

01	Government	21	Real Property
02	Landlord & Tenant	22	Housing
05	Planning	23	Contract
19	Rating	24	Construction
20	Compensation	26	General

Legal &  
Parliamentary

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# evebrief

## Editorial



*Tony Chase*

At items 07 and 08 we report on two cases — coincidentally both in Norfolk — relating to planning applications for wind farm development. The main issues in both were whether the adverse visual impact on the landscape was sufficiently severe to outweigh the Government's policy objectives for new renewable energy sources;

There appears to have been a significant potential impact in both cases. A major factor in the Benacre case, where permission was granted on appeal, was however that parts of the local plan policy relied upon by the local planning authority — which sought to restrict potentially intrusive development on the boundary of an AONB — did not comply with national policy.

Whilst these cases do not in themselves have particularly far-reaching implications, they are perhaps indicative of an increase in the frequency of appeals in relation to wind farm development as demand for more renewable energy sources grows.

As this edition of Evebrief was being finalised, the Government published PPS4 Consultation paper "Planning for Prosperous Economies". The paper takes on the recommendations of the Killian/Pretty and Taylor reviews, giving a combined approach to tackling economic development in both urban and rural areas. This paper is timely given the current economic conditions and the need to plan for recovery. It highlights the need for the planning system to be flexible and responsive and adopt a positive and constructive approach towards planning applications for economic development. The emphasis on the key role of town centres has been maintained as the paper sees them as the bedrock of our economic future and the hub of community life. Also, by combining separate streams of planning policy, the role of the rural economy is recognised more fully and considered in the same context as the urban economy.

**Tony Chase**

# Government

## 01

### Budget — 22.04.09

This Budget did not contain very much of relevance to the commercial property industry. A few of the main points are set out below:

- REITs can now definitely issue convertible preference shares
- the Finance Bill will include legislation to prevent non-property groups from structuring their way into the REIT regime
- despite calls for the reintroduction of relief, there was nothing on empty property rates
- for this tax year only, there will be a 40% first year capital allowances rate for plant and machinery expenditure that would normally be written down at 20%. This provision does not apply to items which qualify for allowances at the 10% rate
- the temporary increase in the nil rate SDLT band for residential property from £125,000-£175,000 will be extended by three months, until the end of this year. The Finance Bill will introduce an SDLT relief for profit-making registered providers of social housing
- the rate of VAT will revert back to 17.5% at the end of this year
- the Government has decided to delay the introduction of the community Infrastructure Levy until April 2010
- the creation of a £600m fund to stimulate housing development. This fund is expected to result in the delivery of 10,000 new homes

# Landlord & Tenant

## 02

CLG Guidance Note

### Financial Services Compensation Scheme (FSCS): Treatment of service charges for residential property

This guidance is set out in the form of questions and answers. It is not binding on either the part of the FSCS or Communities and Local Government and it does not constitute financial or legal advice. The full FSCS rules can be found on the FSCS website at [http://www.fscs.org.uk/industry/about\\_us/limitations/](http://www.fscs.org.uk/industry/about_us/limitations/)  
<http://www.communities.gov.uk/documents/housing/pdf/1204271.pdf>

## 03

CLG Publication

### Regulated Tenancies

Most residential lettings by non-resident private landlords which commenced before 15.01.89 will be regulated tenancies under the Rent Act 1977, whether the property is furnished or unfurnished. Since 15.01.89 most new lettings have been assured or assured shorthold tenancies and it will only be possible to have regulated tenancies in very limited circumstances — this booklet explains how this situation could arise and the law that is relevant to regulated tenants with regard to rent levels and security of tenure.  
<http://www.communities.gov.uk/documents/housing/pdf/138295.pdf>

## 04

RICS Information Papers

### Supplement to Code of Practice on Service Charges

The RICS Code of Practice, *Service Charges in Commercial Property*, became effective two years ago. That Code has the status of a guidance note, setting out best practice which, though not mandatory, should be followed unless there is good reason not to. The RICS has recently published these two information papers in support of the Code.

