

# we keep you informed

## **Planning Gain or Planning Pain?**

When land is sold for development, very often a seller will insist on an additional sum being paid by the developer in the event that he goes on to obtain planning permission for development. This is known as overage or uplift and is usually a percentage of the difference between the original sale price and the value of the land at the time of the grant of the permission.

The Government has identified increased land value as a means to generate income and has proposed the Planning Gain Supplement ("PGS"). A consultation paper has recently been published with comments to be received no later than the 27 February of this year. Implementation is expected no earlier than 2008.

The concept of PGS is that it will be a self-assessment tax as with Stamp Duty Land Tax and is to be calculated on the difference between the value of the land at a given date without the benefit of planning permission and the value of the same land at the same time with the benefit of planning permission. Home improvements would be exempt and it is likely limited improvements to business premises would also be exempt.

Upon the grant of planning permission, a Development Start Notice would be served by the local authority identifying who has to pay, and stipulating a given time to file a return. Failure to pay would result in interest and fines becoming payable and possibly a Development Stop Notice being served obliging the developer to cease the development.

If a developer has acquired land subject to overage triggered by the grant of planning permission, upon grant he would be obliged not only to pay the overage but also the PGS. Where before a developer might generate the funds to pay overage from the plot sales, he might be prevented from doing so if a Development Stop Notice is served. The Developer would be saddled with the contractual obligation to pay the overage and the statutory obligation to pay the PGS all from his own pocket.

There does not have to be any sale of the land for a PGS liability to arise. If planning permission is obtained for say part of a back garden, upon grant the liability would arise.

It is likely that any sale price of a development site will have to reflect the potential tax liability arising. A seller who obtains planning permission for his own site may need to build the liability into the sale price and conversely a developer obtaining a site without planning permission will be looking for a reduction to reflect the subsequent liability on grant. If overage is imposed, any calculation should allow for a deduction of the PGS from the equation as part of the development costs so as to reduce the overage liability.

It is likely that a considerable level of interest in PGS will be generated as the implementation draws nearer.

## **VAT – Any Option?**

Generally, with the exception of new buildings, VAT is not chargeable on the sale or letting of commercial property. However, owners of commercial property may elect to waive exemption from VAT (also known as exercising the option to tax) in relation to a property usually so that they can recover input VAT (VAT paid on invoices in respect of goods or services supplied to the owner) incurred, for example, on acquisition costs, surrenders of leases, alterations and professional fees.

At present, once the election is made it can only be revoked when less than 3 months or more than 20 years has passed since the election was made and in the latter case only with the consent of Her Majesty's Revenue and Customs (HMRC).

VAT must continue to be charged even if the owner no longer wants to because, for example, he wishes to sell the property to a purchaser who cannot recover VAT and who may, therefore, seek to renegotiate the sale price. The net effect may be to reduce the open market value of the owner's property.

Following consultation HMRC proposes that from 2009 the right to revoke after 20 years will be automatic subject to certain conditions and may still be permitted with its prior consent even if all the conditions are not met. Further, the initial 3 month period for early revocation is to be extended to the first 12 months after the option to tax is made.

## **Landlords & Tenants at Breaking Point?**

In today's competitive market landlords are frequently being asked to include in their leases a clause enabling the tenant to break the lease early giving a tenant the flexibility to stay for the full term of the lease, if his business is successful, but also the ability to walk away after an initial period if it isn't.

A landlord will try to attach conditions to any break clause such as having the rent paid up and the covenants in the lease complied with, whilst a tenant will be looking for a condition free break clause. Very often a compromise is agreed and as a result there have been a number of cases before the courts recently in which landlords and tenants have argued about the interpretation of break clauses.

The practical message for both landlords and tenants is to take professional advice before agreeing the wording of a break clause to be inserted in a lease. Tenants should seek advice before exercising the clause to ensure that they comply with its conditions and landlords should seek advice before accepting any purported exercise of it.

If you would like any advice on the matters covered in the above articles or on any other property matters please contact Glyn Evans on **01934 637 911** or [evans@powellslaw.com](mailto:evans@powellslaw.com) or Stephen Soper on **01934 637 915** or [soper@powellslaw.com](mailto:soper@powellslaw.com).

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