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stratland

Autumn 2023

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In this edition

Introduction

Welcome to our first edition of Stratland, a Michelmores' publication containing articles and updates on legal issues relevant to the development of strategic land.

Strategic land is the broad term given to land with potential for development in the mid to long term. It encompasses the process of site assembly, promotion for planning consent, infrastructure requirements, land collaboration and ultimate delivery into a developable asset. Given the current shortage of homes and the stated housebuilding aims of the political parties in the run up to the election next year, strategic land issues continue to be highly pressing and well advised landowners will be best placed to deliver the developable land required at maximised value.

In this edition of Stratland we look at the deal structures that may be used when selling land with development potential and the structures for owning that land which minimise tax liabilities, whilst accommodating succession and estate planning requirements.

The legal jargon and terminology associated with strategic land can be off-putting for landowners who may be inundated with prospecting letters from agents, developers, and promoter companies.

We explain the different deal structures available, set out the pros and cons for using each and consider which may offer the best fit.

Natural capital has been the hot topic of the year for many landowners. From November, developments will need to deliver a mandatory minimum 10% biodiversity net gain from the pre-development bio-diversity status.

We consider some of the provisions that we expect to see built into acquisition contracts, options and promotion agreements to address the biodiversity requirements.

Understanding planning complexities can unlock the development of larger phased schemes. A recent ruling in the Hillside case highlights the uncertainties faced when needing to make material changes to multi-phase developments in a risk-free and cost-effective way. Our Planning team provides an update on the Hillside case and its implications.

Finally, we look at the increasing use of ransom strips in strategic land transactions, how to protect their value and alternative ways to share in the value of future development of adjoining land.

In addition to this publication, we are releasing a series of short podcasts exploring these and other issues affecting strategic land transactions. These can be found on our website at www.michelmores/podcasts. Please do have a listen.

I do hope that you enjoy this edition of Stratland. If you require advice on the topics covered or wish to discuss any matter, please contact me or any of the team listed at the end of this publication.

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Preparing your land for sale or development: Tax, trust and succession considerations

In order to maximise the chances of a successful planning application and subsequent sale, it is important for landowners to consider the best structure for owning the land and plan for the succession of their estate to minimise tax liabilities ahead of making the planning application. Obtaining tax and succession planning advice in good time is essential as it is easy to miss out on tax reliefs if tax and succession planning are not considered at a very early stage.

Ownership and occupation

The sooner title and legal ownership is reviewed the better. It is important to identify the underlying beneficial interests in the land so the beneficiaries can obtain advice and structure their ownership to manage the tax implications. Where trusts, partnerships and companies are involved, there can often be misconceptions about who owns what and in what capacity. It is often the case that the legal documentation does not match the purported position.

A developer will require the land to be sold with vacant possession once planning is secured. Therefore, in addition to ownership, occupation of the land must be reviewed to ensure any tenancies or licences can be brought to an end and the land vacated when required. If the land is not occupied, consider whether it would be beneficial from a husbandry and tax perspective to be temporarily occupied (see tax considerations below).

Taxation

The value of the land for Inheritance Tax (**IHT**) and Capital Gains Tax (**CGT**) purposes will usually increase on the granting of planning permission. It is therefore important to consider taking legal and tax advice early as this provides more options for mitigating any tax due at a later date; this may not be possible if left too late.

On the disposal of the land, CGT will generally be payable at a rate of 20% on the value of all net gains in land value. It is possible to reduce the CGT due by taking advantage of Business Asset Disposal Relief (formally Entrepreneurs' Relief) or deferring the CGT using Roll Over Relief, but using these reliefs requires planning and should be considered alongside long-term aims.

IHT is not always an immediately obvious priority, but it is important to think about the IHT position in the event that one of the beneficial owners die or following the gift of the land. Land is an asset that may be protected from IHT through reliefs such as Agricultural Relief (AR) and Business Relief (BR). Without any reliefs the full value may be subject to IHT at 40%. However, once sold, the landowner may now have a significant sum of cash which does not qualify for any IHT relief.

AR can assist when calculating the agricultural value of land but does not cover any development or hope value. Following a successful planning application, the market value of the land is likely to have increased and be far more than the agricultural value.

BR can assist with the development value where the land is held as part of a trading business, although as with AR, there are various requirements which need to be met to secure this. If AR or BR are not available, any IHT liability will need to be funded and so this should also be considered if necessary. Life insurance may be one option to fund this.

Succession and estate planning

A landowner should review its lifetime estate planning regularly as part of an ongoing process. Where land has development potential, succession planning should be reviewed at an early stage. Depending on the landowner's wishes it may be beneficial to gift the land, either outright or to a trust, prior to planning permission being granted, whilst ensuring sufficient assets to be financially secure for the remainder of its lifetime.

Landowners should ensure that they have an up to date Will (and letter of wishes as required) which best utilises IHT reliefs, reflects their wishes and the succession planning intentions and maximises flexibility.

It is also important to consider a financial Lasting Power of Attorney (if one or an Enduring Power of Attorney is not already in place) so that suitable arrangements are in place should the landowner lose the capacity to make decisions. If a power of attorney is not in place, an application will need to be made to the Court which is a lengthy and expensive process.

Summary

It is crucial that the formal legal documentation reflects the true position on the ground and the current wishes of the landowner. We discuss additional, on the ground considerations when preparing land for sale and development in this article.

Forward thinking and planning are essential to avoid any adverse tax consequences as some options may no longer be viable if left too late. It is important all professional advisors, such as lawyers, land agents and accountants work together, otherwise tax reliefs may be jeopardised.

