



# REAL NEWS

WINTER EDITION 2016/2017

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Welcome to the winter 2016/2017 edition of Real News, DLA Piper's quarterly real estate publication. This edition is a quick review of 2016 and a look forward to what 2017 may bring into the real estate world.

On page 3 I look back at 2016 and provide a ratings round up as well as commentary on the private rented sector, forfeiture and the use of anti-competition law in our field. A look to the year ahead on page 5 covers MEES, the Electronic Code and The Riot Compensation Act. I then look at some of the leading cases due to be heard in the year ahead including the EMI appeal (page 6).

On pages 7-10 Amy Truman and Michael Grieg focus on the planning sector and what 2016 brought as well as offering insight into what to expect in 2017. Topics include affordable housing small sites exemption, headline infrastructure projects, the community infrastructure levy, planning reform and changes to the national planning policy framework.

We'll be back to topic specific articles in the next edition. If you have a request for us to cover a particular area then please do get in touch.

Kind regards



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# 2016 REVIEW

## REVIEW OF 2016

We covered a lot of content in the 2016 editions of Real News. A few points that we didn't cover but are worthy of a mention are as follows:

### ■ Ratings Round Up

- **New guidance on occupation of separate parts of the same building delivered a blow to occupiers.** The Valuation Office Agency (VOA) has issued guidance following a Supreme Court decision last year that two or more separate parts of the same building are no longer a single hereditament for ratings purposes. The change is likely to lead to higher rating bills for affected businesses and, in England, is to be backdated to 1 April 2015.
- **Revaluations will lead to significant increases in rates liability for many businesses.** There are winners and losers here but retailers in particular look set to be hit hard by the revaluations which were based on 2015 figures. The changes will need to be considered by landlords resisting renewal of leases as compensation for some refusals to renew is based on the rateable value of the property.
- **Top level ruling as to assumptions to be made by rating authorities.** The Supreme Court is to rule on the Monk case. The issue to be resolved is this – Where a commercial property has been stripped out for renovation, what physical state is it assumed to be in for the purpose of liability for rates? The VOA argues that the rateable value is to be determined on the assumption that the property is “in a state of reasonable repair”. The ratepayer contends that the works being carried out at the time went beyond “repairs”, and the rating valuation ought to reflect that the premises were not in a condition to be rented out. Unusually, the court has allowed the British Property Federation, the representative of property investors, to make representations to the court. We'll report on the outcome of the ruling in due course.

- **PRS presses its point as individual investors look set to be squeezed out.** Private rented sector (PRS) landlords must check prospective tenants' immigration status. Clients operating in the PRS must see that their agents shoulder this burden and, when acquiring an investment, should check that the seller or its agent has carried out the necessary checks. Other regulatory issues facing PRS landlords include: a three per cent SDLT surcharge for buy to let houses and flats and additional homes; and a significant reduction of the amount of relief that individual investors may claim in relation to their finance costs. Whilst these measures are likely to discourage individual investors in the PRS, there is now significant interest in the PRS from mainstream investors.
- **Early example of fast-track appeal of land deal terms alleged to be anti-competitive.** A small property development business, Latif and Waheed, used competition law to force Tesco to consent to release it from a restrictive covenant. It used a fast-track court procedure, introduced by the Consumer

Rights Act 2015, to challenge the covenant's enforceability. Tesco chose to settle the claim rather than defend it in the tribunal, and Latif and Waheed withdrew its claim. As this case was eventually settled, there is still little guidance from case law to clarify whether a particular restrictive covenant in a land contract may be considered unlawful.

- **Forfeiture and, after 14 months, relief.** The case of *Pineport Limited v Grange Glen Limited* [2016] EWHC 1318 (Ch) shows the extent of the court's equitable jurisdiction to grant a tenant relief from forfeiture where the landlord has forfeited the lease by peaceable re-entry. It is a reminder for landlords to exercise caution if forfeiting in this way. It may allow tenants to seek relief after the expiry of the six month time limit which applies to court-driven forfeiture; also, buyers and other disponees from the landlord will be wary of committing themselves until they are completely confident that there is no real prospect of relief being granted.



