

## Real Estate Update

June 2010

### Blue + Yellow = Green?

After the General Election on 6 May, a cloud of uncertainty hung over the future of the legislation and policy that governed the property industry under Labour. Since the publication of the Coalition Agreement and the Queen's Speech, several key areas of agreement between the Conservatives and Liberal Democrats have been clarified but many of the details are still outstanding. In this article we review what we do know, and what might come next for the property world under the "new politics". [More...](#)

### Development: 12 questions to ask yourself

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#### Are development agreements subject to public procurement rules?

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### Any comments or queries?

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This is a summary of recent developments. It should not be regarded as a substitute for advice on how to act in any particular case. For further information please contact one of the authors.

## Blue + Yellow = Green?

After the General Election on 6 May, a cloud of uncertainty hung over the future of the legislation and policy that governed the property industry under Labour. Since the publication of the Coalition Agreement and the Queen's Speech, several key areas of agreement between the Conservatives and Liberal Democrats have been clarified but many of the details are still outstanding. In this article we review what we do know, and what might come next for the property world under the "new politics".

The initial Coalition Agreement was published on 11 May, with the final Agreement published on 20 May, and the Queen's Speech elaborated on several points raised in the Agreement. Overall, it appears that the Coalition between the Conservatives and Liberal Democrats will bring big changes to the UK property industry, but the full extent of the impact of those changes remains to be seen. The first part of this article discusses what can be gleaned from the Coalition Agreement and Queen's Speech.

### Planning

The Coalition Agreement reveals the potential for big changes to the planning system, with proposals for a new national planning framework covering all forms of development and clearly stating national environmental, economic and social priorities.

The environment is a key focus, with a commitment to a presumption in favour of sustainable development in the planning system. There is also ongoing support for the Green Belt and Sites of Special Scientific Interest (SSSIs).

The Coalition's movement towards local community empowerment is evident in the proposed creation of a new environmental designation. Described as being "similar to SSSIs", here protection will be afforded not only to sites of national or European significance, but also green spaces of importance to local communities. Indeed, the Government's proposed Decentralisation and Localism Bill will abolish Regional Spatial Strategies, return decision making powers on housing and planning to local councils and give greater financial autonomy to local government and community groups. It is not clear, however, how this will fit with the national planning framework proposed in the Conservative manifesto.

### Housing

Private individuals selling their home and house builders will be glad to hear that the unpopular Home Information Packs were abolished with effect from 20 May 2010. In contrast, Energy Performance Certificates (EPCs) are here to stay, seemingly for both residential properties and commercial properties. Home owners will also be pleased with the proposal of home energy improvements paid for by savings from lower energy bills.

Housebuilders and second home owners alike will be intrigued by the Coalition's commitment to "explore a range of measures to bring empty houses into use" and the green agenda raises its head again in the requirement of continuous improvement to the energy efficiency of new housing.



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## Development

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The Agreement's focus on green issues will definitely impact on development, with incentives proposed for local authorities that deliver sustainable development. It is also easy to see how the Coalition's agreement to promote "*open spaces and wildlife corridors*" might impact on both projects that are already in the pipeline and future projects.

Developments with a retail aspect will also feel the effect of proposals that councils should take competition issues into account when drawing up local plans. Described as a means "*to ensure a level playing field between small and large retailers*", the desire to "*shape the direction and type of new retail development*" is express and is likely to have a significant impact on new retail development under this Government.

Developers will also be interested to learn that the Decentralisation and Localism Bill will replace Regional Development Agencies with new Local Enterprise Partnerships (LEPs) made up of bodies from local authority and business with the aim of promoting economic development in the local area.

## Major infrastructure projects

After the introduction of the new Planning Act in 2008, and its implementation over the last year, few who have followed the Act's progress will be surprised by the Coalition's pledge to abolish the Infrastructure Planning Commission (IPC), the body set up to decide planning applications for major infrastructure projects. Both the Coalition Agreement and the Queen's Speech did not give away any details about the future of the Planning Act regime, but a letter published by the IPC itself before the Queen's Speech confirmed that the proposed changes would come under a "Devolution and Local Government Bill" (which sounds very much like the Decentralisation and Localism Bill introduced in the Queen's Speech).

