

Newsletter

www.halliwells.com

Property

April 2005

ALL CHANGE ON THE HIGH STREET



The Town and Country Planning (Use Classes) (Amendment) (England) Order 2005 was made on January 21, 2005 and comes into force on April 21, 2005. The 2005 Order amends the Town and Country Planning (Use Classes) Order 1987. Of course, under that Order, a change of use of land or a building which might otherwise amount to a material change of use (and therefore "development" within section 55 of the Town and Country Planning Act 1990) will not amount to development for the purposes of that Act if the new use and the former use are both within the same specified use class.

The 2005 Order amends the principal 1987 Order by excluding from the specified classes use as a retail warehouse club (retail clubs where goods are sold or displayed for sale only to persons who are members of that club), and use as a night-club. It also includes in the shops class (Class A1), use as an internet café, and divides the former A3 use class (food and drink) into three new classes; Class A3 (use as a restaurant or café), Class A4 (use as a public house, wine-bar or other drinking

establishment), and Class A5 (use as a hot food takeaway). Express planning permission will therefore be required to change use to a pub, bar, takeaway or night-club. As night-club use is being expressly excluded from the Use Classes Order, planning permission will be required for a change of use both to and from a night-club.

Thought needs to be given to the drafting of property documents which refer to the Use Classes

Order. For example, where a lease restricts use by reference to a particular use class, care will be needed to ensure that any undesirable uses which might otherwise fall within the class specified will be excluded, or that desirable uses are not omitted. This might particularly be the case with a user clause in a lease restricting use to a class, such as class A3, which has narrowed under the 2005 Order. Thought needs also to be given to whether a particular property

Halliwells LLP Tel: +44 (0)870 365 8000

St James's Court Brown Street Manchester M2 2JF DX 14317 Manchester 1 Fax: +44 (0)870 365 8001
1 Threadneedle Street London EC2R 8AW DX 98933 Cheapside 2 Fax: +44 (0)870 365 8002
City Plaza Pinfold Street Sheffield S1 2GU DX 10525 Sheffield Fax: +44 (0)870 365 8003
100 Old Hall Street Liverpool L3 9TD DX14126 Liverpool 1 Fax: +44 0870 365 8004

info@halliwells.com www.halliwells.com

Halliwells

document is intended to refer to the Use Classes Order as amended from time to time, or as in force at the date of the execution of the document. Often, a document will state that any reference to an Act of Parliament or statutory instrument includes any modification or re-enactment

of it. This means that later amendments of the legislation will be applied. However, where controlling use in a lease, the landlord usually wants to ensure that the lease clearly states that any reference to the Use Classes Order 1987 is intended to refer to the Order as in force at the date

of the lease. If this has not been done, control of the permitted user is taken partly out of the hands of the landlord where the Use Classes Order is amended (as in April 2005) so as to widen a particular class.

CALLING TIME ON JUSTICES LICENSES

The Licensing Act 2003 is soon to come into force. It overhauls the law relating to licensing in England and Wales. The Act deals with the licensing of "licensable activities" which are defined as (a) the sale by retail of alcohol; (b) the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club; (c) the provision of regulated entertainment, and (d) the provision of late night refreshment.

The licensing authority for all licensable activities will be the local authority. The licensing justices will therefore cease to have jurisdiction to grant, transfer or revoke licences (although they will retain an appellate jurisdiction).

The Premises Licence

Under the Act, licensable activities can only lawfully be carried out under the authority of a "premises licence". The applicant for a premises licence will normally be the person who carries on the business that involves licensable activities. This could be an individual, company, or the proprietors of a partnership.

Under the Act, where a premises licence authorises the supply of alcohol, the licence must include a condition that no supply of alcohol may be made under the premises licence at any time when there is no "designated premises supervisor" in respect of the premises licence, or at a time when the designated premises supervisor does not hold a personal licence (or his personal licence is suspended). It is also a mandatory condition that every supply of alcohol under the premises licence must be made or authorised by a person who holds a personal licence. The "designated premises supervisor" in relation to a premises licence is an individual for the time being specified in that licence as the premises supervisor. An individual who holds a premises licence can also be specified in the licence as the premises supervisor.

