

EVEBRIEF

Legal & Parliamentary

Volume 33(13) 03 October 2011

- 01 Local Government
- 03 Planning
- 08 Housing
- 11 Tort
- 13 General

VALUERS FACE THE MUSIC AND NEW BUILD HOMES ARE JUST TOO SMALL!



Gemma Goakes
Editor

In what is a rather slim edition after the holiday period, we nevertheless report on a number of very noteworthy items. In particular at item 12 we report on the court's decision on a claim relating to a negligent valuation of the Factory Outlet Shopping Centre at the Chatham Historic Dockyard in Medway, Kent. CAFS invested in the property relying on the advice they had been given by Drivers Jonas, and as a result, massively overpaid for their lease. The court found that, had the valuers acted competently, they would, amongst other things, have commissioned a CACI report, which would have been standard practice in order to assess consumer spend from the catchment area of the property; recognised the threat posed by nearby centres; and raised concerns as to the visibility, size and layout of the Centre.

The negligence dated back to 2001; however it is one of the first sizeable negligence cases to emerge since the current economic downturn and we doubt very much that it will be the last. The decision will be of interest to investors in property and may well act as something of an alarm call to all professional valuation firms, particularly in view of the eye-watering damages awarded which were in excess of £18m, the difference between the actual and 'correct' values.

The Housing section sadly gives us little cause for celebration. At item 08, we report that in general, house prices remain in decline apart from new builds which appear to be bucking the trend and are, on average, 6.7% higher than last year. Item 10 confirms that London is the only area of the country which has seen any rise in house prices.

To add further insult to injury, the RIBA research paper *The Case for Space*, reported at item 16, informs us that the average new build home is only 92% of the recommended minimum size – for example, an average two storey, three bedroom home for five people is eight square metres smaller than the recommended size. So whilst the values that new builds command are higher than resale homes, buyers are actually getting much less in terms of space for their money! Roll on next month when we hope we can bring you happier news!

A handwritten signature in black ink that reads "Gemma Goakes". The signature is written in a cursive style and is positioned above a horizontal line.

LOCAL GOVERNMENT

01 Localism Bill

Assets of Community Value – Policy Statement

This policy statement seeks to address some of the issues raised during consideration of provisions at Lords Committee stage of the Localism Bill. This statement sets out the way forward following the consultation on Assets of Community Value which ended on 03.05.11. It is proposed that communities will be given a right to identify a building or other land that they believe to be important to the social well-being of their community, so that if it comes up for sale the community will have a fair chance to bid for it on the open market. A nominated asset that meets the definition of an asset of community value will be listed and an owner can only dispose of such an asset after the expiry of a specified window during which time community interest groups will have time to put together a bid. A compensation scheme will enable private property owners to claim for costs or loss incurred as a direct result of complying with the procedures. It should be noted that the provisions do not restrict in any way who the owner of a listed asset can sell his asset to or at what price, nor do they confer a right of first refusal to community interest groups.

<http://www.communities.gov.uk/publications/localgovernment/assetscommunityvaluestatement>

02 CLG Publication

Government response to the Communities and Local Government Select Committee's Report: Localism

This Command Paper contains the government's formal response to the recommendations and conclusions set out in the House of Commons Communities and Local Government Select Committee report on Localism.

<http://www.communities.gov.uk/publications/localgovernment/responsesselectlocalism>

PLANNING

03 Administrative Court

Enforcement notice – whether structure was a caravan – whether inspector erring in law by assessing planning control position at time of appeal

* BURY METROPOLITAN BOROUGH COUNCIL V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (2011) PLSCS 215 – Decision given 12.08.11

Facts: R, a third party, occupied a structure which looked like a single storey wooden house but which E asserted was a caravan because it had been brought onto his agricultural land on a lorry and trailer in two parts that were subsequently bolted together. The appellant council issued an enforcement notice on the basis that there had been a material change of use of the agricultural land and that R did not have planning permission for a residence. R's appeal against the enforcement notice was allowed by the inspector appointed by the Sec of State, who found that the structure was a caravan in law and that the building operations adjacent to it on which R was working were carried out lawfully pursuant to a planning permission, as at the date of the appeal. Accordingly, R was occupying the structure for the purpose of his employment, there had not been a breach of planning control and the enforcement notice was quashed.

Point of dispute: Whether the council's appeal against the inspector's decision would be allowed. The council contended that: (i) the finding that the structure was a caravan had no evidential or rational basis; and (ii) there had been a breach of planning control because the building operations at the time of the enforcement notice were unlawful, and that was the relevant time to assess the position, not the time of the appeal.