The first, *Sinking funds, Reserve Funds and Depreciation Charges*, clarifies an area often fraught with financial and administrative difficulties, addressing matters which owners, occupiers, managers and drafting solicitors might like to consider including: making provisions for future service charge expenditure, lease term, FRI (Full Repairing and Insuring) and IRI (Internal Repairing and Insuring) leases; and spreading the cost of the works. The second, *Service Charges and Tenant Alterations*, sets out the issues surrounding apportionment of service charges where a tenant makes alterations to a commercial property.

# Planning

## 05

European Court of Justice

### **Environmental Impact Assessment**

**\*\* R (ON THE APPLICATION OF MELLOR) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**  
(2009) PLSCS 142 — Decision given 30.04.09

**Facts:** The appellant had applied for planning permission to develop a hospital, The Sec of State determined that an environmental impact assessment was not required for the development but he gave no reasons for that decision. The appellant appealed against the court's refusal to allow it to seek judicial review.

**Point of dispute:** The Court of Appeal referred the matter to the ECJ for a preliminary ruling on the following questions: (i) whether under Article 4 of Council Directive 85/337, as amended by Directives 97/11 and 2003/35, the Sec of State had to inform the public of the reasons for determining that an EIA was unnecessary; and, (ii) if so, what principles governed that requirement.

**Held:** The preliminary ruling was made. Under Article 4 of Directive 85/337 a determination which stated that it was unnecessary to subject to an EIA a project that fell within Annex II to that Directive did not have to contain the reasons for that decision. However, if an interested party so requested the relevant authority was obliged to give the reasons for the determination, or the relevant information and documents in response to the request. In the event that the determination did contain the reasons upon which the decision was based, this would be regarded as sufficient if those reasons, in addition to factors that had already been brought to the attention of interested parties and supplemented by any additional information requested by them, enabled them to decide whether to appeal against the decision.

## 06

Administrative Court

### **Appeal against refusal of permission for change of use of agricultural field to flying model aircraft due to unacceptable noise — whether obligation to grant permission where proposals code-compliant**

**\* MID BEDS MODEL AIRCRAFT CLUB V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**  
(2009) PLSCS 125 — Decision given 07.04.09

**Facts:** The local planning authority (lpa) refused the claimant club's application for permission to change the use of a field from agriculture to recreation for the sport of model aircraft flying on grounds relating to the effect of noise on nearby residents. The inspector dismissed the club's appeal and upheld the refusal of permission. He noted that the proposals accorded with the code of practice on noise from model aircraft published by the Department of the Environment in 1982, but took into consideration the fact that the code did not form part of the development plan, was 26 years old and did not, in any event, provide hard and fast rules. It was also noted that the code did not take into account the total quality of the noise, which had been a factor in the lpa's decision to refuse permission.

**Point of dispute:** Whether the club's application to quash the inspector's decision would be allowed. It argued that (i) the inspector should have granted permission since the proposals accorded with the code of practice and he had not given adequate reasons for rejecting its criteria; and (ii) the inspector had not taken into account a material consideration, namely the possibility of attaching noise mitigating conditions to the planning permission, based on conditions that the lpa had suggested, without prejudice to their main case that permission should be refused.

**Held:** The club's claim was dismissed for the following reasons: (i) The code of practice provided guidance only and the fact of compliance with it was not sufficient to justify a grant of planning permission. Local circumstances had to be taken into account and the inspector had been entitled to have regard to the evidence regarding the effect of noise, including that given by local residents. (ii) There was no evidence that the club would accept any more restrictive conditions than those which would make their proposal code-compliant. An inspector was not obliged, whenever he found a use or development to be unacceptable, to go on to consider a without prejudice set of conditions, and there was no obvious solution to the noise problem and no obvious set of conditions that the inspector could be satisfied would deal with the problem.

## 07

Administrative Court

### Wind turbines — local plan not in accordance with national policy

\* BENACRE ESTATES CO V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT  
(2009) PLSCS 126 — Decision given 07.04.09

**Facts:** The lpa refused planning permission for the construction of two wind turbines on land adjacent to a wildlife park in Norfolk but an appeal against that decision was allowed by the inspector appointed by the Sec of State. In reaching his decision to grant permission for the development, subject to conditions, he took into account the government guidance on wind turbines contained in PPS 22, considering the determining issue to be whether, given the policy objectives of protecting the landscape of the countryside in general, and the nearby Suffolk coasts and heaths AONB in particular, the visual impact of the turbines would be so great as to outweigh the government's policy objectives concerning renewable energy. The inspector noted the existence of local plan policies which prohibited potentially intrusive development on the boundary of the AONB save where an overriding national need for development could be shown and there were no suitable alternative sites, but indicated that he was disregarding these policies as they were not contained in national policy. He came to the conclusion that the extent and intensity of the development would not be so great as to justify a refusal of permission.