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Structuring strategic land transactions: The basics

There are various deal structures that may be used when selling land with development potential. Which structure best suits the transaction may be driven by a number of factors and ultimately comes down to the degree of risk, control and flexibility required by the parties. We provide a summary of the main deal structures below. Each has its merits and landowners may wish to remain flexible to attract a greater level of interest, following which terms can be compared.

Option agreement

The landowner offloads the risk and the developer seeks to secure a satisfactory planning consent for development within a specified period of time taking on the associated costs. In return, the developer has the exclusive right to purchase the land once planning is secured either at a pre-agreed fixed price or at a discounted sale price, usually a percentage of open market value between 75%-90% depending on the degree of risk and return. The costs of promoting the land and securing planning are usually deductible from the land value. However, these are often capped at an agreed amount to give the landowner more certainty. An upfront option premium may also be paid by the developer to the landowner.

An option is a binding agreement and, if not exercised by the developer, will come to an end. They are generally preferred by developers to other strategic land sale structures and more common where sites are likely to take longer than two or three years to achieve planning consent. A conflict of interest between the landowner and developer may arise when negotiating the ultimate sale price which is not tested on the open market (unlike a promotion agreement).

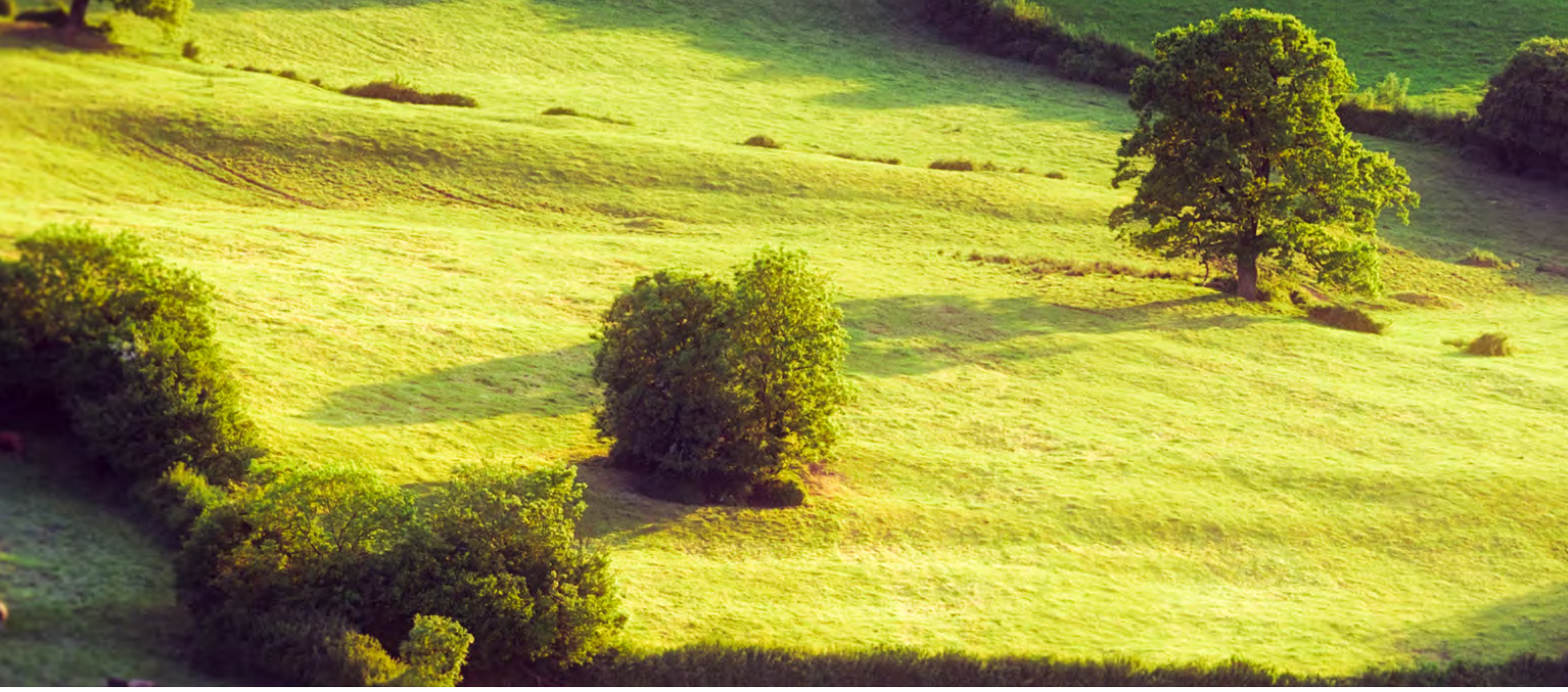
To protect the landowners' position, a minimum price return and a cap on costs may be included. Please refer to our article (page 10) on 'the pros and cons of option, promotion and **hybrid agreement**s' for information.

Promotion agreement

The landowner enters into an agreement with a specialist promoter and, similar to an option agreement, the promoter uses reasonable endeavours to obtain planning consent for development at its own risk and cost. The difference being that, when consent is secured, the land is sold on the open market (rather than to the promoter) and the promoter shares in the net sale proceeds after planning costs have been deducted and reimbursed to the promoter. The promoter typically receives a promotion fee on the sale of 10-25% sale price after deductions.