Held: The council's appeal was allowed.

- (i) The test was whether the structure, when assembled, could be moved by road and the burden of satisfying the inspector that the structure was a caravan rested on R who did not present any evidence on this point.
- (ii) The inspector had not, however, erred in law in examining the planning control position at the time of the appeal.

04 Statutory Instrument

SI 2011/2056 The Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2011

This Order, which came into force on 06.09.11, amends Part 40 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 which confers permitted development rights for the installation of certain microgeneration equipment on a dwellinghouse or within its curtilage, and some of the rights also apply to blocks of flats. The Order creates permitted development rights for the installation, alteration or replacement of electric vehicle charging points in off-street car parks and it introduces three new classes of permitted development rights to install certain types of microgeneration equipment: the installation, alteration or replacement of an air source heat pump (Class G), a wind turbine mounted on a building (Class H) and a stand alone wind turbine. The rights to fix wind turbines to buildings apply only to equipment installed on a detached dwellinghouse or to a detached building within the curtilage of a dwellinghouse or block of flats.

<http://www.legislation.gov.uk/uksi/2011/2056/contents/made>

05 Statutory Instrument

SI 2011/2057 The Town and Country Planning (Control of Advertisements) (England) (Amendment) Regulations 2011

This Order, which came into force on 01.10.11, amends the 2007 Regulations which provide controls on the display of advertisements. Regulation 2(2) substitutes Class 12 of Part 1 of Schedule 3 to the Regulations preventing advertisements of the type set out in Class 12 from being permitted in telephone kiosks, and Regulation 2(3) inserts a new Class of deemed consent into the Regulations – Class 17 gives deemed consent for advertisements on electric vehicle charging points and only applies to energy suppliers and/or those who install these charging points.

<http://www.legislation.gov.uk/uksi/2011/2057/contents/made>

06 Statutory Instrument

SI 2011/2058 The Town and Country Planning (Compensation) (England) Regulations 2011

Section 108 of the Town and Country Planning Act 1990 provides for the payment of compensation in certain cases where planning permission for development granted by a development order or a local development order is withdrawn and, on an application for planning permission for that development, the application is refused or permission is granted subject to conditions. The circumstances in which compensation is payable are limited by s108 in respect of certain development of a "prescribed description". These Regulations came into force on 06.09.11 and add, to the previous definition of prescribed development, minor operations relating to electric vehicle charging points and the installation of domestic microgeneration equipment.

<http://www.legislation.gov.uk/uksi/2011/2058/contents/made>

07 Consultation

Olympic Legacy Supplementary Planning Guidance (OLSPG) – Consultation Draft

Deadline for Comments: 18.11.11

The purpose of this Guidance is to supplement and apply London Plan policy for the OLSPG area by setting out the Mayor of London's strategic priorities and long term vision for the Queen Elizabeth Olympic Park and its surrounding areas in a single spatial planning document. Policy 2.4 of the Mayor's London Plan identifies the potential of the 2012 Olympic Games to deliver fundamental economic, social and environmental change in east London, describing it as "London's single most important regeneration project for the next 25 years". The Plan also confirms the Mayor's commitment to use the Games and its legacy to secure "Convergence" by closing the deprivation gap between the Olympic host boroughs and the rest of London. The Mayor estimates that the OLSPG area has the potential to provide around 29,000 new homes and 1.35 million square metres of new and improved commercial floorspace. The OLSPG consultation draft was produced by the Greater London Authority working with officers from the London Boroughs of Hackney, Newham, Tower Hamlets and Waltham Forest, the London Thames Gateway Development Corporation, Transport for London and the Olympic Delivery Authorities Planning Decisions Team.

<http://www.london.gov.uk/publication/olympic-legacy-supplementary-planning-guidance>



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HOUSING

08 CLG Statistics

House Price Index – July 2011

The latest UK house price indices were released on 13.09.11 and are based on mortgage completions during July. The key points are as follows:

- in July UK house prices decreased by 1.5% over the year and increased by 0.3% over the month (seasonally adjusted)
- the average mix-adjusted UK house price was £207,690 (not seasonally adjusted)
- average house prices were 0.7% lower over the quarter to July, compared to a quarterly decrease of 0.2% over the quarter to April (seasonally adjusted)
- average prices decreased in all UK regions, by 1.5% in England, by 0.1% in Wales, by 1.8% in Scotland and by 4.1% in Northern Ireland
- prices paid by first time buyers were on average 0.5% lower than a year earlier and prices paid by former owner occupiers also decreased by 1.9%
- prices for new properties were 6.7% higher on average than a year earlier whilst prices for pre-owned dwellings decreased by 2.1%