**Point of dispute:** Whether the inspector's decision should be quashed on the grounds that: (i) he had misunderstood local plan policies and effectively rewritten them by disregarding some of their requirements; and (ii) he had misapplied the statutory test in s28(6) of the Planning and Compulsory Purchase Act 2004 by putting government policy first and according more weight to that than to the development plan.

**Held:** The application was dismissed. The inspector had not erred with regard to local plan policies. What he had done was to recognise that some parts of those policies did not comply with national policy and he had not, therefore, attached any weight to those parts. He had first looked at the development plan, then weighed up the other material considerations that he had identified, conducting a balance of judgment as was integral to any planning decision. He had found that the policy which the local plan was striving to achieve, namely the preservation of the setting of the AONB, was not harmed to such an extent that it could not be overridden by other material considerations, in this case the benefits of renewable energy, as part of the overall balancing exercise that he had to conduct.

## 08

Administrative Court

### Wind turbines — impact on landscape and setting of listed buildings

\* ENERTRAG (UK) LTD V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT  
(2009) PLSCS 127 — Decision given 07.04.09

**Facts:** E was refused permission for the construction of a wind farm on a site in Norfolk, and its appeal against that refusal was dismissed twice on hearings before different inspectors. The second inspector's reasons for refusing permission related to: (i) the adverse visual effect of the development on the landscape and to the settings of some listed buildings; (ii) the fact that this detrimental effect on the landscape outweighed the benefit of the development in terms of sustainable energy production — this was because: (iii) the scheme would be unlikely to be able to produce electricity for the national grid by 2010; and (iv) air safety at Norwich airport; although measures could be introduced which would maintain safety these would have some adverse effect upon the airport's operational efficiency.

**Point of dispute:** Whether the decision of the second inspector to refuse permission should be quashed.

**Held:** E's claim was dismissed. It was not accepted that the inspector had focussed too much on the visual impact of the development on the listed buildings, to the exclusion of other elements of the setting. What comprised the setting of a listed building was a matter of fact and degree in each case. In finding that the wind turbines would have a significant effect on the landscape the inspector had recognised the broader landscape impact and the overlap between that and the setting of the listed buildings. He had made rational findings regarding airport safety and the timescale of electricity production that were supported by the evidence before him.

## 09

Administrative Court

### **Certificate of lawful development — planning condition not imposed for proper planning purpose**

\* BASINGSTOKE AND DEANE BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (2009) PLSCS 135 — Decision given 22.04.09

**Facts:** BDBC granted planning permission for the construction of two cottages on condition that they were occupied by agricultural workers. This condition was requested by the applicant so that he could avoid paying development charges. After some years of being occupied by agricultural workers the properties were refurbished and occupied by non-agricultural workers. The owner's application for a certificate of lawful development was refused, but allowed on appeal to an inspector who considered the condition attached to the original planning permission had not been imposed for a proper planning purpose, but to avoid development charges. Since the condition had been breached for more than ten years, enforcement was no longer possible.

**Point of dispute:** Whether BDBC's application to quash the inspector's decision should be allowed. BDBC argued that the clear planning purpose of the condition was to assist agriculture by building cottages for farm workers, and that the inspector had confused the planning purpose with the means by which that purpose might be achieved.

**Held:** The application was dismissed and the inspector's decision to issue a certificate of lawful development could stand. Any condition imposed on the grant of a planning permission had to be for a proper planning purpose and in this case the only reason that the restriction had been imposed was because the applicant had requested it to avoid development charges. The condition was therefore invalid and if enforcement action had been taken for breach of the condition it would have failed.

