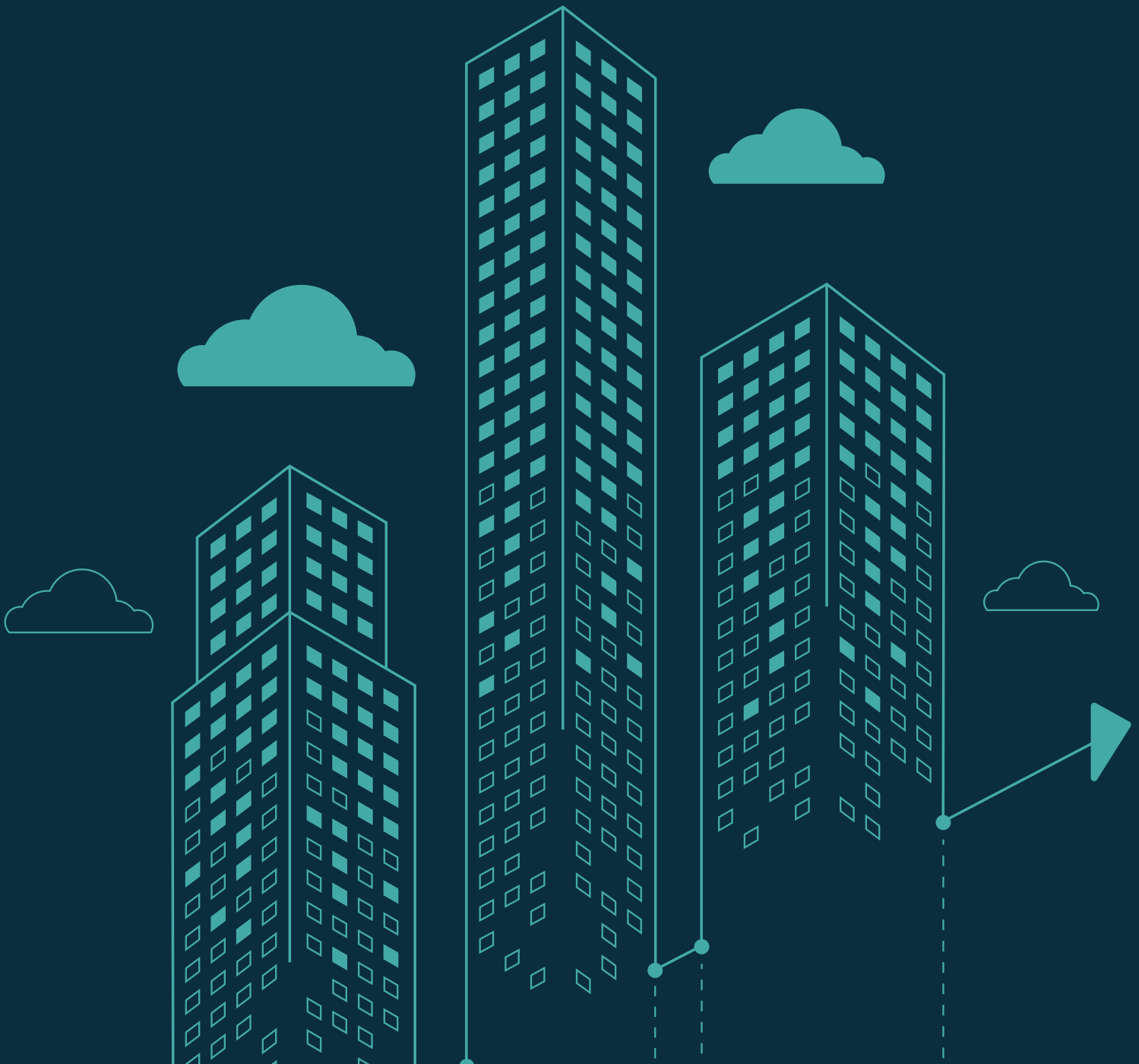


Move On Up

Airspace Development



FORTUNE GREEN
LEGAL PRACTICE



Contents

Introduction - Why Airspace?	3
What is Airspace Development?	4
Managing Your Project Part 1: Feasibility	5
Managing Your Project Part 2: Planning	9
Managing Your Project Part 3: Lots of Legal	11
Managing Your Project Part 4: Let's Get Building	16
Become an Airspace Developer	18



Introduction - Why Airspace?