# 2017

## A LOOK AT THE YEAR AHEAD

A quick look at what lies ahead on the real estate horizon in 2017.

- **Requirement to install meters.** Not quite a 2017 obligation..., but the Heat Network (Metering and Billing) Regulations 2014 impose obligations on heat suppliers (which could be landlords of multi-tenanted buildings) to install individual meters if cost effective and technically feasible (and, if not, to install heat cost allocators and thermostatic valves at each radiator, if cost effective and technically feasible) by 31 December 2016.
- **Restrictions on interest relief on finance costs for let residential property.** New rules will be introduced gradually from April 2017 to restrict the amount of income tax relief for finance costs which owners of let residential property may set against their income tax liability. Finance costs include mortgage interest and fees incurred when taking out or repaying mortgages or loans. The tax relief will be restricted so that 20% (being the current basic rate of income tax) of the finance costs only will be available to be credited against the income tax payer's tax liability on the letting business profit.
- **CRC to be abolished.** The Carbon Reduction Commitment scheme is to be abolished following the 2018/19 compliance year.
- **MEES.** Don't forget that the dates upon which the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 will make it unlawful to rent out residential or business premises that do not reach a minimum energy efficiency standard (currently an EPC rating of E) are creeping closer – unless an exemption applies or energy efficiency works are carried out, it will be unlawful for landlords to grant new leases of premises from 1 April 2018 and it will be unlawful for landlords to continue to let premises under existing leases from 1 April 2020 (residential) or 1 April 2023 (commercial).
- **A revised Electronic Communications Code may come into force.** Although the bill which contains the code is still in draft form at present. The reforms include a major change to the rights communications providers have to access land by moving to a “no scheme” basis for valuation, similar to the system used for utilities. Communications providers will also have new rights to upgrade and share their equipment, which will allow future technologies to be rolled out quickly.
- **The Riot Compensation Act 2016 may come into force.** It received Royal Assent in March 2016 but the implementation dates have not yet been confirmed. The Act clarifies the test for a riot, creates a new scheme allowing compensation to be claimed from the local policing authority for property damaged, destroyed or stolen in the course of a riot (where it is not insured or not adequately insured), states that loss of rent and consequential loss are not recoverable and introduces a £1m cap on compensation.
- **The Welsh Government is to build a distinct body of Welsh law.** As part of a new ground-breaking approach for the UK, existing laws in areas devolved to Wales (many of which are now decades old) will be brought together and set out as distinct Welsh legislation, rather than remaining within laws originally made by the UK Parliament. The plan will involve legislation in areas such as tax, local government, planning and housing being consolidated into codes of law, making them easier to find and understand.



## LEADING CASES DUE TO BE HEARD IN 2017

- **Generator Developments LLP v Lidl (UK) GMBH** [2016] EWHC 816 (Ch) A case where Generator alleged that Lidl was bound by a constructive trust of land (“Pallant v Morgan trust”) bought with a view to a joint venture before Lidl took steps to find a new developer. The Court of Appeal will address this case in March.
- **Burrows Investments Limited v Ward Homes Limited** [2015] EWHC 2287 (Ch) Are damages available where a developer unlawfully disposes of land without obtaining the landowner’s consent? Here, the developer’s solicitors confirmed to the Land Registry that all contractual requirements had been complied with and as a result, the transfer was registered.
- **Heron Quays (HQ2) TI Ltd v The Joint Administrators of Lehman Brothers Ltd** Litigation spiraling out of the collapse of Lehman Brothers will look at whether a lease can be repudiated. The law of forfeiture is largely about relief from forfeiture, whether it should be given and, if so, on what terms. But can the contractual doctrine of repudiation be applied to leases thus offering a landlord a drastic remedy without the prospect of relief? The point looks set to be authoritatively resolved and as the trial has already started we shouldn’t have to wait too long to find out.
- **EMI Group Limited v O&H QI Limited** [2016] EWHC 529 (Ch) EMI’s appeal is set to be heard in May 2017. In summary, this case decided that an assignment of a lease from a tenant to its guarantor was void under s.25 of the Landlord and Tenant (Covenants) Act 1995. This decision creates significant practical problems for corporate reorganisations and needs to be carefully considered when carrying out due diligence on historic assignments and guarantees of existing leases.
- **Hicks v 89 Holland Park (Management) Limited** [2014] EWHC 2962 (Ch) This appeal looks to be a key case on restrictive covenants and turns on whether the holder of the benefit of a covenant could withhold consent to a development.



