

Keeping regeneration schemes alive

The past few years have seen the public sector seizing the opportunities presented by the booming residential and retail markets to regenerate run down districts within towns and cities in partnership with private developers. These developments are often ambitious in scope and include much needed modernisation of local community facilities and infrastructure as well as glossy new retail outlets and homes. However, the severe downturn in the economy has hit these projects hard and schemes across the country are faltering.

The need for regeneration has not, though, gone away: the existence of a development project often accelerates the decline of an already deprived area. This article looks at some of the options for Local Authorities and their developer partners trying to breathe life into these stuttering schemes and highlights some of the additional factors that those dealing with public bodies must take into account.

(a) Timetables

The timing of activities required by any development agreement needs to be looked at carefully. Developers are usually required to use reasonable endeavours to satisfy a number of preconditions, including obtaining planning consent and then to implement that consent within a tight timeframe. The obligation to satisfy those preconditions will rarely if ever be qualified by financial viability. Whilst developers may be confident that Local Authorities will be reluctant to enforce those obligations in the current climate an extension should be agreed to avoid the risk of proceedings and to give the parties a period in which to look at alternative ways of realising some or all of the scheme.

(b) Planning Permission

Also touched upon in our Real Estate Finance Article¹ one of the key factors when considering the length of any extension is the status of the planning permission. If a planning consent has been obtained it will have a finite life (usually three years) in which it must be implemented. Opinion is divided on whether it is preferable to allow the permission to lapse and apply for a new consent when the economic climate improves or to opt for partial implementation and so preserve that existing permission. Both options carry risks and costs.

Allowing an existing consent to lapse and then applying for a new permission has the advantage of enabling variations to the design to be accommodated to meet any changed requirements of the community and the market at the appropriate time. However, renewal can be very expensive with the undertaking of further impact assessments and possibly the risk of a challenge (these schemes often engender strong emotions in the local community). There is also the risk of a change in the political make up of the Local Authority if there is an election during the extension period.

Partial implementation of an existing planning permission will preserve it. This is an attractive option particularly where other factors such as stopping up orders and a CPO may be dependent on that permission. However, what will constitute implementation needs to be considered carefully in each case. Whilst the implementation works themselves may be relatively inexpensive, any pre-conditions attached to the planning consent must be complied with and certain works can trigger actions under associated planning agreements. Commencement of the works may also trigger a substantial SDLT payment for the developer.

(c) Partial implementation

The parties may want to “cherry pick” more viable sections of the scheme by way of more substantive implementation. However, before doing so they must bear in mind any restrictions under planning agreements which prevent occupation or opening of phases of the scheme before other elements are delivered, for example, infrastructure works, a car park or affordable housing. Many development agreements defer the Local Authority’s transfer or grant of a substantive land interest to the developer until after practical completion of the whole scheme. The parties will need to explore the possibility of changing or introducing the phasing of those transfers or grants before embarking on this cherry picking approach.

¹ Safeguards in a downturn

(d) Planning Agreements and Community Projects

Whilst the property sector was booming Local Authorities were able to negotiate significant contributions under planning agreements. The level of these contributions may no longer be appropriate and may affect the viability of the scheme. One of the underlying principles of planning law is that it must be reasonable and this applies equally to planning gain. It may be possible for certain elements of the scheme to be curtailed or provided by the Local Authority (although see, *EU Restrictions*). However, planning gain is a sensitive area and is often referred to when garnering support for the original scheme from the wider local community. The competing commercial and political constituencies within the Local Authority may have differing views to proposals to vary the planning gain and these will need to be carefully managed.

(e) Other partners

Regeneration schemes involve many parties, not just the developer and the Local Authority. These partners (for example, registered social landlords providing affordable housing) should also be included in certain aspects of the discussions. RSLs have responsibilities regarding the spending of any grants which may have been obtained in connection with their part of the scheme which should be investigated.

(f) EU Restrictions

One of the options when considering ways to preserve the viability of a regeneration scheme is to look at whether the relevant public body can contribute anything itself, for example, by paying for community facilities, putting in land at a lower or nominal value or undertaking certain infrastructure projects. However, such variations may constitute State Aid or give rise to public procurement issues. This is a complex area and each proposal will need to be carefully considered on its own merits and developers may need to provide an indemnity in respect of any claw back risk for the Local Authority.

Conclusion

Where developments are faltering, the parties need to be prepared to discuss the issues openly and frankly and to be creative in finding acceptable parameters within which the project can be allowed to continue. Recognising that Local Authorities have responsibilities both to keep the elected members and the local community informed and to manage their expectations will assist in progressing these negotiations.

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