Duration

A premises licence has effect until either it is revoked (under section 52), or the expiry of any limited time period specified in the licence. Under section 27, a premises licence lapses if the holder of the licence dies, becomes mentally incapable, becomes

insolvent, is dissolved, or if it is a club, ceases to be a recognised club.

Personal licences

A personal licence is necessary in order to permit the sale of alcohol at or from premises which have a premises licence. A personal licence is one which is granted by the licensing authority to an individual, and which authorises that individual to supply alcohol, or authorise the supply of alcohol, in accordance with the premises licence.

A personal licence is valid for an initial period of ten years, and may thereafter be renewed, but may be revoked under section 124 where, after a licensing authority has granted or renewed a personal licence, it becomes aware that the holder of a personal licence was

convicted during the application period of any relevant offence (set out in Schedule 4, but of a type which makes that person unlikely to be regarded as a fit and proper person to hold a personal licence) or any foreign offence. A personal licence may also be forfeited under section 129 where the

holder is convicted of a relevant offence by or before a court in England and Wales.

An individual may only hold one personal licence. A personal licence is void if, at the time it is granted, the individual to whom it is granted already holds a personal licence.

Commencement

The first appointed day is February 7, 2005. From then, local authorities will begin dealing with applications to convert existing licences to new licences, as well as considering new applications.

Application for conversion of an existing licence can only be made

within six months of the first appointed day (i.e. by August 7, 2005). The application should be made by the holder of the licence or by some other person, but with the holder's consent. Existing licences are held by individuals. New premises licences can be held by companies. If an existing licence is to be converted into a premises licence in the name of a company, the consent of the licence holder will be required. The conversion does not have effect until the second appointed day, and so the old licence will still be valid until then, and if it is revoked before then, any converted premises licence will lapse. Note that if a provisional liquor licence has not been declared final by the

first appointed day it will not be an existing licence that is capable of conversion. An application for a new premises licence will be required.

The second appointed day will be a date in November 2005 when the old regime will formally end. From the second appointed day, the sale of alcohol can only be permitted under the authority of a personal licence. It is an offence to carry out or to knowingly carry out a licensable activity otherwise than in accordance with a requisite licence, punishable by a fine of up to £20,000 and/or up to six months' imprisonment.

STANDARD FORM LEASES



When the Government first considered reform of the Land Registration system in 2002, it was proposed that there would be introduced a mandatory form of lease (Form L1) and a mandatory form of variation of lease (Form VL1). The proposals would have resulted in all new registrable leases having to be prepared using a standard prescribed form,

and all variations of registered leases being likewise prepared on a standard prescribed form. Following much criticism from the property profession, the Land Registry announced in January 2003 that it was dropping its proposals, but only temporarily.

Now, the Land Registry has revisited its proposals. Form L1 (or a suitable alternative) will be introduced sometime in 2005 or early 2006. Form VL1, however, will not be introduced.

The Land Registry assures the property world that it is not seeking to introduce a full standard form of lease. What is proposed instead is that lawyers will be able to continue to use their own preferred form of lease, but as an addition, they will have to include prescribed

particulars (in the form of a Form L1) or prescribed clauses. The Land Registry is considering two possible approaches:

- Using a "Form L1 front sheet". This would involve using a Form L1 for all new registrable leases. The form would run to several pages, and would require the landlord's solicitor to include in boxed format those matters that would normally appear on the front sheet of a lease (e.g. parties, date and property), as well as any matters that the Land Registry needs for registration purposes (e.g. options, easements, rents, restrictive covenants).

