDA.

The Advocate General has given a preliminary opinion agreeing with Miss Coleman, namely that she should be able to bring a claim under the DDA based on her association with a disabled person. The full decision of the ECJ is expected shortly. If this is in favour of Miss Coleman it could require a major extension of the scope of the DDA.

FOR MORE INFORMATION PLEASE CONTACT
ANDREW TOBEY, PARTNER,
HEAD OF THE EMPLOYMENT TEAM
abt@michelmores.com



Developments in the protection of family wealth

Can you do anything to avoid the inheritance tax liability that your family will face when you die? Yes you can - and business owners in particular have opportunities to protect their family wealth without losing control of the business or a right to receive an income.

The use of a family partnership is proving increasingly popular as a means of protecting family wealth. The partnership comprises all children of the family aged 18 or over and one or two senior family members or close family friends. When the child joins, the child's parent/grandparent would contribute a sum to the partnership as an addition to the partnership capital. The terms of the partnership are such that no partner can withdraw capital until they are, say, 35 and even then, this could be only with the consent of the remaining partners. In this way, the assets are taken outside of the parent's estate for IHT purposes but are

not within reach of the child. Arrangements such as this are increasingly being used to pass assets from one generation to the next in an orderly and tax efficient way.

Trusts are also still widely used as means of managing family wealth, mitigating tax and introducing the next generation to a business. Trusts can be particularly useful when used to hold shares in family companies. For example, shares representing capital can be transferred into trust for the benefit of the broader family while shares providing a right to income can be retained. This approach can also create a family pot of wealth that can be protected against divorcing spouses, profligate children and bankruptcy.

FOR MORE INFORMATION PLEASE CONTACT
JONATHAN RILEY, PARTNER,
PRIVATE CLIENT TEAM
jjr@michelmores.com



Environmental and Waste Management

New site responsibilities

For projects worth over £500,000 there are further requirements including the need to obtain a copy of the waste carrier's registration and a written description of the waste.

From April, Site Waste Management Plans ("SWMPs") will be required for all construction projects worth over £300,000. For projects worth over £500,000 more detailed plans will be required. Failure to comply with the new requirements will be a criminal offence enforced by the Environment Agency or local authorities (which include Unitary, District and County authorities). Penalties range from fines to imprisonment.

In April 2008, SWMPs will become compulsory for all construction projects in England, under the Site Waste Management Plan Regulations 2008. The definition of "construction" is wide, and a "project" means planning, design and construction - through to the completion of construction work. The low project value threshold of £300,000 means that these Regulations will impact on most commercial construction activities as well as many self-builds.

A SWMP is a plan which sets out the types and amounts of waste on a construction site and details how the waste will be recycled, reused and disposed of. The plan must be drawn up prior to commencement of construction and must be monitored throughout

the project. SWMPs must identify amongst other things, the contractor removing the waste, the type of waste removed and the site to which the waste will be taken. For projects worth over £500,000 there are further requirements including the need to obtain a copy of the waste carrier's registration and a written description of the waste.

Failure by a person or company to comply with the Regulations could result in a criminal prosecution - leading to fixed penalty notices or heavy fines for the person or company. The penalties will also extend to officers of companies.

FOR MORE INFORMATION PLEASE CONTACT
MARK HOWARD, ASSOCIATE, ENVIRONMENTAL TEAM
mth@michelmores.com



Code for Sustainable Housing

The Housing Minister Caroline Flint announced at the February Eco Build 2008 conference that all new homes will require a rating against the Code for Sustainable Homes from May 2008. She also stated that all Government-funded new homes will be built to Code level 3.

If you do not wish to use the Code for Sustainable Homes and do not have to, for example, for planning reasons, then you have to issue a NIL rating certificate. This applies to all new building regulation applications made from May onwards.

OR MORE INFORMATION PLEASE CONTACT
MARK HOWARD, ASSOCIATE, ENVIRONMENTAL TEAM
mth@michelmores.com



Latest News and Forthcoming Events

Commercial Property Awards 2008

The sixth Commercial Property Awards Dinner will take place at Sandy Park Conference Centre on Tuesday, 13th May 2008. Sandy Park, itself won the award for the Project of the Year in 2006 hence this choice of venue. This event will bring together the best Westcountry commercial property projects, buildings and people of 2007.

Michelmores Director of Marketing Andrew Maynard said: "The Awards are now established as the region's premier commercial property competition and because of our partnership with the Western Morning News,

shortlisted candidates and the eventual winners are assured of huge publicity for their efforts as well as the prestige of recognition by their peers.

"Each year we receive more entries of greater quality and diversity within a wider geographic spread. The winning entries can come from a wide range of projects and even the smallest has a great opportunity to win. A community led project in Cornwall came within a whisker of winning one of the top prizes last year."

The most expensive development deal in Britain

Michelmores has acted in the sale of Chelsea Barracks to Project Blue (Guernsey) Ltd.

Project Blue revealed they had paid a staggering £959 million for one of the most important development sites in Europe.

Michelmores' Phillip Page, a leading expert in public sector property and advisor to several Government departments, led the Michelmores team who acted for the Ministry of Defence (Defence Estates) throughout. Commenting on the sale Phillip said "This 13-acre site is undoubtedly the most important

residential development property to come on to the London market in more than a decade.

"A site of this size and significance represented a highly complex legal challenge taking many months of diligent work to bring it to fruition. Having said that, from appointing the preferred purchaser to exchange of contracts was achieved in just 48 hours."

Proposals for the scheme, which will be subject to final planning approval by Westminster City Council include a sustainable mix of luxury apartments and affordable units in a green setting, close to the Thames.

Annual Planning Seminar

Michelmores Annual Planning Seminar will be held at Sandy Park Conference Centre on Tuesday 22 April from 9.30 am to 2 pm. The annual event attracts more than 100 delegates each year from the private and public sector. This year's event will include speakers from SWRDA, No 5 Chambers, Birmingham as well as the Planning and Environmental law team at Michelmores.

PLACES MAY BE BOOKED BY CONTACTING SARAH COLEMAN AT SZC@MICHELMORES.COM

Michelmores LLP

Woodwater House, Pynes Hill, Exeter EX2 5WR DX 135608 Exeter 16
Tel: 01392 688688 Fax: 01392 360563 mail@michelmores.com www.michelmores.com

Clarges House, 6-12 Clarges Street, London W1J 8DH DX 140549 Piccadilly 5
Tel: 020 7659 7660 Fax: 020 7659 7661

Harston, Church Street, Sidmouth EX10 8LT DX 48704 Sidmouth
Tel: 01395 512515 Fax: 01395 578422

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