Promotion agreements are often preferred by landowners as the sale price is market tested and the open market value may be higher in the open market without being restricted by assumptions in calculating market value included in an option which may be disputed.

The promoter will make a profit without having to finance the acquisition or development and its interests remain broadly aligned with the landowner's interests throughout the process.



Hybrid agreement

Hybrid agreements offer a blended approach. The landowner grants the developer an option with the ability to elect to sell the land or parts of the land to a third party and share the sale proceeds with the landowner. Similar to a standard option, the developer may acquire part of the site on securing planning consent for a discount of market value. However, a hybrid agreement may require the remainder of the site to be marketed and sold to the highest open market bidder, akin to a promotion agreement. The sale price for the part that is sold on the open market may then be used as the basis for calculating 'market value' in the option element of the agreement. This avoids the price being determined on the basis of an RICS Red Book valuation, which may result in a lower land value as mentioned above.

A hybrid agreement is often most suitable for larger sites where there is sufficient land to be sold in phases. The advantage to the landowner with the hybrid structure is removal of the conflict of interest in agreeing the sale price. A complexity that can arise is over who builds the initial roads and services where the land is being sold in phases.

Conditional contract

A conditional contract is a binding agreement on pre-agreed terms. Unlike an option or promotion agreement, the terms are identified and agreed at the outset. This usually includes the price, extent of development and the parameters for fulfilling any condition. The parties must proceed with the sale and purchase on these agreed terms once the condition is satisfied and within the stated timescales.

In relation to the sale of land for development, the condition would usually be the buyer obtaining a satisfactory planning permission. The buyer must use reasonable endeavours to procure satisfaction of the condition within the specified timescale. Once satisfied, the contract becomes unconditional and the sale completes. If the condition is not satisfied by the stated date then the contract will terminate.

A contract conditional on planning is usually more suited to sites that are allocated in the relevant local plan for development, or where there is already outline planning permission and it is agreed that the contract shall be conditional on the grant of a reserved matters consent. They may not be appropriate where there are other uncertainties in addition to planning.

Unconditional contract with overage

Another option on selling development land may be to agree an unconditional sale, with or without full planning consent, for an agreed price but retaining the right to receive a further payment should planning/ further planning consent be secured or the site be developed more than an agreed threshold. This clawback of future value can be agreed by way of an overage agreement.

The additional sum of money payable to the seller landowner may be triggered on achieving planning permission, a change of use, development of an additional area or additional dwellings, or the sale of dwellings at a price which exceeds an agreed threshold.

The benefit of this arrangement for the landowner is the immediate receipt of capital monies. However, the overage payment is entirely contingent on future events outside the control of the landowner and is therefore at risk. The risk associated with the overage payment may be reflected in the commercial terms of the overage that are negotiated.

Best fit

Landowners are often advised that a promotion agreement would be in their best interests and realise the greatest land value, mainly due to the sale price being market tested. A developer may, however, offer very competitive terms for an option agreement where it wants to build out the site. Ultimately which structure is the best fit will depend on the circumstances and terms offered, and landowners are well advised to consult an agent and solicitor with experience in this complex area in order to plan early.

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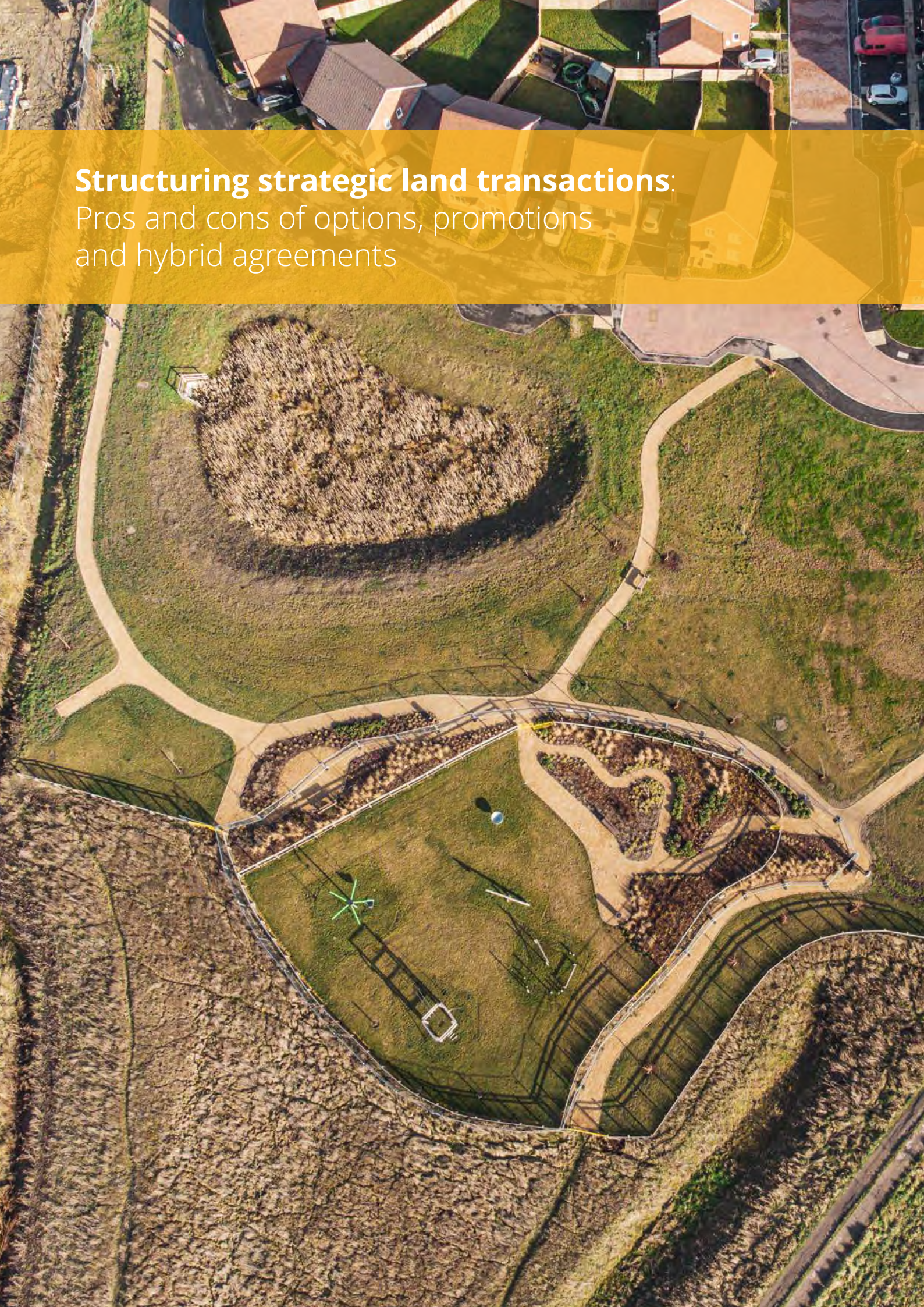


