

Summer 2008

HILL DICKINSON



Commercial Property Newsletter



Welcome

Welcome to the summer edition of the commercial property newsletter.

Gracing the front cover is our new Liverpool office, No. 1 St. Paul's Square. We spoke in the previous newsletter of our move to the premises, and we are delighted to say we are now well and truly settled in our new home. We hope to see you here sometime soon!

This edition sees us taking a look at the results of our recent poll on energy performance certificates. We hope you agree the findings make for an interesting read.

The poll was run in partnership with placenorthwest.co.uk, the online resource for property and regeneration professionals headed up by leading property journalist Paul Unger. We are pleased to announce that we are now in partnership with placenorthwest.co.uk as sole legal sponsor. We would encourage those of you who are not familiar with the site to take a look.

As usual, we welcome your feedback on the newsletter, so please do get in touch. Our contact details can be found on the back page.

Pamela Jones & David Swaffield
Heads of property and construction

Companies Act 2006

The Companies Act 2006 ("the Act") received Royal Assent on 8 November 2006. At 1,300 clauses and 14 schedules it is reputed to be the largest piece of legislation ever put through Parliament. Whilst not directly aimed at the commercial property industry, it will affect every company in every sector. Certain provisions will have practical implications in a property context, particularly the ability since 6 April 2008 for one director (suitably witnessed) to execute deeds.

The Act is being brought into force in stages. The first provisions came into force on Royal Assent. Further provisions came into force in April and October 2007 and in April 2008. More provisions are due to take effect in October of this year, with the remaining provisions due to come into effect on 1 October 2009.

The following represents a small selection of the many changes affecting private companies introduced by the Act:

1. General Meetings – since 1 October 2007, a private company is no longer obliged to hold an AGM, (although if its articles of association specifically require it to hold an AGM then it will continue to have to hold an AGM unless/until it changes its articles);
2. Chairman's casting vote – since 1 October 2007, the Act has done away with the chairman's casting vote (although casting vote provisions contained in articles immediately before 1 October 2007 will continue to be effective);
3. Company secretary – since 6 April 2008, a private company is no longer required to have a company secretary, although it may still choose to have one. To cater for the possibility that a company has only one director and no secretary, the Act allows a document to be executed as a deed by the signature of one director, whose signature is witnessed;
4. Auditor's liability - since 6 April 2008, auditors may limit their liability for negligence, default or breach of duty or trust by entering into a 'liability limitation agreement' with a company they audit;
5. Filing of accounts – since 6 April 2008, a private company must file its accounts with the Registrar of Companies within nine months from the end of the relevant accounting period instead of ten;
6. Directors' duties – with effect from 1 October 2007, the Act codifies directors' duties and changes the way in which in a member of the company can, on behalf of the company, bring an action against a director for breach of those duties. Further duties are added from 1 October 2008. It has been suggested that the new duties will create greater bureaucracy at board level and expose directors to greater potential liability. The most talked-about of the duties is the so-called principle of 'enlightened shareholder value' which requires a director to act in the way which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

This article is intended to highlight some of the key aspects of the Act as it impacts on private companies. However, given the complexity of the Act and the significant number of changes that it has introduced for all companies, it is essential that directors are aware of the changes in the law in this area and all companies are advised to review their articles of association and seek bespoke legal advice without delay.

For more information and advice from a company law expert and member of the Law Society's Company Law Committee, please contact Richard Paton by telephone on **0151 600 8652** or by e-mail: richard.paton@hildickinson.com.

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The Community Infrastructure Levy - DLT in disguise?

Guest contributor **Gary Halman** of HOW Planning LLP reviews the Government's proposals for the new Community Infrastructure Levy, on which further consultation is expected later this year with a view to finalising the Regulations by Spring 2009.



The Planning Bill is currently passing through Parliament and is expected to receive Royal Assent later this year.

Most of its provisions relate to the new Infrastructure Planning Commission, a body which is to be formed, independent of Government, to determine planning proposals for major infrastructure proposals (such as airports, waste disposal projects and major roads).