## 10

Administrative Court

### **Planning and Compulsory Purchase Act 2004 — transitional provisions — policy saving**

\* R (ON THE APPLICATION OF STAMFORD CHAMBER OF TRADE AND COMMERCE) V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (2009) PLSCS 132 — Decision given 07.04.09

**Facts:** The claimants were an association incorporated to promote business and tourism in the town of Stamford. The 1995 adopted Local Plan included a policy safeguarding the route of a new road link which would help to alleviate traffic problems in the town. Following the introduction of the new planning regime under 2004 Act the lpa published a Local Development Scheme setting out their programme for the production of a new Local Development Framework. It was proposed to replace the policies of the Local Plan on a rolling programme, and that in the meantime the policies should be "saved" under the transitional provisions of s38 of the 2004 Act. It was proposed that the road link policy should be replaced by a Core Strategy Development Plan Document and the Stamford Town Centre Area Action Plan, but neither of these documents had been adopted by the end of the three-year period permitted under s38. The lpa submitted a list to the Sec of State of those Local Plan Policies they wished to be saved beyond the end of that period, but the road link policy was not included in the list. No external consultation was conducted before the list was submitted to the Sec of State and in 2007 the Sec of State made a direction under para 1(3) of Schedule 8 to the 2004 Act, saving some of the local policies but not the road link policy.

**Point of dispute:** Whether the claimants' application to quash the direction should be allowed, on the grounds that it breached their legitimate expectation, that the lpa had created and to which the Sec of State should have had regard, that public consultation would take place before a decision was made not to request the saving of the road link policy.

**Held:** The claim was dismissed. The legitimate expectation that the claimants alleged was not that the policy in question would be saved, or even a request made for it to be saved, but merely a procedural expectation that public consultation would take place. There had been no express promise that consultation would take place in this case nor any established practice of consultation. The Sec of State had not erred in accepting the reasons given by the lpa for not requesting the road link policy to be saved. The claimants had not made any third party representations regarding the policy and in the absence of those the Sec of State was not obliged to conduct an extensive exercise of reviewing all those local policies that lpas did not put forward for saving.

## 11

Administrative Court

### **Appeal against grant of temporary planning permission for gypsy site on Green Belt site due to risk of flooding**

\* COLNEY HEATH PARISH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT  
(2009) PLSCS 137 — Decision given 22.04.09

**Facts:** CHPC refused to grant planning permission for the stationing of gypsy caravans on a site within the Green Belt. At the inquiry held in connection with the appeal against that decision an expert from the Environment Agency stated that the development would give rise to flooding, not only at the site, but elsewhere as well. The inspector found that the proposal would not only be an inappropriate development in the Green Belt, but would also be a highly vulnerable one as defined in PPS 5 owing to the risk of flooding. The inspector balanced those considerations against the need for gypsy sites generally and the personal circumstances of the gypsies and concluded that these did not outweigh the potential harm to the Green Belt, but, notwithstanding these conclusions, he decided that a temporary permission would be appropriate.

**Point of dispute:** Whether CHPC's application to quash the inspector's decision would be allowed. It argued that the inspector had failed to deal with the effect of the development on flooding outside the site, as opposed to within the site, even though a witness had been provided especially to deal with this matter.

**Held:** CHPC's application was allowed. The inspector should have dealt with the issue of off-site flooding as it was a principal controversial issue, both by taking it into account and referring to it expressly in his decision letter. He should have drawn conclusions from the witness' cross-examination. As a result CHPC had suffered prejudice since there was a real possibility that the inspector's decision would have been different had he properly considered this issue.

## 12

Statutory Instrument

### **The Planning (Consequential Provisions) Act 1990 (Appointed Day No 2 and Transitional Provision) (England) Order 2009**

This Order appoints 06.04.09 as the day on which paragraphs 3-16 of Schedule 4 to the Planning (Consequential Provisions) Act 1990 partially ceased to have effect. Those paragraphs made transitory modifications to various provisions of the principal planning legislation. The effect of this Order is that s322 of the Town and Country Planning Act 1990 (orders as to costs of parties where no local inquiry held) and paragraph 6 of Schedule 6 to that Act come further partially into force. The latter provision gives inspectors the same power to award costs as the Sec of State has under s322. The provisions that are commenced in this Order relate to awards of costs by the Sec of State or inspectors in relation to proceedings which are dealt with on the basis of representations in writing.  
[http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20090849\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090849_en.pdf)

