



## Rights of Light: back to basics for developers – how do they affect you and what are your options?

When embarking on a development, the list of legal and development considerations, constraints and challenges to overcome can seem limitless and, at times, overwhelming. One such challenge which can be the cause for major headaches is rights of light. In this short note, we go back to basics and discuss how these rights are created; how to find out if they exist and might have a practical impact; strategies for navigating potential claims in order to proceed with development; and what happens if there has been an infringement.

### What is a right to light – back to basics

- > **What is it?** – A right of light is a legal easement (i.e. a right benefiting a piece of land) that grants landowners (as well as potentially tenants, mortgagees and successors in title) the right to receive the natural light that passes over neighbouring land – the “burdened” land.
- > **How will it affect me?** – Once established, a right of light prevents those with an interest in the burdened land from substantially interfering with the right of light which would obstruct the light enjoyed by the neighbouring land; namely, by erecting or altering a building on the burdened land.
- > Importantly, the right of light granted to landowners is the right to sufficient natural illumination to allow the space behind the defined apertures (e.g. windows or skylights) to be used for its ordinary purpose. It is not a right of direct sunlight, nor does it protect a view to or from a property. Different spaces will therefore be entitled to varying levels of light: as you would expect, offices will require more light than, say, basement storage rooms.
- > In the context of a development, opposition from neighbouring owners with the benefit of rights to light can lead to delays in the development programme; a need to redesign the development; or to apply for a new planning permission. It is therefore key to seek advice early on from rights of light specialists to tackle any potential issues and reduce any compensation payable.

### How will it affect my development?

- > If one or more neighbouring properties benefit from rights of light, they would be entitled to receive light into their buildings through defined apertures.
- > The existence of such rights could, therefore, be a barrier to development – it could prevent the owner of the burdened property from substantially interfering with the right of light to neighbouring properties, for example, by redeveloping the property in a manner which obstructs the light of the neighbouring landowners.

### > How are rights of light created?

- > **Consent** – a right of light can arise through express consent (i.e. by specific grant) where parties enter into an agreement securing the right;
- > **Prescription** – but, more commonly, they arise by common law prescription if the light has been enjoyed without interruption for a period of at least 20 years.

### How to find out if they exist

- > **Seek specialist advice** – when planning a development or redevelopment, a developer should seek the advice of a rights of light surveyor who will consider:
  - > The amount of light received by the buildings on neighbouring land (including by the tenants of the neighbouring land), as well as;
  - > Potential claims to rights of light that may be made by the owners and tenants of land benefitting from these rights.

- > **Do your due diligence** – a rights of light surveyor can produce a rights of light report which will help inform the strategy for dealing with rights of light. The report will identify:
  - > The buildings, and where possible, the owners and occupiers that may have a right of light; and
  - > The extent of the loss of light that may be suffered as a result of the proposed development.
- > From the rights of light report, a “development envelope” can be modelled which identifies the physical boundaries within which the development should be kept in order to eliminate or minimise any infringement of a right to light benefiting neighbouring land.

### Strategies for navigating potential claims

Having identified the risk profile through the right of light analysis undertaken, there are a number of practical steps you can take to allow you to proceed with your development despite potential rights of light claims having been identified, as follows:

- > **Building design** – it might be possible to design the building at the property so any infringement of a right of light benefitting neighbouring land is eliminated or at least minimised.
- > **Negotiation and compensation** – quite commonly the beneficiary of a right of light may consent to an infringement in exchange for compensation (either monetary, or a reciprocal benefit or freedom to build on their land). This is common for developments in London, and your surveyor will be able to advise on the identity of such owners, and the quantum of compensation likely to be payable. If this approach is agreed, the parties will enter into a deed of release which will need to be registered at the Land Registry.



If financial compensation is to be given, the amount will be determined by valuation agents and cost consultants who will carry out a valuation of the light lost; calculate a share of the developer's gain from infringing the right of light; as well as taking into account the bargaining power of the party losing their right to light.

- > Tenants and mortgagees may have the benefit of rights of light and if so would need to consent and be joined into any deeds of release and be paid compensation, potentially fragmenting any settlement claim. However, usually landlords take care not to grant rights of light to tenants in their leases and to specifically exclude them from arising (by prescription or otherwise) as well as reserving the ability to develop on any adjoining property that they own to avoid any problems.
- > **Insurance** – indemnity insurance is commonly seen by developers as the most effective way to manage the risks inherent to rights of light. The policy can be structured in two ways:
  - > **“Wait and see”** basis does not allow any contact with the neighbouring injured properties, but provides a full indemnity for any claim up to the limit of indemnity (such amount usually informed by the rights of light surveyor's recommendation in their report); or
  - > **“Agreed conduct”** basis which allows developers to approach injured parties and negotiate a release of their rights of light. The policy would be subject to an excess to cover those compensatory payments, but the policy would cover any sums in excess of such amounts, or if matters progress to Court proceedings.

- > **Light obstruction notices (“LONs”)** – service of a LON constitutes a notional obstruction of a right of light by notice, without physical interruption, and is used to prevent a right of light from being acquired and/or to interrupt an existing right that may, in time, be acquired by prescription.
- > **Under section 203 of the Housing and Planning Act 2016** a local planning authority can override easements and other rights in land that has been appropriated for planning purposes, subject to payment of compensation. Importantly for developers, these powers extend to successors in title, meaning land structures can be devised to ensure that developers are protected by the provisions of section 203, even when the land in question has been disposed of by the relevant council.

### What happens when there has been an infringement?

- > A right of light will be infringed when the space behind the aperture is prevented from being used for its ordinary purpose.
- > Where an agreement with the owner of the right cannot be reached, and they do not consent to an interference, two alternative remedies are generally available if a developer proceeds to breach the right of light:
  - > **An injunction** – an application can be made to the Court at any time before the development is completed seeking an order (i) to prevent the development from proceeding (“prohibitory injunction”), or (ii), following completion (although it would be advisable to move as quickly as possible), that the development be demolished or cut back to prevent the interference with the right of light (“mandatory injunction”); or

- > **Damages** – the Court has a wide discretion to award damages in lieu of an injunction and there is no presumption in favour of an injunction over damages. Instead, the Court should have regard to any commercial aspects of the case and should consider any public interest elements, as well as taking into account the conduct of the developer in deciding which remedy to grant – where the injury is small it may be seen as oppressive to award an injunction and damages may be seen as more appropriate, but that said, even minor infringements might be injunctable depending on the circumstances.

This is a complex area; if you would like to discuss any of the issues in this note in more detail, please do not hesitate to contact your usual Linklaters contact.



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**April 2023**