

## **Contracts conditional upon planning**

Whilst nobody wants to be the first to say it, those of us who are involved in the property market are starting to see the first sustained signs of life since the bubble well and truly burst. True, it is far too early to starting talking about "green shoots" (and this will remain the case until debt finance returns), but for those who have sufficient cash reserves and feel that now is as good as it is likely to get from a buyer's perspective, there is no doubt there is plenty of product available for them to pick and choose what they would like to buy.

That said, the cavalier spirit of investment displayed by some prior to the recession is unlikely to be a feature of the next couple of years. Not that long ago, there were investors whose modus operandi was to secure land first and worry about planning second. As stakeholders now look to be 100% sure that any potential development sites that they acquire are viable, it is likely that any contracts that do complete will be conditional upon full planning permission being obtained. However, a conditional contract that is badly or ambiguously drafted is a dangerous thing and here are some key points that should be borne in mind by any prospective purchaser.

Who is doing what and when?

If completion of his sale is dependent upon you getting planning permission, then your seller will want to make sure that the contract imposes positive obligations upon you to submit and then progress your planning permission as expeditiously as possible. Over and above this, your seller may seek to impose obligations on you not to pursue applications on competing sites and even to pursue an appeal against any planning refusal. From your perspective, your seller should be committed to assist you in obtaining planning. This should include not making any objection or other challenge in respect of your application as well as not pursuing any other application that might reduce the likelihood of your application being successful. Your seller should also be required to enter into any planning agreement that the planning service may require be entered into by the then owner of the land, provided that any such agreement will not impose an undue burden on him and you agree to indemnify him against any costs that he may incur in relation to any such agreement.

What is a "satisfactory planning permission"?

Completion of the sale and purchase of the property is likely to be conditional not just upon the grant of any planning permission, but upon the grant of a satisfactory planning permission. How such a term is defined is of great importance. From your seller's perspective, he will want this to be restricted by reference to a narrowly drafted list of unacceptable conditions tailored to the development referring to the likes of housing density or the net floor space or opening hours of your development. You will want it to be entirely a matter for you to determine whether any permission granted is satisfactory. Reference to your absolute discretion as opposed to your reasonable discretion would be preferable, but it would be hard to argue against the former and in any event there is case law that suggests that a court may still analyse the exercise of your discretion to check that it was properly exercised.

When will you be bound to complete?

Finally, you will want to make sure that completion does not take place too quickly after the issue of your satisfactory planning permission, and not just because you will need time to ensure that any funding required is in place. Third parties have three months from the date of the grant of the permission to seek a judicial review of the decision of the planning service and you should not be bound to complete your purchase before this period has expired. The recent case of *Stoll v Wacks Caller* [2009] saw a purchaser complete its purchase of a property within 21 days of the grant of planning as per the contract, only for a third party to then successfully judicially review the decision of the planning authority. The buyer had therefore acquired the property, but was frustrated from developing it.

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