## 13

CLG Circular

### **Circular 03/09: Costs Awards in Appeals and Other Planning Proceedings**

This circular provides updated guidance on the award of costs in England in proceedings under the Planning Acts. It complements legislative amendments designed to improve the efficiency and effectiveness of the planning appeals system. The guidance in this circular applies to appeals made and other proceedings initiated on or after 06.04.09 and it revokes and replaces Circular 08/93: *Awards of Costs Incurred in Planning and Other (Including Compulsory Purchase Order) Proceedings* and paragraphs 46, 48 and 49 of Part 1 of the Memorandum to Circular 06/04: *Compulsory Purchase and The Crichel Down Rules*.  
<http://www.communities.gov.uk/publications/planningandbuilding/circularcostsawards>  
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/circularcostsawards.pdf>

## 14

CLG Guidance

### **Planning Together: Updated practical guide for local strategic partnerships and planners**

This document aims to provide a simplified explanation of the way in which the planning system works and the duties and responsibilities of Local Strategic Partnerships. It illustrates how key strategies and plans, such as the Sustainable Community Strategy and the Local Development framework work together to address local challenges. The publication is accompanied by an online resource library of good practice which has been produced by the Planning Advisory Service.  
<http://www.communities.gov.uk/documents/localgovernment/pdf/1193492.pdf>

## 15

CLG Publication

### **Home Information Packs: Guidance for Enforcement Officers**

This document explains the background to and legislation connected with Home Information Packs (HIPs). It contains sections on enforcement procedures, the effects of the Housing Act 2004, HIP duties, exceptions from these, the contents of HIPs, their assembly, accuracy, Home Condition Reports and new homes.

<http://www.communities.gov.uk/documents/housing/pdf/1196912>

## 16

CLG Statistical Release

### **Local Planning Authority Green Belt Statistics: England 2008/09**

- The amount of designated Green Belt land in England on 31.03.09 was estimated at 1,638,840 hectares, representing about 13% of England's land area.
- Compared with 2007 estimates there has been a net increase of 3,170 hectares. The majority of this extra area is the result of improved measuring techniques rather than a net real increase.
- The largest net increase as a result of improved measurement was seen in the North West, whilst the largest net decrease was in East Midlands.
- Between 01.01.08 and 31.03.09 three authorities have adopted new plans which resulted in a real net decrease of 170 hectares.

<http://www.communities.gov.uk/documents/statistics/pdf/1210399.pdf>

## 17

London Plan

### **A new plan for London**

This document contains, along with the Mayor's Transport Strategy and Economic Development Strategy, Boris Johnson's vision for London's development over the next 20 years. Comments and views on this document are invited and these will be taken into account by the Mayor when preparing a draft London Plan for detailed consultation later this year. The London Plan is intended to be the overall strategic plan for London, setting out an integrated economic, environmental, transport and social framework for the development of London over the next 20-25 years, but it will also form part of the development plan in each London borough to be taken into account when determining planning applications. It should deal with matters that are of strategic importance to Greater London including economic development and wealth creation, social development, improving the environment, principles of equality of opportunity for all and the need to prevent crime and disorder.

<http://www.london.gov.uk/mayor/publications/2009/docs/london-plan-initial-proposals.pdf>

## 18

Planning Portal News

### **Possible extension to planning permission consent period**

The Department for Communities and Local Government has confirmed that it will consult later this summer on measures to reinstate the five-year consent period for planning permissions. Developers and the CBI have been lobbying for this as they consider that it would assist companies affected by the economic downturn — the consent period was cut to three years by the Planning and Compulsory Purchase Act 2004.

# Rating

19

Lands Tribunal

## **Deletion of computer centre from rating list on grounds that incapable of beneficial use**

\*\* LEDA PROPERTIES LIMITED V DAVID KELVIN HOWELLS (VO)  
RA/62/2006 — Before The President, George Bartlett QC — Decision given 27.03.09

**Property:** Computer Centre and Premises at Bureau West Centre, Horton Road, Devizes, Wiltshire entered in the 2000 rating list at RV £200,000. The site was a purpose-built computer centre built for the Ministry of Defence in 1973/4.

