Devonshires

Changes to the Planning Regime and Use Classes

The Government has announced that we are due to see a radical shake up of the planning system. The aim is to deliver a system able to support the acceleration of delivery of the development of new homes, hospitals and schools.

"Planning for the Future" and consultation on changes to the current planning system have been issued today. Whilst the consultation doesn't close until October, the message seems clear that the government are looking to the construction and development sectors to provide a platform to "build, build, build" the economy back to previous levels of growth.

One of the key elements that has enabled the housing sector to flourish is clarity. A stable planning system has provided a bedrock upon which landowners can make sensible decisions to build out or sell on as required rather than 'landbanking' in the hope of a legislative change that arbitrarily enhances the value. The stability creates the fluidity in the market.

It is fair to say that the phrase 'radical shake up' (or something very similar) has been heard numerous times before. However, the recent SDLT changes aimed at reinvigorating the housing market which in turn, by virtue of greater sales volumes, will increase the exchequer's 'purse' means that they have grasped the nettle on the legislative and taxation agenda to help drive growth in the economy.

Click here to read our recent article on the SDLT changes.

Amendments to the Use Classes Order and its impacts for landlords and developers

The Government has recently published theTown and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ("the Regulations"). These new regulations come into effect on 1 September 2020 and mark a significant deregulation of the planning system.

The Use Classes Order places the use of land and buildings into various categories. It provides that a change of use of a building, or other land, does not involve 'development' if the new use and the former use are both within the same specified class.

The main effect of the Regulations is to bring together a number of currently separate land uses into a single land use class. From 1 September 2020 existing buildings that fall within and are used for Class A1 (shops), A2 (professional services), A3 (restaurants), B1 (offices) and certain D1 (medical health) and D2 (indoor sports and fitness) will fall within the new the use Class E – *single commercial, business and service uses.*

A new use Class F1 '*learning and non-residential institutions*' will include the current Class D1 that aren't subsumed into the Class E and includes education, non-commercial galleries, museums, libraries and places of worship.

The new use Class F2 for '*local community uses*' includes small shops, community meeting halls, swimming pools and skating rinks. In addition, local shops (arguably for

local people) being those mostly selling essential goods including food to the public of up to 280m2 in size where there is no other such facility within 1000m. The quintessential village shop providing a community service.

Pubs (previously A4), hot food takeaways (previously A5), live music performance venues, cinemas, concert and bingo halls (previously all within D2) are now all added to the list of sui generis uses. Please note that from a practical point of view on the delivery of mixed use buildings with residential above a pub, bar or club we are still seeing a differing approach in relation to the valuation and availability of mortgage products between open market sale and shared ownership. We would recommend that those delivering shared ownership units consult with lenders prior to the delivery of a scheme. You may need to look at the specific drafting of the user clause in the lease to expressly prohibit certain uses to prevent the erosion of value on a scheme.

Other use classes C (residential), B2 (general industrial) and B8 (storage and distribution) remain unchanged.

The Regulations also introduce the concept of a 'part use' allowing a change of use of part of a building, use or planning unit to another Class E use without consent.

These changes are aimed at introducing a greater degree of flexibility of uses on the high street and in town centres to give businesses the flexibility to adapt and diversify to meet modern challenges in the high street. There is simply no point limiting the use of a high street shop to A1 if there is no demand for such space from both business owners and consumers alike. Covid-19 has arguably accelerated this change but it has been clear since before the Mary Portas review back in 2011 that the High Street has been ripe for change. Whether further legislation in the form of a sales tax or otherwise will seek to level the playing field between 'bricks and mortar' retailers and online retailers remains to be seen. Click here to view the full updated Use Classes Order table, located at the end of this article.

From 1 September 2020 planning permission will not be required for change of use within the three new Use Classes giving businesses and landlords significantly increased flexibility. Uses which were previously considered to be significantly distinct and different – shops, gyms or medical facilities no longer require planning applications because a move between them is no longer considered to be 'development'. The changes are not limited to high street locations. The flexibility the Regulations introduce will apply to any buildings within the relevant uses, potentially leading to significant changes to town centre locations, office blocks and retail/business parks.

The local town planners will need to think about how they adapt to these potential changes, how they could help create synergies between business and local clusters in particular areas and sectors and the impact on the existing infrastructure in an area. Similarly, the local authority may use Article 4 Directions (to remove permitted development rights) to modify or cancel the impact of these changes. Existing Article 4 Directions will continue to have effect.

Tenants are currently experiencing difficult trading environments in a number of sectors. A number have worked really hard to keep their businesses going in testing circumstances. Adapting to online services, takeaway offerings or working from home – depending on the relevant sector.