The Mayor of London's London Plan of 2021 sets out ambitious plans for the construction of 65,000 homes per year across the capital, with a reduction on the density cap within land use. This has significantly opened up the market for development on top of existing buildings, colloquially known as 'airspace development'.

Early estimates by Knight Frank envisage that 40,000 new homes could be built by merely utilising the roofs of existing buildings, presenting a unique opportunity for property developers.

We look at the opportunities and challenges presented by airspace development and how project managed advice from relevant specialists can reduce costs, risk and produce excellent outcomes for developers and property owners alike.

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What is Airspace Development?

It's simple - airspace development is building residential properties on the roof of an existing building.

Wherever there is a roof, there is the possibility that it can be used for the development of residential flats. Clearly, not all roofs are equal and a nice, flat roof will likely be more attractive to a developer than a pitched roof; but all roofs present opportunity.

Why haven't I heard of airspace development before - is it new?

Airspace development is not a new idea, by any means. What has changed is the attitude of the government, planners, funders and property developers to airspace development meaning that it's now being seen as a viable way to increase residential development in dense urban areas.

Also, advances in off-site or 'modular' construction methods means that many of the costs associated with the construction of rooftop properties and the issues of the load-bearing capabilities of buildings have been mitigated.

Ok, I'm in - what's required?

This guide seeks to provide an introduction to the legal, practical and other considerations for property owners and developers to take full advantage of the opportunities offered by airspace development.



Managing Your Project: PART 1

Feasibility

The biggest challenge of airspace development is that of feasibility: is it feasible to develop the roof of a building at all and, if it is, is it feasible to develop for a cost that will make the development possible?

From our experience, we estimate that 25%-30% of roofs are actually feasible for development. Hence, for airspace developers the sunk cost risk is high.

At Nockolds we offer a fixed-fee legal service to carry out an initial legal feasibility study to minimise our clients' sunk costs risk. Even so, there are a number of additional challenges to overcome.

Before developers expend significant costs in proceeding down the route of airspace development, there are initial steps that need to be taken to ascertain whether you'll be able to develop the rooftop.

1. WHAT'S ON THE ROOF?

As with any development site, a prudent airspace developer will inspect the roof before expending any time and money in exploring the opportunity further. The 'site' in an airspace development is a roof, and on roofs there are certain items developers should be aware of that are signs of increased cost or timescales in the future. You should look out for:

- » Telecommunication masts;
- » Utilities cupboards;
- » Lift shafts;
- » Aerials and satellite dishes;
- » Light wells;
- » Rooftop drainage; and in particular
- » Evidence that tenants have been using the roof for their own purposes.

All these items signify feasibility issues or challenges that may require time and cost to overcome. Fortunately, the initial inspection can be dealt with by you with no third party costs incurred, so from the get-go you'll be able to make a decision as to whether a roof is worth pushing forward on.

2. THE TITLE TO THE BUILDING

At a very early stage, a freeholder or developer should obtain a high-level review of the title to the building (and adjoining buildings if necessary) and of the existing residential leases of the building.

Does the seller even own the roof? Do any third parties have rights over the building that may impact upon the ability to develop the airspace? Are there restrictive covenants to which the property is subject that may restrict the development of the airspace? Are there leases to third parties in place, for example utilities companies for telecommunication masts.

All of these issues must be considered and cleared down before substantive expense is incurred by a freeholder or developer.