**Issue:** Whether the entry should be deleted from the list on the ground that it was incapable of beneficial use and beyond economic repair, or alternatively that the value should be reduced to RV £90,000 as industrial premises.

**Held:** The appeal was dismissed. (i) The hereditament was occupied until January 2000 and the rateable elements had not deteriorated by the date of the proposal in September 2000 to the extent that demand for it in that state would have disappeared as at the antecedent valuation date. (ii) The proposal to delete was limited to that simple contention and could not also be treated as a proposal to reduce and change the description to "store and premises".

# Compensation

20

Court of Appeal

## **Compulsory Purchase Act 1965 — whether omission to serve notice to treat precluded claim for compensation**

\*\* UNION RAILWAYS (NORTH) LTD V KENT COUNTY COUNCIL  
(2009) PLSCS 143 — Decision given 01.05.09

**Facts:** UR was involved in the construction of the Channel Tunnel Rail Link and in connection with that work needed to divert some electricity cables. Some of the land which they proposed to use for the diversion had been compulsorily acquired by KCC in connection with the construction of a new road. UR claimed compensation for disturbance on the basis that they had had interests in the land in question (including options to acquire the freehold or a long lease of parts of the land) and had incurred additional costs in diverting the cables. KCC disputed the existence of those interests but contended that even if there were potentially compensatable interests s5 of the Compulsory Purchase Act 1965 gave them a discretion as to which interests to acquire and that no claim to statutory compensation arose where they had not taken steps to acquire UR's interests by serving a notice to treat.

**Point of dispute:** Whether KCC's appeal should be allowed against the Lands Tribunal's ruling that: (i) an acquiring authority was required to serve a notice to treat on the holders of all interests in land to be acquired; (ii) a party that had not received such notice could still apply for compensation; and (iii) a party that had not had notice served upon it was entitled to have compensation determined under s10 of the Compulsory Purchase Act 1965.

**Held:** KCC's appeal was dismissed. (i) Under s5 an acquiring authority had to determine what land was "required" for a scheme and in this connection KCC needed to acquire or secure the release of any options to purchase held by third parties. If UR had compensatable interests in the form of options to purchase the land compulsorily acquired these had been taken away pursuant to statutory powers and UR were therefore entitled to statutory compensation. (ii) The acquiring authority had a positive duty under s5 to serve a notice to treat in respect of such interests as it required for its scheme and the general principle was that land should not be acquired compulsorily without compensation. (iii) All issues relating to UR's entitlement to compensation should be remitted to the Lands Tribunal for determination.

# Real Property

## 21

High Court

### Obstruction of right of way

\*\* HESLOP V BISHTON

(2009) PLSCS 134 — Decision given 20.04.09

**Facts:** H owned a house on an estate. B were the successors in title to the remaining freehold interest in the estate and also owned the house next door to H. A right of way at the back of the houses had been diverted in 1985 to enable H and his neighbour to extend their houses at the back over the original right of way. Subsequently a dispute arose between the parties when H obstructed the right of way by erecting a wall and pillars on part of it for the purpose of constructing a new gateway into his property.

**Point of dispute:** Whether H's appeal would be allowed against the ruling of the district judge in B's favour that the wall and pillars constituted a substantial interference with the right of way. H accepted that the wall and pillars prevented effective use of the right of way, but contended that anyone entitled to use it could avoid the obstruction by stepping onto a small piece of H's land which would enable them to gain access to the right of way in an equally convenient manner.

**Held:** H's appeal was dismissed. A servient owner (the owner of the land over which the right is exercised) has no right to alter the route of an easement of way unless such a right was an express or implied term of the grant of easement or was subsequently conferred upon him. Altering the route of a right of way involves, first, the grant of a right of way over a new route and, second, the extinguishment of rights of way over the existing route so that the dominant landowner has to use the new route. The dominant landowner could not object to the first of those steps, but the unilateral grant of a new right of way by the servient owner could not prevent acts of obstruction of the old route from being in principle actionable and did not extinguish the original right. Where there was an equally convenient alternative route available the court could decline to grant an injunction to enforce the use of the original route, but it could also choose to grant some other relief, such as a declaration as to subsistence of the right or compensation. It would be unjust for an existing legal right to be extinguished by the creation of an equitable right, only for the latter to be defeated in some way leaving the dominant landowner without any right at all.