Buried at the back of the Bill are however important proposals to provide for a new local levy to be raised by local authorities - the Community Infrastructure Levy (CIL). These are very broad enabling powers only, and contain very little detail. However the Government published a consultation paper recently which set out some draft proposals and key principles that give a clue to the form this may take.

Essentially the basis of the Levy is the premise that those who obtain planning permission should mitigate the impacts of that development on the local community. There are often negative impacts and these should be offset by a contribution which pays for infrastructure to ensure that development within a Local Authority's area can be carried out sustainably and is supported by adequate services.

CIL depends on a number of key steps which are the responsibility of the relevant local authority - known as a Charging Authority - to carry out. These are:

- An assessment of the infrastructure needs of the area and the costs of implementing this;
- An assessment of the broad extent of development likely to take place during the time period covered by the Development Plan;
- Consideration of funding availability from other sources;
- Apportionment of the infrastructure costs across the identified development, so as to establish an equitable means of spreading these costs.

The outcome of this exercise will be the CIL expressed as a cost per unit (for example, per residential unit) or per square metre of floorspace. All relevant development which then receives planning permission and is implemented will then be liable to a charge under the levy.

The Government intends that CIL liability will fall on the landowner or developer at the time a planning permission is implemented; this means liability will be calculated based on a detailed permission, and not at the time of an outline approval.

The consultation paper expects CIL to be a standard charge across each local authority area, and that all development, other than householder or very small scale proposals, will be caught. Local Authorities will not be required to introduce CIL, which

will be optional. Given the powers however it is difficult to see why a local authority would not want to avail itself of the opportunity to raise more funds locally to apply to its area.

Interestingly, Planning Obligations in the form of section 106 agreements are to remain the means by which site specific improvements (such as detailed access works) and affordable housing are secured. The CIL is for strategic infrastructure and other community benefits and is additional to the local, site specific requirements.



Comment

The Government attempted to introduce Planning Gain Supplement in recent years, a similar revenue raising initiative which was finally dropped in 2007 amidst much objection from the property industry. CIL looks a much firmer proposal and will almost certainly be brought into effect across much of England and Wales in coming years.

The effects of CIL are difficult to predict. As an extra cost it is of course a further burden on development, which the Government expects will in time be borne by landowners - in essence the CIL liability being factored into land price. Given that land values are fixed some time ahead of development taking place, some form of transitional arrangements would seem to be necessary.

Assessing the impact on development within local authorities' areas is more complex. Much depends on the level of CIL and how this might vary between authorities. It is quite possible to conceive of high tax and low tax CIL authorities adjoining each other, which could impact significantly on future development patterns and occupier preferences.

The level of CIL will have to be set carefully having regard to viability, so as to ensure the additional cost does not deter valuable investment and regeneration, which most authorities are anxious to secure, especially in a more uncertain climate for development going forward.

Fundamentally however the challenge for authorities is ensuring that the infrastructure which CIL pays for is actually delivered. Presently a developer who makes a financial contribution through a well-drafted s106 agreement knows that he will get what he is paying for or else the Council will refund the money. Not so with CIL, where the relationship is far less direct. The experience of public bodies procuring infrastructure when and where it is needed, to meet the requirements of a dynamic property sector, is not good.

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Energy Performance Online survey results



In the November 2007 newsletter Bill Chandler previewed the Energy Performance Certificate (“EPC”) regime being phased in for commercial properties from 6 April 2008. In the week prior to implementation, Hill Dickinson announced the results of our exciting online survey carried out in March 2008 to establish the state of readiness and attitudes of the property industry towards this important legal development. In this article Bill Chandler analyses the results of that survey.



The level of interest in EPCs for commercial property among the property industry reached quite staggering proportions in the run up to implementation from 6 April 2008. We have attempted to inform and update our clients and contacts through this newsletter and by a series of e-shots over recent months. A client seminar we hosted in Liverpool in February generated an overwhelming response (so much so that we struggled to fit everyone who wanted to attend into the room!) and sparked a healthy debate among various property professionals and clients, all keen to discuss how the new regime will impact on their particular businesses.

