

## **Alert** | Real Estate



September 2020

### **Under Control? A Call for Evidence Around Land Control in the UK**

The UK government is consulting on proposals to make certain data in respect of ‘contractual control’ interests in land (rights of pre-emption, options and estate contracts) publicly available.

In the August 2020 white paper, *Planning for the Future*, the government confirmed its intention to move towards a modernised, open-data approach within the planning system and explained how data on land ownership and control is essential to achieve this. By increasing transparency around contractual arrangements used to exercise control over the acquisition and disposal of land, the government hopes to improve the development process and encourage further entry into the house building market.

#### **Current Position**

The Land Registry publicly registers the ownership of land in England and Wales. Once land is entered in the register any changes to ownership or entry into charges or leases affecting the land are recorded.

However, not all interests affecting land are recorded in detail on the register. Contractual control interests are typically protected by the entry of a notice on the register together with, in some cases, a restriction against the registration of a disposition of land without consent.

Notices can be unilateral or agreed and ensure priority of the interest protected so it can be enforced against a subsequent owner. Unilateral notices require no documentary evidence – only a brief description of the protected interest and the name and address of the beneficiary. Agreed notices require supporting documentation (and can therefore be less popular where parties want to keep terms private,

albeit commercially sensitive details can be exempted), but the key information is still not available on the face of the register.

Depending on the type of protection, the terms of the interest including the owner's ability to freely use, develop or dispose of the property (as applicable) may not be easily available, or indeed at all.

### **Government's Proposals**

The government proposes to collect and place additional data on the register and publish a contractual control interests' dataset, making it apparent where land is subject to a contractual control interest and details of the beneficiary and other terms publicly available.

The ability to use a unilateral notice to protect a contractual control interest would be removed. Instead there would be a requirement to apply for an agreed notice but not until certain data had been supplied as a pre-condition. The current procedure for exempting prejudicial information, contained within supporting documentation, would be retained save where the additional data was a requirement. Interestingly, the ability to enter a restriction in relation to a contractual control interest will remain. Parties to these documents could presumably therefore choose to treat them in the same way as non-land contracts and give up the protection that a unilateral or agreed notice affords, relying instead on a restriction on title requiring novation to a third-party purchaser as a condition of consent to a disposal.

The proposed additional data requirements differ depending on the type of contractual control interest. Common data fields, for all types of contractual control interests, include confirmation of the duration of the interest; termination provisions and whether the interest is capable of being assigned or charged. In terms of estate contracts (for example, conditional contracts for the sale of land), the government is specifically targeting long-term contracts (completing more than six months after exchange) conditional on obtaining planning permission. Estate contracts would require confirmation as to whether the contract was conditional; details of any deposit paid and the price. Options would require confirmation as to the type of option (put; call; put and call); details of any lockout periods and again price, together with details of any premium payable. Whether data appeared on the register or in the dataset would depend on the data field, but it is not proposed to include any price details on the register.

Beneficiaries of all contractual control interests would have to provide a Legal Entity Identifier (LEI) – a unique global identifier in the form of a 20-digit, alpha-numeric code for legal entities participating in financial transactions. The holder of an LEI must report both their direct and ultimate accounting consolidating parent enabling links to be made between subsidiary companies holding contractual control interests and their parent companies within larger corporate structures.

An individual's contractual arrangements or rights relating to the acquisition or leasing of residential property (save for options dependent on the fulfilment or non-fulfilment of a condition that required planning permission), testamentary options or any statutory rights, for example a tenant's right of enfranchisement pursuant to the Leasehold Reform Act 1967, would all be exempt. There is also no proposal to apply this system to contractual control interests in unregistered land.

## Principles Behind the Proposals

The government has stated that it has two principles in mind – (1) securing the public interest in greater transparency around who is in control of land and (2) limiting the burdens on business.

According to the white paper, the government believes that disclosing data on land subject to contractual control interests will help facilitate the development process for planners and developers. Identifying suitable development land can be costly and time-consuming, and the lack of available and/or viable land acts as a barrier to home building by SME builders and new market competitors. It is suggested that by providing better data, the time and cost associated with site identification will reduce, and barriers to entry will be lowered encouraging more companies to enter the house-building market and help build the homes the recent white paper reiterates the country needs. Additional data such as conditionality will also theoretically enable communities to be more informed about the likely pattern of local development.

To minimise the burden on businesses the government proposes to simply adapt the existing agreed notice procedure to collect the additional data required, placing a reliance on the self-interest of beneficiaries to note their interests and avoid the financial and legal risks associated with no protection.

## Impact of the Proposals

This would be a significant overhaul of the existing regime, and the proposals would have a considerable impact on developers in particular. Supporting documentation, which may include sensitive business information, will be required to be disclosed and therefore publicly accessible. Removing prejudicial information is possible but a cumbersome task in itself and does not override the requirement to provide the considerable amount of data required to obtain protection. The concern, of course, for developers will be that absolute transparency does not always result in successful site assembly; without a fully assembled site it is difficult to make a credible planning application.

The proposals may extend beyond rights of pre-emption, options and estate contracts to include other types of contractual arrangements pursuant to which a third party can exercise control over the acquisition and disposal of land. Collaboration or consortium agreements, for example, provide for parties to act together to obtain a planning permission for the development of land which may be held pursuant to an option. Certainty as to the types of contractual arrangements affected would be required and/or a list of excluded arrangements.

Acknowledging that application of the proposals to existing arrangements could be unduly burdensome, the government is proposing to limit this to existing interests which are assigned, novated or varied. Failure to provide the additional data at this point would result in a loss of existing protection. This is an extreme response (with a high degree of consequential risk for the beneficiaries) to what could simply be an erroneous oversight, especially if the beneficiaries' details on the register are not kept up-to-date. Perhaps this is why the government has asked for views on how best to inform current beneficiaries of the need to provide additional data.

Beneficiaries of contractual control interests would also be required to certify in their annual accounts that all relevant interests are the subject of an agreed notice. Furthermore, there would be a potential duty for the board of the beneficiary (assuming a legal entity) to certify that all relevant contractual control interests have been noted. As a minimum this would require additional time and cost spent on preparing annual accounts and identifying the relevant interests – no mean feat especially within larger corporate structures.

## Conclusion

The Land Registry remains committed to improving transparency around the control of land and becoming ‘*the world’s leading land registry for speed, simplicity and an open approach to data*’.

The aim of this call for evidence by the government is to seek a better understanding of the types of arrangements that exist and to canvas opinion on how best to improve transparency around them and what additional data should be made public. The views and comments the government obtains will help refine the proposals, minimise the costs to business and maintain the integrity of the land register. However, the onus is equally on those who will be directly impacted by the proposals to highlight where potential issues may arise.

The **consultation** closes on 30 October 2020.

\* *This GT Alert is limited to non-U.S. matters and law.*

## Authors

This GT Alert was prepared by:

- Sarah Louise Atkinson | +44 (0) 203.349.8726 | [atkinsons@gtlaw.com](mailto:atkinsons@gtlaw.com)
- Rachel Whittaker | +44 (0) 203.349.8863 | [whittakerr@gtlaw.com](mailto:whittakerr@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. <sup>~</sup>Houston. Las Vegas. London. <sup>\*</sup>Los Angeles. Mexico City. <sup>+</sup>Miami. Milan. <sup>»</sup>Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul. <sup>∞</sup>Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. <sup>^</sup>Tokyo. <sup>\*</sup>Warsaw. <sup>~</sup>Washington, D.C.. West Palm Beach. Westchester County.

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