Structuring strategic land transactions: Pros and cons of options, promotions and hybrid agreements

In the previous article we outlined the key features of various deal structures that may be used when selling land with development potential. In this article we focus on options, promotion agreements and hybrid agreements and outline some pros and cons of each from a landowner perspective.

Option agreement

An option agreement offers the landowner a relatively straightforward arrangement with a developer who will promote the land, buy it (if the price can be agreed) and develop it.

A positive for the landowner is that they will be contracting with the likely end user of the land and so can forge a relationship with that party. A developer may offer favourable terms if it wants to build out the site. In addition, the developer will generally be procuring a planning permission for itself and so the risk inherent in a promotion agreement, of the planning permission falling short of a developer's requirements, is removed.

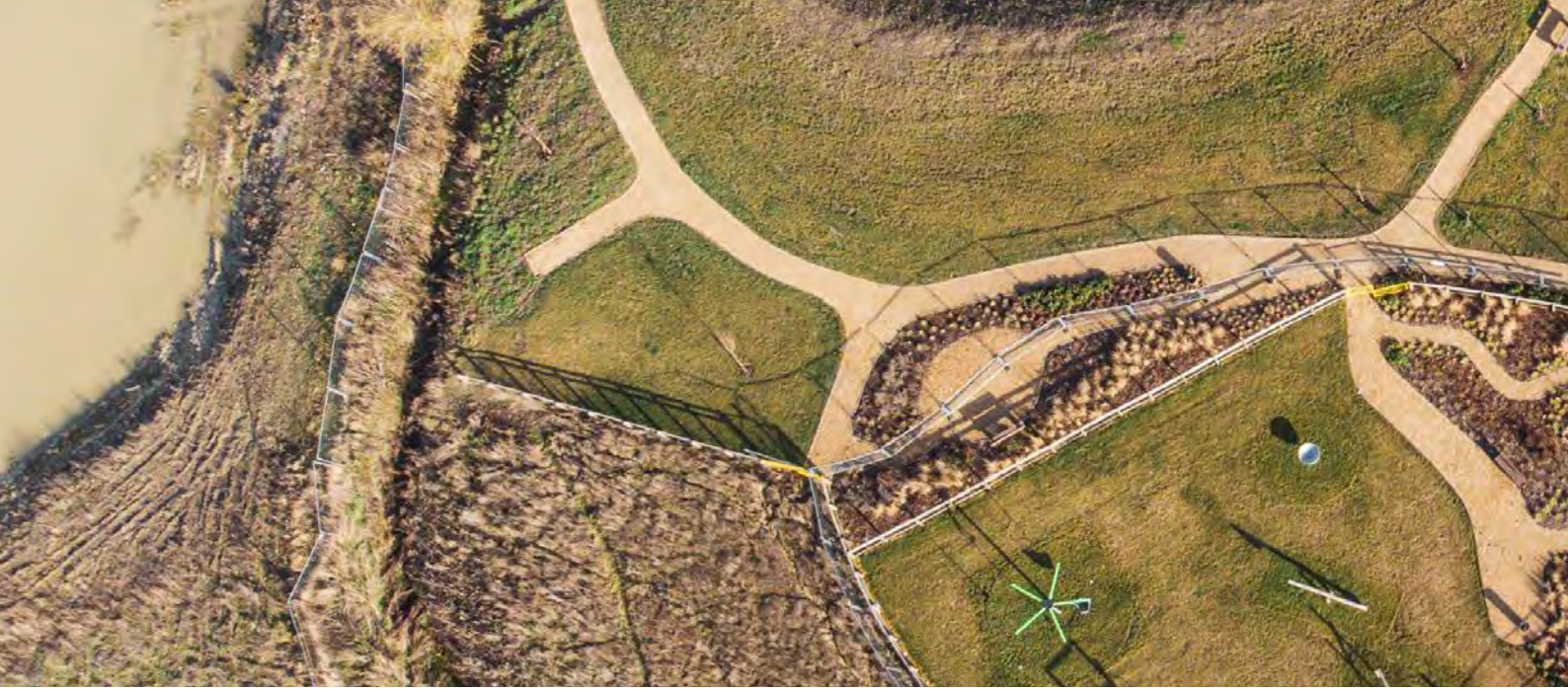
Risks to consider are:

- The parties' interests are generally aligned, until the price negotiation stage. Until then, both parties want to see planning permission granted. Once planning permission is granted, there will be a negotiation on price and there may be a significant difference between what the developer is offering and what the landowner is seeking. If the price can't be agreed, the option will usually provide for expert determination. A key protection for a landowner is therefore the inclusion of a minimum price clause with indexation, and a cap on the recoverable planning and promotion costs.
- Timing is another area where the parties may not be aligned. The developer may want to slow down the planning process to accommodate other competing priorities. To address this, timescales can be built in to govern the planning process. However, landowners should proceed with caution before imposing strict timescales. It may be more advantageous for both parties to delay the application so as to wait for a more favourable local planning landscape, and generally the developer is best placed to assess this.

Promotion agreement

Many landowners will veer towards a promotion agreement, because of the attraction of exposing the site to the open market and testing its value once planning permission has been granted, rather than the prospect of a battle on price with a developer under an option.
Key points to think about are:

- The parties' interests are aligned to an extent in that the land owner and promoter both want to get planning permission which maximises value. However, the promoter will naturally want to recover its significant planning outlay as fast as it can. Therefore, the promoter may be keen to press ahead with marketing so as to realise its return, even in an unfavourable market, whereas it may be better for the landowner to wait for the market to rise again. Clauses which suspend marketing where the land values have fallen by an agreed percentage can protect a landowner.



- The promotion costs are generally recoverable when the land is sold, and can be significant, therefore a cap on these costs will provide some protection to a landowner.

- As the design of the scheme evolves, it may become apparent that third party land is needed to provide services or visibility splays. The promoter will be required to negotiate the acquisition of such land but the landowner should have the right to approve the costs, acting reasonably, otherwise there is a risk that the promoter will pay over the odds leaving the landowner to foot the bill.

Hybrid agreements

Hybrid agreements seek to offer the best of both worlds in relation to sites which can be sold in phases. Typically, they take the form of an option, where one or more of the early phases is required to be put to the open market and sold to a third party, so as to establish a benchmark for the value of later phases to be sold to the developer under the option. Sometimes the developer has a right of first refusal in relation to the market phase.

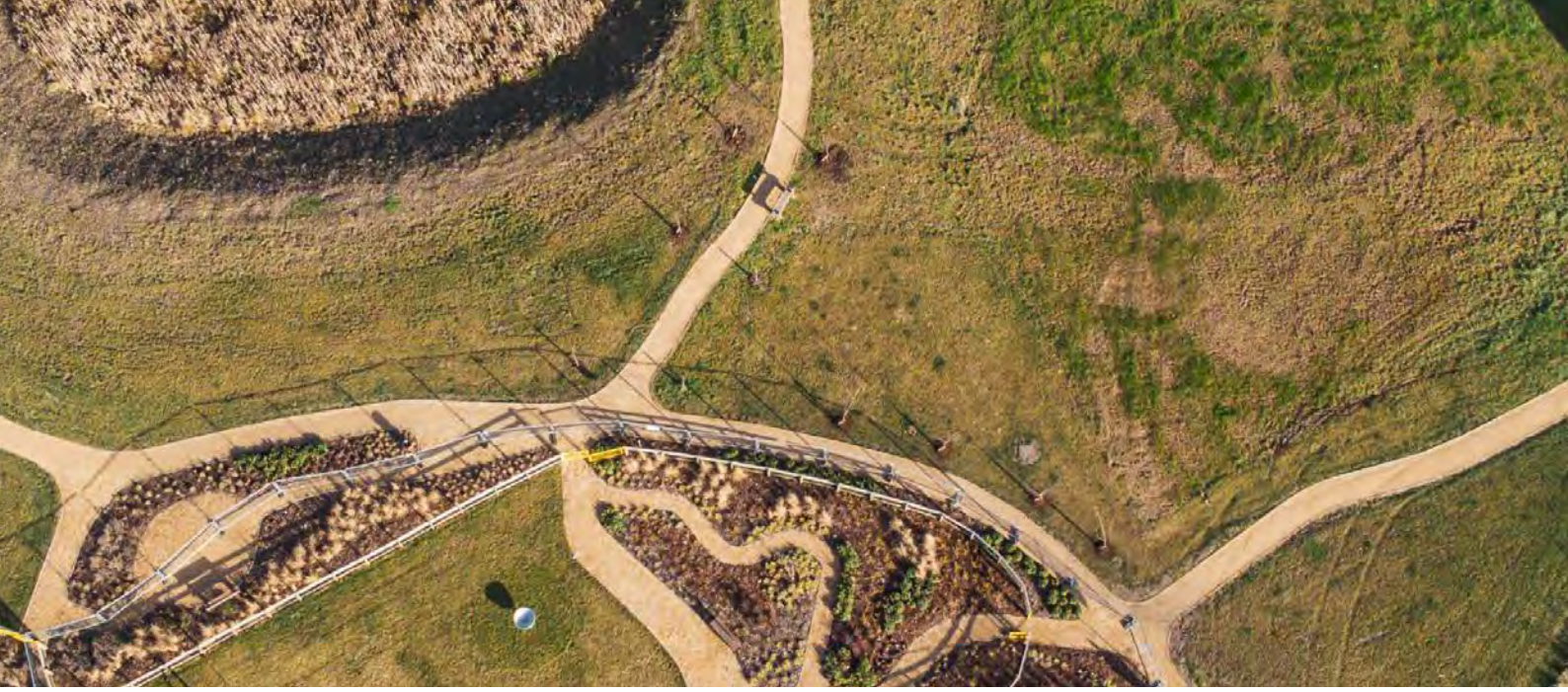
These agreements can be tricky and it is worth looking at:

- Is the site large enough to warrant splitting it up and marketing it in phases? A phased sale process is complex because the section 106 and planning obligations need to be apportioned between different developers, and obligations need to be imposed to deliver roads and services for the benefit of the serviced parcels. This can increase the cost of selling the site.