It was against this backdrop that we decided to commission an online survey to establish how informed the property industry was about the extension of EPCs to commercial properties in the days leading up to implementation and how ready the industry was for the new regime. We targeted not just our own clients but also surveyors, architects and engineers. We were excited to receive nearly 200 responses, most of whom not only ticked the boxes but took the time to add some informative and considered comments. We are immensely grateful to all those who took the time and effort to contribute to what has ultimately become a fascinating and insightful piece of research.

The survey revealed the following:

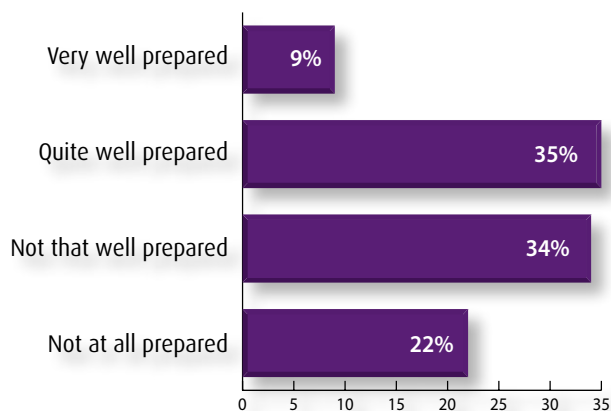
Does it affect me?

Less than 10% of respondents considered that the EPC issue does not currently affect them, and it is apparent from the comments made that some of those respondents accept that even they will be affected once the regime extends to virtually all commercial properties from October 2008. It is pleasing to note that there is no culture of denial and the property industry accepts that this is an issue it has to face up to.

Am I prepared?

With just days to go before implementation, over half of the respondents who considered themselves to be affected admitted to being unprepared to some extent, with nearly a quarter (and nearly half of owner occupiers) admitting to being “not at all prepared”. In fact, only two in five of all respondents claimed to even know what they need to do to comply. Less than one in ten felt they were “very well prepared”. Whilst not altogether surprising, this is obviously a matter of concern given the potentially serious implications of non-compliance. Interestingly, developers generally considered themselves to be better prepared than surveyors.

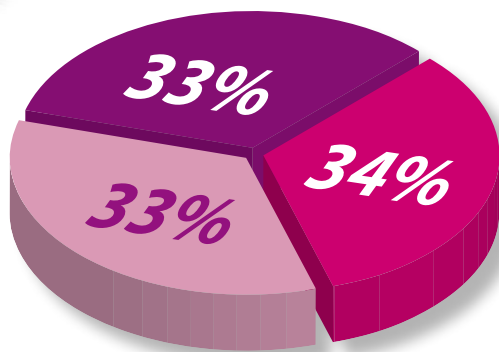
How well prepared are you for the introduction of EPCs?



Who will prepare my EPCs?

One third of respondents are intending to produce EPCs in house, with surveyors the most likely to do so. A further third intend to use third party suppliers but the final third have not yet decided. Given the need to recruit (or to train and accredit) an in-house assessor and the potentially limited number of fully accredited energy assessors for complex commercial properties in the short term, those who are currently undecided should really be making that decision now if they are likely to need an EPC in the coming months.

How do you intend to deal with the EPC requirements...?



- In-house resource to provide EPCs
- Use a third party supplier to provide EPCs
- Don't know yet

Will it really happen as planned?

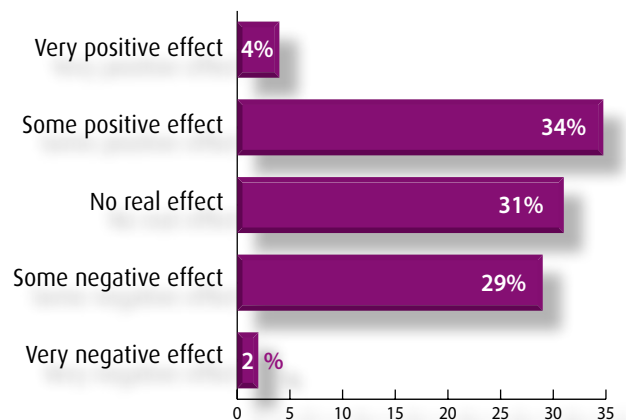
Half of all respondents believed that the timetable for implementation would slip, whilst two thirds doubted that there would be enough accredited energy assessors at the relevant dates. Those respondents have been vindicated by the transitional provisions announced in mid-March which exempt a number of properties from the EPC obligation in the short term at least (see inset box).

