

Developers and landowners seize “control” – speak now or forever hold your peace



If there is one thing we have learnt from the last year or so in the real estate sector, it is that when the Government is not busy reforming it is busy consulting! What is more, there are generally two common themes to these seemingly endless cycles of reform and consultation and those are **transparency and control**.

On 24th January, the Government launched [Contractual controls on land: consultation – GOV.UK \(www.gov.uk\)](https://www.gov.uk). The consultation runs for 8 weeks and closes on **20 March 2024**. This consultation comes hot on the heels of the transparency driven initiatives of the introduction of the Register for Overseas Entities under the Economic Crime (Transparency and Enforcement) Act 2022 and the launch of the consultation on transparency of land ownership involving trusts (which closes on 21st February).

The legislative context

This current consultation follows on from (and takes account of the responses to) the 2020 [Transparency and competition: a call for evidence on data on land control – GOV.UK \(www.gov.uk\)](https://www.gov.uk). This initial call for evidence was initiated as a result of the Government’s concern that the lack of data on contractual controls was leading to a market failure resulting in two significant dis-benefits to the public.

- The first was that without comprehensive information on those controlling land, local communities were not able to fully understand the likely path of development in their area (for example where land was being brought forward for development).
- The second was concern over an “information asymmetry” – namely that it raised a barrier to entry for small builders and new market participants reducing competition and market efficiency.



To put the current consultation into a legislative context, Part 11 of the Levelling Up and Regeneration Act 2023 (LURA) which deals with the disclosure of interests and dealings with land gives the Government the power to collect and publish information about “contractual control agreements”.

The consultation seeks the views of individuals, organisations and businesses on the time, cost, and market impact implications of collecting and publishing a publicly available dataset comprising the “what”, “where”, “who” and “when” of contractual control agreements intended to secure land for residential, commercial or mixed-use development. This will in turn inform the regulations giving effect to Part 11, implementing the disclosure regime and ultimately governing what that disclosure will look like in practice.

The Government rationale is that “*anyone should, if they wish to, be able to find out not just who owns land, but who controls it*”.

What does the consultation mean for developers, landowners and land promoters?

The position as it currently stands is that there is no legal requirement to record the data from a contractual control agreement until such time as the transfer of the land has taken place and whilst contractual control agreements may be protected on registered titles they are not currently recorded in an easily accessible and transparent way.

Following implementation, which is expected to be in April 2026, developers will need to provide certain prescribed information to the Land Registry within 60 days of the grant, assignment, variation or termination of a “contractual control agreement” which, in theory, will complete the picture of who controls the land prior to a transfer.

What are contractual control agreements?

Contractual control agreements are those agreements which are “*used to control land short of outright ownership*”, namely option agreements, pre-emption agreements, conditional contracts, and promotion agreements (but excluding overage and clawback agreements).

Do all contractual control agreements fall within scope?

The short answer is no.

The Government has indicated that to fall within scope and have to be disclosed to the Land Registry, a contractual control agreement must be in writing and relate to registered land. It will also need to meet the following conditions:

- last for 12 or more months from the requirement arising or which if it does terminate within 12 months, includes an entitlement for the grantee (typically a developer) to extend the agreement; and
- relate to:
 - a new agreement entered into after the commencement of the regulations (expected to be 6 April 2026); or an existing agreement, entered into after **6 April 2021** (being 5 years from the expected commencement of the regulations); or
 - an existing agreement entered into at any time which is varied in such a way that alters any of the required information or assigned after the date of commencement of the regulations.

There are two key points to note. The first is that, as noted above, the disclosure obligation will apply to



agreements entered into since April 2021 which means that it is retrospective in effect. This will cause a headache for developers and their advisers alike and is likely to be one of the main bones of contention.

The second is that certain agreements will be exempt such as:

- those that terminate within 12 months with no right to extend;
- those made for the purposes of 'national security' or defence;
- those made to facilitate finance and loan agreements; and
- importantly those relating to overage, clawback, and restrictive covenants.

It will be interesting to see whether, once the regulations are in force, we see agreements increasingly structured in such a way that they fall out of scope to avoid the additional disclosure obligations. That said, there would of course always be the risk that drafting for such exceptions without a commercial reason for doing so would be challenged.

What information needs to be provided?

The Government acknowledges that there is a need to strike the right balance between gathering enough information to improve transparency around who controls land, short of outright ownership, where, and for how long, without the requirement to provide overly commercially sensitive information or information that is not useful or relevant.

This is reflected by the fact that the proposed dataset is scaled back in comparison to the proposed data requirements set out in the original Call for Evidence from 2020 which included financially sensitive information such as deposits and pricing information in estate contracts, option pricing and premiums in option agreements and fees in pre-emption agreements.

It is clear that there is no intention for the underlying document to be made available for inspection on the register or be made publicly available in any other way. Instead, the proposed dataset that will be available for download on the Land Registry's website comprises the following:

- type of agreement e.g., an option agreement;
- the names of the contracting parties (grantees and grantors);
- the date the agreement was entered into;
- whether there is a fixed start date different from the date of the agreement;
- end date;
- description and location of the land affected as well as title numbers; and
- details of any entitlement for the grantee to extend the agreement.