The IPC suggests that the Bill will include the replacement of the IPC with a Major Infrastructure Unit that will sit alongside the Planning Inspectorate as part of a revised Department for Communities and Local Government. The Major Infrastructure Unit will then make recommendations on applications for Nationally Significant Infrastructure Projects to Secretaries of State for final decisions. It is anticipated that the Bill will become law in 2011 and, until then, the IPC has suggested that the "*existing process*" will continue.

## Rail and Aviation

The Coalition Government sets out its position on rail and aviation projects in the Agreement. There is support for the Crossrail project in London and a green light for a national high-speed rail network, which will be the subject of a hybrid High Speed Rail Bill. However, the third runway at Heathrow will be cancelled and the Coalition Agreement expressly refuses in advance any applications for further runways at Gatwick and Stansted.

## Energy

Promoters of coal-fired energy generation projects will have noted the introduction of an emissions performance standard to prevent the development of new coal-fired power stations unless there is sufficient carbon capture and storage (CCS) technology in place to meet the new standard. This should be helped by the Government continuing Labour's proposals for public sector investment in

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CCS technology for coal-fired power stations. Keeping up the green theme, the Agreement also pledges to increase the target for energy from renewal sources (albeit subject to the thoughts of the Committee on Climate Change on the matter). Promoters of major energy projects will also be interested in the commitment in the Coalition Agreement to promote energy from waste through anaerobic digestion and marine energy.

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The main step change in energy policy seems to be in relation to new nuclear energy generation development. It is well known that the Liberal Democrats are not in favour of nuclear power and the differences in opinion between them and the Conservative party are clear in the drafting of the Coalition Agreement.

The Agreement provides that the Government will complete the drafting of “*a new national planning statement*” on nuclear power and put it before Parliament. A Liberal Democrat spokesman will then speak against the planning statement but Liberal Democrat MPs will abstain from the vote. Whilst this should allow some nuclear new build to get up and running the new Secretary of State for Energy and Climate Change, Chris Huhne (a Liberal Democrat) has said that there will be no public subsidiary for nuclear power – and no public bailout should a project run into difficulties.

## Tax

Neither the Coalition Agreement nor the Queen's Speech was detailed on tax proposals (as you might expect before the emergency budget planned for 22 June), but we do know that the Government will review the effectiveness of the raising of the stamp duty land tax threshold for first-time buyers. Whether this will herald further changes to the SDLT regime remains to be seen.

## Painting the town green?

Overall, the Coalition Agreement is environment-focused when it comes to property issues and the Queen's Speech reinforced that agenda. However, many details remain outstanding.

For example, there is no mention of the Community Infrastructure Levy (CIL). In their manifesto, the Conservative Party pledged to abolish the CIL and replace it with a “*local tariff*”, but it seems that, for the moment at least, the CIL lives to see another day.

It is notable that even after the long-planned abolition of the Infrastructure Planning Commission there is still no official line from the Government as to how much the Planning Act regime will change in practice, nor how the impact of any change on applications already made to the IPC would be managed. Further, the status of the draft National Policy Statements published under the Planning Act 2008 last year remains ambiguous; the Agreement heralds a “new” nuclear planning statement, whilst pledging to “complete” that very same statement in the same breath.

What is clear is that the agenda for the new Government is green, with a focus on locally driven politics. The Prime Minister has already thrown his weight behind the idea of local effort driving the bigger picture in a commitment to a 10% reduction in carbon emissions by central Government within 12 months. How much more this localism-focused and green agenda will affect the property industry will no doubt be revealed as the true colours of the Coalition begin to show over the next few months.

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## Development: 12 questions to ask yourself

No one really seems to know what is next for property development. Stories in the press oscillate from doom and gloom about the lack of bank funding, to wild optimism about those projects which have soldiered on through the downturn and the lack of supply which will make them doubly profitable, to swirling rumours that long-mothballed sites are about to be unwrapped.