How will it affect me?

As we expected, a large number of property professionals (and surveyors in particular) feel that EPCs will have a generally negative effect, resulting in increased bureaucracy, delay and

cost in commercial property transactions (and causing particular difficulties in the sale or letting of older properties, which are likely to receive lower ratings than new builds). Perhaps the biggest surprise of the whole survey, however, was that an equal number (and a large majority of architects in particular) believe that EPCs will have a positive effect, creating "a level playing field" for buyers and tenants, forcing the market to provide greener premises and in doing so driving down running costs in the long term. Many respondents also appreciate the commercial opportunities for their own businesses arising out of the new regime. Many of the comments made reveal an acknowledgement and support within the property industry for the proposition that environmental issues affect us all and need to be tackled.

What effect do you think the introduction of EPCs will have on your business and/or the market generally?



We hope that the results of our survey are of interest not only to those who responded but also to the property industry generally and the wider community. We will continue to monitor the whole EPC issue over the coming months to see what happens in practice and whether the reality matches people's expectations.

If you would like to receive a copy of the full report detailing the results of the online survey, please contact your usual Hill Dickinson property contact or Bill Chandler on the email address below.

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EPC Update Transitional Provisions

Transitional provisions introduced in March provide that an EPC need not be supplied to a prospective buyer or tenant "up front" after 6 April 2008 (for commercial properties exceeding 10,000 sq metres) or 1 July 2008 (for commercial properties exceeding 2,500 sq metres) provided the property was on the market on that date with an intention to sell or let before that date.

The seller/landlord will however still need to supply an EPC to a prospective buyer/tenant:

- as soon reasonably practicable following exchange of contracts for a sale or letting of the property
- if the property is taken off and then put back on the market (unless taken off due to acceptance of an offer and put back on within 28 days of that deal falling through)
- if the property is still on the market on 1 October 2008.

Construction Focus:



The new Site Waste Management Plans Regulations 2008 (“the Regulations”) came into force in England on 6 April 2008. Construction partner **Alan Pugh** considers the Regulations and the potentially serious implications of failure to comply.

The Regulations apply to both developers and contractors involved in construction projects in England with an estimated cost greater than £300,000 excluding VAT which are planned and commenced after 6 April 2008. The Regulations also apply to those projects which are currently in the planning stages but where the construction work does not begin until after 1 July 2008. In brief, the Site Waste Management Plan (SWMP) must record details of the construction project, estimates of the types and quantities of waste that will be produced, and confirmation of the actual waste types generated and how they have been managed.

The Regulations are brief, with only 17 sections, yet they contain eight separate offences for companies failing to comply with the Regulations punishable by a fine up to £50,000 on summary conviction (in the Magistrates Court), or an unlimited fine on conviction on indictment (in the Crown Court). It is not just companies that must be aware but also senior company officials (director, company secretary, manager) because if there is any suspicion that an offence has been committed with the consent or connivance of an official then that person may also be charged with an offence also punishable by a fine up to £50,000 or unlimited.

Preparation of a site waste management plan (SWMP)

A SWMP must be prepared for any construction project with an estimated cost greater than £300,000 excluding VAT before work begins. A SWMP must conform to the Regulations. If a construction project begins without a conforming SWMP the client and the main contractor are both guilty of an offence (offence no.1). This should be a relatively straightforward matter for enforcing authorities, who will only require proof that the project commenced without a conforming SWMP. Any lack of knowledge of the new law or of the circumstances resulting in the absence of a SWMP is unlikely to provide a credible defence to a prosecution.

To conform to the Regulations the SWMP must include:

- the identity of the client, main contractor and the person who drafted the SWMP;
- a description of the construction work, including the location of the site and the estimated cost of the project;
- details of any decision taken before the SWMP was drafted which dealt with the nature and design of the project including materials and methods to be employed to minimise waste;
- a description of each waste type expected to be produced during the construction project;
- an estimate of the quantity of each waste type;
- details of the waste management action for each waste type e.g. re-use, recycle, recovery or disposal; and
- a declaration stating that all reasonable steps will be used to ensure that all waste from site is dealt with in accordance with the statutory requirements, and all materials will be handled efficiently and waste managed appropriately.