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## PLANNING AHEAD

### A review of the highlights of 2016 and an insight of what we can expect in 2017.

#### AFFORDABLE HOUSING SMALL SITES EXEMPTION & VACANT BUILDING CREDIT

- The Court of Appeal<sup>1</sup> reinstated the vacant building credit and small sites affordable housing exemption policies set out in the Written Ministerial Statement of 28 November 2014 (“**2014WMS**”):
  - contributions for affordable housing and tariff style planning obligations should not be sought from small developments; and
  - developers should receive a financial credit against affordable housing contributions for any existing floor space in vacant buildings brought back into use.
- Some confusion follows the ruling, which confirmed 2014WMS was a material consideration only, so could be outweighed by the development plan and other policies.
- The London Borough of Richmond recently wrote to the Planning Inspectorate, highlighting four appeals where inspectors reached contradictory decisions on whether the 2014WMS or Richmond’s conflicting local plan policy should apply in relation to the small sites exemption.

<sup>1</sup> R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441

## “THREE YEAR HOUSING SUPPLY?”

- Gavin Barwell, in his Written Ministerial Statement of 12 December 2016 (“**2016WMS**”), announced neighbourhood plans would not automatically be deemed out of date where:
  - 2016WMS is less than two years old;
  - the neighbourhood plan allocates sites for housing; and
  - the local authority can demonstrate a three-year supply of deliverable housing sites.
- This reduces the normal requirement for local authorities to be able to demonstrate five years’ housing land supply where a neighbourhood plan is in place.
- In January 2017 25 claimants applied for judicial review, asserting that the 2016WMS removes the well-established five-year housing land supply requirement without any consultation.
- The White Paper (7 February 2017) (“**White Paper**”) includes a consultation on amendments to the 2016WMS approach including the need to demonstrate that housing supply policies will meet the neighbourhood’s share of housing need; and compliance with the forthcoming housing delivery test for the wider authority area. This demonstrates a retreat from the 2016WMS’s position.

## RELEVANT POLICIES FOR THE SUPPLY OF HOUSING

- The Court of Appeal upheld a wide interpretation of “relevant policies for the supply of housing” pursuant to paragraph 49 of the National Planning Policy Framework (“**NPPF**”), finding that it encompasses any policy which affects the delivery of housing, including restrictive policies seeking to protect the Green Belt and other environmental designations.<sup>2</sup>
- This means that any such policies will be considered out of date if the local authority cannot demonstrate a five year supply of deliverable housing sites.
- The Supreme Court is due to hear an appeal of this decision late February 2017.

## HEADLINE INFRASTRUCTURE PROJECTS IN 2017

- **High Speed 2** – The High Speed 2 project continues to receive support from the Government; Royal Assent of the High Speed Rail (London – West Midlands) Bill is imminent, signalling the go-ahead for works and acquisitions for the project’s first phase.
- **Tidal Lagoons** – The Hendry Review came out in favour of tidal lagoons, recommending the Government develop the Swansea Bay tidal lagoon as a pathfinder project for maximising the advantage to the UK of its tidal lagoons.
- **Heathrow** – The Department for Transport released the “Draft Airports National Policy Statement” for public consultation, setting out the requirements for additional airport capacity in southeast England and the reasons to support a northwest runway at Heathrow.

## COMMUNITY INFRASTRUCTURE LEVY (“CIL”)

- The CIL Review published alongside the White Paper, sets out proposals for reform of developer contributions through CIL and s.106 obligations.
- The review proposes a twin-track system of low-level Local Infrastructure Tariff (plus a possible Strategic Infrastructure Tariff for combined authorities) together with s.106 agreements for larger/strategic sites. Both the infrastructure list and the pooling provisions in regulation 123 of the CIL Regulations are proposed to be scrapped.
- The Government will examine the options for reform and make an announcement during the Autumn Budget 2017.