Whatever the truth is, for those who are embarking on development – whatever the scale – the same set of legal issues often tend to raise their heads. We have compiled a checklist of our top 12.



### Ownership

- **Do you own all the land you are planning to develop?** An index map search will reveal which parts of the site, if any, are registered at the Land Registry. Sometimes the Land Registry can be persuaded (for a fee) to produce a “jigsaw puzzle” plan showing all the titles within a landholding. For unregistered land, it will be a case of going back through the deeds to the property to check exactly which land is included in the site and whether it is subject to any rights, restrictive covenants etc (see below).
- **If you don’t own the whole site, what are you going to do about it?** This needs to be weighed up carefully: is it worth trying to purchase – or take an option to purchase – any additional pieces of land or would it be better just to change the design to fit the land you already own? Buying more land might provide a better site, but set against this is the risk that the adjoining owner(s) will refuse to sell if they object to the proposed development, or set a vastly inflated price (hence the term “ransom strip”). Negotiations to purchase extra land may also put adjoining owners on notice of any rights they may have over the site or the benefit of any restrictive covenants (see below).
- **How much co-operation do you need from adjoining owners?** Do you need temporary access to their land or a licence for crane oversailing, for example? Do party wall notices need to be served? Adjoining owners may also seek to impose other conditions on a developer as part of the sale, such as demanding a “buffer zone” at the edge of the site to screen them from the development. How far you agree to their requests and how much you pay for their co-operation will depend on the respective parties’ bargaining positions.
- **Does the seller have the right to sell the land?** If you are buying from a charity or a local authority, for example, there are various statutory requirements which must be complied with, designed to ensure that the seller gets the best possible price for the land.

### Rights benefitting the land

- **Does the land have the benefit of sufficient rights?** Can you get to the public highway? Are there sufficient rights of drainage? If you are joining with someone else’s services, is there sufficient capacity?

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- **If you are buying the land in several separate parcels, does each parcel have the benefit of sufficient rights?** Parcel A might have the benefit of a right of way over adjoining land to reach the public highway while Parcel B does not. If a developer buys both Parcel A and Parcel B, making one larger parcel of land, only the land formerly known as Parcel A will have the benefit of the right of way – there will be no legal way of getting from Parcel B to the public highway.
- **Are the rights sufficient for the proposed use of the property?** A right of way on foot only is not going to be sufficient access for a commercial development. Case law suggests that, where there is a radical change of use and this leads to substantially increased use of the right, the right may not be sufficient – so a right of way for agricultural purposes cannot be used as access to a large residential development, for example.

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### Matters which burden the land

- **Does anyone have a right of way across the land (or any other right for that matter)?** If so, a developer must weigh up whether to approach the person with the benefit of the right and ask them to release it (usually for a fee) or to keep their own counsel and take out indemnity insurance. It has to be one or the other – once the person with the benefit of the right has been approached, insurance will not be available.
- **Is the land subject to any restrictive covenants?** For obvious reasons, restrictions on building, development or commercial use represent the biggest hurdles for would-be developers. The first task is to assess whether the covenant is enforceable. Covenants which are hundreds of years old and no longer reflect the situation on the ground, or which are drafted very widely, may not always be enforceable. For example, a covenant not to use the property as a butchers, which is expressed to be for the benefit of all branches of a long-extinct local butchers, probably does not present too much of a risk. Having considered enforceability, the balancing act is the same as for rights of way: do you pay out for insurance immediately or risk approaching the person with the benefit to get the covenant released? A third option is an application to the Lands Tribunal for modification or discharge of the covenant, but this is likely to be time-consuming and expensive.
- **Has the land been registered as a village green, or are there local residents who might be preparing an application?** Increasingly, village green applications are being used to stop development. In the recent case of *R (Lewis) v Redcar & Cleveland Borough Council* a property developer was prevented from developing a golf course by the locals' registration of the land as a village green. Local residents used parts of the golf course for dog walking and children's games and this was sufficient for their application to be successful. The publicity surrounding this case will no doubt encourage others to use the same approach. A search of the register of commons and village greens will reveal any existing registrations, but there is no priority period attached to the search, so there is nothing to stop an application being made in the future.