# Housing

## 22

CLG Statistical Release

### House Price Index — February 2009

- UK house prices were 12.3% lower than in February 2008.
- The mix-adjusted average house price in the UK stood at £189,813 in February 2009 (not seasonally adjusted).
- UK house prices fell by 4.8% in the quarter ending February 2009. This compares with a fall of 4.3% for the quarter ending November 2008.
- Annual average house prices fell in England by 12.4%, in Wales by 12.5%, in Scotland by 8.6% and in Northern Ireland by 19.4%.
- Annual average house prices paid by first time buyers in February 2009 were 15.1% lower than a year earlier. By comparison average house prices paid by former owner occupiers were 11.2% lower.

<http://www.communities.gov.uk/documents/statistics/pdf/1201483.pdf>

## Contract

23

High Court

### **Breach of fiduciary duty**

\*\* J D WETHERSPOON PLC V VAN DE BERG & CO LTD  
(2009) PLSCS 129 — Decision given 07.04.09

**Facts:** JDW, a company which owned and operated a chain of public houses, employed VDB as its property finder and consultant. The director of VDB, B, worked closely with the chairman of JDW for a period of about 15 years during which time VDB introduced numerous properties to JDW and received fees of £14m for its work. There was no written contract between the parties. From 1999 VDB was paid an annual fee for its services. In 2005 JDW summarily terminated VDB's retainer and brought proceedings against VDB and B for breach of contract, conscious and deliberate breach of fiduciary duty, fraud and dishonesty. VDB counterclaimed for damages for wrongful termination of its contract.

**Point of dispute:** Whether JDW's claim and VDB's counterclaim would be allowed. JDW alleged that: (i) between 2002 and 2005 VDB had introduced four properties to one of JDW's rivals in breach of its duty to act exclusively for JDW; and (ii) between 1993 and 1998 VDB had advised JDW to enter into leases of properties where the freeholds had been available and had diverted the freeholds to other purchasers.

**Held:** JDW's claim was allowed in part and VDB's counterclaim was dismissed. On the evidence it had not been expressly agreed that VDB would provide its services exclusively to JDW and there were no grounds for implying such a term. However, given the large amount of confidential material that JDW had provided to VDB and the close relationship between VDB and JDW, VDB owed fiduciary duties to JDW. In such a situation VDB could act for one of JDW's competitors only if it was given consent to do so by JDW, having disclosed details of the proposed transaction. In this case this meant that the disclosure would have to be made by B to JDW's chairman. It would be insufficient to provide material to lawyers or surveyors which, if it was seen by JDW's chairman, might suggest that the proposed transaction might amount to breach of fiduciary duties. B owed a direct personal fiduciary duty to JDW's chairman since there was a close relationship of trust and confidence between them and VDB was his vehicle for discharging that relationship.

## Construction

24

Consultation Paper

### **Proposed changes to the Local Authority Building Control Charging Regime**

**Deadline for Responses: 25.06.09**

This paper sets out the Government's detailed proposals to change the current local authority (LA) building control charging regime. It is hoped to introduce more flexibility, accuracy and transparency into the regime, leading to fairer charges and improvement of the competitive environment within which LAs operate.

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/lachargingregimeconsult.pdf>

25

RICS Guidance Note

### **Asbestos and its implications for members and their clients**

The aim of this guidance note is to give its readers an appreciation of the various issues surrounding asbestos, and in particular its use in buildings and structures. It is aimed at clients commissioning surveys for asbestos-containing materials or their repair, treatment or removal, at surveyors carrying out or organising inspections of buildings that might contain asbestos and at persons instructing contractors or briefing other specialists. It is intended to provide such persons with a general understanding of the issues, to enable them to protect themselves and others who may be affected by their activities, personally and commercially, and to ensure that they can meet their legal obligations.