According to the Land Registry: "The Form L1 would contain all the information that Land Registry need to effectively process an application and may also assist

the practitioner in reminding them to include an application for the registration of, for example, easements."

- Using prescribing clauses. Instead of Form L1, lawyers would simply use their own form of draft lease, but would be required to include the information that would otherwise be contained in Form L1 at the front end of the lease, set out in

prescribed clauses. The Land Registry would not be prescribing how you draft those clauses – they would simply be requiring that your document contained those clauses, in the precise order prescribed by regulations.

One immediately apparent drawback is simply that the lease will look odd – whichever approach is adopted. But, whichever approach is adopted, its use will

be compulsory. The Land Registry had considered making the new system voluntary, but suspected that take up would be minimal. In any event, when e-conveyancing arrives, the Land Registry will need information relating to a lease to be presented to the Land Registry in a format that allows for ease of identification and input.

PROPERTY TAXATION



The VAT option to tax

HM Customs & Excise has issued a consultation paper relating to the election to waive the VAT exemption in property transactions. The paper, issued on December 2, 2004, is entitled "VAT: The Future of the Option to Tax: Consultation document." It comes about in part because of the need to introduce regulations before August 2009 which will deal with the method by which an option

tax can be revoked, and the effect of the revocation. At present, an option to tax can be revoked within three months of the election having been made, and after 20 years. (For elections made immediately following the introduction of VAT on property in 1989, the 20 year period is up in 2009 – hence, the need for regulations).

The paper deals also with a number of other significant issues relating to options to tax. These include considering the possibility of introducing a new right to revoke an election within the existing 20 year period; removing the ability to make "global" options (i.e. options to tax covering all of the properties owned by an elector, without the elector individually itemising the properties affected); alterations to the option to tax rules in relation to companies within the same VAT group; reviewing the need to opt separately in respect of land, and a building subsequently built on that land, and the need to re-elect if a building in respect of which the option to tax has been made is demolished, and then replaced; and reviewing the rules on what constitutes a building for election purposes where two or more buildings are linked by covered walkways.

CORPORATION TAX AND CAPITAL ALLOWANCES

The Inland Revenue has issued a consultation paper following an announcement made some time ago by the Chancellor that the Government would introduce a scheme (Business Premises Renovation Allowance) which would provide 100% first year capital allowances for the capital costs of renovating or converting unused business premises in

disadvantaged areas that have been vacant for at least a year. The measure needs approval from the European Union and would run for a period of five years.

In the consultation document ("Capital allowances: Renovation of business premises in disadvantaged areas: A consultation document", issued

by the Inland Revenue on December 2, 2004), the Government outlines the design of the scheme and asks for views on certain aspects of it. The paper also publishes the draft legislation governing the scheme, and seeks views on whether the legislation is technically correct. Comments are invited by March 1, 2005.

COMMONHOLD - IS IT REGARDED YET AS GOOD SECURITY?

The answer to that question today would have to be non-committal. The official view of the Council of Mortgage Lenders has remained unchanged over the last few months. On its website, the CML asks: "Will the Lenders' Handbook [a set of standing instructions for lenders' solicitors] cover Commonhold requirements?" The answer is positively: "Yes." However, a temporary caveat is explained: "We are currently considering what changes we should make to cover Commonhold in the Lenders' Handbook for England and Wales. We are unable to introduce new requirements until the Law Soci-

ety changes its Practice Rule 6(3) to cover Commonhold." Practice

beyond Practice Rule 6(3) may result the solicitor being unable to act.



The effect of this statement, therefore, is that solicitors are currently without standing instructions to act on the acquisition of a commonhold unit. Until the Law Society updates rule 6(3) (which sets out the permitted scope of a solicitor-lender retained where the solicitor acts also for the borrower), so that the CML can update the Lenders' Handbook, solicitors are left without standing instructions.

