

Number 18

Mezzanine Floors – A Cunning Plan?

Recent controversy has surrounded the use of mezzanine floors in order to circumvent a loophole in current planning law. Following a planning appeal decision involving the retailer, Asda, it seems that, even when there is a condition in an outline planning permission restricting retail floorspace, the construction of a mezzanine floor does not contravene that permission unless there is a specific condition prohibiting mezzanine floors. This loophole has enabled a number of major retailers to double, in some cases, their retail floorspace without obtaining further planning permission. Campaigners, most notably Friends of the Earth, are calling for this loophole to be closed as it contradicts current national planning policy (PPG6) which advocates supporting town centres and local retailers by restricting the size of out of town retail developments.

Therefore, how does increasing retail floorspace in this way escape the need for planning permission, particularly if this goes against the grain of planning policy? Additional considerations also arise, depending on whether you are a landlord or a tenant. If you are a tenant, can your landlord prevent or limit your proposed works of expansion under the alterations clause in your lease? If you are a landlord, following the construction of a mezzanine floor by your tenant, can you enjoy the advantage of an increase in rent on review?

Why do mezzanine floors not need planning permission?

The answer lies in the definition of “*development*” under Section 55 (1) of the Town and Country Planning Act 1990. If proposed works are classed as “*development*” and do not fall within one of the exemptions set out in Section 55 (2) then they will require planning permission. “*Development*” is broadly defined as works in, on or over land that involve building, engineering, mining or the carrying on of “*other operations*”. “*Development*” also comes about if the works result in a material change of use.

Where a retailer expands its area of retail use, even if for different goods to those sold on the ground floor, generally there is no change of use for which planning permission is required.

So far as building works are concerned, Section 55(2) provides the loophole. If the works carried out only affect the interior of the building or do not materially affect the external appearance of the building, then they are not “*development*” under the Act and so no planning permission is needed. For example, roof space may be used and mezzanine floors may be constructed without use of additional land or disruption to trading. To close the loophole, the Planning and Compulsory Purchase Bill seeks to add a qualification so that the exemption will only apply if the works do not increase the overall retail floor area by more than 10%.

Furthermore, as the Asda decision has indicated, even if an outline planning permission restricts floorspace or provides that increased floorspace is a “reserved matter” for which further planning permission is required, because a mezzanine floor only involves internal works (which are not classed as “*development*”) “reserved matter” approval is not necessary and the outline permission will not be contravened. The planning inspector in the Asda decision observed that if Local Authorities wished to avoid installation of mezzanine floors then a restriction should be imposed in the outline permission. Planning appeal decisions do not make legal precedents that must be followed, but the decision does send out a message.

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Implications for landlords and tenants

If the tenant wishes to install a mezzanine floor can the landlord prevent this, should it wish to do so? The answer is, to an extent, depending on the wording in the lease, but the likelihood is that, if the tenant has a lease of whole, alterations affecting the interior only are likely to be subject to the landlord's consent which may not be unreasonably withheld. Generally, the landlord will not, in those circumstances, be able to withhold consent. Even if there is an absolute prohibition on alterations, the tenant would have some recourse under the Landlord and Tenant Act 1927 which allows a tenant to carry out "improvements" (meaning, among other things, an alteration which increases the value of the landlord's reversion) notwithstanding a prohibition in the lease. That Act provides that a landlord may not withhold its consent to such improvements although the landlord may choose to do the works itself and charge an additional rent for doing so. It is not clear whether the additional rent will reflect the cost of the works or the additional space created.

If the tenant does install a mezzanine floor can the landlord achieve an enhanced rent on review? The lease will dictate, but unsurprisingly tenants are resistant to wording allowing their improvements to be rentalised! Most rent review clauses will, in broad terms, provide that any improvements carried out by the tenant (or its predecessors in title or subtenants) will be disregarded on rent review.

Until the loophole in planning law is closed, construction of a mezzanine floor would indeed seem to be a cunning plan so long as none of the necessary works either requires planning or, unless the tenant is able to use the 1927 Act route, are such as to give the landlord an unfettered discretion to refuse consent.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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