

City of London Law Society Land Law Committee's response to the Government's consultation on Contractual controls on land

Introduction

This is the response of the City of London Law Society Land Law Committee to the Government's consultation on "Contractual controls on land".

The City of London Law Society represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The City of London Law Society responds to a variety of consultations on issues of importance to its members through its 21 specialist committees. This response to the Consultation has been prepared by the Land Law Committee, described as the Committee in this response.

If there are any questions in relation to this response, please contact Kevin Hart of the City of London Law Society at 4 College Hill, London, EC4R 2RB, email address kevin.hart@clls.org and telephone number 020 7329 2173.

Response

The Committee is pleased to respond to this important Government consultation on Contractual controls on land.

While there may be some benefits of having publicly available information about agreements that contractually control land (for example for local planning authorities), the Committee has a number of concerns with the proposals in the consultation. They are set out below.

Breadth of coverage of the regulations and impact on Land Registry resources

The Land Registry already has serious resourcing challenges leading to excessive delay in processing applications. Although the regulations are unlikely to go live for over 2 years, there will be worries about whether the Land Registry will have the resources to cope with the additional work involved with these regulations, without there being an adverse impact on their other workflows. That is especially the case if the regulations apply not only to options and pre-emptions but also to any and all agreements for lease since 2021 if not before, relating to a lease of more than 7 years and conditional on the carrying out of works, or on the obtaining of planning permission for change of use (albeit the 12 months requirement will reduce the number). It is not the stated aim of the legislation to capture such agreements and by making the regulations so broad, the concern is that this undermines the objectives of the proposals; as the data on land banking will become lost in the other arrangements being captured.

In relation to paragraph 57 of the consultation, the Committee also has concerns about "a contractual right of pre-emption or any other contract that prevents the proprietor of a legal estate in land from making a relevant disposition of that estate or which regulates the circumstances in which the proprietor can do so." The Committee considers that this could catch for example standard assignment provisions in an occupational lease. The Committee considers that the regulations should expressly exclude that situation. The Committee would suggest that there is a much more restricted set of arrangements captured initially,

particularly given the concerns that the Committee expresses elsewhere in this response as to the practicalities and costs of resourcing the requirements.

Retrospective effect of the regulations

Although the regulations are unlikely to come into force before April 2026, the requirement to provide information applies to agreements entered into from 6 April 2021 and even earlier in certain circumstances. Questions will be raised as to whether it is appropriate for the regulations to have this retrospective application. A grantee of an option agreement may have entered into an agreement say in April 2022 and protected this at the Land Registry with a unilateral notice (meaning that the agreement did not need to be submitted and only limited information needed to be provided). This may have been done for the very valid reasons of confidentiality and commercial sensitivity and yet now, retrospectively, information (some of which will be commercially sensitive) will need to be provided with criminal sanction for failure to do so. The approach is reflecting a recent trend, see for example the retrospective impact of the proposals on existing ground rents. The Government should give consideration to the regulations only applying to future agreements.

Criminal nature of offence

There are criminal offences for a failure to comply. While the Government is presumably including these as a strong incentive for relevant parties to comply, the question should be raised as to whether this is an appropriate remedy for breaches of these regulations, particularly if the regulations remain retrospective and capture agreements dating back to 2021.

Application to commercial property or to agreements not used for land banking

If the purpose of the regulations is ultimately to provide greater transparency in relation to the practice of land banking for example in the context of housing development, is it appropriate for the regulations to affect land intended for the development of commercial property? Also, option agreements, pre-emption agreements or conditional contracts, even if they have some link to development, are not necessarily always used for land banking. Such agreements may be needed for example to allow time to obtain a relevant planning permission for the relevant development.

What does “development” mean?

There is uncertainty inherent in the chosen word of “development” used in the regulations. This could include construction works and/or change of use (in a planning sense) and the Government should clarify whether it is the intention that such development should be disclosed. For example, are the regulations intended to capture an agreement for the grant of an occupational lease of commercial premises which is conditional only on obtaining a planning permission for change of use (between whatever use classes)?

How do the regulations encourage new housing?

No evidence has been provided to demonstrate how the regulations will specifically encourage the construction of new housing. Other factors such as the planning system (for example, the length of time it takes to get consent, or extensive pre-commencement conditions) or factors making development

uneconomic for a developer, including planning obligation requirements, inflation, borrowing costs and likely sale values, will be bigger reasons why new housing developments are being stalled.

Negative impact of regulations on new housing

The Committee has a concern that, in certain circumstances, the regulations might deter or inhibit development of new housing. Option arrangements are often used in connection with site assembly to ensure that land can be acquired from a number of different landowners at an appropriate commercial price to enable a development to proceed. If details of those agreements are registered, then that will alert subsequent landowners to the possibility that they have a ransom position in relation to a proposed development, which could disincentivise or delay developers from bringing forward schemes involving site assembly from a number of landowners.

Additional costs of required professional advice

The grantee of a relevant agreement may need to incur additional costs in seeking professional advice to comply with the requirements – this is particularly an issue for agreements entered into before the regulations come into force. That would be a particular concern for developers given the proposed wide reach of the regulations, which would catch many transactions that do not relate to land banking, such as agreements for the grant of a commercial lease, subject to planning.

Type of information being captured

Thought needs to be given to the information being captured. For example, for “Agreement type” the consultation suggests there will be multiple options but only one choice. However, an agreement might have more than one arrangement. For example, both an option to buy and also a pre-emption. Similarly, for “End date” the options are a fixed date or “in perpetuity” whereas the end date of an agreement might not be fixed. For example, it might be extendable if a planning application remains undetermined or a planning permission is subject to a challenge. In those situations, while the End Date may not be fixed, it would not be appropriate to describe this as an arrangement “in perpetuity” as the end date will be linked to when the planning application is determined, or proceedings resolved. The Committee is also not clear why the SRA number of a solicitor should be provided as the Committee does not see how this helps the policy objectives of identifying the details of contractual controls on land. In most cases, matters are taken on by a firm rather than an individual and more than one solicitor may work on a matter.