

Legal Review



NEW PLANNING LAW - IMMUNITY CERTIFICATES

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About the author

Jason Green is a partner at Collas Day and heads the Property department. Jason's experience centres on property, ranging from the property matters of individual clients to major commercial transactions. He was part of the Collas Day team that advised on the transfer of control of Herm. His work on residential property has led him to deal extensively with matters of inheritance and the structuring of individual and family assets.

The new planning laws relating to enforcement and Immunity Certificates contained in the Land Planning and Development (Guernsey) Law, 2005 and the associated ordinances came into force on 6 April 2009.

One of the significant features of the new law, as far as the sale and purchase of property in Guernsey is concerned, is the ability of the Environment Department to take enforcement action against successors in title to a property, whether or not they were responsible for the breach of planning control if it can be shown that the illegal works took place on or after 6 April 2009. The Department did not have this power under the old law.

Under the old law a new owner would not be liable for any breaches of planning control for which a previous owner was responsible. Therefore a purchaser of property was safe in the knowledge that no action could be taken against them for works requiring planning permission undertaken by the previous owner or seller. This position changed with the implementation of the new laws.

The new law defines a breach of planning control, for which enforcement action can be taken, to be where:

The Law provides for a number of exemptions, the most common of which are where:

- development has been carried out without planning permission where permission was required;
- any provision (including a condition or limitation) of any planning permission has not been complied with; or
- any relevant requirement of the Building Regulations has not been complied with.

During the consultation process, concern was expressed that a purchaser of a property would have no means of ensuring that there were no outstanding breaches of planning control at the time of purchase. In response to this the new law provides for the issue of Immunity Certificates.

The issue of an Immunity Certificate effectively give the property a clean bill of health and protects a purchaser from prosecution in relation to planning control. So far so good, but there are several features of the Immunity Certificates of which a potential purchaser should be aware:

1. Only a purchaser can apply for an Immunity Certificate. This will prevent a seller from obtaining a certificate in advance of the sale to expedite its progress.

Further, it will not be possible for the purchaser of the shares of a company which owns the property to make an application. A share transfer is a common method of effectively transferring ownership of commercial and open market residential property. As the property is not being conveyed and the ownership is not changing then technically an application for an Immunity Certificate cannot be made. That said, the purchaser will be able to make their own enquiries of the Department and have the benefit of warranties as previous.

2. An application form can be obtained from the Department or your Advocate and must be submitted together with a cheque for £50 and a letter of authority from the seller.
3. In the build-up to the coming into force of the new planning law the Department confirmed that it would be able to process the applications and issue the certificates within 7 to 8 days. So far, the certificates have been issued within one week, with the first few being issued within 24 hours. The certificates are issued to the applicant or the applicant's agent.

The application form does not allow for the proposed completion date of the transaction to be noted. However, by making the Department aware of the completion date then there may be a greater likelihood of receiving the Immunity Certificate in time. Presently there are no delays, but this may be a consideration for the future.

4. The current general practice is to await receipt of the Immunity Certificate before committing to a purchase. However, it is possible to sign up conditionally upon the receipt of the certificate if time is of the essence.
5. The Department have stated that the Immunity Certificate will prevent the Department from taking any enforcement action in the future on the property to which it relates. This specifically relates to development undertaken between 6 April 2009 and the date the Immunity Certificate was issued. However, it will not certify that any development at the property has permission or has taken place in accordance with any permission. The Immunity Certificate only provides immunity from the purchaser who has applied for it. The seller and current owner is not protected.

It is assumed that if the Department have overlooked a breach of planning control in issuing the Certificate, the certificate will prevent any enforcement action being taken in respect of that breach. The checks made by the Department when an application for a Certificate is made will only relate to the period from the date of introduction of the new planning laws to the issue of the Certificate.

6. In relation to breaches which took place prior to 6 April 2009, the old regime will apply. Liability for these breaches does not pass with the property to a purchaser. However, there is an evidential presumption that all development took place on or after 6 April 2009. That is to say that the Department will assume that any breaches of planning control found on a property will be subject to the new planning laws unless the owner can prove otherwise. Evidence such as photographs and contractors' invoices can be used to confirm that the works were carried out prior to 6 April 2009.

From a purchaser's point of view it is important to obtain from the seller all relevant information concerning the development so that the necessary evidence can be provided to the Department on request, should the need arise.

The Department have also reformed property history search procedures and now offer a comprehensive property search service. It would seem that the ultimate intention of this is to return the risk of checking the planning status of the property to the purchaser and his advisers. The issue of Immunity Certificates may therefore be a transient phase.

Searches can be carried out against domestic and non-domestic property at two levels: standard or enhanced. There is also an option to arrange an appointment to view the file details personally. The fees range from £80 to £200 depending on the type of search required. These fees are similar to the cost of obtaining Local Authority search results in the UK. Before Home Information Packs (HIPs) were introduced, it was the obligation of a purchaser to obtain these search results at their own cost. Now, the information is contained in the HIP supplied and paid for by the seller.

For the time being at least, Immunity Certificates are a useful way to avoid planning pitfalls and provide peace of mind to a purchaser.

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