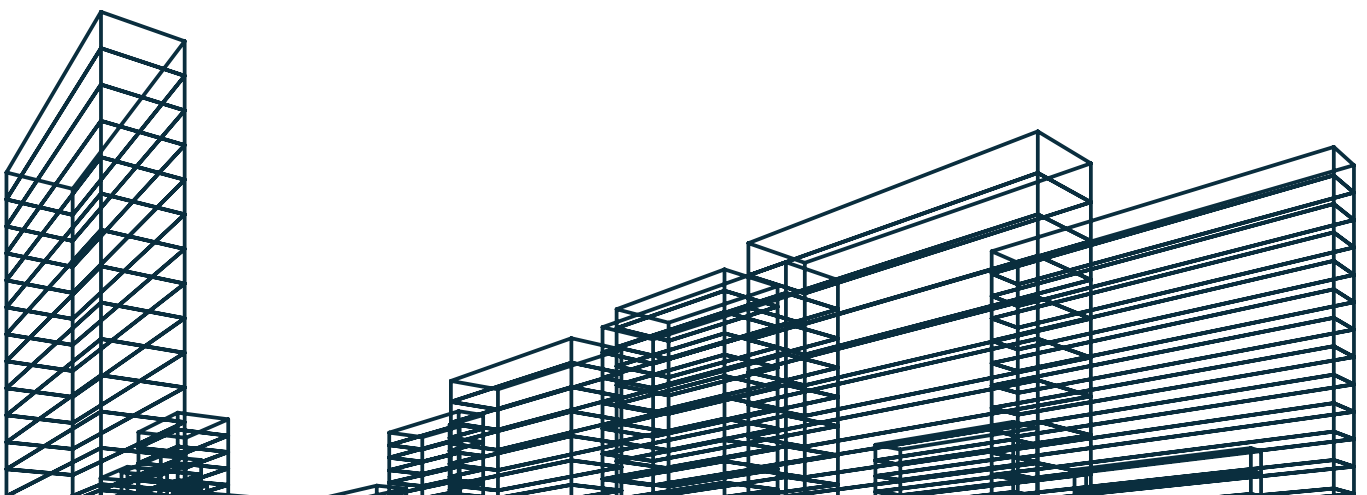
3. THE EXISTING LEASES

The next step in a title suitability review is to consider the existing leases.

The reasons for this are many, the most important being:

- » Do the rights granted to the tenants in the leases impact on the rooftop? For example, do the tenants have rights to use the roof for leisure purposes?
- » Are the boundaries of the existing flats clear and unambiguous in the leases? There has been significant litigation on whether tenants can claim that they have the rights to the airspace of a building due to their demise clauses being ambiguous.
- » Do the leases reserve to the landlord sufficient rights to enable development? Modern leases will reserve a specific right to develop, but older leases will likely not. That being the case, there needs to be sufficient other rights reserved to the landlord to enable that development - for example, rights to use the common parts, erect scaffolding, enter into existing flats, etc.
- » Do the leases prevent the landlord from creating more leases? Although this restriction is rare, there are leases that prevent the landlord from creating further leases of a building.
- » Does the service charge provision require the tenants to pay a fixed percentage of the service charge meaning that by adding additional flats, the service charge percentages will be more than 100%?
- » Do the leases allow the relocation or connection into existing service media to serve the new flats that will be constructed on the building? Are there utilities that are located on the roof, such as air conditioning units or satellite dishes that may not be able to be moved?

The fact that the leases are not perfect is not a death toll for an airspace development, but it does make the proposed development a lot more difficult; not least as you'll likely need to obtain variations to each of the leases which, itself, has additional legal challenges to overcome, the agreement of all tenants, and of course, additional legal costs.



4. LOAD BEARING OF THE BUILDING

Development on top of an existing building may not always be possible or viable. There are many technical issues to consider, such as whether the existing building has sufficient structural strength.

The first hurdle to overcome is to confirm that the building will support a proposed development for which a civil engineer will need to be retained to provide a report and to confirm what, if any, structural support works will be required. For a freeholder, the report should be made available for a rooftop developer to review when they're doing their due diligence and the freeholder should ensure the terms and conditions they enter into with the engineer allow that report to be relied upon by a potential developer.

5. UTILITIES

As with any standard development you need to be aware of how the utilities are going to get to the development and whether they're going to have sufficient capacity to service the development. The nuance of airspace is that, in addition, you need to ensure that the existing water and drainage will have sufficient pressure to meet the requirements at the top of the building and that you'll be able to make connections into the utilities systems from the roof.