This in turn has a knock on effect on landlords – as if the tenant isn't trading during Covid-19, can they afford to pay the rents? The landlord in turn will often have to pay for the cost of borrowing from such rents and so they are also being squeezed. The discussion as to who is taking the risk on the rent due or potentially lost income remains ongoing with different parties reaching different commercial agreements and litigation pending in the courts in relation to the interpretation of insurance contracts and rent cesser provisions. Click here to read our article from the start of lockdown which covers some of the key considerations.

The changes noted above may provide tenants with a greater degree of flexibility in relation to the use of the premises during their tenancy.

The approach to permitted uses under a lease varies significantly within the commercial market, from specific uses (normally within short term leases) to allowing the tenant to use the premises within a certain class or classes of use. The approach varies in part down to where the investment value is held. A Tenant of a long lease will want maximum flexibility to preserve value over the length of the lease. As noted above, the landlord will want to protect their own interest particularly if they hold property with residential use in the vicinity. We have in recent years seen a much more detailed discussion around user cases – a position we expect to continue as we help broker the balance between value and flexibility of use.

Typically, the reference to a class of use in a lease was made in relation to the soon to be succeeded class order. Some may now ask what happens to their lease if the class

of use has changed. The first step would be to check the exact terms of the lease as this governs the terms of use of the premises. As well as checking the actual permitted use clause, you should also look at the change of law clauses including references to '*or such further enactment from time to time*'.

You should also consider the impact on the rent review clause (if applicable) and in particular the hypothetical terms of the reviewed lease.

If the lease is clear that the new order will apply then, unless there are further constraints on the use of the premises in the lease, a tenant may find that they have further flexibility in relation to the use of the premises in the future.

For those situations lacking clarity then the traditional method of landlord and tenant negotiations will undoubtedly apply.

For landlords, asset managers and funders alike these changes will enable them to reposition any voids in their portfolio and bring them back into use. If there is no demand for a retail unit then the space could potentially be reconfigured as say B1 usage to attract a new pool of tenants. Some consideration would need to be undertaken as to the impact on business rates but ultimately that will be the liability of the tenant under almost all leases.

For those current voids or new spaces coming to market we expect additional negotiation to take place in the following areas:

1. A more specific user clause to allow the amount of flexibility the landlord is willing to accommodate. We anticipate that rather than allowing the full gamut of the proposed class E that there are express exclusions included within the lease. Where the term is longer there will inevitably be more flexibility.
2. A more detailed 'prohibited user' clause – if you do not want a nightclub, pub etc in the development, you will need to set this out.
3. Alienation – can they share/sublet/enter into concession arrangement to help drive synergies and business and what is the impact of this on who the landlord is contracting with.
4. Rent review - what are the hypothetical terms?
5. Amenity space – particularly in mixed use developments – how do you properly regulate the position between the commercial use and potential breach of quiet enjoyment with any residential tenants at any development.

Transitional arrangements

There are transitional arrangements that will apply from 1 September 2020 to 31 July 2021. These cover existing permitted development rights and planning applications (submitted prior to 1 September 2020) up to the end of transitional period when revised permitted development rights will be introduced.

For more information on any of the topics covered in this article, please contact the below individuals.

Jonathan Corris
Partner
020 7880 4305
jonathan.corris@devonshires.co.uk

Hannah Langford
Partner
020 7880 4450
hannah.langford@devonshires.co.uk

Dan Moan
Partner
020 7880 4336
dan.moan@devonshires.co.uk

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Guide To Changes To The Use Classes Order In England

Use	Use Class up to 31 August 2020	Use Class from 1 September 2020
Shop not more than 280 sq m mostly selling essential goods, including food and at least 1km from another similar shop	A1	F.2
Shop	A1	E
Financial and professional services (not medical)	A2	E
Café or restaurant	A3	E
Pub or drinking establishment	A4	Sui generis
Take Away	A5	Sui generis
Office other than a use within Class A2	B1a	E

Use	Use Class up to 31 August 2020	Use Class from 1 September 2020
Hotels, boarding and guest houses	C1	C1
Residential institutions	C2	C2
Secure residential institutions	C2a	C2a
Dwelling houses	C3	C3
Use of a dwelling house by 3-6 residents as a ‘house in multiple occupation’	C4	C4
Clinics, health centres, crèches, day nurseries, day centre	D1	E
Schools, non-residential education and training centres, museums, public libraries, public halls, exhibition halls, places of worship, law courts	D1	F.1