### Permissions

- **What will the local authority require in exchange for granting planning permission?** Conditions may be attached to the planning permission or, for larger developments, the local planning authority may require other contributions – to highways,

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green space, education, affordable housing or any number of other things, depending on the development.

- **What other consents are needed?** These might include building regulations approval, listed building consent and conservation area consent, to name but a few. At the end of 2009, the Penfold Review began looking into non-planning consents for development and how these could be streamlined. An interim report has been published, concluding that duplication between regimes and the difficulty of co-ordinating different consent timetables can cause problems for developers. It remains to be seen how the review will be followed up.

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## Case notes

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#### Background

In this case, the parties initially intended to enter into a formal building contract setting out all the terms upon which RTS were to design and install packaging machines for Muller. However, as is so often the case, such good intentions did not come to fruition.

The parties entered into a letter of intent (LOI) in March 2005 to allow time to agree a full set of terms. RTS started work on the project whilst negotiations continued. Unfortunately, the letter of intent expired in May 2005 without a formal contract having been signed.

By July, a draft final contract was produced (in the form of an MF/1 contract) which included the agreed price for the work and almost all the contractual terms and schedules. The terms included clause 48, which provided that the contract would “*not become effective until each party has executed a counterpart and exchanged it with the other*”. However, the contract remained unsigned and a dispute arose between the parties which diverted attention away from finalising the contract documentation so no formal contract was entered into.

The High Court held that there was a contract between the parties which incorporated some (but not all) of the terms in the draft final contract. The Court of Appeal overturned this judgment, on the basis that clause 48 operated as a “subject to contract” provision which prevented any contract coming into effect until each party had signed.



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## Decision

The Supreme Court reversed the Court of Appeal decision and found that there was, in fact, a binding agreement between the parties and the parties had agreed to waive clause 48, as any other conclusion did not make commercial sense. Also, the Supreme Court's view was that a reasonable, honest businessman would have concluded that the parties intended that the work was carried out on the agreed terms at an agreed price regardless of there being no formal written contract. Furthermore, important variations were agreed in August 2005, with no suggestion at the time that there was no contract to vary.

## Conclusion

The Supreme Court adopted a 'common sense' approach in its finding in line with the intention of the parties. Developers and contractors should be aware of the danger that where the parties act as if the terms are agreed, the court may find that those contract terms are indeed agreed and binding, even in the absence of a formal contract.

Should employers and contractors want to rely on "subject to contract" clauses, they should ensure that no act or omission could infer that they had waived this requirement.

Letters of intent should always be used with caution and should be drafted in clear terms which include the price, duration of the works and set out exactly what works are to be carried out under the letter. Where a letter of intent expires, the parties should expressly extend it as necessary until the building contract is entered into. Where there are no clear written terms, the parties are, in effect, leaving the door wide open to disputes, as there may well be some uncertainty as to whether a contract exists, and if so, on what terms.

## Are development agreements subject to public procurement rules?

Well, possibly. Now this may sound like a typical lawyers' response; however, in the light of a recent European ruling, the answer really swings on the nature of the agreement. In *Helmut Muller GmbH v Bundesanstalt für Immobilienaufgaben*, the European Court of Justice provided guidance of when development agreements may be subject to the EU procurement rules and helped to confine the wide interpretation previously put forward in earlier cases, such as *Auroux v Commune de Roanne (Roanne)*.

## Background

A German federal agency announced that it intended to sell a piece of land. Helmut Muller offered to buy the land subject to a condition that urban planning permission was granted. The agency rejected the offer and requested offers for the land without urban planning permission. Helmut Muller increased its offer but the agency accepted an even higher offer of from a different company, GSSI, stating its preference for GSSI's project on urban development grounds.