Managing Your Project: PART 2

Planning

Getting through the planning process smoothly will be key to the success of your airspace project. **Fortune Green Legal Practice** sets out the key considerations to watch out for.

The permitted development rights that came into force on 31 August 2020 now permit additional storeys to be built on top of existing buildings to create new flats.

This right applies to buildings in commercial use, both to those with a specific commercial use, or to mixed use buildings. In addition, for dwelling houses, there is now the right to build up to two new storeys - one storey if the original house consists of one storey, and up to two if the original house has two or more storeys.

There are some contexts where the permitted development rights do not apply, such as for listed buildings, buildings within a conservation area, an Area of Outstanding Natural Beauty, a National Park, the Broads, or on World Heritage Sites. If your building is within a restricted site, you will need to apply for planning permission, following the normal process.

Also, to benefit from the rights your building must have been constructed after 1 July 1948 and before 5 March 2018. However, if the buildings have already been enlarged with an upwards extension of one storey or more, you will need to apply for planning permission.

Depending on the type of building, whether detached or terraced, there are height limits to observe.

Where the permitted development rights apply, you can use the prior approval process. This is a “light touch” regime, as long as you ensure that the local planning authority has all the necessary information to make a decision. The factors that will be considered will depend on the location of the property and whether there are, for example, other commercial buildings in the area. All prior approval will look at factors such as:

- » Transport and highways impacts of the development
- » Contamination risks
- » Flooding risks
- » The external appearance
- » The provision of adequate natural light in the new dwellings
- » The impact on the existing buildings in the vicinity in terms of privacy, overlooking, and loss of light.

Developers should provide a construction management plan, too. This should set out measures to be taken to protect occupiers of neighbouring buildings from noise and disturbance during construction.

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Linda Felton

Fortune Green Legal Practice solicitors offer bespoke, expert advice in Town and Country Planning law and can help you deal with a wide range of planning issues.





Managing Your Project: PART 3

Lots of Legal

Once you're satisfied that it's possible to develop the airspace, the next step is to start the legal procedure. This can be complex and time consuming, not least due to the two-month time scale required for the statutory notice procedure.

Nockolds' Head of Leasehold Enfranchisement, Lucy Riley, discusses the challenges of existing tenants' right of refusal.



Lucy Riley

Lucy is an expert in the field of leasehold enfranchisement, advising landlords and tenants on freehold purchases and lease extensions. Lucy also advises on commercial property transactions and mixed use buildings.



Statutory Notice Procedure

The building is likely to be subject to legislation which provides that before the airspace lease is granted, the owners of the long leases of the flats will need to be offered the right of first refusal of this lease. The process is as follows:

- » Notices are served on all qualifying flat owners notifying them of the main terms of the proposed lease and the premium payable;
- » The notice will confirm that a majority of the flat owners have the right to purchase the airspace lease collectively, provided that they serve a valid acceptance notice within the statutory two-month period;
- » If the flat owners do not serve a valid acceptance notice within the statutory two-month period the airspace lease can be granted at any time over the next 12 months, provided that it is granted on the terms set out in the offer notices;
- » If the flat owners serve a valid acceptance notice they must then serve a notice providing details of the individual/s or company that will act as the purchaser of the airspace lease (the nominee purchaser) within the further statutory period of two months;
- » Once both notices have been served by the flat owners, exchange of contracts and completion of the airspace lease will follow in accordance with the statutory time limits.

Failure to adhere to the statutory time limits for exchange and completion is likely to result in a substantial delay to the grant of the airspace lease, service of fresh notices and costs payable to the nominee purchaser and/or the flat owners. It could also result in the airspace lease being transferred to the flat owners at a later date and, in theory, a criminal prosecution.

