



### **FLOOR SPACE RESTRICTIONS BITE EVEN THOUGH MEZZANINES ARE NOT EXPRESSLY BANNED**

A recent case in the High Court involving Land Securities has turned accepted wisdom on the effectiveness of planning conditions to control floor space in retail developments on its head.

#### **Condition restricts Floor space?**

The case involved Land Securities, who owns the Nene Valley Retail Park in Northampton. The Retail Park was granted outline consent in November 1987 subject to a number of conditions, one of which (condition 6) restricted the amount of non food retail floor space to 150,000ft<sup>2</sup> (13,935 m<sup>2</sup>) gross. A subsequent permission for the variation of condition 6 increased the non food retail floor space limit of the Park to 160,000 ft<sup>2</sup> (14,864 m<sup>2</sup>) gross.

Planning permission had been sought in 2001 for the installation of a mezzanine floor in units 7 and 8 of the Park. The local planning authority, Northampton Borough Council (NBC), refused the application but the mezzanine was installed in any event. An application for retrospective planning permission was made and also refused by the Council. An appeal was lodged and subsequently dismissed in May 2003.

Land Securities then proceeded to apply for a lawful development certificate for the mezzanine which was, unsurprisingly, also refused by the Council in April 2004. In May 2004 the Council took enforcement action against Land Securities for the failure to comply with condition 6 of the 1987 consent, as subsequently amended, on the basis that the installation of the mezzanine caused the breach of the floor space limit.

Land Securities appealed against both the enforcement notice and the refusal of the lawful development certificate and an Inquiry was held in September 2004. In October 2004 the Inspector allowed the appeals and quashed the enforcement notice. The Inspector concluded that a condition limiting floor space in an outline consent had the effect only of defining the scope of any subsequent reserved matters submission. If such a condition was meant to also prevent, for example, the installation of mezzanine floors which, as they were not development would otherwise not require planning permission, then it should expressly say so. As it did not, then condition 6 should not be construed in such a way.

---

#### LONDON OFFICE

Morley House  
26 Holborn Viaduct  
London  
EC1A 2AT

Tel: 020 7583 6767  
Fax: 020 7583 2231

#### CHELTENHAM OFFICE

Burlington House  
Lypiatt Road  
Cheltenham  
GL50 2SY

Tel: 01242 259290  
Fax: 01242 259299

#### NORTHAMPTON OFFICE

Wykes Farm  
Allens Hill  
Bozeat  
Northampton NN29 7LW

Tel: 01933 666391  
Fax: 01933 664861

## High Court Intervenes

NBC appealed to the High Court. It successfully argued, in front of Sullivan J., that condition 6 should be read on its face and that the “restriction” in the condition, to the “reasonable reader” should be taken to mean that this was an absolute limit on the amount of retail floor space that could be developed at the Nene Valley Retail Park. Sullivan J. concluded that this was a case of a condition being construed by Land Securities in a “legalistic rather than in a commonsense way”. He allowed the challenge accordingly.

This decision has potentially serious ramifications for the retail industry that go way beyond the confines of the Nene Valley Retail Park. A previous Inspector’s decision in Tamworth (September 2003) had, in effect, rendered conditions that imposed floor space restrictions ineffectual. On the strength of the Tamworth decision retailers began to install mezzanine floors where there were no conditions expressly preventing this. Now, however, it would appear that mezzanines so installed are unlawful, where the floor space restriction in a condition is breached as a result.

Even in situations where a lawful development certificate has been issued these may now not provide immunity from enforcement as the decision to grant them would have been made on an incorrect premise. That said, there is some doubt as to whether a local planning authority, having issued a lawful development certificate for a mezzanine would be justified in subsequently taking enforcement action in the light of the Northampton case.

It remains to be seen whether Land Securities will take the matter to the Court of Appeal but all those with significant investment riding on this case will hope this is not the end of the story.

For further information on this case, or on retail matters in general, please contact Steve Wilson on 020 7832 1472 or at [steve.wilson@cgms.co.uk](mailto:steve.wilson@cgms.co.uk).