<http://www.communities.gov.uk/publications/corporate/statistics/hpi072011>

09 Oxford Economics Report for the National Housing Federation

Housing Market Analysis July 2011

This report considers:

- recent developments in the housing market including house price changes;
- mortgage lending trends including loan-to-value ratios, income multiples, deposit values and mortgage activity;
- house building;
- demographics and household formation; and
- outlook for house prices.

http://www.housing.org.uk/publications/find_a_publication/general/housing_market_analysis_by_oxf.aspx

10 Homes and Communities Agency (HCA) Housing Market Bulletin

Housing Market Bulletin – 21 September 2011

- house prices have changed very little over the last month
- London is the only place to have seen any house price rises
- the number and value of loans advanced for house purchase in July rose to its highest level since August last year
- the level of private rents has risen during the three months to July
- new construction orders fell by 16.3% on the previous quarter in Q2 2011 and the total volume of orders is now at its lowest level since 1980
- the IMF has revised its forecast for growth for the UK economy for this year from 1.5% to 1.1%
- the UK Bank Rate remained at 0.5% in September
- RPI inflation increased from 5.0% to 5.2% in August

<http://www.homesandcommunities.co.uk/sites/default/files/our-work/housing-bulletin-september2011.pdf>

TORT

11 Administrative Court

Abatement notice for noise nuisance

R (ON THE APPLICATION OF ELVINGTON PARK LTD) V YORK CROWN COURT
(20110 PLSCS 220 – Decision given 26.08.11)

Facts: The claimants owned an airfield on which they carried out motor sports events. The local authority served notices on them under s80 of the Environmental Protection Act 1990 requiring abatement of excessive emissions of noise from motor vehicle activities, motor sports events and associated activities. The notices were upheld in the Crown Court.

Point of dispute: Whether the claimants' application for judicial review would be allowed. They alleged that the hearing was flawed because their company secretary (H) and other witnesses had been required to remain outside the courtroom until they were called as witnesses whereas three officers of the local authority had been permitted to sit in court. The claimants also argued that the abatement notices were defective because they had failed to identify particular activities that amounted to a nuisance. The court had found that a nuisance was "an unacceptable interference with the personal comfort or amenity of neighbours or the community" but it had not assessed nor given reasons why the effect of the activities on the airfield constituted a nuisance.

Held: The claimants' application was refused and the appeal dismissed.

- (i) Their application for judicial review was dismissed. What had occurred at the Crown Court was only a procedural accident which did not amount to an injustice or fundamental error that would justify intervention by the High Court on appeal. The claimants had not been placed at any significant disadvantage.
- (ii) Section 80(1) of the Environmental Protection Act 1990 did not require the identification or specification of the activities that were the subject of an abatement notice. A notice that referred to a nuisance, but did not state what type of nuisance eg noise, smoke or odours, would be invalid but otherwise the threshold for description had been set by the courts at a low level eg dog barking. The court had been correct in concluding that the local authority did not have to specify in the abatement notices the exact activities which amounted to a statutory nuisance.
- (iii) The mere omission of any reference to reasonable or unreasonable user could not be regarded as an error that affected the court's conclusion.

12 Commercial Court

Professional negligence

** CAPITA ALTERNATIVE FUND SERVICES (GUERNSEY) LTD V DRIVERS JONAS
(2011) PLSCS 225 – Decision given 09.09.11

Facts: The claimants (CAFS) ran an enterprise zone property unit trust which was established in 2001 in order to invest in a Grade II listed structure at Chatham Historic Dockyard in Medway, Kent, and run it as a factory outlet shopping centre (FOC). 480 investors were to participate in the investment. The defendants, DJ, were instructed to advise on the acquisition. In its report DJ valued the property at £62.85m with the benefit of Enterprise Zone tax allowance, or £48.15m without. CAFS paid DJ £500,000 for its services, of which £400,000 related to "investment and valuation advice". CAFS acquired a 155 year lease of the site for £62.85m, but when the centre opened in 2003 only 60% was let and over the following few years it proved difficult to find tenants or for tenants to trade successfully.