Contract

While there's nothing stopping a buyer and seller entering into a contract for the sale and purchase of the airspace, a contract cannot be entered into until the two-month period for the statutory notice procedure has been satisfied. This provides a quandary for developers – you don't want to expend significant sums of money on solicitors, surveyors and obtaining planning permission without binding the seller into selling to you. The most usual route for sellers and buyers is to enter into an Exclusivity Agreement. This means that the seller cannot negotiate or sell the property to anyone else within the agreed exclusivity period. However, it does not bind the parties into completing the sale and purchase and there is still a risk for a developer that the seller may just wait for the exclusivity period to end before remarketing the property, presenting a sunk-cost risk to developers.

What Are You Going to Buy?

The most usual way to purchase airspace is to take an airspace lease.

AIRSPACE LEASE

Whether you're a developer or a freeholder, there will need to be a long lease of the roof and of the airspace that will enable the development of the residential units in accordance with the planning permission granted.

There are a number of considerations for both the freeholder and the developer when dealing with the airspace lease, including matters such as how the developer is going to access and build on the roof (is the developer going to need scaffolding?), how the service charge is going to work following the build, who's going to insure the build and who has liability for it, how far above the building the freeholder will grant for development, etc.

What a developer is looking for is a lease that will enable the developer to build the development, sell the flats once that development is completed and then walk away from the development without having to be concerned about it ever again.

FREEHOLD

Purchasing the freehold of a building has significant advantages in terms of dealing with the existing tenants, especially if you need to vary the existing leases. It also enables you to enforce the tenant covenants in the existing leases, which you would not be able to achieve with an airspace lease.

The disadvantage is that you become liable as landlord to the tenants of the building and must comply with all of the landlord covenants (to keep the building in repair, for example) and be liable for any breach of the covenants for quiet enjoyment.

Design with Modular in Mind

Designing a modular building requires a different mindset to designing a traditional building and there are different restrictions imposed as a result. Primarily (at feasibility stage) the following factors should be considered:

- » Site access and the general route to the site - are there any low bridges / narrow roads that need to be taken into consideration?
- » Site laydown areas - can the modules be stored on site or do they need to be installed straight off the delivery vehicle?

The above will determine the most economical and realistic size for your module(s). The accommodation must then be designed to accommodate this.

- » Never design the space traditionally and then try to accommodate modular design later - this will be inefficient and costly;
- » Flexibility is limited when designing modular homes - careful and thoughtful design is required early on to reduce the potential for redesign or alteration works later down the line;
- » Interfaces between modules need to be carefully considered - how is this represented (or not) within the internal finishes?

- » Consideration for connection to services needs to be incorporated. Once a module is placed, is there sufficient access for follow-on works?
- » Fire protection of the structure needs to be carefully considered early on – what is the strategy?
- » Acoustic performance between modules needs to be considered (particularly across party walls). Careful detailing is required to minimise flanking / acoustic transference between modules;
- » External finishes - modules can be over-clad in almost anything – brickwork, timber, aluminium cladding, zinc etc. The aesthetic of the development should not be an issue if designed properly and intelligently from the beginning;
- » End user feel is key! - Ultimately, if the design, detailing and installation are executed successfully - the end user will not know that they are in a modular homeS.

Daylight and Sunlight, Rights to Light and Oversail

From a legal point of view, the due diligence carried out by a solicitor on an airspace development is similar to what would be carried out against usual development. There are, however, some nuances associated with building up that require additional expertise.

Nicholas Ealey of Point2 Surveyors details the additional considerations you need to be aware of to get your development off the ground or, rather, the roof.

Daylight and Sunlight

Local planning authorities and planning inspectors will consider the suitability of a proposed scheme for a site within the context of BRE guidance. Consideration will be given to the urban context within which a scheme is located, and daylight and sunlight will be one of a number of planning considerations which the local authority will weigh.

This early stage is crucial in order to support both architects and developers in achieving optimum densities, whilst maintaining a good quality of daylight and sunlight amenity, both to existing neighbours and future occupants.

Innovative techniques can ensure technical assessments are undertaken in line with national standards, whilst overcoming major daylight and sunlight issues at planning in order to achieve planning permission.

Wide Area Assessment modelling helps inform the contextual daylight and sunlight levels within established built environments, enabling client support through the planning process and to justify the use of alternative target values which may be required in dense urban environments.