Although not publishable there is also a proposal to collect details to identify the legal professionals involved (by Solicitors Regulation Authority number or similar) allowing for easy identification needed for compliance purposes.

The process for future contractual controls

Once the new regulations have commenced, where parties enter into a new contractual control agreement from the date of commencement, the grantee (meaning any person entitled under the agreement to acquire a relevant disposition or to enforce the provisions that prevent or regulate the proprietor of a legal estate in land from making a relevant disposition) will be required to provide information within 60 days of the contractual control agreement being entered into.



If the party also wishes to apply for a notice or restriction to protect their interests and/or rights in respect of a contractual control agreement (as is commonly the case), they will be required to provide the required information about their agreement before they can register the notice or restriction. Importantly, if parties choose not to register a notice or restriction, parties will still be required to provide the specified information to the Land Registry within 60 days of the contractual control agreement being entered into.

The process for existing contractual controls

For existing agreements entered into from 5 April 2021 (5 years before the expected commencement of the regulations), grantees will have until 6 April 2027 (i.e., a year from the commencement of the regulations) in which to provide the necessary information to the Land Registry.

In each case the data is expected to be provided to the Land Registry by a conveyancer to ensure that the information is complete and accurate (and explains the reason why the SRA number for the conveyancer forms part of the required dataset). Not only does this add to the professional burden of the acting conveyancer but it also means that the holders of contractual controls will have to instruct a conveyancer and incur legal fees in submitting the application.

The other point to note here is that this is not a one-off disclosure obligation but an ongoing one. Any change to the original agreement whether that be an assignment of the agreement, any variation in writing to a contractual control agreement that alters any of the required information and the termination or expiry of the whole or any part of the contractual control agreement will be notifiable to the Land Registry again with 60 days of becoming effective.

Penalties for non-compliance

If information regarding contractual control agreements is not provided, the Land Registry will refuse to register a notice or restriction against the relevant title. This will not however prevent the registration of the transfer itself.

Furthermore, failure to comply will amount to a criminal offence under LURA and may attract a maximum summary penalty for failure to comply with an information requirement (up to six months imprisonment or a £5,000 fine) and up to two years imprisonment and an unlimited fine for knowingly or recklessly providing false information.

Comment

Some may argue that there is a benefit not only to developers but also for local planning authorities and local communities in having a publicly available dataset that can be used to streamline the process of site identification and assist in understanding the likely path of development in any particular area.

Developers should also seek comfort from the fact that the proposals are less onerous than have been feared based on the 2020 Call for Evidence.

However:

- With the existing backlogs (up to 2 years) and associated resourcing issues that the Land Registry are currently experiencing there are serious concerns as to whether the Land Registry has the capacity to take on this additional work.
- Questions will undoubtedly be raised about the retrospective effect and there is a strong argument to suggest that legislative provisions should not interfere with existing contractual relationships. Furthermore, there is a risk that imposing disclosure duties for pre-existing agreements will result in grantees

unintentionally failing to comply as a result of either not being aware of the new rules or not having realised that their agreement falls within scope.

- The criminal sanctions are clearly intended to act as a strong incentive to ensure compliance however query whether such draconian consequences are proportionate or indeed appropriate.
- It seems that one of the key underlying policy objectives of the proposed new regime is to improve the transparency of sites for housing development therefore query whether contractual control agreements relating to commercial land need to fall within the scope of the regulations.
- Grantees of in scope agreements may well need to incur additional costs in seeking advice to comply with the requirements particularly in requiring a conveyancer to make the application containing the requisite information to the Land Registry.

The overriding concern is whether the benefit of having such a publicly available dataset in terms of promoting the transparency and efficiency of the likely path of development is in fact outweighed by the administrative burden and associated costs of the parties to affected agreements.

Furthermore, one wonders whether the proposals meet the Government's stated objective of providing "a complete picture of where and how the land is under control, short of outright ownership" in the first place? Many contractual control agreements are protected at the Land Registry by means of a notice or a restriction so one could argue that they are already visible to anyone who checks the title (albeit the actual information available is very limited). Even if the proposed dataset is made publicly available, without the sensitive financial information, it is hard to ascertain whether the contractual controls are in fact commercially realistic. This of course is a hurdle that cannot be overcome without broadening the dataset to include financially sensitive information which would in turn undoubtedly have a negative impact on the market.

How can we help?

It seems likely that given the overarching national focus on housing delivery, this initiative will survive a change of Government and, unusually for a consultation process, the date for the regulations to come into effect has already been announced which suggests that the wheels are already very much in motion and there is no doubt that the direction of travel is clear. That said the consultation does provide an opportunity for industry bodies, stakeholders and their advisers alike to shape the process and so it is a case of "speak now or forever hold your peace".

If you would like to discuss any of the above further or you have views on the "what", "where", "who" and "when" of contractual control agreements or the time, cost, and market impact implications of this new regime that you would like to share please [get in touch](#).

The consultation closes on 20 March and you can respond using this link [Contractual controls on land: consultation – GOV.UK \(www.gov.uk\)](#). We are also happy to assist you with preparing a response.





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