Rule 6(3) sets out what a solicitor can and cannot do when acting for both the lender and borrower. Any instructions that go

One particular concern that has been aired, and which affects any decision to create a Commonhold

CASE LAW UPDATE

SPEED IS ESSENTIAL WHERE LANDLORD'S CONSENT IS REQUESTED

Ever since the introduction of the Landlord and Tenant Act 1988, landlords and tenants have been aware of the need for speed on the part of the landlord when dealing with an application for licence to assign or sub-let. Where the tenant has applied for consent, the landlord owes a statutory duty to the tenant to give consent within a reasonable time (unless it is reasonable to withhold consent) or to serve written notice of the tenant of its reasons for refusal - again, within a reasonable time. The consequences of the landlord's breaching its duty is that if the tenant suffers loss as a result, damages will be payable. But the big question has always been: How long is a reasonable period time?

Landlords may be alarmed by the suggestions in [NCR Ltd v Riverland Portfolio No. 1 Ltd \[2004\] EWHC 2073 \(Ch\)](#) that, in the case of a sub-letting, once armed with all relevant information, 7 days might be sufficient. The judge said that: "In my judgment, a period of two weeks from the [date sufficient financial information about the sub-tenant was provided] was quite sufficient time for Riverland [the landlord] to make a decision. In fact, in the light of the facts that (a) the application was for a subletting so that the financial strength of the proposed undertenant and guarantor was somewhat less important than if the application had been for, say, an assignment, and (b) much of the information that any landlord could have expected was in Riverland's hands from [an earlier date], a period of seven days should have been sufficient." The landlord's response was too slow.

TOO LATE TO STOP ME NOW? THINK AGAIN

When seeking to build in breach of restrictive covenants, do not automatically assume that delay on the part of the person with the benefit of the covenant will rule out the award of an injunction. In [Mortimer v Bailey \[2004\] EWCA Civ 1514](#), it seems that it had been assumed that the delay on the part of Mortimer (to the building of Bailey's extension) would automatically deny him an injunction. He had, to a degree, stood by whilst the extension was being erected, and had therefore arguably acquiesced in the breach. An earlier decision of the Court of Appeal ([Gafford v Graham \[1999\] 41 EG 159](#)) suggested that an injunction would only be available if swift action were taken. Indeed, in that case, because of the extent of the delay in seeking relief, the court denied the claimant an award of damages too, stating that its acquiescence in the breach was sufficient to deny all forms of relief – legal or equitable.

However, this case re-iterates the discretionary (and therefore necessarily unpredictable) nature of injunctive relief. Acquiescence may very well deny relief for the claimant, but probably not in a case where the claimant had made clear all along his objections to the breach of covenant. One cannot simply assume that an injunction will not be awarded.

CASE LAW UPDATE

THE GREATER MANCHESTER MS

Those living and working in Manchester will have seen the striking "Giant M" advertising hoardings in and around the city which were put up four or five years ago to mark the city's regeneration. The agreements relating to the M sites re-ignited a long-standing legal debate. The case of [Clear Channel UK Limited v Manchester City Council \[2004\] EWHC 2873 \(Ch\)](#). saw a re-run of the traditional lease/licence argument – this time relating to whether the agreements in respect of the advertising hoardings amounted to leases (with 1954 Act protection) or mere contractual licences capable of termination by the council. The court was of the view that the agreement between the parties in relation to 13 M Sites created nothing more than licences. Of significance was the fact that "the Sites" (defined in the terms of the draft agreement) were not the areas of the concrete bases of the Ms, but larger undefined areas of land owned by the Council in which the concrete bases were to be placed. There were no plans attached to the draft agreement, and there was no evidence that there were any in existence at the date the draft which would identify the precise location of the concrete bases of the Ms. That being so, there were no defined premises of which exclusive possession could have been taken.

For Further information about this newsletter or any other queries please speak to

Alan Riley

Direct Dial: + 44 (0)870 365 2919

Email: alan.riley@halliwells.com

www.halliwells.com