- The element of competition in an open market bidding process can be what makes these agreements attractive to a landowner. However, developers may be nervous of a third party with a particular motivation coming forward with a specially high bid for the market phase, resulting in an inflated market value for later phases. Under a pure option, there is less scope for a special purchaser scenario to arise because the valuation process generally precludes this.

Planning

As referred to above, if the site is to be split into separate phases for development, then it is sensible that the planning permissions are also phased — so as to bind to each separate development site. While this may require several applications for planning permission, the benefits include easy identification of the land being bound by those permissions.



The further benefit of using separate planning permissions for each development is that each developer can ensure they meet their own obligations. If the separate developments are covered by the same permission, then developer A may have to work with developer B to fulfil the obligations for the land as a whole which would add unnecessary complication (and cost) to each party's development.

In addition to the above, caution should also be taken regarding overlapping planning permissions in line with a recent decision of the *Supreme Court in Hillside Parks Ltd v Snowdonia National Park Authority* [2022] (see related article on page 16). This endorsed the 'Pilkington Principle' which provides that, whilst it is possible for a landowner to make multiple planning applications over the same land, if development under one planning permission renders implementation of any other planning permission for that land physically impossible then the earlier permission may no longer be valid.

Best fit

Ultimately, finding the structure which is the best fit will depend on the circumstances and terms offered. Landowners are well advised to consult an agent and solicitor with experience in this complex area in order to identify the best way forward.

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Biodiversity Net Gain:
Dealing with Biodiversity Net Gain in land acquisition agreements

Biodiversity Net Gain (BNG) delivery will become mandatory for the majority of housebuilders and developers in November 2023, and a growing number of local authorities are already imposing it as a planning requirement.

Please see two articles we recently published on this topic below:

- Overview of the basics: Biodiversity Net Gain: the basics | Michelmores
- Steps developers can take before November 2023: Biodiversity Net Gain : An update for developers | Michelmores

Achieving BNG – the mitigation hierarchy

Developers will be required to demonstrate that they will deliver a minimum 10% net gain from the pre-development bio-diversity value of new developments.

To achieve net gain in a way that is consistent with the mitigation hierarchy, developers will be required to follow these steps in order:

1. aim to avoid or reduce biodiversity impacts through site selection and layout
2. enhance and restore biodiversity on-site
3. create or enhance off-site habitats, either on their own land or by purchasing biodiversity units on the market, and
4. as a last resort to prevent undue delays, purchase statutory biodiversity credits from the UK Government where on-site and off-site options are not available.

In practice, delivery of BNG on-site may not be viable or attractive and developers may need to turn to the off-site options. These are essentially the developer buying off-site land to deliver BNG itself, or securing an agreement or conservation covenant from a third party who will then deliver off-site BNG, or buying biodiversity units on the newly emerging market, for example, from a habitat bank.

Future proofing acquisition contracts, options and promotion agreements

These delivery requirements will need to be reflected in land acquisition agreements. Some examples of the provisions that we expect to see built into acquisition contracts, options and promotion agreements to address BNG requirements are:

- Clauses which set out a route map of options for satisfying BNG requirements, for example, by the landowner agreeing to make nearby land available under a conservation covenant at low cost on agreed terms.
- Clauses which provide checks and balances and address the respective parties interests, for example, landowners may want to incentivise developers to go down the off-site route despite the attendant ongoing management obligations and costs, whereas developers may prefer purchasing biodiversity units which may be more costly but will be a one-off payment.
- Price calculations which expressly allow for the deduction from the price of BNG acquisition costs, potentially subject to approval of the costs by the landowner acting reasonably. Landowners will want to incentivise developers to minimise these costs and therefore BNG cost-sharing provisions may emerge.
- Contracts which are conditional not only on the grant of planning permission but potentially on the securing of off-site BNG land where relevant. A planning permission will only become implementable when the BNG plan has been approved by the LPA, and this means that the developer will want to have secured any necessary third party interests before buying a development site.
- Long stop provisions which recognise that additional time may be needed to secure not only the planning permission but also any third party land interest that is required for BNG. Potentially we may see extensions of time which are triggered by ongoing BNG negotiations.
- Flexibility in requirements for a minimum number of units to be achieved, since developers will be concerned that on-site BNG may reduce the number of units that can be built. A scheme which falls below a specific number of units or value may not however be viable to the seller.
- Overage clauses are being agreed upon more widely to address landowner's concerns over the developer getting a "second bite of the cherry" when the 30-year biodiversity maintenance period has expired, with provision for future enhancements in value to be shared.

The involvement of any third party land outside the development site may cause delay and uncertainty and we are already seeing the structure of transactions changing to address these risks.