Rights for Light

A right to light is an easement. It is a legal right to enjoy light to a building across land not in one's

ownership. Where the redevelopment of adjacent land materially harms the light to a building to the extent that that is considered a nuisance then the affected interest can take private legal action.

A right to light is one of the key constraints for developers, therefore strategic advice may be required to enable developers to design the best schemes for development sites whilst navigating through often challenging right to light restrictions.

Detailed understanding of risks associated with development opportunities is crucial. Throughout the design development stages of a project, close liaison with the architects, devising design solutions that seek to reduce rights of light risks wherever possible, is likely to be a requirement.

Identification of key risks and advice on how best to manage them is crucial. Liaison with industry specialists such as insurance brokers to provide targeted strategic advice to comprehensively resolve rights of light risks and manage them appropriately may be part of the risk mitigation strategy and, if required, to proactively secure rights of light agreements with affected neighbours through negotiation.

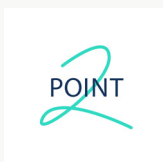
Oversail

The use of tower cranes is common on construction sites. An inevitable consequence is that the jib of the crane will most likely oversail adjacent sites. Even if the operation of the crane can limit the swing of the jib, when the crane is not in use, safety and structural stability require that the jib must be left to swing in the wind, thus any property within the swinging circle will potentially be oversailed.

English law provides that a landowner owns all the airspace above the land, this means that the jib of a tower crane swinging across land owned by an adjoining landowner is trespassing.

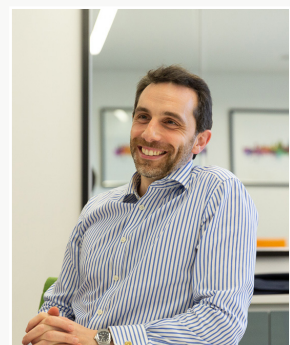
As with so many development constraints, the key is to address them early, in some cases with the use of a crane oversail licence.

Adjoining owners may seek a fee to grant the oversailing rights needed in addition to payment of the adjoining owner's costs and fee of putting the licence in place. There is no set formula for working out these fees, however the fee should take into account the impact of the use of the tower crane on development costs, compared with the use of other construction methods, and any costs of the adjoining owner arising from the arrangements.



Nicholas Ealey

Nicholas specialises as a rights to light and daylight / sunlight surveyor. He advises clients across the UK on projects ranging from single storey extensions to 40 plus storey towers.





Managing Your Project: PART 4

Let's Get Building

Nockolds' Head of Construction Law, Charlotte Barker, details what you need to keep in mind when dealing with construction contracts on your airspace development.

Construction Contracts

Of key consideration is the building contract. The freeholder may wish to approve the form of building contract negotiated between the developer and its contractor, and the airspace lease should make provision for this.

It may transpire that the existing structure has defects, in which case the developer might be entitled to pursue the original contractor in the event the existing structure cannot sustain the load of the additional levels and as a consequence seek to recover its losses under the building contract or any collateral warranty.

Collateral Warranties

Fundamental to the construction of adding additional storeys will be the provision of collateral warranties in the freeholder's favour and indeed any other class of beneficiary who has a significant interest in the build, such as the freeholder's funder. Collateral warranties should be obtained from each of the developer's professional team including

