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Seeing the Light

The existence of a right to light can prevent a development from taking place and so it is important to establish whether such rights exist when considering sites for potential development.

Rights to light have an important role to play in the regulation of land use and can be fundamental to the enjoyment of land. However, the law relating to rights of light is complex and outdated, with the result that development is often unnecessarily impeded. This article provides a few tips to the potential developer on how to recognise and deal with such rights. A right to light, like other easements, is a right enjoyed over land for the benefit of adjoining or nearby land. There are a number of ways in which the right can be acquired or created.

Does a right to light exist?

EXPRESSGRANT – Most simply, a right to light may be expressly granted or reserved by deed (usually in a transfer or a lease). If the land is registered and the right was created on or after 13 October 2003, the existence of the right should be discoverable simply by an examination of the appropriate register. If the right was created prior to 13 October 2003 or, indeed, if the land is unregistered, amore detailed inspection of the title deeds will be required.

IMPLIEDGRANT – A right to light may also be acquired by an implied grant or reservation (usually where land has been divided into two parts and either one or both parts is subsequently sold or let). A well-drafted lease or transfer will often exclude the implied grant of easements but where this is not the case and the correct conditions are satisfied, a court may be ready to infer the existence of an easement. Where the developer is aware that the land to be developed once formed part of a larger parcel of land in common ownership, this may be an indication that rights of light could be an issue and will warrant further examination of the title deeds.

PRESCRIPTIVERIGHT – More often, a right to light maybe claimed where light has been enjoyed for 20years or more by virtue of the rules relating to prescription. Where this is the case, the existence of a right to light is not likely to be discovered simply by looking at the title documents and a physical inspection of the property will be necessary (preferably combined with a basic knowledge of the land's recent development history). A developer should check whether there are any adjoining or nearby buildings that might benefit from a right to light. If there are no buildings, then there can be no right to light. If there are buildings, do they have windows, or apertures, overlooking the land to be developed? If not, again, there can be no right to light. However, if there are nearby buildings, whose access to light might be affected by the new development, it is quite possible that the development land will be subject to rights of light in favour of those buildings. A detailed consideration of the situation is necessary including looking at the ages of the buildings and a developer may wish to speak to a specialist surveyor to assist with this.

If rights to light exist that prevent a development, the developer is faced with a number of options:

- abandon the development;
- redesign the proposed development to avoid any potential infringement;
- negotiate with the owner of the right to light with a view to agreeing a financial settlement (at this stage, if not before, a specialist surveyor should be instructed to assess and value any potential loss of light);
- continue with the development and deal with any claims if, and as, they arise. This option has a risk, if the claim is successful, that the developer will be ordered either to pay damages or to remove the offending part of the building. The case of Regan v Paul Properties (2006) sounds a cautionary note on this. Although here the High Court valued the loss of Mr Regan's right to light as a result of development at around £5,500 and made a damages order, the Court of Appeal overturned the High Court's decision, and ordered the developer to remove the offending penthouse flat; and
- in limited circumstances a right of light obstruction notice can be served to prevent an adjoining owner from exercising the right for the necessary 20 years to gain a prescriptive right to light.

There have been a number of cases since the Regan case between developers and adjoining landowners claiming to have the benefit of a right of light that is interfered with by a development. These include Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2007] where the court gave a summary on the principles to be used when assessing damages for a breach of a right to light. Although these cases show that an injunction will not always be granted, they also show that adjoining landowners often try and use such rights to prevent a development.

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