<sup>2</sup> Suffolk Coastal v Hopkins Homes Limited, Richborough Estates Partnership LLP v Cheshire East Borough Council, [2016] EWCA Civ 168



## STARTER HOMES

- The Housing and Planning Act 2016 (“HPA16”) introduced starter homes, but detailed provisions relating to starter homes are not yet in force and subsequent regulations are required.
- Alongside the “Government response to the technical consultation on starter homes regulations”, the White Paper sets out proposals to be secured through regulations and amendments to the NPPF including:
  - widening the NPPF definition of affordable housing to include starter homes;
  - removing the requirement of 20% starter homes on development sites;
  - introducing a combined income cap of £90,000 for London (£80,000 elsewhere); and
  - introducing a 15-year period during which:
    - the 20% discount has to be repaid on sale to a new owner; and
    - sale and sub-letting of starter homes will be restricted
- This, particularly the removal of the mandatory requirement, represents a softening of the HPA16 starter homes provisions. We expect to see regulations and the amended NPPF later this year.

## CHANGES TO THE NPPF

An amended NPPF was awaited following consultation ending in February 2016. Instead, we have a summary of responses to the consultation proposing changes to the NPPF and a White Paper proposing further amendments. Proposals include:

- increased weight on using suitable brownfield land within settlements for housing;
- encouraging efficient use of land and higher density housing in urban locations;
- allowing authorities to have a housing land supply figure fixed for a year to protect against “planning by appeal”.

The White Paper also launches a consultation on amendments to the NPPF and other policy including:

- a requirement for a statement of common ground between authorities to work together to meet housing requirements;
- standardising methodology for assessing 5 year housing land supply;
- an amended presumption in favour of sustainable development to reflect the process undertaken; considering whether national policies restrict development, and then whether adverse effects significantly and demonstrably outweigh the benefits;
- ways to encourage build to let and construction of housing by hospitals and schools.

## COMMUNITY EMPOWERMENT – SCOTLAND

Significant new community powers came into force in 2016 under the Community Empowerment (Scotland) Act 2015. The main changes are:

- New community planning obligations with community planning partnerships placed on a statutory footing;
- Expansion of community right to buy powers to urban areas;
- A new community right to request a transfer of public sector land or buildings.

The Scottish Government has consulted on draft regulations for implementing the powers for communities putting forward proposals for community running of services and community right to buy abandoned or neglected land. These are likely to be implemented during 2017.

A further power for community right to buy land to further sustainable development was introduced in the Land Reform (Scotland) Act 2016. This potentially wide-ranging power is still to come into force.

## COMPULSORY PURCHASE AND LAND REFORM – SCOTLAND

The Scottish Law Commission submitted a report to the Scottish Government in September 2016 on reform of compulsory purchase law. The report recommended modernisation of the legislation but not significant systemic change. Proposals for legislation are expected.

A further phase of the Scottish government's agenda of land reform was set out in The Land Reform (Scotland) Act 2016. The Scottish Government is currently consulting on their statutory Land Rights and Responsibilities Statement.

In addition, there are a number of outstanding recommendations from the Land Reform Review Group report in 2014 including:

- Compulsory sale orders for neglected land;
- Providing a statutory right of pre-emption for local authorities to buy land;
- Greater emphasis on public sector-led development;
- Measures to facilitate development on land in split ownership.

The Scottish Government is expected to look at land reform again once the Land Rights and Responsibilities Statement is in place.



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## PLANNING REFORM – SCOTLAND

In May 2016, an independent panel appointed by the Scottish Government presented their review of the planning system "Empowering Planning to Deliver Great Places." In January 2017, the Scottish Government issued a consultation paper "Places, People and Planning" setting out proposals for reform of the planning system. Some of the key proposals are:

- abolishing strategic development plans so that there are single tier local development plans throughout Scotland;
- simplifying the procedure for making local development plans ("LDPs");
- early scrutiny of LDPs with an independent review of key issues like housing land numbers;
- a new power for communities to create "local place plans";
- expansion of the types of appeal considered by local review bodies;
- power for local authorities to introduce an infrastructure levy.

The consultation closes on 4 April 2017.

The Scottish Government will then introduce a reform bill, possibly later in the year.



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