

New powers for local authorities to rent out vacant high street premises

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The Levelling-Up and Regeneration Act 2023 (the **Act**) received Royal Assent on 26 October 2023. The Act contains many provisions of interest to real estate but one of the most notable is the empowerment of local authorities in England to hold rental auctions and subsequently contract to let vacant high street and town centre premises without requiring the prior consent of the owner or any superior landlords or mortgagees.

This note provides a high-level overview of what is currently known about the high street rental auction provisions.

1. Background

The powers for high street rental auctions are primarily set out in Part 10 of the Act, though further detail is to be provided through secondary legislation which we await. Some additional context can be found in the government's consultation paper "High street rental auctions" which was released earlier this year (**Consultation**) and closed in July. However, as the Consultation is not a binding document, there is no guarantee that the proposals and comments made therein will be carried forward into the awaited secondary legislation.

The motivation for introducing these powers is the desire to counteract the negative impact of high street vacancy rates on local economies. The ambition, as set out in the Consultation, is "to breathe new life into once-bustling town centres and transform them into vibrant places where people once again want to shop, live, work and relax – restoring local pride as we level up across the country".

The powers are permissive, meaning the local authority has discretion whether to utilise them. While not reflected in any provision of the Act, the Consultation stated that the use of these powers is "not intended to apply in the case of properties whose landlords are actively seeking to fill their premises – rather where vacancy rates are a significant issue and landlord cooperation is low". We await to see whether this guidance will be reflected in the official guidance the government produces for local authorities.

2. Overview

The process outlined in the Act can be broken down into four stages. "Landlord" in this context is the person entitled to possession of the premises who can grant a tenancy of the premises for one year or more.

Stage 1: Designation

Local authorities are given the power to designate:

- a. a street as a high street; and
- b. an area as a town centre,

if the street or area is important to the local economy because of a concentration of high street uses of premises on that street or in that area. In the case of town centres, the area must also be a built environment principally characterised by a network of streets. The local authority is required to maintain a public list of such designations and those designations will constitute local land charges.

Premises within such designations will be qualifying high street premises if the local authority considers that they are suitable for high street use.

High street use is not confined to retail. Instead, it is given a very wide definition similar to, but wider than, the commercial, business and service Use Class E. It includes (but is not limited to) uses such as offices, restaurants/café/bars, public entertainment, community halls and manufacturing. Warehouses are, however, specifically excluded and residential is out of scope.

Stage 2: Initial letting notice (ILN)

A local authority will be empowered to serve an ILN on a landlord in relation to qualifying high street premises if both of the following conditions are met:

- a. **vacancy condition:** this requires the premises to have been unoccupied on the date of the ILN and to have been unoccupied for: (i) the whole of the immediately preceding year; or (ii) 366 days in the immediately preceding two years. Interestingly, a state of affairs will not amount to occupation unless the occupation is substantial, sustained and involves the regular presence of people at the premises. Further, the sale of the property (without occupation resuming) will not reset the clock for these purposes and any period of non-occupation prior to the relevant provisions coming into force will still count; and
- b. **local benefit condition:** this requires the local authority to be satisfied that occupation of the premises for a suitable high street use would be beneficial to the local economy, society or environment. Again, another wide definition.

The ILN period is 10 weeks. During this time, the landlord will be restricted from letting the premises (including granting licences to occupy or entering into arrangements entitling others to possess or occupy the premises) without the written consent of the local authority. There is an exception where the landlord is bound by an obligation to let which pre-dates the ILN, save where the arrangement is conditional on the service of an ILN (i.e. there are anti-avoidance provisions). The local authority must grant consent to a letting or licence which fulfils certain criteria. Hence, the landlord is given a window of opportunity to let the premises but only if such letting (or licence) meets certain conditions – this opportunity is not replicated under the restrictions on letting during the final notice period.

Stage 3: Final letting notice (FLN) and rental auction

An FLN can be served by the local authority if:

- a. there is an ILN in force in relation to the premises and eight weeks have elapsed since it took effect; and
- b. the premises have not been let etc. in the interim or the local authority is satisfied that any tenancy, licence or agreement so granted or entered into is consistent with the contemplated exercise of its powers to hold a rental auction.

However, the FLN must be served in time for it to take effect before the initial notice period expires. The meaning of "take effect" is to be clarified in secondary legislation.

Landlords will have 14 days from the date of the FLN to serve a counter-notice stating that they intend to appeal and specifying upon which of the seven permissible grounds for appeal set out in Part 1 of Schedule 20 of the Act they will be relying. One of those grounds of appeal which may help developers is where the landlord is intending to carry out substantial works of construction, demolition or reconstruction affecting the premises and those works could not

reasonably be carried out without retaining possession of the premises. If the FLN is not withdrawn, the landlord will have 28 days (starting on the date the counter-notice was received by the local authority) to launch the appeal to the County Court on the grounds specified in the counter-notice.

During the final notice period, the landlord will not only be subject to restrictions on letting the premises (including granting licences to occupy or entering into arrangements entitling others to possess or occupy the premises) without the local authority's written consent, but will also be subject to restrictions on works without that consent. Works include alteration or removal of any fixtures or fittings on the premises.