Helmut Muller challenged the sale, arguing that there was a public works contract which should have complied with the public procurement rules.

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## Decision

The ECJ confirmed the following:

- A pure land transaction would not be subject to public procurement rules
- The public authority must gain a direct economic benefit in order for the public procurement rules to apply
- There will be a direct economic benefit if:
  - the public authority will become the owner of the works, or
  - the public authority will have a right to use the works so that they are available to the public, or
  - the public authority is going to derive advantage from the future use or transfer to it of the work, or
  - the public authority has contributed financially to the carrying out of the work, or
  - if the public authority has assumed the risk for the work.
- There will be no direct economic benefit where a public authority is merely exercising urban planning powers which are intended to look after the public interest
- For there to be a public works contract to which the public procurement rules, there must be an enforceable obligation on the contractor to carry out those works

## Conclusion

The *Helmut Muller* decision eased some of the uncertainty that arose following previous decisions in the ECJ (eg *Roanne*). Understandably, this uncertainty caused some difficulties for local authorities because it was unclear whether any development agreement, section106 agreement or highway agreement which was above the financial threshold would have to be publicly tendered.

The impact of *Helmut Muller* is that while some development agreements will remain caught by the procurement rules, most planning and highway agreements should not, unless they go above and beyond the implementation of pure planning policy.

No doubt this decision is welcomed by public contracting authorities and, indeed, developers. The requirement that there is a direct economic benefit to the contracting authority is a helpful clarification, potentially limiting the application of the procurement rules.

The ECJ's guidance in this case is useful, albeit the examples given by the ECJ are not thought to be exhaustive and further clarification is undoubtedly necessary, particularly over what precisely amounts to a direct economic benefit and how this applies to planning agreements entered into under English law. Following the *Roanne* decision, the Office of Government Commerce published a guidance note on the application of the procurement regulations to development agreements with local authorities, but this stopped short of providing guidance on section106 agreements. Such guidance is expected to be published in due course.

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## Round-up

### Costs recovery clauses in leases: Landlords beware

A recent Court of Appeal case has highlighted the importance for landlords of making sure that all costs of enforcement against the tenant are recoverable under the lease. In *Agricullo Limited v Yorkshire Housing Limited* the tenant was a few years into the term and had allowed the property to fall into disrepair, particularly the roof.

The landlord served a notice on the tenant under section 146 of the Law of Property Act 1925 (LPA) requiring the tenant to remedy the situation. After the notice had been served, the parties managed to reach agreement as to what needed to be done and the tenant carried out the repairs. The landlord then tried to recover its costs, both for serving the notice and for the subsequent negotiations with the tenant. The tenant refused to pay.

The court held that the landlord could not recover costs incurred negotiating with the tenant. This was because the lease only allowed the landlord to recover costs incurred “*in connection with any steps taken in or in contemplation of, or in relation to any proceedings under section 146 of the LPA*”. The lease made no reference to enforcing repairing covenant through other means, such as through negotiation, and so the landlord could not recover the costs of the negotiation.

The key for landlords is to ensure that leases clearly state that the landlord can recover the costs of enforcement of the tenant covenants, not just for the service of section 146 notices.

### Virtual assignment: update

In the last issue of the Real Estate Update, Alex Prew reported that the Court of Appeal in *Clarence House Limited v National Westminster Bank* had overturned the High Court decision as to whether virtual assignments (where all the economic benefits and burdens associated with a lease are transferred to another party but the leasehold interest itself doesn't move) infringe a covenant against sharing or parting with possession. [Click here](#) for a link to our previous article.

The landlord, adamant that the tenant had breached its alienation covenant, appealed to the House of Lords. Leave to appeal has now been refused, so the Court of Appeal decision stands.

### Land Aid Fun Run

And finally...look out for the RPC team at this month's Land Aid Fun Run on 23 June in Battersea Park. Six gallant competitors from RPC will be running 5k to raise money for Land Aid, the property industry's charity, which helps disadvantaged young people through a variety of projects, with a particular focus on homeless young people. [Click here](#) for more information:



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