The Only Way is Up

New permitted development rights for additional storeys for bocks of flats and the consequences for collective enfranchisement

Article by Piers Harrison, Barrister, Tanfield Chambers – July 2020

The prospect of development at rooftop level has proven controversial in many collective enfranchisement cases. It raises issues as to whether the development is possible, and if so, whether it is profitable, and if so, how much the roof is worth as a site. Those issues often involve the parties needing to obtain evidence from planners and engineers in addition to the evidence of a surveyor. Often the issue is intractable because of irreconcilable differences of opinion as to the feasibility of development, the costs of development, and the gross development value. This area is thrown into a state of flux by (I) the Law Commission's tentative suggestions for reform and (II) the imminent introduction of increased permitted development rights i.e. rights which allow development to occur without the need to obtain planning permission.

Since much has been written about the Law Commission proposals and little about the new development rights, this article will consider the latter first and then consider the interplay between the two.

New Permitted development rights

From 1st August 2020 permitted development rights will allow for some blocks of flats to be extended upwards by two storeys to create residential accommodation. The new rights permit development consisting of works for the construction of up to two additional storeys of new dwelling-houses immediately above the existing topmost residential storey on a building which is a purpose-built, detached block of flats.

The right also permits necessary ancillary works such as engineering operations, replacement of plant, construction of new access and egress, and construction of storage waste and other facilities necessary for the new dwellinghouses ("the Ancillary Works").

In order to qualify the following conditions must be fulfilled:

- The existing building in question must not be less than 3 storeys in height above ground level.
- The building must have been constructed between 1st July 1948 and 5th March 2018.
- The additional storeys must be constructed on the principal part of the building.
- the floor to ceiling height of any additional storey must not be more than 3 metres in height; or more than the floor to ceiling height of any of the existing storeys, whichever is the lesser, where such heights are measured internally.

- The new units created must be flats.
- The overall height of the roof of the extended building must not be greater than 7 metres higher than the highest part of the existing roof (not including existing plant).
- The extended building (not including plant) must not be greater than 30 metres in height.
- The engineering operations permitted must not include the provision of visible support structures on or attached to the exterior of the building upon completion of the development.

There are a number of other conditions appertaining to the extent of the Ancillary Works and a number of other exclusions e.g. for listed buildings.

"Purpose-built" is defined as “a building that was built as and remains as a block of flats” and it would seem, therefore, to exclude buildings converted from some other use. Taking a belt and braces approach the legislation also expressly excludes buildings converted to residential via certain existing permitted development rights, so it would not, for instance, apply to offices, or light industrial units converted to dwellinghouses under existing permitted development rights.

Any development is permitted subject to a condition that before beginning the development, the developer must provide the local planning authority with a report for the management of the construction of the development,

The relevant legislation is the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020/632 which amend the Town and Country Planning (General Permitted Development) (England) Order 2015 (“the 2015 Order”). The new right is introduced by amending Schedule 2 of the 2015 Order to add a new Part 20.

Interplay with enfranchisement

The Law Commission summarises its proposals in relation to development value thus:

> “. . . we conclude that leaseholders could be given a power to decide to accept a restriction on future development of their block when they acquire the freehold. If they chose to accept that restriction, they would not have to pay the landlord any development value in the enfranchisement claim – so their enfranchisement premium would be reduced. If the leaseholders subsequently decided that they wanted to develop the block and therefore “realise” the development value, they could negotiate with the former landlord to release the restriction. They would, at that stage, have to make a payment to the former landlord in respect of the development value.”
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> (Summary of Report dated 9th January 2020)

This was given a "green light" by counsel instructed by the Law Commission to advise on compatibility with Article 1 of the First Protocol to the ECHR, which provides for the peaceful enjoyment of property. She advised as follows:

> "In my view, enabling leaseholders to elect to take a restriction on development, so as to avoid paying development value, is likely to be compatible with A1P1. This option does not deprive landlords of an entitlement; it simply removes the conditions in which an entitlement would arise. If the enfranchising leaseholders subsequently decide that they want to develop, this option would ensure that landlords receive a portion of the profit. Provided the landlords' share of any subsequent profit is no less than the amount the landlords would have received by way of development value at the date of the freehold acquisition, I can see no basis for any objection under A1P1. I assess the risk of a successful legal challenge to such an option as Low."

The problem with this advice is that it is applicable in relation to some cases where development value arises, but inapplicable in others. As I set out in "Development value in collective enfranchisement claims" E.G. 2012, 1206, 88-89 it makes sense to differentiate three situations when development value can arise:

a. Firstly where at the date the claim is made the landlord can carry out the proposed development without trespassing on the tenant's land and without needing to obtain the tenant's permission. An example would be where the landlord has reserved to himself a flat roof and the right to develop the same.
b. The second situation is where one party to a lease can carry out a development but the development is only viable if the developer (whether landlord or tenant) acquires land or a release of a covenant from the other party to the lease. An example would be where a tenant could substantially increase the value of a top floor flat by adding an additional storey but where the landlord owns the roof and airspace or there is an absolute covenant against alterations. Another example would be where the landlord could develop the roof and airspace but for rights granted over it to the tenants.
c. The third situation is where the landlord could develop adjacent land but the ability to do so will be lost or impaired on the enfranchisement of neighbouring land. An example would be where the landlord has land adjacent to the premises being enfranchised which could have been developed in conjunction with those premises but which cannot be developed on its own, or can, but less profitably e.g. a penthouse straddling two blocks of flats.

The advice given by human rights counsel is applicable only in situation (b). In that case the development value could, prior to enfranchisement, only be released by the parties reaching

agreement, and that would be the same after enfranchisement if a restrictive covenant were imposed.

In situation (a), however, the Law Commission's proposal would be disastrous for the landlord. Take the following situation. The landlord has retained a flat roof of a block of flats, the airspace above it and all necessary rights to allow a future development. Development is vehemently opposed by the lessees. The new permitted development rights apply and the site value of the roof is now, in anticipation of those rights coming into force, £1m.

As things presently stand the landlord ought to receive compensation in the sum of £1m, but if the Law Commission proposal is adopted and the tenants seek to enfranchise opting for a restrictive covenant, the landlord will receive nothing in compensation for loss of development. He will instead have the benefit of a restrictive covenant, which is worth relatively little given that the tenants oppose development.

Similarly in situation (c) above the imposition of a restrictive covenant to prevent development of the enfranchised property does not compensate the landlord for the loss or impairment of his ability to develop neighbouring property.

Implications

It is not known whether the Law Commission proposals in relation to development value will be implemented. If there is a decision to implement them then it is possible that the fully formed proposals might deal with the anomalous situations explored above. The eventual legislation would also have to deal with the situation where a landlord has commenced development in some way. If a landlord has expended money on development, even if the development is incomplete, then it would be difficult to say that he would be adequately compensated by the imposition of a restrictive covenant on the nominee purchaser.

Where the permitted development rights apply and landlords have retained the legal rights necessary for development landlords should consider commencing development because if the Law Commission proposals are implemented in their present form, landlords will not be adequately compensated by the imposition on the nominee purchaser of a restrictive covenant.

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