(Please note that the following link is accessible only with an RICS member's password)

[http://www.rics.org/NR/rdonlyres/96BBCD50-D203-4457-9889-DDFF5E9AFBA4/0/RICSGuidancenote\\_Asbestos2ndedition.pdf](http://www.rics.org/NR/rdonlyres/96BBCD50-D203-4457-9889-DDFF5E9AFBA4/0/RICSGuidancenote_Asbestos2ndedition.pdf)

## General

### 26

Statutory Instrument

#### **SI 2009/845 The Land Registration Fee Order 2009**

This Order, which replaces the 2006 Order and comes into force on 06.07.09, increases a number of land registration fees.  
[http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20090845\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090845_en.pdf)

### 27

CLG Guide

#### **Looking after our town centres**

This guide, which is aimed at town centre managers and their partners, offers practical help in finding ways to ensure that town centres reach their full potential during the economic downturn. Examples of different strategies that have been put in place are given including, for example, making vacant buildings look more attractive to local people and appealing to potential tenants.  
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1201258.pdf>

# Gerald Eve's UK office network

Gerald Eve LLP is an independent firm of chartered surveyors and property consultants, employing more than 330 staff across the UK.

We provide a comprehensive range of services to our private and public sector clients — including more than 40 per cent of the FTSE100 — covering agency, corporate property management, professional and transaction-based advice.

Our philosophy is to serve clients by identifying opportunities and solving problems relating to property through the provision of high quality, thoroughly researched cost effective advice.

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Evebrief has been established for more than 30 years. It is a summary of the latest statutory and legal cases affecting the property industry and is widely regarded in the industry as the most comprehensive document of its type.

### Useful web links

[www.ukonline.gov.uk](http://www.ukonline.gov.uk)  
[www.odpm.gov.uk](http://www.odpm.gov.uk)  
[www.dft.gov.uk](http://www.dft.gov.uk)  
[www.inlandrevenue.gov.uk](http://www.inlandrevenue.gov.uk)  
[www.hmso.gov.uk](http://www.hmso.gov.uk)  
[www.egi.co.uk](http://www.egi.co.uk)  
[focus.focusnet.co.uk](http://focus.focusnet.co.uk)  
[www.newLawonline.com](http://www.newlawonline.com)

### Abbreviations

The following abbreviations are used in evebrief:

BLD	Lexis Nexis Butterworths (internal abbreviation)
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
P&CR	Property, Planning and Compensation Reports
PLSCS	Property Law Service Case Summaries

### The star system

Cases are marked with one, two or three stars as follows:

- \*\*\* Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.
- \*\* Noteworthy case which does not significantly alter the law or which relates to a relatively obscure point.
- \* Interesting but non-essential reading.

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### Gerald Eve Research

One of our key roles at Gerald Eve Research is to communicate with our clients and others; to inform them, for example, on our latest thinking on topical issues such as legal matters and the implications for broader property market trends.

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## SCOTLAND

### Planning

#### 01

##### **Launch of online planning service**

The Scottish Government has launched its own version of the Planning Portal to streamline planning applications and appeals. ePlanning will provide:

- a facility to apply online for planning permission or an appeal;
- more planning information online, allowing the progress of applications and appeals to be tracked;
- a mechanism to consult electronically with statutory consultees; and
- information on local development plans

#### 02

Scottish Government Social Research Paper

##### **Review of Fees for Planning Applications — Research Findings**

This research was commissioned by the Scottish Government to examine the existing methodology employed to calculate planning fee increases and to establish if this methodology remains appropriate. The research was concerned with the fees paid by applicants for planning permission which are designed to offset or cover the costs incurred by local authorities in processing these applications.

<http://www.scotland.gov.uk/Resource/Doc/269322/0080116.pdf>

# WALES

## Planning

### 03

Statutory Instrument

#### **WSI 2009/851 The Town and Country Planning (Fees for Applications and Deemed Applications) (Amendment) (Wales) Regulations 2009**

These Regulations, which came into force on 06.04.09, amend the 1989 Regulations and increase by 4.2% certain of the fees payable in relation to Wales under those Regulations.

[http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi\\_20090851\\_mi.pdf](http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20090851_mi.pdf)

### 04

Statutory Instrument

#### **WSI 2009/995 The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009**

These Regulations, which came into force on 06.05.09, implement Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. They apply to damage to protected species, natural habitats, sites of special scientific interest, water and land.

[http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi\\_20090995\\_mi.pdf](http://www.opsi.gov.uk/legislation/wales/wsi2009/pdf/wsi_20090995_mi.pdf)