Point of dispute: Whether DJ was liable to CAFS for professional negligence. CAFS argued that:

- i. it had retained DJ to advise them on whether to proceed with the purchase, to conduct due diligence and to negotiate the purchase price;
- ii. they had relied on DJ's valuation of the property and its advice as to the commercial prospects of the development; and
- iii. DJ's advice had been inadequate and contained fundamental errors in its approach to the valuation of a FOC. CAFS argued that the ability of an FOC to secure and retain tenants and the level of rent chargeable depended on the number of consumers who would spend money at the centre and that an assessment of its likely ability to attract consumers was crucial to the valuation. It argued that DJ's failure to undertake such an assessment by reference to a retail analysis report had resulted in a substantial overstatement of the rent, value and prospects of the development.

Held: CAFS's claim was allowed.

- i. DJ had been retained to act for CAFS who was entitled to rely on its advice. The retainer included carrying out due diligence and negotiations with regard to the transaction and providing valuations and investment advice, including advice as to the commercial viability and prospects of the development as an FOC. In carrying out its valuation DJ should have carried out an evaluation of future income stream and a determination of one or more appropriate yield figures. This involved commercial investment advice and DJ was required to make recommendations on the likely prospects of the centre to attract customer spend and tenants. As well as its contractual obligations under its retainer, DJ also owed a duty of care in tort to exercise the reasonable standard of skill and care to be expected of an ordinarily competent valuer and commercial property investment adviser.
- ii. DJ had breached its duty as it had not commissioned and relied upon full retail analysis reports in carrying out its valuation. Its report had also focused too much on positive aspects and not given proper consideration to negative ones. A correct valuation would have been £34.375m without the benefit of Enterprise Zone allowances and £44.8m with them.
- iii. DJ's negligent advice had induced CAFS to invest in the development and the consequence of the incorrect advice was that CAFS paid £62.85m instead of £44.9m. CAFS was entitled to damages of £18.05m; that being the difference between those two figures.



GENERAL

13 CBI Report

Building Strong Foundations: financing UK infrastructure

This report highlights the growing gap between the need for investment in the UK's infrastructure and the government's infrastructure spending plans, which is perceived to be a significant barrier to economic growth. The report argues that the Government needs to outline longer term programmes of work in order to increase private sector involvement and, secondly, to bring down the cost of capital, while providing leadership and championing the use of public-private partnerships (PPPs) to fund and deliver projects.

<http://publicservices.cbi.org.uk/reports/00451/>

14 The Chartered Institute of Marketing Construction Industry Group (CIMCIG) Report 2011

Taking Sustainability to the Consumer

Following last year's announcement of the Green Deal this research was commissioned by CIMCIG in order to gain a better understanding of how the construction industry is responding to the opportunities to supply sustainable products and services to homeowners as there is concern that these are not being fully exploited by the industry. This recently conducted research amongst manufacturers and suppliers of products and systems that can make homes more energy efficient, found that in the short term only 21% of relevant manufacturers see Feed-In Tariffs as a very important opportunity, while an even lower proportion, 8%, perceive the Green Deal as a very important opportunity. This report draws on recently published work to provide suggestions focused on the opportunities that the Green Deal will provide for companies who wish to develop this market.

http://www.cimcig.org/files/library/Taking_Sustainability_1314178654.pdf

15 British Council of Offices Survey

Occupier Satisfaction Survey 2011

This document is the executive summary of the fifth annual survey measuring the satisfaction of commercial occupiers in the UK. The rating for overall occupier satisfaction is 5.4 out of 10, although office occupiers scored slightly more with 5.6 out of 10. There appears to be a significant difference between small and large occupiers, and high scores were achieved for the leasing process. Sustainability continues to be an important issue for the industry.

<http://www.bco.org.uk/research/researchreports/detail.cfm?rid=173&cid=0>

16 RIBA Research Paper

The Case for Space

This paper is the first for RIBA's new initiative, "Homewise – Better homes for Britain", whose aim is to understand the types of homes needed for modern and future lifestyles and households, and to consider whether new homes should be better. It assessed the internal floor area of homes on a sample of sites built by England's eight largest housebuilders and compared the findings to the Greater London Authority's space standards. The paper also analyses past research into what adequate space in the home means and how it impacts on peoples' lives. The report comes to the conclusion that the average new home in England is only 92% of the recommended minimum size – the average new three bedroom home was found to be 88 square metres which is 8 square metres smaller than the recommended minimum floor area for a two storey, three bedroom home for five residents.

<http://www.architecture.com/HomeWise/RIBAresearch/RIBAResearch.aspx>

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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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