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Revisiting Hillside: Eight months on

Last November, *Hillside Parks v Snowdonia NPA* was heard in the Supreme Court. Hillside concerned multiple and inconsistent planning permissions for the same site based in Snowdonia Park. In this article we will reflect on the practical implications of the case for the planning sector.

Without going into significant detail about the background of Hillside, the case concerned a series of full planning permissions for residential development on a site, dating back to a masterplan for 401 dwellings permitted in 1967. Only 41 of the houses had been built on the site but several later permissions had been granted. The Supreme Court decided following the principles in the case of *Pilkington v SoS for the Environment* 1973, that the development authorised by the original 1967 planning permission could no longer be built-out, as the intervening development of dwellings on the site had made it physically impossible to complete the original development in accordance with the 1967 permission. The case of Pilkington concerned mutually consistent planning permissions to the same site and held that where development has already been built in accordance with Permission A the ability to lawfully implement a second, normally full Permission B on the part of the same site, is dependent on whether it is physically possible to implement and carry out the second permission, given what has already been carried out under Permission A (the 'Pilkington Principle'). This has been referred to in the planning world as a 'drop-in permission'.

Drop-in permissions have been a common tool to allow changes to be made to a development that surpass the thresholds for non-material or section 73 applications. If successful, a drop-in permission permits a new planning permission for an area within an existing planning application and will work alongside the original planning permission. Although Hillside goes some way to clarify the approach regarding multiple planning permissions, it raises questions regarding the use of drop in applications and the extent to which they can be a valid way of varying an existing permission.

Physical impossibility – inconsistency and materiality

Hillside upheld the 'Pilkington Principle'. The test of physical impossibility applies to the whole site covered by the unimplemented planning permission, and not just the part of the site on which the landowner subsequently wants to build. Hillside went further to clarify the principles and Pilkington:

1. 'Physical impossibility' of constructing the development authorised by the earlier permission is to be contrasted with 'mere incompatibility between the 2+ permissions' which is not fatal. The court referred to the earlier judgement of Prestige Homes case where two permissions involved the same site, the earlier one had a condition relating to the retention of trees. The later one was a condition relating to the removal of those trees. The later one was implemented. That did not preclude reliance on the earlier one because the development of the earlier one could still be built out it was just a condition of it that was no longer able to be complied with but the actual physical development was possible to complete. So, this was a case of mere incompatibility.

2. Physical impossibility does not require 'exact compliance'. For example, deviations from a previous permission which are not material in the context of the development as a whole, would not be fatal to carrying out development pursuant to that permission. Where implementing permission B (later permission) means any of the development authorised by Permission A is physically impossible, Permission A is incapable of further implementation unless the incompatibility is not material in the context of the scheme as a whole the Court did not provide a definition of what is 'material' but they explained that "what is or is not material is plainly a matter of fact and degree" and it appeared to be analogous of the term with section 96A of 1990 Act in determining non-material amendments.

Severability

The court found that the 1967 planning permission was not severable as it did not comprise independent acts of development that could be implemented separately so they were not able to preserve some of the 1967 permission in areas where there was no physical incompatibility. However, the court clarified that it is down to interpretation whether it is a permission which authorises a series of independent acts of

development, each of which was separately permitted by it. If it was for example, a large, phased permission then it may be possible to continue under the permission after works have been completed on part of the site under another permission.

Bringing together the courts analysis of the cases of Pilkington, Lucas and Sage the main point is, "In summary, failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express provision making it severable) a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible". This confirms that there is no principle of abandonment of a planning permission in planning law, a planning permission can only be lost by the terms of the permission itself or by statute. It was also held that a part-completed development for which permission has been granted does not make the development already carried out unlawful.

Variation

Hillside established that a later planning permission cannot now generally be considered a variation of an earlier planning permission. The Court was not satisfied that the later permissions comprised 'variations' because "the development which took place under each of them is substantially at variance from what was shown in the Master Plan" and without plans showing how they integrated with the rest of the development "it cannot be said that these permissions authorised a new development scheme for the whole site". A later permission would only be considered a variation of an earlier planning permission if the variation was *to the scheme as a whole*, and simply using the word variation in the later permission is not enough. The court found that a developer could submit an additional application for permission that incorporates the wider site which benefits from an existing permission that has not been fully built out. Permission B can however be interpreted as authorising a "variation" to Permission A if it covers the whole site. This needs to be done *by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications*. The court suggested that this should include (re)submission of the documents relevant to the whole site including an EIA if required. The documents would have to demonstrate that the two planning permissions could work coherently together for the whole site. The courts suggestion to follow this approach rather than use the drop in application process, would mean that the developer would have a new second permission under which they could proceed. The governing permission for the whole site thereafter will be Permission B on it's own and therefore not a drop in permission.

Practical takeaways

From the judgement there appears to be three ways to deal with multiple and inconsistent planning permissions:

1. Developers might be able to future proof a large consent by making it expressly severable. If the original planning permission is drafted explicitly and carefully (in particular thinking about the description of development and making sure there is no ambiguity) the permission may still be capable of making certain parts of the development severable. It is unlikely that reference to phasing conditions alone would be suitable, and for the foreseeable future be prepared to see creative and lengthy descriptions of development. This will only be helpful for future developments.