The final notice period is 14 weeks (subject to extension in some circumstances, such as the landlord appealing the FLN). During that time, the local authority may hold a rental auction to find persons who would be willing to take a tenancy of the premises and ascertain the consideration they would be willing to pay. Prior to the auction, the local authority must specify the suitable high street use for the premises (any subsequently imposed letting will be for this use only).

The details of the rental auction process (including how costs will be allocated) are to be set out in secondary legislation. The Consultation proposed that:

- a. there should be no reserve price/rent;
- b. local authorities should have the option of outsourcing the process; and
- c. the auction would be run on a sealed bids basis with the landlord having sole direction over choosing the successful bidder.

Stage 4: Power to contract to let

The local authority's power to contract to let (and thereby bind the landlord to the letting) arises where the following conditions are met:

- a. an FLN is in force in relation to the premises;
- b. at least 42 days have elapsed since the FLN took effect;
- c. a rental auction has been carried out; and
- d. the premises have not been let etc. in the interim or the local authority is satisfied that any tenancy, licence or agreement so granted or entered into is consistent with the contemplated exercise of its powers to hold a rental auction.

The Consultation envisages that standardised contracts to let and tenancy agreements will be produced to speed up the process.

The contract to let must not only set out the terms of the agreed tenancy but may also include provision:

- a. allowing the tenant to carry out pre-tenancy works (and to enter land for that purpose) – this may or may not be subject to the landlord's consent; and/or
- b. requiring the landlord to carry out pre-tenancy works (whether in or outside the premises) before the term of the agreed tenancy commences. This may be accompanied by provision about the remedies available to the tenant if the landlord fails to undertake the works.

"Pre-tenancy works" means works undertaken before the term of the agreed tenancy begins in contemplation of the use of the premises by the tenant once the term begins.

In relation to (b), the Consultation proposed that landlords would be obliged at their own cost to bring the relevant premises up to a minimum standard to ensure that the premises are safe, stable and secure. To mitigate some of the burden on landlords, there was a suggestion in the Consultation of disapplying Minimum Energy Efficiency Standards for the duration of the agreed tenancy (at present, landlords are prohibited from letting or continuing to let premises

with an EPC rating of F or G, with any breach attracting a fine). Whether these proposals are carried through will be confirmed when the details of the letting process are fleshed out in secondary legislation.

If the landlord subsequently defaults on the obligation to let, the local authority can grant the tenancy on the landlord's behalf.

The Act contains provisions specifying some, but notably not all, of the terms on which a local authority may let, such as the:

- a. premises must be used wholly or mainly for the high street use designated prior to the rental auction;
- b. term must be at least one year but not more than five years;
- c. letting will be outside security of tenure;
- d. letting must satisfy the criteria laid out in Schedule 21 of the Act; and
- e. rent payable will be determined through the rental auction process.

The Consultation earlier this year did not, therefore, focus on the above but did invite views on the other terms typically found in this type of agreement. For example, the Consultation suggested that there would be no requirement for would-be tenants to provide a guarantor but a rent deposit at three months' rent or £1,000 (whichever is greater) would be required – again we wait to see whether that will be carried through to secondary legislation.

The Act does require the local authority to have regard to representations made by landlords as to the terms of the contract to let and the agreed tenancy, but that does not mean that the local authority is bound by those representations. Instead, there is a catch-all reassurance that, in making regulations prescribing further details as to the terms of imposed contracts to let and agreed tenancies, the Secretary of State must have regard to the terms on which short-term tenancies (and contracts to grant the same) are typically granted on a commercial basis.

The contract to let and subsequent tenancy will be deemed to have been entered into with the express consent of any superior landlords and/or mortgagees.

3. Other points of note

The following are some of the other points of note relating to Part 10 of the Act:

- a. The local authority can require a person, who appears to it to have an interest in the relevant land in which the premises are comprised, to provide information as to the occupation of the premises, matters affecting the premises, persons interested in the premises and that person's own interest in the premises. Breach of the obligation to provide information amounts to a criminal offence.
- b. Part 10 also includes powers in relation to premises situated on a designated high street or within a designated town centre for the local authority, and those authorised by it, to have access to the premises and other land to survey the premises. Obstructing access where lawfully requested will amount to a criminal offence.
- c. The only compensation available to landlords under Part 10 of the Act is in relation to any damage caused in the exercise of the power to enter and survey. Section 216(5) of the Act expressly provides that save for this exception "no compensation is payable in respect of the exercise of the powers conferred by this part".

4. Conclusion

While:

- a. Part 10 of the Act is not yet in force (the commencement date is to be specified in regulations); and
- b. the details of some of the provisions are to be provided in secondary legislation which has yet to be laid and

which may or may not reflect the proposals contained in the Consultation, any party with an interest in high street premises should start considering the impact of these provisions now, especially as the clock on the vacancy condition is already ticking.

Going forward, it will be interesting to see the extent to which these powers will be utilised and, to the extent they are, whether they are successful in revitalising the nation's high streets.

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