

Propriety in land deals

By Andrew Harris MBIM FRICS

The dictionary defines propriety as 'fitness, rightness and correctness of behaviour'. The word, or its opposite, is increasingly being applied to land and property deals. It therefore deserves some consideration of what this concept means in practice.

Penalties for impropriety exist on several levels, from the loss of goodwill of a client or the other party (who may be encountered again) to imprisonment for fraud. Between these extremes there are a range of administrative provisions to which an aggrieved party can have recourse. The range of penalties can be summarised in the following increasing order of severity, although the commercially-minded may regard the first as paramount:

- Diminished goodwill of clients and others.
- Reference to an 'Ombudsman', usually in respect of local government. Councils can regard this as toothless but embarrassing.
- Threat to employment if standing orders or an internal code of conduct is breached.
- Threat to professional standing if the code of conduct of a professional body is seriously breached. They say little about the propriety of land deals but apply if the profession is brought into disrepute.
- Threat to the pocket if civil legal action is taken by the aggrieved party. The outcome can affect professional indemnity premiums or whether cover can be achieved at all.
- Finally, there is the threat to liberty if one or more types of fraud are involved.

So what are the usual forms of impropriety and how are they avoided? The answer is not as straightforward as might be supposed.

Expectations of the public and private sectors are different but both share the need to avoid deception: not as easy as it sounds given the cut and thrust of negotiations. Beware 'criminal deception' which is dishonestly obtaining some kind of advantage as a result of deception. For this to be proved there must be a false statement by the accused which was made dishonestly, deliberately or recklessly to deceive the other party.

Traditionally it is local government which attracts the greatest concern and which is most affected by procedures to counter impropriety. The Act normally used to bring criminal charges was passed in 1889 so the problem and the response are nothing new.

Broadly there are three courses of action open to a person or company ag-

grieved by treatment by a local authority; the commission of Local Administration (the 'Ombudsman' with similar arrangements in England, Scotland and Wales), a formal complaint to the council or referral to the local fraud squad if there are grounds for suspecting fraud.

The Ombudsman scheme does not result in a finding that commits a council to a remedy but many will implement the finding almost as a matter of honour. The Ombudsman system is slow, however, and in practice the 'horse has bolted' before a council voluntarily closes the stable door. Can be a Pyrrhic victory.

Increasingly, companies choose to make a formal complaint to a local authority which will usually agree to look into the circumstances of the case if it feels that the complainant has a *bona fide* case. This approach is more successful if pursued in a constructive manner and without all the threats and trappings of imminent legal action which tends to make a council 'clam up' often on the premature pretext that the matter is *sub judice*.

The approach adopted by the author is to write to a council and indicate that a client has asked for the circumstances to be looked into and would the council please co-operate on the basis that the outcome is not a foregone conclusion. Usually a council will co-operate, with the result that the reasons for the council's actions can be fully explained to the aggrieved party to the relief of the council. Often some remedy can be agreed amicably: if not the complainant has good and objective 'evidence' which can be used by a solicitor to decide if legal action can be recommended. This option has the merit of speed and does not commit the aggrieved party to any single course of action.

The third option is to refer the complaint to the fraud squad. This is often done due to anger and frustration. Many fraud squads have indicated that cases where council conduct has been unfortunate but not fraudulent are better dealt with by other means as they can achieve no remedy - although criminal charges against an individual arguably provide a remedy for society rather than the complainant.

It is true to say that too many aggrieved parties see fraud in everything. It is rare, and allegations should be made thoughtfully and discreetly if possible.

A surprising feature of fraud investigations is that there are few clear-cut rights and wrongs. It is obviously wrong to receive any 'gift, loan, fee, reward or advantage' (Public Bodies Corrupt Practices Act 1889) in return for promoting or favouring the interests of a particular party.

In such cases the Prevention of Corruption Act 1916 has the unusual provision that any such payment is deemed to be corrupt 'unless the contrary is proved'.

Beyond this scenario the issues become more complex: were marketing, development and procedural methods justifiable as good practice and if so by what criteria? To this we turn.

The main issue is usually whether marketing and negotiations should be bilateral (between two parties only) or multi-lateral, usually by going to the market generally. In the opinion of the author there are four sets of circumstances that can make it proper and justifiable to sell, lease or develop a site or building via bilateral negotiations without involving a wider market.

- If a potential owner-occupier is uniquely able to meet a legitimate objective of a local authority on a specific site. Examples are industrial companies moving to a locality and providing jobs for local people. They cannot be attracted by an invitation to bid against competition (who?). The competitive element is often another local authority also trying to attract the firm. It is unlikely that two or more such firms would seek the same site as inward investment is rare despite the claims of more boastful councils.

- If a development company is genuinely specialist and therefore is the only means by which a desired project can be achieved. It would be wrong and counter-productive to take such proposals and use them to produce a brief for circulation to others.

- If a company has part ownership (by interest or area) of a building or development site. This does not legitimise purchasing part of a property due to inside knowledge of future proposals although this can produce many grey areas. Such a special advantage should not be linked with councils members or officers.

- If the market for a particular area, site, building or activity is so weak that failure to enter into bi-lateral negotiations would miss an opportunity to achieve employment, environmental or financial objectives. This begs the question: how can it be known that the market is weak if it has not been tested? Exceptions occur but it is wise to anticipate the question and ensure the answer is genuine and convincing.