2. If the amendments needed to the existing permission are material changes, then the drop-in approach will not be suitable, instead the new Permission B should be treated as a variation to Permission A and should include a plan of the whole site which incorporates the development that can be built out under Permission A, which

will become the overarching permission for the site once implemented. Proceeding with a whole fresh permission may not be practical in every case and the options and associated risk, must be considered on a case-by-case basis for example:

- the practicalities of re-submitting documents
- application fees
- potential implications for CIL payments and
- it is possible that the Local Authorities may require developers to require any interested parties in the wider site to be bound to any new section 106 agreement required which could cause issues and further delays

3. If the proposed amendments are not material in the context of the scheme as a whole, then developers might be able to utilise the drop-in application process. It could be made to sit together with the existing permission by ensuring that clarity as to what development will be built out pursuant to which permission, so that for example, phases are built under one or the other permission. As part of this process, careful thought and assessment must have been given to anticipated development scenarios. Points to consider with using the drop in application process include:

- this process could be attractive to developers where they do not want to proceed with a whole fresh permission which will come with associated costs and risks
- whilst it will be possible to use drop in permissions to preserve the ability to carry out further works under the original permission, materiality and inconsistency will be assessed on a case-by-case basis
- although it may still be possible to use drop in permissions alongside other applications to amend conditions through section 73, there could be further restrictions to using s73 as a result of the Finney [2019] judgement, which places a 'web of restriction' over large schemes for changes to be made without a fresh planning application. Finney established that section 73 can only be used to amend conditions and cannot be used to vary the description of the development. Although, in the recent case of Mikael the Court held that s73 is not limited in scope to "minor material amendments" which clarifies that there was a much wider scope for application of s73 and may see an increase of developers using it.

Conclusion

Although the judgement went some way to clarify some uncertainties within the planning and development sector such as that a planning permission can never be abandoned and that the Pilkington principle only applies when physical impossibility is engaged in a material rather than merely inconsistent manner, there are still questions about the best way to approach making material changes to multi-phase developments in the most risk-free and cost effective way. Developers are now awaiting the proposed new statutory framework in the Levelling-Up and Regeneration Bill which is currently before Parliament. This will insert a new section 73B into the Town and Country Planning Act 1990 giving the local planning authority power to grant a new planning permission that varies an existing permission but only if the local planning authority is satisfied that "its effect will not be substantially different from that of the existing permission".

There are many takeaways from the judgement and time will tell how they will operate in practice and whether the proposed new statutory framework will be welcomed by the sector.

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Strategic land:
Ransom strips

A common feature when selling development land is retention of a strip of land along any boundaries with adjoining third party land that could have future development potential but would likely need to run access or services across the ransom land. Structured properly, any third party looking to develop the adjoining land will need to pay to cross the ransom. This article considers the issues arising when negotiating retention of ransom land and/or its release and how to maintain its value.

What does a ransom strip look like?

Ransom strips are usually defined as a strip of land ranging between 0.3m to 0.5m wide specified to lie between certain points shown on a plan. They sometimes physically exist on the ground and are demarcated from the main title by a fence or other structure, however, more commonly they exist only on paper. Ransoms are often at risk of being lost through adverse possession by third parties, especially if they do not exist on the ground.

Ransom strips are usually created by being retained when a landowner sells the main site. Where land is sold under a promotion agreement, a ransom strip can be jointly owned by the seller and the promoter thereby giving both parties the right to share in any future value generated by it.

Is the ransom ransomed?

Merely retaining ownership of the strip may not be enough to realise full value from a third party who needs to connect through it. When selling the main title, unless the sole reason for the ransom is to prevent the main site purchaser acquiring adjoining land, the landowner should reserve full rights of access and services for the benefit of the ransom land.

It may be appropriate for a developer of the main site to install an access road and services to a connection point with the ransom or alternatively, for the owner to enter the site to do so. The owner may need to carry out later works to upgrade or increase capacity of the same. It may also need the main site owner to procure adoption and/or enter into planning, works or other statutory agreements. Such obligations would ideally be protected by title covenants and possibly a title restriction. Without considering these points, a landowner may find the ransom worthless.

How much is the ransom worth?

The advice of an experienced surveyor will be required to assess value. The ransom landowner of fully ransomed adjoining land can often expect to receive 30% – 50% of the increase in value. The surveyor will consider the residual calculations, comparable evidence, construction costs and profits. The timing of the valuation will also have an impact. A developer may wish to negotiate value and complete the release of a ransom before obtaining planning permission.

How can I protect my ransom land?

Ensure that the ransom strip is properly registered at the Land Registry. If the ransom land is unregistered, attend to voluntary first registration. Set a 'Property Alert' on the land at the Land Registry so that you are notified if any third party seeks to register any form of notice against the land.

The purchaser of the main site may need access to the ransom land in order to carry out development works and/or comply with planning conditions. If rights are granted over the land, then these may circumvent the ransom. Rights should be restricted wherever possible. However, if the purchaser insists on access over the ransom, restrict these to the use of the site and specifically state that no rights may be granted for the benefit of any adjoining land. Bear in mind that once services are installed and adopted, they are controlled by the utility company who may allow adjoining landowners to connect.

When releasing a ransom, should I transfer the land or simply grant rights over it?

If the ransom land payment has been calculated based on a specific development, consider whether the landowner wishes to share in future increases in value if planning on the adjoining scheme is improved or proceeds with a more valuable form of development. Retaining ownership and granting rights over the ransom for the specific development, may allow the landowner to keep control.

Should a ransom strip be retained when selling my land?

Whilst a ransom strip may sound like an attractive structure to claw back value realised from adjoining land, a landowner should consider overage as an alternative approach. Overage terms protected by title restriction may be easier to protect and enforce than theoretical ransom land that does not exist on the ground.

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