For construction projects of £500,000 or less, whenever waste is removed from site the main contractor must record on the SWMP the identity of the person removing the waste, the type of waste removed and the site that the waste is being taken to. Within three months of the construction work being completed the main contractor must add to the SWMP confirmation that it was monitored on a regular basis and the SWMP was updated in accordance with the Regulations. Failure to comply is an offence (offence no.2).

For construction projects worth more than £500,000, the obligations on the main contractor are more onerous as he must (in addition to the above):

- record on the SWMP the registration number of the waste carrier, provide a written description of the waste and details of the site to which the waste is being taken;
- review the SWMP as often as is necessary, and not less than every six months, record the type of waste produced and record the waste management action for each waste type e.g. re-use, recycle, recovery, landfill or other disposal, and update the SWMP to reflect progress;
- within three months of completing the project, carry out a more detailed review of the SWMP, confirming the SWMP has been monitored on a regular basis, comparing estimated against actual quantities of each waste type, explaining any deviation from the SWMP and an estimate of cost savings for implementing the SWMP.

Failure to comply with these obligations is an offence (offence no. 3).

The SWMP must be kept on site at all times and be made known to and available to all contractors carrying out work described in the SWMP. This is likely to be all sub-contractors involved in the project. Failure to comply is an offence (offence no. 4).

The SWMP must be kept by the main contractor for up to two years after the completion of the project. Completion is not defined but is likely to mean practical completion of the project. The SWMP must be kept either on site or at the main contractor's head office. Failure to comply is an offence (offence no. 5).

It is an offence to knowingly or recklessly make false or misleading statements in a SWMP (offence no. 6).

It is also an offence to intentionally obstruct, fail to give assistance or information to an enforcing authority, knowingly provide false information or fail to produce a SWMP when required to do so by an enforcing authority (offence no. 7). Rather than bring proceedings for a failure to produce a SWMP when required, an enforcing authority may instead give a notice offering the opportunity of discharging any liability to conviction for that offence by payment of a fixed penalty of £300. If offered, the recipient of the notice has 14 days to make payment and avoid further more serious proceedings. The Regulations set out specific particulars which must be referred to by the enforcing authority, failure to comply with which would probably render the notice invalid.

The enforcing authorities are the Environment Agency, any local government with a principal authority, any district or county council or in the City of London the Common Council.

Conclusion

The impact of the Regulations on large construction businesses is likely to be less than on small to medium sized businesses since the larger business are generally already applying a SWMP approach to waste management for their own commercial reasons under the voluntary scheme. It is not expected that the Regulations will lead to significantly increased Court cases since prosecution for non compliance is anticipated to be combined with prosecutions for other waste related offences. However, businesses (both developers and contractors alike) and their senior officers cannot ignore the potential impact of failure to comply with the Regulations, particularly given the potentially high fines if found guilty of an offence. Only time will tell what approach the enforcing authorities will take and the likely fines to be imposed. It is expected that the majority of prosecutions will take place in the Magistrates Court, in which the punishable fine will be limited to £50,000.

Do not ignore these Regulations, otherwise you may find yourself facing an entirely avoidable prosecution and significant fine. The Regulations provide sufficient guidance on what needs to be done and if managed correctly the requirements of the Regulations can be incorporated into a construction project without causing an administrative headache. If you have not already considered how to incorporate SWMPs into your business then act now to avoid the risk of prosecution.

The Regulations do not apply to Wales, however a Welsh consultation is planned for later this year and could have a major impact on the way in which Welsh construction firms handle on-site waste for projects on both sides of the border.

If you require any further advice on these Regulations - or any other environmental issue affecting the construction industry - then please do not hesitate to call or email Alan Pugh on 0151 600 8749 or alan.pugh@hilldickinson.com.

If you require advice on managing or preparing a site waste management plan then Alan can recommend an organisation which specialises in this field.

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About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have over 150 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

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