In all other cases land and property should be publicly advertised. To avoid unnecessary abortive work and expense by interested parties, a short-list is recommended in a strong market: in a weak market the list will shorten itself. Local authorities often attract much opprobrium by apparently favouring local firms. A

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Continental Group: Forthcoming sessional meetings of the Continental Group will be held in Paris (9 October), Berlin (26 November), London (4 February 1993), Cannes (12 March 1993), Madrid (7 May 1993) and Amsterdam (1 July 1993). Full details are available from Simon Dice at RICS headquarters on 071-222 7000 ext 462.

Mentor structured reading programme

Mentor, another major CPD initiative, starts in this issue of *CSM* and its divisional supplements. It is a new RICS Business Services (RBS) project designed to provide structured reading to conform with chartered surveyors' CPD requirements.

Mentor has been devised by RBS after much painstaking research and consultation with the divisions, branches and the RICS' CPD sub committee.

RBS stresses that although the articles in *CSM* and its divisional supplements are given the Mentor stamp of approval, it is entirely the responsibility of the individual member to choose the material relevant to his or her own requirement for CPD. To this end, Mentor will facilitate efficient selection of mate-

rial from complete corporate and divisional menus, all of which will include references for further study, some of which will include follow-up products such as Owlion audio cassettes and CPD study packs.

It is therefore recommended that members should, in their own interests and in pursuance of the Institution's policy, read an article on a new, unfamiliar or undeveloped topic relevant to businesses; note the references, undertake further reading, and contact the RICS library information service to obtain further material and reading lists; write up notes and findings as reference documents for their own benefit and that of their colleagues; and prepare short presentations for colleagues or branches.

Surveyors wanted for France and Spain

The RICS' European section receives a considerable number of requests from members of the French public who want to sell residential properties to the British, and from Britons wanting to buy in France and Spain.

The European section maintains lists of chartered surveyors with offices in other EC states, but most of them specialise in commercial or industrial property.

To meet the need in the residential sector the Institution is preparing a list of chartered surveying practices based in the UK, France or Spain (or other EC member

states) who have experience as estate agents for UK clients wishing to purchase or rent residential property in France or Spain; as estate agents for clients based in France or Spain wanting to sell or rent to buyers or tenants in the UK; or carrying out structural surveys on properties in France or Spain.

The RICS would also like to hear from firms with residential property experience in any of the other EC states. Details should be sent to Simon Dice, European Section at 12 Great George Street, London SW1P 3AD (tel: 071-222 7000 ext 462).

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good response is to short-list an equal number of local and non-local firms subject to the status of the firms and their proposals. The final selection and decisions should be based upon clear, objective and recorded criteria.

In the spirit of open government and good marketing, councils should produce a frequent and regular bulletin of the property they are offering. It is then more difficult for companies and individuals to claim that they could not know about a property being available.

Although often judged within a legal framework, the propriety of land deals is a matter for practitioners familiar with the potential of property, with letting, lease, sale, development and funding methods

and procedures together with the 'art of the possible'. As an adviser or expert witness, it is striking how often practitioners fail to consider how the way a deal is done may appear to others. The answer is some basic guidelines which are woefully lacking at present. This article touches briefly on some of the issues involved.

Andrew Harris is a chartered surveyor. He was a local government chief officer and private sector chief executive for 20 years. He is the principal of Andrew Harris Associates which specialises in land and property investigations and is currently preparing a book on the propriety of land deals. He can be contacted on 0772-885250.

IN BRIEF

● **Calling all musicians.** An organ recital in the music room on Sunday morning has been a feature of the Oxford Study Weekend for general practice members. Organiser Tony Johnson has asked Clifford Dann, past president and organ player extraordinary, to play at the 1993 meeting. Since the organ is particularly enjoyable when in use ensemble, Mr Dann is looking for trumpeter and flautist members who would be willing to perform at Oxford on 28 March next year. He hopes some rehearsal time could be arranged on the day before. Contact him at Albion House, Lewes, East Sussex BN7 2NF. We have the RICS Singers, so why not form an RICS Ensemble?

● **Planning and pollution controls.** Responding to the DoE's draft Planning Policy Guidance note on planning and pollution control, the RICS is concerned that it would not, in practice, avoid considerable confusion as to the relationship between the planning system and pollution control agencies.

● **Flood risk areas.** In its response to a DoE draft Circular on Development in Flood Risk Areas the RICS says that it should state that the local planning authority should, on the advice of the National Rivers Authority, take the cost of providing and maintaining flood protection into consideration when assessing a planning application in a high risk area. The Institution also proposes that the DoE should produce a regular report on the working of the Circular to assess its effectiveness.

● **Planning appeal costs.** Although it provides a more useful and comprehensive set of guidelines, the RICS believes that the consultative draft DoE Circular about awards of appeal costs in certain planning and other proceedings is disappointing, in that the intention to make awards of costs available in all written representations appeals remains under review. The Institution believes that this matter ought to be quickly resolved.

● **Affordable housing.** The report of Serplan's first survey of the provision of affordable housing in the south-east, which also describes how many planning authorities are developing policies designed to secure such housing, is available, price £15, from the Serplan Secretariat, 50-64 Broadway, London SW1H 0DB.

● **Haigh Hall.** Donald Anderson, an octogenarian member of the RICS has published a fascinating history of the Wigan coal and iron company - *Life and times at Haigh Hall*.



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Daily Telegraph offer. A four-week free trial of The Daily Telegraph is being offered to young professionals - any chartered surveyor living in the UK who is aged 35 or younger on 31 December 1992. Eligible members wishing to apply must write, by 13 November, to Telegraph Young Professionals Offer, c/o PO Box 14, Horley, Surrey RH6 9DW, confirming age and where they saw the offer.