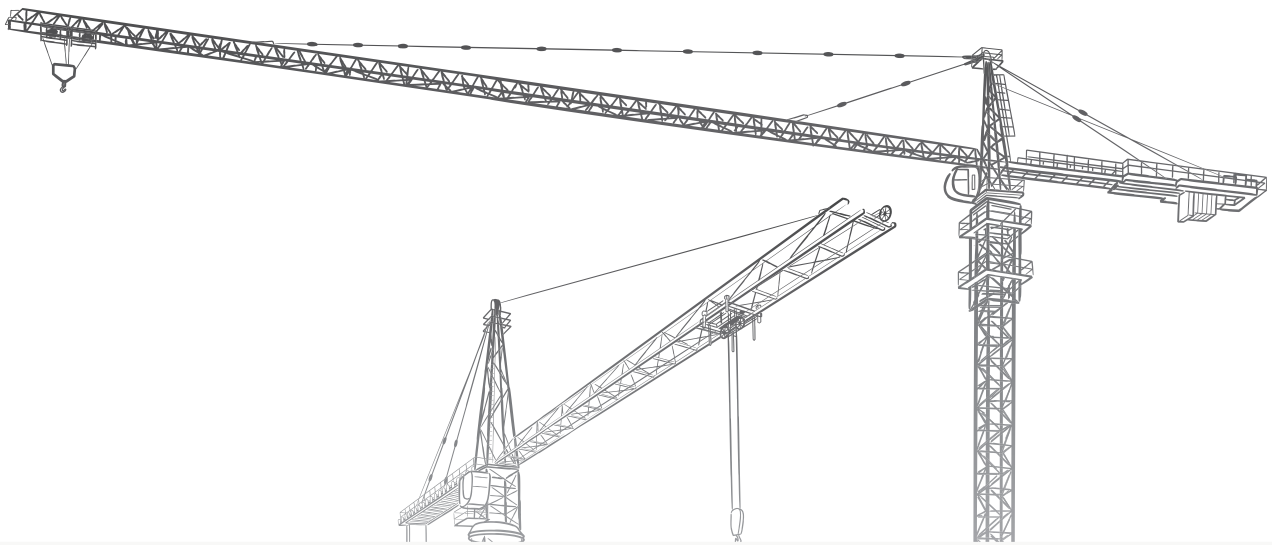
any contractors / subcontractors and consultants with a design responsibility.

Once the development is completed and sold, the freeholder will have responsibility to maintain the structure of the building. In the event of any latent or inherent defects in the build, a collateral warranty entitles the developer to pursue members of the professional team for breaches under their respective contract / sub-contract / appointments. The freeholder will require the benefit of these warranties in order to bring any claims.

Quiet Enjoyment

When you're building your airspace development, you must have due consideration for the existing tenants of the building. They have a right to quiet enjoyment of their property and a breach of that quiet enjoyment may delay or stop your development. At every stage of the process you should update the existing tenants and consult with them, detailing your proposals, timescales and extent of the work. You must make all efforts to minimise disruption, and this should be at the centre of your proposed works. Scaffolding should be sympathetic to the tenant's light needs and you should mitigate noise disruption.

Key here is having the tenants on board with your project, showing the value to them and minimising the disruption to them.



Charlotte Barker

Charlotte has extensive non-contentious and contentious construction law experience acting for all clients including main contractors, sub-contractors, sub-subcontractors and suppliers across a range of projects.





Become an Airspace Developer

Airspace development offers significant opportunities to develop in urban areas for high profit margins. Although the challenges to overcome can be significant, there are steps you can take to make your developments profitable and proceed smoothly.

Finding Sites

The best sites for development are sites where there are roof-repairs or other building works required to an existing building. These sites will mean that for you agreeing to carry out the repairs, thereby saving the existing tenants significant service charge bills, you can develop the roof. The benefits are that you already have the tenants on your side - you're adding value to the existing tenants' building and properties and you're not having to pay a premium for the roof.

Getting the Tenants on Your Side

From the very start of your development you should seek to get the existing tenants on your side. Even if you're buying a site for a premium, carrying out upgrades to the building or the existing tenants' facilities will go a long way to currying their favour.



You should always consult with the tenants, establish and assuage their concerns and develop in a way that mitigates the disruption to the existing tenants.

Deal with Feasibility First

The sunk costs risk for airspace development is high. Deal with the legal feasibility first at a minimal sunk cost risk - the majority of sites that aren't feasible will be discovered from first legal review.

Put an Experienced Team Around You

Professionals with experience of airspace development aren't common. The number of challenges involved with airspace development means that you need an experienced team around you - an experienced team like Vangeya Mhone, Lucy Riley and Charlotte Barker at Nockolds Solicitors, Linda Felton at Fortune Green Legal Practice and Nicholas Ealey at Point2 Surveyors will mitigate sunk costs risk at each stage of your development and help make your airspace development a profitable success.

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